


# A Prescription for Optimism – Judge Kim Prost on the Future of the International Criminal Court

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**By: Amna Farooqi**

**A History of Judge Kim Prost's Contributions in International Law: The UN and ICTY**

Judge Kim Prost was elected as Judge of the International Criminal Court (ICC) in 2018, for a term of nine years. Due to her international expertise, Judge Prost contributed to the United Nations Convention Against Transnational Organized Crime, and the United Nations Convention Against Corruption. Judge Prost also served as a member of the Canadian delegation for the negotiation of the Rome Statute – the legislation that governs the International Criminal Court.

Prior to her appointment to the ICC, Judge Prost served as a judge on the International Criminal Tribunal for the former Yugoslavia (ICTY) for events related to Srebrenica in 1995. All seven accused were convicted after a four-year trial. Of the seven that stood trial, five were charged with genocide, conspiracy to commit genocide and extermination. To date, this is the largest trial conducted at the ICTY, where over 5000 exhibits were admitted into evidence. The indictments relate to the "summary execution of 7000 Bosnian Muslim men and boys from the Srebrenica enclave." According to the indictment, the entire Muslim population of Srebrenica had either been removed or fled by the end of 1995. Judge Prost's term as a judge at the ICTY during this important proceeding bolstered her knowledge in international criminal law proceedings.

**How the ICC Operates**

The ICC is governed by the *Rome Statute* – a treaty that became enforceable in 2002, after being adopted at a diplomatic conference in Rome in 1998. The *Rome Statute* identifies four major international crimes: crimes against humanity, genocide, war crimes, and crimes of aggression. According to article 29 of the Statute, none of these crimes are subject to any statute of limitations. Under each of these crimes, there are statutorily enshrined definitions and subsections.

Under the *Statute*, crimes against humanity include murder, rape, enslavement and enforced disappearances. For the purposes of the *Statute*, the term genocide lists five acts "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group." The list includes causing serious bodily or mental harm to members of the group, and forcibly displacing children of the group to another group. The term "war crimes" refers to severe breaches of the Geneva Convention of 1949, and "other serious violations of the laws and customs applicable in international armed conflict." Crimes of aggression are defined under the *Statute* as an act of aggression which constitutes a manifest violation of the Charter of the United Nations. An act of aggression is defined in the *Statute* as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State." The four international crimes here mentioned are governed by the Statute, and the ICC has the power to prosecute them.

**Judge Prost's Keynote Speech**

At the 48th annual Canadian Council on International Law Conference, Judge Prost gave the keynote speech and presented her observations of the ICC that spoke to the Conference's theme: Diversity and International Law. In particular, she divided her speech into two parts: accomplishments, and challenges - looking back to history and forward to the future. This article includes key takeaways from Judge Prost's lecture, and provides insights and expansions on her findings.

**Accomplishments in Diversity and Accountability Mechanisms**

Judge Prost's starting reminder to the Conference was that establishing the ICC was always going to be a difficult pursuit. To create an international judicial body is difficult in and of itself; to create one that is effective and balanced is almost impossible. But the very invention of the ICC represents an

unprecedented feat in international law. Unlike the tribunals that came before it, the ICC amalgamates two systems of law: the civil and common law traditions. That is no small feat.

However, Judge Prost noted that a reflection of these two systems in the *Rome Statute* is not a sufficient reflection of all of the legal systems around the world, and the diversification of legal traditions practiced in the court seems it would be a welcome adaptation. A step toward a diversified legal practice is one accomplishment; the diversity of the bench is another. Article 36 of the *Rome Statute of the International Criminal Court* is concerned with the representation of legal systems, geographic distribution of positions, and gender balance among staff. It is constitutionally enshrined in the voting system to elect ICC judges. This ensures that there is a diverse bench of judges to deliberate on the varied cases brought to the ICC.

The creation of the ICC has also placed accountability at the forefront of the international agenda. Judge Prost argued that accountability, justice, and an end to impunity are all possible through the exercise of the powers of the ICC. The Independent Investigative Mechanism for Myanmar and the Independent International Commission of Inquiry on the Syrian Arab Republic, Judge Prost noted, both featured contributions from the ICC. Although there always exists an unlimited amount of work to be done, strides in international law have been made by the very establishment and functioning of the ICC.

