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Institutional History, Behaviour and Development

Morten Bergsmo[*]

1.1. Recent Institutional History, Relevant to Institution-Builders

This book contributes towards a history of the Office of the Prosecutor of the International Criminal Court ('ICC'), and provides a broad and structured collection of analyses for those who construct national capacity to investigate and prosecute core international crimes.[1] In a way, this two-fold objective looks both to the past and to the future. It reminds us of Janus of two faces, or his namesake, the month of January, which concurrently looks at the past year and the one that has started. Among the main beneficiaries of its historical chronicling are institution-builders in national jurisdictions. Whereas the ICC Office of the Prosecutor has largely been built – albeit still youthful, in search of its full powers – the construction of national capacity to investigate and prosecute core international crimes may just have started.

Two of the co-editors – Mr. Klaus Rackwitz and the present writer – dedicated several years of intense work to the construction of the ICC Office of the Prosecutor. With this book, we hope to make a modest contribution to those who are and will be similarly engaged at the national level. This is one of the core functions of the International Nuremberg Principles Academy which Mr. Rackwitz currently directs. It is also a primary function of the Case Matrix Network ('CMN') department of the

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[1] For the purposes of this volume, the term 'core international crimes' includes the categories of war crimes, crimes against humanity, genocide and crimes of aggression.

Centre for International Law Research and Policy ('CILRAP') of which the present writer is Director.[2]

The book appears as Volume 5 in the series *Historical Origins of International Criminal Law*. The chronology of the first edition of Volumes 1–4 ends the analysis of international criminal law and justice with the *ad hoc* Tribunals for ex-Yugoslavia and Rwanda, before the establishment of the ICC. Volume 5 is focused on the birth of the ICC Office of the Prosecutor. More specifically, it concerns a 15-month period from 1 August 2002 onwards, during which time a preparatory team for the ICC Office of the Prosecutor conducted a series of expert consultation processes and drafted several foundational documents for the Office, among other activities.

The ICC Statute entered into force on 1 July 2002, and the Advance Team set up by States Parties to facilitate the establishment of the Court immediately commenced its work. This is the starting point of the book. The Team was led by Dr. Alexander (or Sam) Muller who has written the Foreword to this book. With the consent of the States Parties overseeing the Advance Team, it formed a preparatory team for the ICC Office of the Prosecutor. I was asked to co-ordinate the preparatory team and, to this end, I was released on loan by Chief Prosecutor Carla Del Ponte of the International Criminal Tribunal for the former Yugoslavia ('ICTY'),[3] whose Office of the Prosecutor I had served as a legal adviser since May 1994. On 1 November 2002, the designated ICC Director of Common Services, Judge Bruno Cathala, commenced his work and I was employed by the ICC as the Senior Legal Adviser of the Office of the Prosecutor, an appointment confirmed by Prosecutor Luis Moreno Ocampo both after his election in April and swearing-in in June 2003. As co-ordinator of the preparatory team, I reported to Dr. Muller until 1 November 2002, to Judge Cathala from 1 November 2002, and to the Prosecutor from his assumption of office on 16 June 2003. Dr. Muller and Judge Cathala gave me full autonomy as co-ordinator of the preparatory team. They were singularly supportive of the work of the team from its start. The first Prosecutor, Mr. Moreno Ocampo, gave me autonomy in the co-ordination of the completion of the expert consultation processes started by the prepara-

[2] The CMN – directed by Mr. Ilia Utmelidze – has undertaken capacity-development and knowledge-transfer projects in more than 20 countries. It also runs several online services in the CMN Knowledge Hub, primarily for national practitioners.

[3] The tribunal is frequently referred to as the "ex-Yugoslavia Tribunal" in this chapter.

tory team, while I naturally assumed new tasks for him directly as Senior Legal Adviser from his first day in office. The last of the expert groups set up by the preparatory team worked through the month of October 2003, submitting its report in November 2003 (as discussed below in Chapter 45, "The Principle of Complementarity in Practice"). That marks the end of the temporal scope of the book.

It is the work of the preparatory team that the book addresses, not new actions that started in the Office of the Prosecutor from the summer of 2003 onwards. For example, the book does not deal with the "Paper on Some Policy Issues before the Office of the Prosecutor" released by the Office of the Prosecutor in September 2003.[4] The preparatory team had not initiated or been responsible for this paper (although input was given[5]). It was prepared under the supervision of the Prosecutor and his Chef de Cabinet at the time, Judge Silvia Fernández de Gurmendi.[6] The preparatory team never suggested that the ICC Office of the Prosecutor should issue institutional 'policy papers' on any topic.[7] We did not consider this an important tool to ensure high quality in the performance of core functions of the Office.

