

Revisiting Integrity in International Justice

By Morten Bergsmo

FICHL Policy Brief Series No. 93 (2018)

1. Cheap Talk, Expensive Silence

In a ceremony in Rome on Saturday 18 July 1998, then United Nations Secretary-General Kofi Annan proclaimed the establishment of the International Criminal Court ('ICC'), a "gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law".¹ Twenty years on, there have been several changes in international relations with implications for international organisations, not excluding the United Nations and the ICC. There is concern that multilateralism is under growing pressure, and that this may, among other things, increase the scrutiny of the operation of international organisations, including international courts. China, India, Russia and the United States are all standing outside the ICC, watching attentively its every move, noting any weakness that could serve their perceived future interests. Anne-Marie Slaughter claims that some of these leaders "support a return to an era of unfettered state sovereignty. They would dismantle international and supranational organisations of all kinds and return to multipolar 'Great Power' politics, in which alliances shift and are transactional".² Time may or may not verify this fear, but it is already discernible that the *performance* of international courts and tribunals has come to weigh directly on the will of States to further strengthen the rule of international law.

However uncomfortable at times, an environment of increased scrutiny provides a welcome opportunity to revisit the role of the individual in international justice institutions. A new research project of the Centre for International Law Research and Policy ('CILRAP') and the Internation-

al Nuremberg Principles Academy³ (the 'Integrity Project') will explore this topic as detailed in the subsequent sections of this brief. It will do so in a forward-looking manner, while cognizant of the saying that, "[t]hough talk about ethics is cheap, silence about ethics is far too expensive".⁴ When serious 'integrity' problems within international courts become manifest, they tend to affect the external reputation of and support for the institution, and erode morale among staff. We have seen that high-maintenance 'integrity' problems can lead to shifts in work priorities (in attempts to cover up or distract attention), undermining internal quality-control mechanisms. Quite apart from such crisis management after the damage is done, focusing on the standard and practice of 'integrity' is an open-ended necessity for international justice institutions, none of which is exempted from the common challenge of professionalisation. Erosion of the 'high moral character' standard indicates lack of progress as much as rigid moralism does. Both can undermine our mindful ability to balance moral concern with a sensitivity to complex situational differences and dilemmas.

2. What is 'Integrity' in International Justice?

In international justice, 'integrity' is often used in connection with 'high moral character'. In the ICC Statute, for ex-

¹ Statement by the United Nations Secretary-General Kofi Annan at the Ceremony Held at Campidoglio Celebrating the Adoption of the Statute of the International Criminal Court, 18 July 1998 (<http://www.legal-tools.org/doc/8b0ab6/>).

² See Anne-Marie Slaughter, "Donald Trump and Vladimir Putin want to create a new world order: We should take their vision of unfettered state sovereignty seriously", in *Financial Times*, 22 July 2018. She warns in the same article that it is "incumbent upon those of us who see an arc of progress bending towards peace and universal human rights to appreciate the full scope of the threat posed to our 20th-century global architecture".

³ There will be an international expert conference on 'Integrity in International Justice' in the Peace Palace in The Hague on 1-2 December 2018, and an anthology with the same title will be published based on conference presentations (by experts such as Payam Akhavan, Olympia Bekou, Emiliano J. Buis, Hans Corell, Gunnar Ekeløve-Slydal, Gregory S. Gordon, FAN Yuwen, Jan Fougner, Richard J. Goldstone, Hanne Sophie Greve, Brigid Inder, Karim A.A. Khan, Adel Maged, Teresa McHenry, Erik Møse, Marc Perrin de Brichambaut, Klaus Rackwitz and Christopher Staker) and some additional papers. The conference and book should contribute towards the crystallisation of a sub-discipline of 'ethics of international criminal justice'. Ethics of law is taught as a subject in several countries, in particular in the United States. The textbook by Deborah L. Rhode and David Luban (*Legal Ethics*, Fifth Edition, Foundation Press, New York, 2009) is an example of a broadly-based approach at the national level. The chapter by Alexander Heinze and Shannon Fyfe in *Quality Control in Preliminary Examination: Volume 2* (Torkel Opsahl Academic EPublisher, Brussels, 2018) calls for a more systematic approach to ethics in international criminal justice.

