



CICJ Statement No. 7

Safeguarding Prosecutorial Independence and the Standing of the International Criminal Court: Article 46(1) Should Be Amended

Berlin, Buenos Aires, Florence, London, Montpellier, Oslo and Queenstown, 6 May 2026

This statement argues that Article 46(1) of the Rome Statute on grounds of removal is currently inadequate to address complex realities and protect the Office of the Prosecutor and the International Criminal Court ('ICC') as a whole. Recent events have drawn attention to the Court's framework for disciplinary action, but this CICJ statement is neither about the allegations against ICC Prosecutor Karim A.A. Khan KC, how the Bureau of the Court's Assembly of States Parties handles the allegations, the Court's Palestine-related work, nor the procedure to enforce removal grounds.

A review of Article 46(1) is long overdue. Historically, it should probably have been applied by the Assembly with respect to the first ICC Prosecutor, Luis Moreno Ocampo, who provided concerns during his tenure regarding his conduct, competence and worthiness in light of the "high moral character" requirement in Article 42(3) of the Statute.¹ The Assembly's failure to address these issues through removal from office or other disciplinary measures was followed by a string of integrity challenges in and around the Court, suggesting problems in its culture, as documented by the Independent Expert Review ('IER').² Whilst some efforts have been made to implement the IER findings, more remains to be done.

On its face, Article 46 offers three grounds to remove the ICC Prosecutor: Article 46(1)(b) concerns inability to exercise statutory functions (typically because of illness);³ and 46(1)(a) regulates "serious misconduct" and "a serious breach of his or her duties under this Statute", to which Rule 24 of the Rules of Procedure and Evidence ('RPE') tries to give more precise content. Rule 24(1) defines "serious misconduct" (a) in the course of official duties (requiring that it is "incompatible with official functions, and causes harm to the proper administration of justice before the Court or the proper internal functioning of the Court")⁴ and (b) outside official duties (when the conduct needs to be "of a grave nature that causes or is likely to cause serious harm to the standing of the Court"). Rule 24(2) defines 'serious breach of duty' to include gross negligence of duty and knowledge of acting in contravention (mentioning as examples non-compliance in relation to excusal and unwarranted delays).

¹ See, for example, "Interim report of the Office of the Prosecutor in response to paragraph 140 of resolution ICC/ASP/17/Res.5, ICC-ASP/18/INF.5, 14 November 2019 (<https://www.legal-tools.org/doc/rtgyvisbq/>); Morten Bergsmo, Wolfgang Kaleck, Alexander S. Muller and William H. Wiley, "A Prosecutor Falls, Time for the Court to Rise", Policy Brief Series No. 86 (2017), Torkel Opsahl Academic EPublisher ('TOAEP'), Brussels, 2017, pp. 1–4 (<https://www.toaep.org/pbs-pdf/86-four-directors/>).

² See, *inter alia*, Independent Expert Review, "Review of the International Criminal Court and the Rome Statute System, Final Report", 30 September 2020 (<https://www.legal-tools.org/doc/cv19d5/>); Morten Bergsmo, "Institutional History, Behaviour and Development", in Morten Bergsmo, Klaus Rackwitz and Song Tianying (eds.), *Historical Origins of International Criminal Law: Volume 5*, TOAEP, Brussels, 2017 (<https://www.legal-tools.org/doc/1c93aa/>); Brigid Inder, "Conformity, Leadership and the Culture of Integrity at the International Criminal Court", and Cyril Laucci, "The Wider Policy Framework of Ethical Behaviour: Outspoken Observations from a True Friend of the International Criminal Court", both in Morten Bergsmo and Viviane E. Dittrich (eds.), *Integrity in International Justice*, TOAEP, Brussels, 2020 (<https://www.toaep.org/nas-pdf/4-bergsmo-dittrich>).

³ Rome Statute of the International Criminal Court, 17 July 1998, Article 46(1)(b) (<https://www.legal-tools.org/doc/7b9af9/>).