4 International Criminal Court ('ICC'), "Paper on Some Policy Issues before the Office of the Prosecutor", 5 September 2003 (http://www.legal-tools.org/doc/f53870/).

5 For example, the notion of an 'impunity gap', which had been coined in the preparatory team in late 2002 (see section 1.3.8. below), found its way into this policy paper and later became a term of common use in the field.

6 At the time of writing, she was the President of the International Criminal Court.

7 The reports of the expert groups created by the preparatory team were reports by *external* experts, for the benefit of the ICC Office of the Prosecutor, ICC judges, and for those building relevant investigation and prosecution capacity in national jurisdictions. The preparatory team never suggested that these reports should commit the Office of the Prosecutor. The only institutional governance instruments the team put forward for the consideration of the first Prosecutor were the draft Regulations of the Office of the Prosecutor (Chapter 46), a draft Code of Conduct (Chapter 47), budgetary submissions for the second budget (Chapter 48), and human resources tools such as vacancy announcements and job descriptions. When the idea of the initial policy paper surfaced, I thought to myself that the Office should first prove that it could successfully select, investigate and prosecute cases. The gain the Office may enjoy in certain constituencies if it publicly articulates policies is of little consequence if it does not perform its core criminal justice functions impeccably. In my experience, responsible States Parties understand this, especially those who end up paying most of the bill. Add to this the difficulty the Office may face should it decide that it no longer wants to stand behind a policy paper: it obviously has the power to undo policy papers, but doing so may come at a price.

Chapter 48 does address one significant activity that the preparatory team did *not* do, namely the preparation of the first budget of the ICC Office of the Prosecutor and what some of the central considerations at the time were. The first budget was prepared before the preparatory team was established, even before the ICC Statute entered into force. I was requested to do this, in my personal capacity and not as a Legal Adviser at the ex-Yugoslavia Tribunal.[8]

The book does not deal with everything that the preparatory team did. For example, we have not included the work undertaken for the two-day hearing on policy questions relevant to the ICC Office of the Prosecutor held on 17–18 June 2003 in the Peace Palace. That event remains under-researched. So is the work of the preparatory team more generally, which makes it difficult to properly understand the early history of the ICC Office of the Prosecutor, since the work of the preparatory team was the basis on which the Office started and it influenced aspects of its subsequent operations.[9]

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[8] This needs to be said because in his book chapter on the evolution of the Office of the Prosecutor, Professor Jens Meierhenrich correctly recognises that a "first sketch for the institutional design of the OTP appeared as an annex to the ICC's first budget and was unveiled in September 2002", but he erroneously assumes that the ICC Advance Team was behind the proposal; see Jens Meierhenrich, "The Evolution of the Office of the Prosecutor at the International Criminal Court: Insights from Institutional Theory", in Martha Minow, C. Cora True-Frost and Alex Whiting (eds.), *The First Global Prosecutor: Promise and Constraints. Law, Meaning, and Violence*, University of Michigan Press, Ann Arbor, 2015, pp. 105–6. It is a pity that he had not been properly informed on this point, because he makes it a central rhetorical device in his argument: "The work of the Advance Team merits a closer look because it throws into sharp relief the gradual emergence of contending visions of institutional design", with reference being made to the creation of the Jurisdiction, Complementarity and Cooperation Division of the ICC Office of the Prosecutor (pp. 104, 106–10). In fact, neither the ICC Advance Team nor the preparatory team for the ICC Office of the Prosecutor ever put forward any "institutional design" for the Office. The very idea of the Jurisdiction, Complementarity and Cooperation Division came from one of the expert groups established by the preparatory team. There was never any controversy between the Prosecutor and the preparatory team about this or the "international dimensions of the OTP" (p. 106). Quite the contrary, Prosecutor Louise Arbour and I had pointed out the weaknesses in the fact-finding and state co-operation regimes of the ICC in the first publication on the topic already in 1999, hence the decision of the preparatory team to establish the expert group on fact-finding and state co-operation, as discussed in Chapter 44 below (see Louise Arbour and Morten Bergsmo, "Conspicuous Absence of Jurisdictional Overreach", in *International Law Forum du Droit International*, 1999, vol. 1, no. 1, pp. 13–19 (http://www.legal-tools.org/doc/d4cfaf/)).

[9] The 34-page "Report on the Activities Performed during the First Three Years (June 2003–June 2006)" issued by the ICC Office of the Prosecutor on 12 September 2006

1.2. Proximity to the Preparatory Team for the ICC Office of the Prosecutor

The persons behind this book have a particular responsibility to ensure that the work of the preparatory team for the ICC Office of the Prosecutor is understood and represented on an accurate factual basis. They were involved in the work processes at the time and can attest to them first-hand. Their proximity to the preparatory team could not be closer. This has some advantages in terms of knowledge of relevant facts. But it inevitably risks perceptions of self-consciousness with which we have to live.