⁴ See Rhode and Luban, 2009, *supra* note 3, p. 1074.

ample, Article 36(3)(a) mentions both standards, whereas Article 42(3) only mentions ‘high moral character’. Thus, for the purposes of this policy brief and the Integrity Project described in the previous section, both are *legal* terms; at the same time, ‘integrity’ is used as “one of the most important and oft-cited of virtue terms”, referring to “a quality of a person’s character”, used “virtually synonymously with ‘moral’”, righteous, conscientious or with rectitude.⁵

The United Nations International Civil Service Advisory Board observed in an influential 1954 report that ‘integrity’ must be judged “on the basis of the total behaviour of the person concerned. Such elementary personal or private qualities as honesty, truthfulness, fidelity, probity and freedom from corrupting influences, are clearly included”.⁶ Dag Hammarskjöld (the second United Nations Secretary-General) equated ‘integrity’ with “conscience” and “respect for law and respect for truth”.⁷ In his important monograph *The International Civil Servant*, Jacques Lemoine subsumes “the moral qualities of dedication, fairness and impartiality [...] under the concept of integrity”.⁸

The word ‘integrity’ has linguistically evolved from the Latin adjective ‘*integer*’, meaning whole or complete. On one narrow and technical reading, ‘integrity’ could include consistent immoral conduct as long as conduct and personal principles operate in harmony. This reading is counter-intuitive to most of us and does not take fairly into account centuries of use of the term. David Luban has nevertheless made an insightful attempt to address problems associated with this narrow reading.⁹ There are other narrow, conversational views that subjectivise terms such as ‘integrity’ and ‘virtue’ in manners that may not only appear rigid, but are both dissonant with how constituencies in China, India and other populous regions actually think, and incompatible with the legal status of ‘integrity’ in international courts.

3. Are States Parties Upholding the ‘Integrity’ Requirement?

In my experience, representatives of States Parties sometimes seem to lose focus on the binding nature of the ‘integrity’ requirement. How could that be? Establishing an international court takes years of preparations and negotiations by States – if not several decades, as we have seen with the ICC – to agree and adopt its statute and wider legal infrastructure. Securing near consensus on a statute negotiated

by more than 150 States is a monumental undertaking, as illustrated by the Rome Diplomatic Conference on the ICC in 1998 and the two preceding years of intense discussions. When the statute finally enters into force, the process to establish and build the institution of the international court in question commences in earnest. States Parties must now agree on the financing of the court, its buildings, staff, case flow, and other operational needs. This again requires a protracted investment by governments. In contrast to the making of the law and organisational framework, the attention given to *who should lead* these institutions can sometimes seem surprisingly lacklustre. It is almost as if some government representatives see their job as done when the legal instruments and institutional structures are in place. This is a particular risk for positions such as prosecutor or deputy prosecutor of international criminal jurisdictions, where we have usually not seen State-driven campaigning in the same way as for international judgeships.¹⁰

States Parties are responsible for the election of judges and prosecutors of international courts. This is an important responsibility that requires vigilance. The high officials of international courts define the culture of integrity within their institutions. As observed by four long-standing actors in the field of international criminal justice: “we should recognize that an international court will not be better than the integrity of its leaders”.¹¹ Do States take this responsibility seriously enough? If not, what can be done to help improve their performance? Should more be done to expose the pursuit of national interests and deal-making when that reduces the emphasis placed on ‘integrity’ in the election of high officials of international courts? Should there be more attention on the conduct of State officials with portfolio-responsibility for an international court when they themselves have a known ambition to become its high officials? These are among the questions which the Integrity Project seeks to shed light on.

4. Institutional ‘Integrity’ Measures Available to International Courts

The role of international courts in upholding ‘integrity’ is as important as that of States Parties. Several institutional, non-political measures are available to raise awareness and build cultures of integrity within such courts.¹² But does our

⁵ See *Stanford Encyclopedia of Philosophy*, 9 July 2018 (<https://plato.stanford.edu/entries/integrity/>).

⁶ See “Report on Standards of Conduct in the International Civil Service”, 8 October 1954 (<http://www.legal-tools.org/doc/d94c61/>).