The protection of human rights does not progress in a linear fashion. Dr. Bonny Ibhawoh has explained that the landscape of human rights has peaks and valleys; that its progress cannot be tracked by a graph displaying a linear upward trend. In fact, the protection of human rights, both within a national and international framework, ebbs and flows. The creation of the ICC represents a landmark advancement in the project of human rights law. However, it does not come without its own set of challenges.

**Macro-Challenges and Internal Issues**

The *Rome Statute* of the ICC itself faces existential challenges. Judge Prost explained that many states, whether or not they are signatories, are opposed to multilateralism. Beyond this, there currently exist 122 signatories to the *Rome Statute*, leaving a number of countries outside the jurisdiction of the ICC excluding a large majority of the globe's population. Certain countries – Judge Prost mentioned Syria, Iraq, and Yemen in particular, for example – are not subject to the jurisdiction of the Court. The lack of universal application represents a significant challenge to the functioning of the Court. Further, Judge Prost explained that the lack of universality leads the public to question the credibility and effectiveness of the Court.

Since its inception, the perennial question that the Court must engage with is: how do we strike a balance between respecting state sovereignty and flexing the legal muscles of the ICC? The answer to this question has yet to be found; it is a constant negotiation. As a characteristically international body, the ICC requires that its legitimacy should be recognized universally. But it is not. This lack of

universal recognition affects the operation and efficacy of the ICC. As Judge Prost explained, it is difficult to operate a criminal court premised on ensuring accountability for the most serious crimes when many state leaders refuse to subscribe to its legitimacy.

A separate issue Judge Prost explored is an internal issue found in the very structure of the court. As the ICC is designed to support a diverse bench, it requires a three-year cycle term where six judges depart, and six new judges arrive. This makes it difficult to foster a judicial culture and can lead to fractured decision-making. As a result, the consistency of decision-making suffers. Judge Prost remarked that the onus falls upon judges to create practices that can be institutionalized in order to facilitate the decision-making process.

**The Necessity of International Cooperation**

Judge Prost explained that the ICC inevitably relies on the cooperation of its signatories. The creation of the ICC itself was due to an alignment of the political and legal stars. But the Court has no police system to enforce cooperation and it relies entirely on states to provide evidence necessary to bring those responsible to account. This inherent reliance means that international cooperation is a cornerstone.

This brings to light the issue of unmanageable expectations being imposed upon the ICC. When an international crisis occurs, Judge Prost noted that people defer to the ICC,, and often question the utility of the UN. However, Judge Prost finds that a central issue with this approach is that the ICC has not devoted enough attention toward national capacity building. Further, the current state of affairs does not reflect a culture that universally accepts the Court's legitimacy. This reluctance results in the difficulty of achieving the international cooperation that the ICC requires. By its nature –the ICC, much like the majority of international legal constructs – is aspirational. But, while the ICC might find it difficult to reach all of its objectives without harnessing universal recognition or legitimacy, it is a necessary mechanism for the functioning of international justice and accountability.

**Conclusion**

Judge Prost's lecture promoted optimism for the future of international law. Reflecting on the incredible feat of adopting the *Rome Statute* and the creation of the ICC, we are reminded that a better, more accountable legal world remains possible. Trying to level the scales of justice is a Herculean task that the international judiciary takes on – this includes the ICC and the ICJ. Both of these institutions were premised upon the recognition that an international mechanism is required for the arbitration of justice with regard to crimes of international significance, including war crimes and crimes against humanity. The idea is - if we are to hold people accountable for the most serious crimes – we require a mechanism through which accountability is achieved. Judicial institution-building flows from international cooperation and international cooperation is the *sine qua non* of the ICC. Since its inception, the ICC has begun chipping away at international crimes with the aim of carving out a more just, equitable, and accountable future in international law. With patience, and a confrontation of the

difficult technical questions of international law, Judge Prost concludes that justice remains possible.

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Amna FarooqiAmna Farooqi is a first-year JD Candidate at the University of Ottawa, where she is the LeBreton-Holmes Memorial Scholar and the El-Aggan Scholar. Amna holds an Honours Bachelor of Arts degree with distinction in justice, political philosophy, and law from McMaster University.

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