The co-editor of this volume, Mr. Rackwitz, a former German judge, served as a consultant in the preparatory team in August–September and in November–December 2002, and joined the Court full-time on 2 January 2003. Mr. Salim A. Nakhjavani, author of Chapter 47 below ("The Origins and Development of the Code of Conduct"), also served as a consultant-member of the preparatory team. Mr. Carlos Vasconcelos, author of Chapter 46 ("Draft Regulations of the Office of the Prosecutor") and one of the top federal prosecutors of Brazil, was consulted by the preparatory team on several issues and was a member of the expert consultation group on draft Regulations of the Office of the Prosecutor.[10] Dr. Markus Benzing, who gave input during the preparation of

(http://www.legal-tools.org/doc/c7a850/) refers to the preparatory team's work in paragraphs 55 and 56. It mentions the "expert consultation processes" and the "draft Regulations that […] establish a code of conduct for its members and provide guidelines and standard operating procedures", in the context of "the process undertaken by the Office to develop its policies".

10 Mr. Vasconcelos, who had served as deputy prosecutor in the United Nations Transitional Administration in East Timor, was one of the shortlisted candidates to be the first ICC Prosecutor. The story of how his candidature was derailed in a meeting of the Bureau of the ICC Assembly of States Parties in early 2003 is interesting and yet to be publicly told. 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. 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. For example, during a subsequent meeting called by the Bureau in New York in early 2003 for representatives of States Parties, the German representative, Ambassador Christian W. Much, several times raised concerns about the sole candidate presented, Mr. Moreno Ocampo. The late Judge Hans-Peter Kaul explained to some colleagues at the ICC that the German Embassy in Buenos Aires had prepared a report for the German Foreign Ministry that was unfavourable about the candidate. But Germany was not heard at the key meeting, although Germa-

Chapter 46, was the consultant-member of the preparatory team who worked specifically on the draft Regulations, in support of the designated expert group. Dr. Vladimir Tochilovsky, co-author of Chapters 43 ("Measures Available to the International Criminal Court to Reduce the Length of Proceedings") and 44 ("Fact-Finding and Investigative Functions of the Office of the Prosecutor, Including International Co-operation"), was the member of the expert groups on length of proceedings and on fact-finding who co-ordinated the drafting of both reports. Finally, Mr. Tor-Aksel Busch, author of the Preface to this book, was a member of the expert group on draft Regulations of the Office of the Prosecutor, and was consulted on the report on length of proceedings. It was indeed an honour to co-ordinate a preparatory team that could draw on such distinguished colleagues of high integrity. Mr. Busch is perhaps the prosecutor in Europe who is most highly respected for his professionalism and rectitude, having served as Director-General and Deputy Director-General of Public Prosecution of Norway for more than 30 years. He was a pillar of support in 2002–2003.

The team behind this book has also consulted the authors of the chapters in Part 1 of the volume, who include the former Director of Public Prosecutions of Ireland, Mr. James Hamilton, and Chief Justice of Tanzania, Mr. Mohamed C. Othman. Earlier, I had discussed the idea of the book with late Mr. Christopher K. Hall and Judge Håkan Friman, both of whom participated actively in the expert consultation processes described in Parts 1 and 2 below and later shared information and documents on their interaction with the Court with me. This book is dedicated to their memory, both of whom passed away prematurely. Mr. Hall had been a trusted collaborator of the present writer since the start of the ICC negotiations in 1996. Judge Friman had been a fellow Scandinavian with whom I worked closely when he later joined the ICC negotiations.

1.3. Risk Assessment in August 2002

What are the main risks that will confront the ICC Office of the Prosecutor? This was the first real question I asked myself after joining the preparatory team for the Office on 1 August 2002. It was a question inviting

ny was the main financial contributor to the Court at the time and had played a vital role during the making of the Court.

careful reflection, as my intention was to let the answer guide the work of the team.

I considered the question in light of input received from several sources. I started out with what I had observed during my service at the ICTY Office of the Prosecutor between May 1994 and July 2002, including strengths, bottlenecks and weaknesses. I had joined the Tribunal's Prosecution rather than Chambers because I expected that it would be the weakest link of the organisation.[11] Arguably, this held true until the Tribunal's judges started issuing surprising decisions in 2012.[12] Furthermore, I considered input that I had received from government delegates during the ICC negotiations, many of whom had served in national criminal justice or had opinions about the ways the ex-Yugoslavia and Rwanda Tribunals had functioned up until that point in time.[13] I had also received invaluable input through conversations with some leading prosecutors and judges such as Mr. Busch. And I made several visits to the Serious Fraud Office in London and the Oberlandesgericht in Cologne, to study their work on fact-rich cases, and to the Generalbundesanwalt beim Bundesgerichtshof in Karlsruhe. Finally, in the autumn of 2002, we also started to receive input in the general expert consultation process covered by the elaborate Part 1 of this book.