⁷ See Dag Hammarskjöld, “The International Civil Servant in Law and Fact: Lecture delivered to Congregation at Oxford University, 30 May 1961”, in Wilder Foote (ed.): *The Servant of Peace: A Selection of the Speeches and Statements of Dag Hammarskjöld, Secretary-General of the United Nations, 1953-1961*, The Bodley Head, 1962, p. 348 (<http://www.legal-tools.org/doc/64bcae/>).

⁸ See Jacques Lemoine, *The International Civil Servant: An Endangered Species*, Kluwer Law International, The Hague, 1995, p. 257.

⁹ See Chapter 8 of his *Legal Ethics and Human Dignity*, Cambridge University Press, Cambridge, 2007.

¹⁰ This is elaborated by Morten Bergsmo, “Institutional History, Behaviour and Development”, in Morten Bergsmo, Klaus Rackwitz and SONG Tianying (eds.): *Historical Origins of International Criminal Law: Volume 5*, Torkel Opsahl Academic EPublisher, Brussels, 2017, pp. 25-27 (<http://www.legal-tools.org/doc/09c8b8/>).

¹¹ Morten Bergsmo, Wolfgang Kaleck, Sam Muller and William H. Wiley, “A Prosecutor Falls, Time for the Court to Rise”, FICHL Policy Brief No. 86 (2018), Torkel Opsahl Academic EPublisher, Brussels, 2017, p. 3 (<http://www.toaep.org/pbs-pdf/86-four-directors/>).

¹² A statement of the Women’s Initiatives for Gender Justice expressed concern that media revelations about the first ICC Prosecutor “could be considered emblematic of an underlying *culture* within the Court, rather than exceptional to the overall environment”, see “A critical time for the ICC’s credibility”, 12 October 2017 (<http://www.legal-tools.org/doc/e2fbc7/>) (italics added). It observed that this “is an important moment for the ICC’s evolution as a permanent court built for longevity, worthy of public trust and focused on the ethical fulfilment of its mandate”.

understanding of ‘integrity’-awareness, -reasoning, -intent and -behaviour within these institutions correspond to the new international environment described above?¹³ Have we overlooked or underestimated ways in which the administration can “help to create an atmosphere which is conducive to the [integrity] of international officials”?¹⁴ Are the existing statutory requirements of ‘integrity’ or ‘high moral character’ adequate or should there be stronger language to emphasise their legally binding nature, to dispel any doubts that may exist? Do the codes of conduct in international courts work or should they be developed further? Should a model code of conduct for international criminal justice be drawn up? Are existing mechanisms effective enough to deal with sexual misconduct within international courts and with misconduct by former high officials?¹⁵

The Integrity Project seeks to analyse these questions, in particular how we can give maximum effect to existing ‘integrity’ mechanisms, including oversight mechanisms.¹⁶ Relevant recent developments of standards and mechanisms in the United Nations system more widely will be assessed.

5. Individual Awareness and Integrity as Professionalism

Quite apart from what States and courts could do, at the individual level, it is necessary to ask whether international civil servants and high officials in international courts have a sufficient understanding of what ‘integrity’ and ‘high moral character’ refer to. It is problematic if these legal terms are largely seen as slogans or empty shells to which everyone is free to give equally valid content as may be convenient. The terms require interpretation according to the same methodology that applies to other binding language in the statute of the international court in question. There is relative scarcity of relevant international law sources, so we may benefit from a broader analysis of what ‘integrity’ in the context of justice means in major philosophical, religious and cultural traditions. Does the meaning differ significantly between various traditions, or are there common, universal elements?

In his biography on Dag Hammarskjöld, Brian Urquhart explains how Hammarskjöld left a personal impression on

most of the people who dealt with him. He highlights Hammarskjöld’s “integrity, disinterestedness and purity of intention”,¹⁷ while never questioning his practical judgment in matters of government, politics or international civil service. Hammarskjöld saw service as “self-oblivion”, as striving towards “an unhesitant fulfilment of duty”.¹⁸ How is this relevant to ‘integrity’? Should steps be taken to revive Hammarskjöld’s legacy of ‘integrity’ as a standard-bearer for civil servants and high officials in international courts?¹⁹

Furthermore, is there a requirement of ‘intellectual integrity’ for high officials and international civil servants in international courts? If prolific use of separate opinions affects the standing of an international court, could the practice bear on ‘integrity’?

