

## A Prosecutor Falls, Time for the Court to Rise

By Morten Bergsmo, Wolfgang Kaleck, Sam Muller and William H. Wiley  
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### 1. The Promise of the International Criminal Court

Let us step back in time, to Saturday 18 July 1998. There was intense sunlight over the Capitoline Hill – ‘Collis Capitōlinus’, one of the Seven Hills of Rome – where some of the delegates who had negotiated the Statute of the International Criminal Court (‘ICC’) during the preceding five weeks were gradually assembling. They looked tired but contented, as if surprised that they had just managed to complete a marathon. Some sported sunglasses, while formally dressed for the imminent ceremony to mark the successful conclusion of the United Nations Diplomatic Conference.

Of the present co-authors, Morten Bergsmo was there, having represented the ex-Yugoslavia and Rwanda Tribunals at the Conference. He recalls the solemnity as delegates ascended the stairs in the Palazzo dei Conservatori, built in part on the land where the Temple of Jupiter had stood and where, on 25 March 1957, the founding treaty of the European Union – the Treaty of Rome – was concluded.

The UN Secretary-General, Kofi Annan, reinforced the elation by proclaiming that the establishment of the Court is “a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law”.<sup>1</sup> He quoted the Roman statesman Cicero, who “declared that ‘in the midst of arms, law stands mute’. As a result of what we are doing here today, there is real hope that that bleak statement will be less true in the future than it has been in the past”.<sup>2</sup> It felt right, even for hardened realists among the delegates in the room.

Upon taking custody of the Final Act and text of the ICC Statute,<sup>3</sup> the Italian Foreign Minister Lamberto Dini prudently reminded those assembled of the “expectations of international public opinion, clamouring around these ancient walls”.<sup>4</sup> Not

only proposing that it “will not be disappointed thanks to the farsightedness shown by all of you and the countries you represent”, the Florentine also invoked “the pressure of civil society”, making the success possible as they “passionately backed the work of governments”.<sup>5</sup> He linked the United Nations’ own credibility – which “has now been further enhanced” – to the Statute.<sup>6</sup> He crowned his language describing the commitment of the moment by stating that “it will mark not only a political but a moral stride forward by international society”.<sup>7</sup>

In hindsight, Dini’s statement stands out for its prescient, veiled warning that States Parties and the ICC should heed international expectations, retain the support of civil society, and show foresight in preserving the credibility of international organizations and the moral order of which they are part. More than celebrating the adoption of the Statute, Dini seemed to caution that the hard work was yet to come.

When Annan gave the name ‘Rome Statute’ to the Statute, he referred to Rome by her title, the ‘Eternal City’. Of all things Roman, the Capitoline Hill or Capitolium was regarded by the Romans as indestructible. It was a symbol of eternity. It has given the name to ‘capitols’ around the Americas and elsewhere, and to the very word ‘capital’, the seat of power of nation States. From its inauguration in 509 B.C. until its closure by Emperor Theodosius I just after 390 A.D., the Temple of Jupiter<sup>8</sup> was the most important temple in ancient Rome. Jupiter was the sky-god, a divine witness to oaths, an important generator of the trust which is a prerequisite of justice and governance.

All this is to say that the international community could not have chosen a more hortative stage and symbolism for the birth of the ICC than Rome’s Capitol. It was as if the assembled States took an oath, not to an omniscient Jupiter, god of the sky, but to an equally all-seeing humankind, pursuant to whose collective aspirations the States claimed to act, in the name of peoples, of victims.

<sup>1</sup> 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/>).

<sup>2</sup> *Ibid.*

<sup>3</sup> Technically speaking, the formal purpose of the ceremony was to transfer the Final Act of the UN Diplomatic Conference and the text of the Statute to the Foreign Minister of Italy, see article 125(1) of the ICC Statute (<http://www.legal-tools.org/doc/7b9af9/>).

<sup>4</sup> Statement of H.E. Mr. Lamberto Dini, Minister of Foreign Affairs of

Italy on the Occasion of the Conclusion of the UN Diplomatic Conference to Establish an International Criminal Court, 18 July 2017 (<http://www.legal-tools.org/doc/5b7148/>).

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*

<sup>8</sup> The Temple of Jupiter Optimus Maximus (‘Aedes Iovis Optimi Maximi Capitolini’).