1.3.1. Perceived Lack of Independence

The main threat to the ICC Office of the Prosecutor that I could see in August 2002 was the risk of a perceived lack of independence on the part of the Prosecutor or senior members of his or her Office *vis-à-vis* a small

[11] See Morten Bergsmo, "Foreword", in Morten Bergsmo (ed.), *Quality Control in Fact-Finding*, Torkel Opsahl Academic EPublisher, Florence, 2013, pp. iii–x (http://www.legal-tools.org/doc/5b59fd/).

[12] See, for example, Gunnar M. Ekeløve-Slydal, "ICTY Shifts Have Made Its Credibility Quake", FICHL Policy Brief Series No. 49, Torkel Opsahl Academic EPublisher, Brussels, 2016 (http://www.legal-tools.org/doc/18ba48/). He quotes Mr. Carl Bildt, former Foreign Minister of Sweden: "It is becoming increasingly difficult to see the consistency or logic in the different judgments"; see "War Crimes in the Former Yugoslavia: Two Puzzling Judgments in The Hague", in *The Economist*, 1 June 2013.

[13] I was the official representative of the ICTY to the ICC negotiations between 1996 and 2001, serving in effect as a technical adviser to delegates on the law and practice of the *ad hoc* tribunals. I was called upon to comment on many questions, in particular issues linked to the provisions in the ICC Statute on the powers, function and organisation of its Office of the Prosecutor.

number of powerful governments. There is a broad spectrum of reasons why such perceptions could take hold. For one, the process to establish an international prosecution service necessarily entails a period of searching for and trying different approaches. Such dynamic circumstances increase the opportunity for states to influence the Office.[14] More generally, the history of the ex-Yugoslavia Tribunal shows that there is no shortage of actors who would like to promote perceptions of lack of independence in order to weaken the effect of prosecutorial action directed against what they see as their interests. At times, governments in the former Yugoslavia played such political games. Furthermore, there is the relative factor of professionalism: learning the proper language of international prosecution services – in informal settings, in personal e-mail and telephone communication, or when on mission – does not come without effort and has been difficult for some leaders of international prosecution services. There are also some leaders of international criminal justice institutions who have their clear country preferences, sometimes linked to simple cultural bias.

Further from the centre of the spectrum would be an international criminal justice leader who thinks that the Office of the Prosecutor or the Court cannot be without protection from one or more national governments – that the question is only which governments it should be. This view – which I have witnessed more than once – considers it naive not to recognise that the continued existence of international criminal justice institutions depends on such protection. Fully equal treatment of all governments is therefore not considered realistic. This view is sometimes combined with a clear personal preference for one or a few governments – perhaps because the international justice leader in question has not yet developed a genuine global identity or, of greater concern, because those governments have helped to make his or her international career. This combination can create perceptions of instrumentalisation or facilitate actual instrumentalisation.

This was the greatest risk I saw for the ICC Office of the Prosecutor in August 2002. That is also why – in a lecture on the occasion of the end

[14] During such establishment processes, "the range of plausible choices open to powerful political actors expands substantially and the consequences of their decisions for the outcome of interest are potentially much more momentous"; see Giovanni Capoccia and R. Daniel Kelemen, "The Study of Critical Junctures: Theory, Narrative and Counterfactuals in Historical Institutionalism", in *World Politics*, vol. 59, no. 3, 2007, p. 343.

of term of the first ICC President, Mr. Philippe Kirsch – I called for a deeper form of "fraternity of international criminal justice, whereby international justice institutions seek an equal measure of protection from all States Parties".[15]

1.3.2. Lack of Balance Between Civil and Common Law Staff

A second risk facing the ICC Office of the Prosecutor concerned the related need to ensure a balanced composition of its staff from different legal systems and traditions, regions, language spheres and countries. The main divide characterising international criminal justice between 1994 and 2002 was not one between North and South or East and West, but between common and civil law. As I wrote in 2009:

> This tension had some roots in facts and others in fiction. Regrettably, by 2002, some 85% of managers in the ICTY Office of the Prosecutor came from four countries: the United States, the United Kingdom, Canada and Australia. More than 50% of the lawyers in the Office were from the same four countries, as were approximately 75% of its GTA lawyers. Add to that, transparent layers of information showing who was assigned to which cases, to which witnesses and which legal questions, and the contours of the topography of power start to emerge with some clarity.[16]

This had of course not gone unnoticed in various capitals outside the group of leading English-speaking countries, the so-called Anglosphere. The issue was alive during the ICC negotiations. But how could such an abstract distinction between common and civil law become a real dividing line?