‘Conflict of interest’ is the most common arena for discussion of ‘integrity’ in the preparation and adjudication of cases before international courts. This issue has received some attention already.²⁰ While it may be decisive for the reputation of individual lawyers, it rarely has that effect on the institutions themselves. This and other ‘integrity’ challenges in operations – such as self-interest in recruitment, remuneration and privileges, loyalty in external activities, and propriety during missions – will also be considered in the above-mentioned Integrity Project.

6. Integrity and Independence

Lastly, the project will explore the relationship between the principles of ‘integrity’ and ‘independence’. How does the ‘integrity’ standard in international justice relate to the requirement of independence? This is not just a conceptual question with little real-world implication. Do more recent phenomena such as WikiLeaks and proliferation of communication surveillance techniques affect the ways high officials and international civil servants of international courts should communicate with representatives of embassies or governments? Recognising that international civil servants meet their “most severe test in intercourse with government authorities, whether it be delegates accredited to the organization or officials of the various departments of national governments”,²¹ how close can they be to govern-

¹⁷ See Brian Urquhart, *Hammarskjöld*, Harper & Row, New York, 1972, p. 33.

¹⁸ Quoted in W.H. Auden, “Foreword”, in Dag Hammarskjöld, *Markings*, Ballantine Books, New York, 1983, p. vii. Fair-minded readers of *Markings* can hardly perceive Hammarskjöld as naïve – he was obviously not a Brand-like character (as in the uncompromising figure in Henrik Ibsen’s celebrated play *Brand* from 1866).

¹⁹ Ever since the establishment of the Secretariat of the League of Nations and the International Labour Office in 1920, the international civil service’s performance as regards “independence from any authority external to the organization, and the highest standards of efficiency, competence and integrity” has been “fragile and [...] repeatedly called into question” (Marcel A. Boisard, “Preface”, in Lemoine, 1995, *supra* note 8, pp. v-vi). Boisard maintains that the preservation of these requisites “implies a continuing struggle” (*ibid.*).

²⁰ Brandeis University’s International Center for Ethics, Justice and Public Life has produced several short reports on aspects of this problematique, see the collection at https://www.legal-tools.org/en/browse/ltfolder/0_38344/#results.

²¹ Lemoine, 1995, *supra* note 8, p. 54.

¹³ This paraphrases Deborah L. Rhode, “Where is the Leadership in Moral Leadership?”, in *idem* (ed.), *Moral Leadership: The Theory and Practice of Power, Judgment, and Policy*, John Wiley & Sons, San Francisco, 2006, pp. 22-33.

¹⁴ See the influential report “The International Secretariat of the Future: Lessons from Experience by a Group of Former Officials of the League of Nations”, Royal Institute of International Affairs, London, March 1944, p. 61 (<http://www.legal-tools.org/doc/53ecbb/>). The bracketed word “integrity” replaces “loyalty” in the original.

¹⁵ In a statement, the International Criminal Court Bar Association (IC-CBA) observes that the first ICC Prosecutor, “as a former elected official, falls outside the IOM’s investigative mandate”, see “ICCBA Statement on Allegations Against Former ICC Prosecutor”, 29 November 2017 (<http://www.legal-tools.org/doc/a8cdeb/>).

¹⁶ This will include analysis of whistle-blower protection and the use of external experts for inquiry into alleged misconduct, such as deliberate retaliation against staff members.

ments before it puts ‘integrity’ in jeopardy?

Similarly, do we have sufficient means to detect cases where a high official of an international court acts on feelings of indebtedness towards a government that ensured his or her election or appointment, especially when the government is that of a great power whose actions towards the institution are jealously guarded by other States?²² Should there be stronger whistle-blower protection for members of staff who detect signs of such indebtedness, to deter that it be acted upon (for example in recruitment) and discourage statements in informal settings that lend themselves to the perception of bias or lack of independence on this ground? Moreover, are ‘integrity’ challenges that are linked to the relations between high officials of international courts and leaders of non-governmental organisations adequately addressed (including the latter’s concern for continued financial support from States Parties and the *de facto* influence of high officials of the court)? These are among the less comfortable questions that deserve careful and open analysis, based on my observations as a former international civil servant.