## 2. From Legal Infrastructure to Institutional Reality

The work to establish the Court commenced as soon as the Statute entered into force on 1 July 2002. Following six years of painstaking negotiations on the Court's legal infrastructure, it was time to move from normative framework to a real institution with staff, cases and building: from idea to reality. The mood was very hopeful. Co-author Sam Muller led the Advance Team, which Bergsmo joined in August 2002 to co-ordinate the establishment of the Office of the Prosecutor ('OTP') before becoming its Senior Legal Adviser. Everyone they turned to for input or assistance responded enthusiastically.

Bergsmo conceived and co-ordinated a number of consultation processes, involving more than 70 leading experts from national and international criminal justice. There was such a strong interest that he could select from the highest shelf when he assembled the preparatory team for the OTP. Within a few months, the team had produced the draft Regulations and Code of Conduct of the Office, several expert reports, a wealth of operational and policy advice on the functioning of the Office, and the key documents for the definition of positions, their requirements, responsibilities and inter-relationships. Top criminal justice professionals – such as Tor-Aksel Busch, Norwegian Director General of Public Prosecutions – gave freely of their time to participate in the process. The recently published *Historical Origins of International Criminal Law: Volume 5* (1,180 pp.) chronicles the work of the preparatory team.<sup>9</sup>

On 21 April 2003, Luis Moreno-Ocampo from Argentina was elected as the first Prosecutor of the Court. During his press conference at UN Headquarters after his election, he referred to himself, his designated *Chef de cabinet* from Argentina, and Bergsmo as the “dream team” of the Office of the Prosecutor. He described the preparatory work undertaken for his Office as a “miracle”. Bergsmo asked himself: Is it really true, can the transition from the phase of abstract norm-creation by diplomats to the construction of an international court be so seamless?

## 3. From Dream Team to Problems Not Dreamt Of

This idyllic mood in the OTP continued through the summer of 2003, as if “the Office was embraced by the human warmth and outstanding social skills of the Prosecutor”.<sup>10</sup> Among the new staff then recruited was co-author William H. Wiley, the first investigator in the Office.

The situation started to change in late September 2003. The *Chef de cabinet* sought to hire a fourth diplomat in the OTP from one of the two Governments that had enabled the election. The Prosecutor asked the Senior Legal Adviser to legitimize the appointment. When he gently referred to the importance of following the rules on recruitment, the Prosecutor shouted: “For you, I am the law!”<sup>11</sup> To facilitate the recruitment of the diplomat, the Prosecutor asked Wiley to find dirt on the stronger candidate, as his first “investigative task”.

The mask of power fell repeatedly during the autumn of 2003 and subsequent months. The practice of vigorous peer review of important draft motions and other documents – so carefully established in the OTP of the nearby International Criminal Tribunal for the Former Yugoslavia – was not followed. A culture was established whereby even working meetings were choreographed, to ensure that the Prosecutor and his favourites would not be contradicted – soon, no one dared to. A “sense of fear” and “intimidation” set in.<sup>12</sup> The idea of ‘one Court’ was undervalued. Several government officials and leaders of non-governmental organizations knew about the problems already from late 2003 onwards.

Within a few years, 22 of the top staff members in the OTP left.<sup>13</sup> Among those who remained were colleagues who worked on cases that collapsed, were withdrawn, and postponed again and again. Many of those hired by the first Prosecutor are still in their positions. After 14 years of work and an annual budget of approximately €150 million, the ICC has only seen four convictions.

It is second nature for us to try to explain this by referring to the complexity of the work on cases, that the ICC has taken cases from widely differing countries, and that there have been some administrative improvements in the Court recently. This is how friends of the Court think. But we need to recognize the realities to help the Court forward.

In October 2017, several revelations about the OTP and its first Prosecutor, Moreno-Ocampo, were made public, initially by six media outlets<sup>14</sup> that were members of ‘European Investigative Collaborations’. They have analysed more than 40,000 documents believed to have originated from Moreno-Ocampo's e-mail system. In a string of articles, journalists make numerous factual propositions that raise serious questions about the Court, its OTP, and Moreno-Ocampo. It is suggested that Moreno-Ocampo, after his period as ICC Prosecutor, has made money, with help from staff in the OTP, from assisting persons suspected of having aided violations in Libya.<sup>15</sup> Moreno-Ocampo is alleged to have actively sought to have the case against Uhuru Kenyatta withdrawn after he left the Court.<sup>16</sup> When he was Prosecutor, one of his closest subordinates and collaborators allegedly requested a Government to hold a suspect without legal basis.<sup>17</sup> He is also suspected of having leaked confidential Court doc-

<sup>12</sup> See *supra* note 9, p. 24.