⁴ Rule 24(1)(a) (<https://www.legal-tools.org/doc/8bcf6f/>) mentions three examples that capture (i) prejudicial disclosure of information, (ii) concealing information precluding appointment, and (iii) abusing office to obtain favour.

Rule 24(1) conflates distinct categories and should be amended. Whereas Rule 24(1)(a) addresses *gross incompetence or unprofessionalism*, 24(1)(b) concerns *improper conduct*. Even if these are two different problems, and the motivations behind the provisions are not identical, Rule 24(1) requires that they be assessed under the same heading of “serious misconduct”.

This contortion creates two challenges. First, improper conduct is defined only by reference to the “standing of the Court” or *respect* for the Court, not the *trust* that the Office of the Prosecutor requires, nor a Prosecutor’s *worthiness* for the position. While protecting prosecutorial independence, an objective assessment of both ‘trust’ and ‘worthiness’ are explicit in some jurisdictions, for example, within the Norwegian grounds of removal.⁵ A separate, independent ground should be added to Article 46(1) to safeguard both respect for and trust in the Office of the Prosecutor, as well as worthiness for the position.

Secondly, making “serious misconduct” the strained standard for both gross incompetence and improper conduct does not sufficiently take into account the fundamental State-Party interest in respect for the institution. It has operational implications for co-operation, the execution of arrest warrants, the provision of evidence, and the willingness of witnesses to participate in cases. States and individuals are more likely to make these efforts for a Court or Office they respect and trust.

Rule 24(2) on ‘serious breach of duty’ is less problematic than 24(1), but it does not address the situation where a Prosecutor has breached his or her duties despite a warning, and whether such repeated breach must also be “serious”.

If grounds of removal are to be stated expressly in the Statute – and some national jurisdictions that respect prosecutorial independence do not – they need to cover main practical scenarios in order to provide useful guidance. The following autonomous grounds should be included in Article 46(1):

- (i) *Illness*: It is already covered by Article 46(1)(b);
- (ii) *Loss of qualifications*: It should be added as a new subparagraph in Article 46(1), including the prescribed qualification of “high moral character” in Article 42(3);
- (iii) *Gross incompetence or unprofessionalism*: It is currently covered by “serious misconduct” in Article 46(1)(a);
- (iv) *Serious breach of duty*: It is currently covered by Article 46(1)(a), but should become a separate subparagraph in 46(1); it could also include repeated breach of duty after warning;
- (v) *Improper conduct in the course of or outside official duties*: Currently only partially covered through Rule 24(1)(b), this ground must be made a separate subparagraph in Article 46(1) that also includes grave conduct that breaks down the trust required by the Office of the Prosecutor (not only respect for the Court) or that makes the Prosecutor unworthy of his or her position.

“The wording of Rule 24 exposes how good intentions behind the verbal economy of the drafting of Article 46 have depleted the armoury available to the Assembly of States Parties to protect the Court”, stated the CICJ Steering Group. “Truncating the list of grounds of removal beclouds the ability of States Parties to protect the independence of the Court, including that of the Prosecutor”, said CICJ Director Gunnar M. Ekeløve-Slydal.

Beyond the current issues, we call upon States Parties to properly equip the Assembly to protect the Court by amending the patchwork of Article 46(1) and Rule 24, pursuant to the expedited procedure in Article 122 for amendments to provisions of an institutional nature.



Coalition for International Criminal Justice

Via San Gallo 135r, 50129 Florence, Italy

URL: www.cicj.eu

X-handle: @_cicj_

⁵ See § 27(1), Lov om statens ansatte mv., 1 July 2017 (<https://www.legal-tools.org/doc/x5oi84g9/>). The grounds of ‘trust’ and ‘worthiness’ were both upheld in a recent review of aspects of the Norwegian civil service (*Norges offentlige utredninger*, 2023: 21, 19 June 2023) (<https://www.legal-tools.org/doc/tfe1kmcy/>).