> Did the details of the distinguishing features of common and civil law criminal procedure really have the capacity to mobilise governments and international justice institutions? Or was the common versus civil law divide merely a proxy tension, a smoke-screen? Interests do mobilise – conflict of interests even more. Maximising the national interest by working together with likeminded States or other actors is

[15] See Morten Bergsmo, "The Autonomy of International Criminal Justice", FICHL Policy Brief Series No. 3, Oslo, 2011, p. 3 (http://www.legal-tools.org/doc/5fa508/). The lecture was given on 6 February 2009 at the Dutch Ministry of Foreign Affairs in The Hague.

[16] *Ibid.*, p. 2.

> not unknown to multilateral diplomacy and international organization.[17]

By August 2002, it seemed clear to me that tension along a civil–common law divide was a real risk for the ICC Office of the Prosecutor, and that this was as predictable as it was avoidable. This concern was echoed late in 2002 and early 2003 by various experts whose input is included in Part 1 of this book.

1.3.3. Inadequate Quality of Staff

The quality of staff in the ICC Office of the Prosecutor was also a risk factor high on my list back in August 2002. This should not require any explanation. The ICC is a permanent international court, the only criminal jurisdiction of its kind. Our sense in August 2002 was that it deserves only the best, being born out of the painstaking efforts by governments, non-governmental organisations, and individuals over a number of years of negotiations, and building on the sacrifices of those who had made the legacy of predecessor institutions such as the International Military Tribunals in Nuremberg and Tokyo and the *ad hoc* Tribunals for ex-Yugoslavia and Rwanda.

The challenge was not only to find the most highly qualified candidates for positions in the ICC Office of the Prosecutor, but also to define the right skill sets required for each position. By 2002, it was manifest to discerning minds in the field of international criminal justice that suitable core international crimes cases for international(ised) criminal jurisdictions are normally fact-rich, involving multiple crimes or incidents that implicate persons in positions of leadership (who could have prevented or stopped the crimes from occurring). Fact-rich cases may have more in common with serious fraud cases than, for example, ordinary murder or rape cases. Fact-rich cases – sometimes involving an evidence-base of more than one million documents and several thousand potential witnesses – require staff who can process large volumes of material fast. Such staff may not perform well in a domestic murder or rape case, but they have what large corruption or war crimes cases require.

When I visited the Serious Fraud Office in London shortly after joining the preparatory team for the ICC Office of the Prosecutor, I was told that they would hardly employ traditional police officers in their staff

[17] *Ibid*.

of several hundred, but rather borrow such officers from local districts for operations such as search, seizure and arrest.[18] The practice at the Tribunals for ex-Yugoslavia and Rwanda had differed fundamentally on this point: a large percentage of the members of their Office of the Prosecutor were domestic violent crime investigators. There was a real risk in 2002 that the ICC Office of the Prosecutor would repeat the same mistake without first learning from highly competent national criminal justice agencies working on large, fact-rich cases with work processes that resemble typical core international crimes cases.[19]

1.3.4. Lack of Analysis Capacity

A related risk was that the ICC Office of the Prosecutor would not have adequate analysis capacity from the start of its work to undertake proper pattern and other analysis to guide decision-making on the selection and prioritisation of cases, incidents, crimes and suspects, and help develop information and evidence on systemic facts (such as the existence of the context of an armed conflict or the *de jure* and *de facto* authority of a superior in a complex organisation).

The *ad hoc* tribunals did not have such capacity initially which had adverse consequences for the strategic planning of investigations and case portfolio. I had taken several initiatives inside the ICTY Office of the Prosecutor to redress this problem, *inter alia*, by suggesting that the Office ask the Government of Norway for the secondment of a demography-statistics expert. This and other ideas contributed to the development of a

[18] At the time of writing this chapter, the website of the Office prominently announced that "[o]ur staff includes investigators, lawyers, forensic accountants, analysts, digital forensics experts and a variety of other people in specialist and support roles" (see https://www.sfo.gov.uk/about-us/#ourpeople, accessed on 10 March 2017). In January 2016, this highly competent Office had "a full time equivalent of around 380 permanent staff. When we take on very big cases we expand our capacity with temporary and fixed term staff" (*ibid.*). This should be a matter of interest to the ICC States Parties.