7. The Will to Let Integrity and Uprightness Distinguish Our Acts

It is not so long ago that Dag Hammarskjöld cited Nikita Khrushchev’s statement that “while there are neutral countries, there are no neutral men”, and lamented that were this view of the international civil servant to be proven true, “we would be thrown back to 1919”.²³ We have no guarantee that one or more of the great powers will not, at one stage, take a similarly dim view of international civil service, also of international justice. One of the main points made by the important 1944 report “The International Secretariat of the Future: Lessons from Experience by a Group of Former Officials of the League of Nations” was that no “attribute is more essential for an international secretariat than ability to gain and hold the confidence of member Governments and of public opinion”.²⁴ As Hans Corell has highlighted,

²² There are two sides to instrumentalisation of such feelings of indebtedness: “international civil servants are, as much as governments, guardians of their own integrity”, see *ibid.*, p. 47. “[U]sing knowledge and skills acquired by virtue of official position to concoct tactical moves” in “connivance with national authorities [...] is not unknown”, see *ibid.*, pp. 58-59, where he continues: “Lobbying, approaching delegations in an unofficial and unauthorized capacity, is another failing some international officials are prone to”.

²³ Hammarskjöld, “The International Civil Servant in Law and Fact: Lecture delivered to Congregation at Oxford University, 30 May 1961”, *supra* note 7, p. 329.

²⁴ “The International Secretariat of the Future: Lessons from Experience

“international judges are operating under the eyes of the whole world, and the impression they give and the way in which they perform their work will directly reflect on the standing of the institution that they serve”.²⁵ For this reason, he argues that “the standards that international judges must uphold must be set even higher than at the national level”,²⁶ while it should be recognized, he would agree, that “judges must first and foremost apply the law and not use it to pursue their own ethical agendas”.²⁷

Against the background discussed above, the Integrity Project by CILRAP and the International Nuremberg Principles Academy will try to shed light on questions raised in the preceding paragraphs and, by that, to contribute to placing renewed emphasis on ‘integrity’ in international justice, both among States and within international courts. International lawyers within and around these courts²⁸ would seem – in the current environment – to have a direct interest in deliberating on the applicable professional standards of ‘integrity’ and ‘high moral character’, with a view to improving the institutions from within, thus enabling them to withstand growing scrutiny. We should do so mindful that “progress is possible on issues of professional responsibility, and that it matters”.²⁹ This is not primarily a question of financial resources, but one of will to let integrity and uprightiness distinguish our acts.

Morten Bergsmo is Director of the Centre for International Law Research and Policy (CILRAP). He was the first lawyer hired by the ICTY Office of the Prosecutor (1994-2002). He subsequently led the preparatory team that established the ICC Office of the Prosecutor, and served as its first Senior Legal Adviser (2002-2005). He has been an academic at leading institutions in China, Europe and the United States.

ISBN: 978-82-8348-079-5.

TOAEP-PURL: <http://www.toaep.org/pbs-pdf/93-bergsmo/>.

LTD-PURL: <http://www.legal-tools.org/doc/e550f7/>.

by a Group of Former Officials of the League of Nations”, March 1944, *supra* note 14, p. 17.

²⁵ Hans Corell, “Ethical Dimensions of International Jurisprudence and Adjudication”, 10 June 2002, p. 6 (an excerpt from the report of the 2002 Brandeis Institute for International Judges) (<http://www.legal-tools.org/doc/5eb7d4/>).

²⁶ *Ibid.*

²⁷ See “The Judiciary as a New Moral Authority?”, p. 3 (an excerpt from the report of the 2006 Brandeis Institute for International Judges) (<http://www.legal-tools.org/doc/ad4d13/>).

²⁸ In the case of the ICC, this would also be in accordance with victims’ expectations.

²⁹ Rhode and Luban, 2009, *supra* note 3, p. 1074.



Torkel Opsahl Academic EPublisher

E-mail: info@toaep.org

www.toaep.org

All rights reserved by the Torkel Opsahl Academic EPublisher (TOAEP).