<sup>13</sup> *Ibid.*, pp. 22–23, where there is a list of names.

<sup>14</sup> They included *Mediapart*, *Der Spiegel*, *NRC Handelsblad*, *The Sunday Times*, *El Mundo*, *L'Espresso*, *Le Soir*, ANCI, *Nacional* and *The Black Sea*.

<sup>15</sup> *Mediapart*, “Former ICC prosecutor's lucrative links with Libyan billionaire and ex-ally of Gaddafi”, 1 October 2017 (<http://www.legal-tools.org/doc/895f3b/>); *Spiegel Online*, “Ex-Chefankläger Ocampo beschützte libyschen Milliardär”, 29 September 2017 (<http://www.legal-tools.org/doc/bdb5ca/>); *The Sunday Times*, “Insight: Luis Moreno Ocampo, war crimes prosecutor, tipped off Gaddafi crony Hassan Tatanaki”, 1 October 2017 (<http://www.legal-tools.org/doc/26c605/>); *NRC Handelsblad*, “Medewerker van Strafhof betaald voor lobby bij het hof”, 1 October 2017 (<http://www.legal-tools.org/doc/b0cc4f/>).

<sup>16</sup> *Mediapart*, “The secret double-dealing in Kenyatta ‘crimes against humanity’ case”, 6 October 2017 (<http://www.legal-tools.org/doc/939caf/>).

<sup>17</sup> *Mediapart*, “The devious manoeuvres behind ex-Ivorian leader Laurent Gbagbo's trial at ICC”, 8 October 2017 (<http://www.legal-tools.org/doc/0c5a22/>).

<sup>9</sup> Morten Bergsmo, Klaus Rackwitz and SONG Tianying (eds.): *Historical Origins of International Criminal Law: Volume 5*, Torkel Opsahl Academic EPublisher, Brussels, 2017 (<http://www.legal-tools.org/doc/09c8b8/>).

<sup>10</sup> *Ibid.*, chap. 1, p. 22 (in Morten Bergsmo, “Institutional History, Behaviour and Development”).

<sup>11</sup> Morten Bergsmo, “ICC må gjenreise tilliten”, *Morgenbladet*, 6 October 2017 (<http://www.legal-tools.org/doc/a16eb0/>).

uments to film stars,<sup>18</sup> and to have held money in offshore accounts without the knowledge of the ICC.<sup>19</sup>

This has raised questions about the Court among reasonable men and women worldwide. They are concerned about trust in the Court and the work it has done and is doing: the trust of States, of victims, and of millions of individuals who believe in the Court. The leaders of the Court must prove themselves worthy of this trust.

#### 4. How Can Trust be Restored?

##### 4.1. By Respecting the Legal Requirement of Integrity When Electing Prosecutors

How can we take a constructive approach to the revelations and the serious, underlying realities? First of all, we should recognize that an international court will not be better than the integrity of its leaders. The Statute of the ICC requires high integrity or “moral character”.<sup>20</sup> International prosecutors such as Richard J. Goldstone and Louise Arbour – the first and second Chief Prosecutors of the ex-Yugoslavia and Rwanda Tribunals – show that this is a realistic qualification. In fact, integrity is a legally binding requirement to serve as Judge or Prosecutor at the ICC. States Parties are obliged to be as responsible when they elect the next chief Prosecutor as they were during the highly deliberate creation of the Statute in 1998. If the normative framework of the Court is its chassis, the OTP is the engine. It is equally important that both function well.

We may need to better understand the process that led to the election of the first ICC Prosecutor to avoid the subordination of the legal requirement of integrity to convenience or political expediency during future elections (the next will be in the autumn of 2020 at the latest). “Given the serious challenges faced by the ICC Office of the Prosecutor during the period of the first Prosecutor, Mr. Moreno-Ocampo, it is surprising that academics have not produced more penetrating analyses of the process that led to his election in the first place”, says Bergsmo, who underlines that what is “important for the future is to understand the quality control failures in the decision-making process, including which actors sought to exercise influence over it. There is considerable material available for interested researchers”.<sup>21</sup> Bergsmo points out how Germany had “raised concerns about the sole candidate presented” for first Prosecutor, without being heard.<sup>22</sup> This should be further explored with a view to distilling lessons for future elections, including which mechanisms made the decision-making process ignore the warnings of the main donor to the Court at the time, which had played a key role in the making of the Court.