[19] The Director of the Serious Fraud Office, and various managers, extended the utmost co-operation during our visits. They expressed appreciation that someone from the international criminal jurisdictions in The Hague would make such study visits to the Office. It surprised me to learn this, as leaders of investigations at the ICTY Office of the Prosecutor had often gone to London for meetings between 1994 and 2001. I was told that those visits had been to the Metropolitan Police Service (Scotland Yard) and not the Serious Fraud Office. In March 2016, the Metropolitan Police Service had more than 48,000 full-time personnel and a very different organisational culture than that of the Serious Fraud Office and what international prosecution services can afford to develop.

strong analytical capacity within the Office, including for civilian chains of authority,[20] thanks in no small measure to the quiet support of the Norwegian Foreign Ministry.

Prior to joining the preparatory team for the ICC Office of the Prosecutor, I had drafted the first budget of the Office. As discussed in Chapter 48 below, I wrote an Analysis Unit (with several professional posts) into the budget to ensure that the ICC would take on board relevant lessons from the *ad hoc* tribunals. I could not be certain in August 2002 that this would be upheld by the Prosecutor upon assuming Office.

1.3.5. Perceived Bias in Exercise of Prosecutorial Discretion

I was concerned with the further related risk that the exercise of discretion by the ICC Office of the Prosecutor would be seen as biased or lacking in independence, which could weaken the credibility of the Office. The urge to get started with the first case – or, later, the temptation to select a case that places the ICC Prosecutor in a peacemaker's role, even if there may not be sufficient gravity in the case – could set a standard which the Office cannot easily apply equally in subsequent cases. This is the story of the ICTY's first case, against Duško Tadić. There is a need to shelter the Prosecutor's exercise of discretion, by a proper framework of criteria for selection and prioritisation as elaborated in Chapter 43 below,[21] and by investigation management tools (Chapter 46).

1.3.6. Lengthy Proceedings

Another risk identified in August 2002 was the probability of long proceedings before the ICC. Several States Parties had already expressed dissatisfaction with the length of proceedings before the *ad hoc* Tribunals for ex-Yugoslavia and Rwanda. States have a human rights concern that suspects wait too long for trial,[22] and an economic concern that proceedings

[20] For an overview of the development and contributions of the demographic analysis capacity at the ICTY, see Helge Brunborg, "The Introduction of Demographic Analysis to Prove Core International Crimes", in Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (eds.), *Historical Origins of International Criminal Law: Volume 4*, Torkel Opsahl Academic EPublisher, Brussels, 2014, pp. 477–512 (https://www.legal-tools.org/doc/740a53/).

[21] Section 43.3. Criteria for the Selection of Cases.

[22] United Nations General Assembly, International Covenant on Civil and Political Rights, 19 December 1966, Article 14(3)(c) (http://www.legal-tools.org/doc/2838f3/) guarantees the right to "be tried without undue delay", and the 1791 Sixth Amendment to the United

are too costly. The credibility of, and political support for, international criminal jurisdictions depend on their proceedings not being too lengthy and costly. I am not sure this is generally recognised within international organisations such as the ICC. But their activities are largely bound by elaborate formal or statutory procedures – their hands are quite tied – so these institutions are not easy to manage efficiently. There is a standing risk of lack of innovation in the administration of proceedings and their preparation – hence the critical importance of those discretionary steps in the work processes that can have a significant impact on judicial economy (see, for example, section 43.5. below). There is also a risk of aggregated personal interest in dawn-out proceedings among participants in international(ised) criminal jurisdictions.

Either way, it was our feeling in the late summer of 2002 that the ICC should excel in relation to other international(ised) criminal jurisdictions both in terms of the time it takes to prepare trials and the duration of proceedings. Its high officials should turn every stone not to develop a problem of lengthy proceedings. As a permanent international criminal jurisdiction, the ICC should differ from those *ad hoc* jurisdictions that have been criticised for lengthy proceedings.

1.3.7. Weak Fact-Finding Powers

A seventh risk that could affect the ICC Office of the Prosecutor, as we saw it in the preparatory team in August 2002, concerned the relatively muted state co-operation regime in the ICC Statute and its implications for the fact-finding powers of the Office. Prosecutorial decisions on charging and sentencing require access to all relevant information, or miscarriages of justice may occur. Chapter 44 elaborates how the Office has a weaker ability to obtain information and evidence than the *ad hoc* Tribunals for ex-Yugoslavia and Rwanda. The latter acted pursuant to the ultimate power of Chapter VII of the United Nations Charter – their legal basis – when seeking information from or in states, while the ICC depends on the co-operation of States Parties. It does not have the power to collect evidence on the territory of states in an autonomous and effective manner, unless the government concerned agrees or the United Nations Security Council so decrees in a referral to the Court.

States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy trial" (http://www.legal-tools.org/doc/2bd122/).

This risk had been identified in a 1999 publication by Justice Louise Arbour and the present writer,[23] so it was clear to the preparatory team from the start that it would conduct a careful expert consultation process to see whether any solutions could be found to this architectural constraint built into the ICC Statute.

1.3.8. High Expectations and Perceived Impunity Gap

Finally, I already feared in August 2002 that expectations of what the ICC Office of the Prosecutor could do would be too high. Even with optimal management and work processes, the ICC can only do a few cases in every situation it opens. The national capacity to do additional cases in any given situation before the ICC will be limited, at least initially. A contrast between the shiny but narrow justice of the ICC, and the limited or absent national justice could well become visible to the public. I coined the term 'impunity gap' for this phenomenon in the early autumn of 2002, and made the illustrations in Figures 1 and 2, which later found their way into the second budget of the ICC.[24]

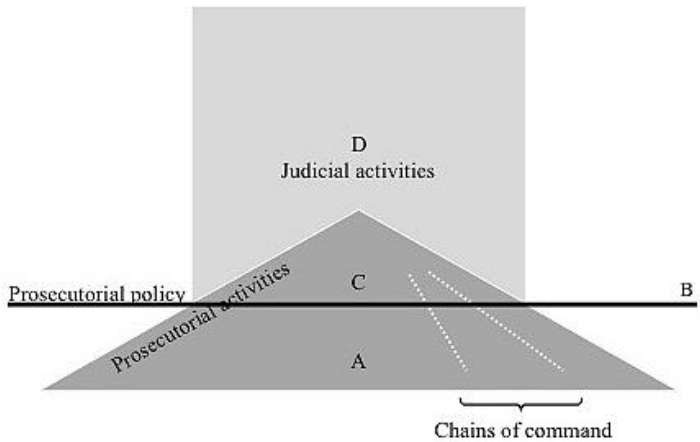

Figure 1: The effect of prosecutorial policy on resource needs. Scenario 1: Broad target selection (C), widening the scope of judicial activities (D).

[23] Arbour and Bergsmo, 1999, see *supra* note 8.

[24] See Programme Budget for 2004, ICC-ASP/2/10, para. 16.

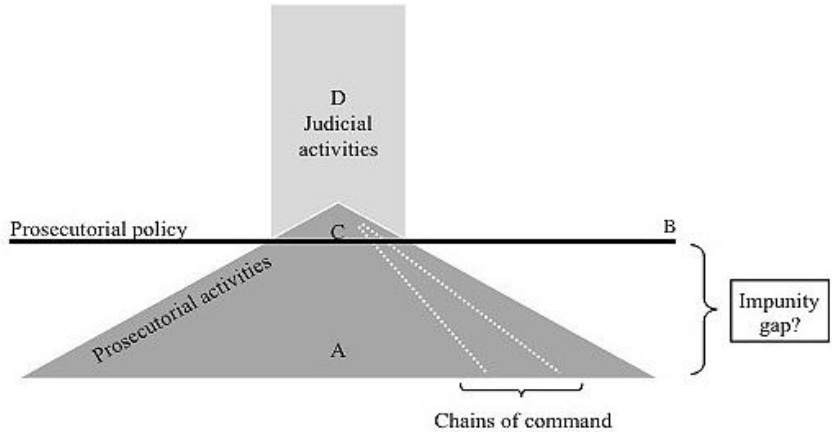

Figure 2: Scenario 2: Narrow target selection. C shows the potential cases selected, opening an 'impunity gap'.

The articulation of the idea of the impunity gap started the discussions on what can be done to address this gap. I suggested that a positive approach to the development of national capacity to investigate and prosecute core international crimes was required, and introduced the term 'positive complementarity'. For a number of years, there was not much interest in commencing a practice of positive complementarity. The ICC Legal Tools Project became the first platform on which national investigators and prosecutors were engaged in discussions about their needs to strengthen their ability to work on core international crimes. The Project undertook visits to more than 25 countries from 2006 onwards. The CMN supported the ICC Legal Tools Project, and started the development of several online services seeking to assist national investigators and prosecutors in this field.[25] At the Review Conference in Kampala in 2010, a resolution on positive complementarity was adopted.[26] That triggered a number of actors to start projects in support of national capacity building in the area of international criminal law. This is a very positive development, where actors are gradually gaining expertise related to the activities

[25] These services were later assembled in the online CMN Knowledge Hub.

[26] It was actually the first resolution adopted by the Review Conference, see resolution RC/Res.1, Complementarity, 8 June 2010 (http://www.legal-tools.org/doc/de6c31/). See, for example, para. 8, where the Review Conference "[e]ncourages the Court, States Parties and other stakeholders, including international organizations and civil society, to further explore ways in which to enhance the capacity of national jurisdictions to investigate and prosecute serious crimes of international concern […]".

and services they offer or facilitate towards capacity development. But it would take a long time for this to reduce the impunity gap where it exists.