##### 4.2. By Effective Oversight and Credible Inquiry

The ICC cannot wait until the next election of Prosecutor to restore trust; it needs to take action. On 5 October 2017, the Court announced that its Independent Oversight Mechanism (‘IOM’) “has determined that the matter will proceed to a full investiga-

tion. As per IOM standards and procedures, the allegations will be assessed objectively and impartially with full respect for due process and fair treatment of the staff members concerned”.<sup>23</sup> But the media revelations and allegations do not primarily concern current “staff members” of the Court, they concern the former Prosecutor. Not only the Court’s own wording, but the mandate of the IOM excludes a former Prosecutor from its investigative reach,<sup>24</sup> as well as questions of “personnel-related grievances”<sup>25</sup> and contempt.<sup>26</sup> Already on 13 October 2017, an article by Stéphanie Maupas showed how the first Prosecutor and his Office had systematically sought to weaken the IOM in the name of prosecutorial independence.<sup>27</sup> It is also well-known how the first Prosecutor refused to adopt a code of conduct during his term.<sup>28</sup> To complicate matters further, the Head of IOM, Mr. Ian Fuller, tendered his resignation five days later in a letter to the President of the ICC Assembly of States Parties.<sup>29</sup>

Without prejudice to the process, it is clear that the IOM investigation will not restore trust in the OTP and the Court as a whole, despite the contrary wishes of well-intended States Parties. The longer doubt is allowed to linger, the more entrenched it may become. If things ‘quiet down’ after the revelations, that does not mean that they go away. Unless resolved, problems can be invoked by adversaries of the Court any time in the future. The Women’s Initiatives for Gender Justice has already stated that “the revelations could be considered emblematic of an under-lying culture within the Court, rather than exceptional to the overall environment”.<sup>30</sup>

As part of our support for the ICC, we therefore need to ask more of its leaders. The future of the Court depends on them. Prosecutor Bensouda should use her “full authority over the management and administration of the Office” to conduct professional and credible reviews of the legacy of the first Prosecutor, to establish relevant facts with a view to avoiding repetition.<sup>31</sup> This should include not only what has come out through the recent media revelations, but also a) communication between the first Prosecutor after his term ended and other members of the Office with whom he is known to have been close (to avoid a perception that the two named staff members are turned into scapegoats for a wider problem); b) the allegations of abuse by the first Prosecutor of several dozen former staff members (to see whether compensation or rehabilitation

<sup>23</sup> ICC Press Release, “ICC Statement on recent media allegations”, 5 October 2017 (<http://www.legal-tools.org/doc/babdf6/>).

<sup>24</sup> See ICC Assembly of States Parties resolution ICC-ASP/12/Res.6, 27 November 2013, sect. C.1., para. 28 (“the Prosecutor”) (<http://www.legal-tools.org/doc/64ebeb/>).

<sup>25</sup> *Ibid.*, para. 29.

<sup>26</sup> *Ibid.*, para. 30, which refers to article 70 of the ICC Statute on “Offences against the administration of justice” (including conduct such as retaliation against Court officials for duties performed and bribery).

<sup>27</sup> *Mediapart*, “CPI: comment le procureur Ocampo a organisé son impunité”, 13 October 2017 (<http://www.legal-tools.org/doc/bc10af/>).

<sup>28</sup> See Salim A. Nakhjavani, “The Origins and Development of the Code of Conduct”, in Bergsmo, Rackwitz and SONG (eds.), 2017, see *supra* note 9, chap. 47. He drafted the original Code of Conduct at the time of the preparatory team for the OTP.

<sup>29</sup> See Letter from Mr. Ian Fuller to H.E. Mr. Sidiki Kaba, through Mr. Renan Villacis, Director, Secretariat of the Assembly of States Parties, IOM-2017-ASP-04, 18 October 2017 (on file with the authors).

<sup>30</sup> See their statement “A critical time for the ICC’s credibility”, 12 October 2017 [sic] (<http://www.legal-tools.org/doc/e2fbc7/>).

<sup>31</sup> Article 42(2) of the Statute.

<sup>18</sup> *Mediapart*, “Angelina Jolie, Omidyar et le Qatar: le cabinet cache du procureur Ocampo”, 6 October 2017 (<http://www.legal-tools.org/doc/ea4930/>).

<sup>19</sup> *Mediapart*, “How chief prosecutor at International Criminal Court owned companies in tax havens”, 29 September 2017 (<http://www.legal-tools.org/doc/56cfa8/>).

<sup>20</sup> See articles 36(3)(a) and 42(3) of the ICC Statute.

<sup>21</sup> *Supra* note 9, p. 5, footnote 10.

<sup>22</sup> *Ibid.*

by the Office is required); c) the suspicion that some persons hired by him who still serve in the Office may not be properly qualified for the positions they hold; d) the persistent rumours that the timing of the application for an arrest warrant against President al-Bashir was linked to the outcome of a case before the Administrative Tribunal of the International Labour Organisation that involved allegations of sexual violations against the first Prosecutor; and e) the prevalent suspicion that it was members of the OTP who gave the idea and actively encouraged the Palestinian Administration to use article 12(3) against Israel – that the first Prosecutor even used to refer to a member of his staff as “our Palestinian” – and that this was done with a view to showing even-handedness to those criticising the early arrest warrant application against President al-Bashir.

Prosecutor Bensouda may wish to use an external expert who has expertise from complex internal inquiries, including in public agencies. Senior attorneys are often used for this type of assignments in, for example, the Scandinavian countries.<sup>32</sup> Such an inquiry could help the Prosecutor turn every stone to restore trust in her Office, which is her duty and, we are confident, her wish. It could obviate the need for action by the Assembly of States Parties and proposals for statutory reform.

### 4.3. By Offering the Court a More Accurate Mirror

The ICC operates in a different context than national criminal justice. It is not watched in the same way by peers, associations of counsel, prosecutors and judges, tabloid media, a justice committee in parliament, a national audit service, and a community of legal academics shaped by a culture of uniform legal education. This is a distinct disadvantage for the Court. Criminal justice tends to improve when placed under multi-level pressure by stakeholders. While budget power must respect prosecutorial independence, steadily increasing the budget may lead to the opposite result: it may weaken quality control.

The Court should therefore welcome more investigative journalism on the way it operates and can improve, as well as the emergence of a serious sociology of international criminal justice that examines systematically and responsibly institutional behaviour and use of power. Such developments will offer the leaders of the Court a better mirror in which they can see their own performance.

### 5. Time for the Court to Rise

Oversight of the ICC cannot be left to States Parties alone, some of which are reluctant to criticize the Court as long as China, India, Russia and the United States have not yet joined. Immunizing the Court through the good intentions of officials and civil society actors may inadvertently numb the normal sense

<sup>32</sup> See, for example, the ‘Valla case’ involving the main trade union in Norway (<http://www.legal-tools.org/doc/5ec389/>) and the ‘Monika case’ concerning a police district (<http://www.legal-tools.org/doc/fd84d4/>).

of vigilance within the organization, on which its self-preservation depends. An unarticulated sense within the Court that it will not be held accountable, that Governments will conceal problematic information from the public, should not be allowed to take hold.

In his remarks on 18 July 1998, Lamberto Dini expressed the hope that once the reluctant great powers have more carefully appraised “the *operation* of the Court [...], they will come to a different determination in the not too distant future, and will accede to the new Institution”.<sup>33</sup> He linked the views of China, India, Russia and the United States towards the ICC, to the Court’s own performance, not to outreach or diplomacy around the Court. He is right. The leaders of the Court must earn trust by the way they conduct its core business.

For 900 years the sky-god Jupiter was venerated as the ultimate overseer, at the location where States chose to celebrate the adoption of the Rome Statute, in the heart of the Eternal City. Article 1 proclaimed the Court as “a permanent institution”, with no time limitation.<sup>34</sup> The formalized Independent Oversight Mechanism is not the ultimate overseer of the Court, nor is the Assembly of States Parties. The aspirations of individuals and communities made the Court and continue to provide its foundation. If the leaders of the Court cannot retain their trust, their aspirations will move on to other instruments for the betterment of humankind. A Prosecutor has fallen, but it is time for the Court to rise.

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<sup>33</sup> *Supra* note 4 (italics added).

<sup>34</sup> The Women’s Initiatives for Gender Justice has reminded us 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”, *supra* note 30.