1.3.9. Map of Perceived Risks

Figure 3 shows an approximate map of the risks perceived by the preparatory team in August 2002, their relative seriousness, and how they relate to each other. As indicated, the length of proceedings (discussed in section 1.3.6. above) was seen to pose the greatest overall risk by a good margin, followed by weak fact-finding powers (1.3.7.), perceived lack of independence (1.3.1.), staff balance (1.3.2.) and quality (1.3.3.), and perceived imbalances in the exercise of prosecutorial discretion (1.3.5.). The actual developments in the Office of the Prosecutor during 2004–2012 would show that this risk assessment had overlooked three factors that turned out to be important. We will see how below.

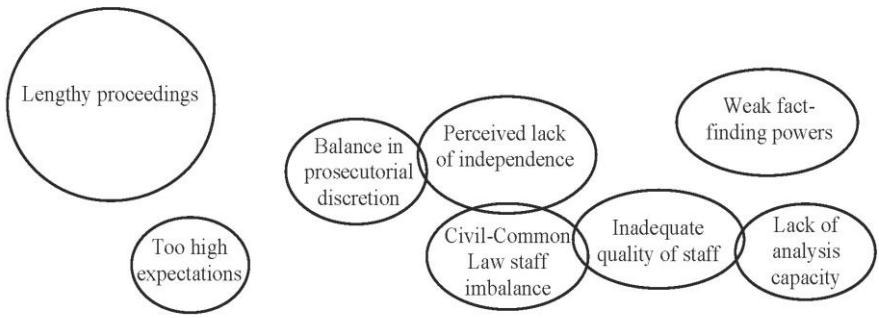

Figure 3: Risks facing the ICC Office of the Prosecutor upon its establishment, as seen in August 2002 by the preparatory team for the Office (discussed in section 1.3.).

1.4. The Strategy of the Preparatory Team for the ICC Office of the Prosecutor

On the basis of this tentative risk analysis, the preparatory team for the ICC Office of the Prosecutor designed its strategy of activities and started the planning. The first substantive activity was the establishment of a group of experts to consider the measures available to the Office and the Court as a whole to reduce the length of proceedings before the Court. This corresponded to what had been identified as the greatest risk facing the Office upon its establishment (see Figure 3 above). The expert group

was established in October 2002, and it had completed the first draft of its report by early January 2003, at which time it was circulated for comment among additional experts. This activity is described in more detail in Chapter 43 below which explains that this risk continues to challenge the standing of the Court and its Office of the Prosecutor. It is perhaps one of the areas that requires the most careful and creative attention during the coming years. Not only does the report prepared by the experts in early 2003 remain relevant, but recent Court practice goes against important advice offered at that time.

Second, the preparatory team started a broadly based expert consultation on general questions concerning the effective exercise of prosecutorial powers under the ICC Statute. The activity was based on the premise that it is "important to contribute to giving full effect to [the] statutory authority" of the Prosecutor over the management and administration of all resources of his or her Office as provided in Article 42 of the Statute.[27] Between 29 November 2002 and 2 April 2003, 85 experts were invited to "prepare some thoughts in writing relevant to the establishment and operation of the ICC Office of the Prosecutor for the benefit of the future ICC chief prosecutor. […] In this way the chief prosecutor will be presented with written input prepared by key experts with relevant experience in a neutral and objective manner, at a time when he or she is likely to be approached from many sides".[28] Of the experts invited, as many as 42 submitted papers, 41 of which are reproduced as Chapters 2 to 42 in Part 1 of this book. Among these authors are the leading practitioners and experts on questions linked to the investigation and prosecution of core international crimes in 2002–2003. It is quite an extraordinary assemblage of advisers whose combined experience exceeds that of any one prosecutor. Their preparation and submission of papers amount to a *de facto* hearing process, pursuant to an invitation to write "on the subjects and issues of your choice relevant to one or more aspects of the powers of the ICC chief prosecutor (and their exercise)",[29] with individualised suggestions

[27] From communication addressed to the late Mr. Christopher K. Hall, one of the experts involved, dated 24 February 2003. As stated earlier in this chapter, after 1 November 2002, the preparatory team acted through the Director of Common Services, Judge Cathala, in terms of written communications concerning new activities such as this expert consultation process.

[28] *Ibid*.

[29] *Ibid*.

for specific topics based on the profile of the expert. "Differences of views in the submissions received or, alternatively, corroboration of views through like-minded observations by two or more experts"[30] were encouraged, as that would "simply be beneficial to the future chief prosecutor. It will illustrate the complexity of the challenge before him or her".[31] As they came in, I carefully read every chapter. The wealth of advice offered was duly presented as a whole, and in various distilled ways, to the first ICC Prosecutor upon his election. The chapters have been organised in three sections in Part 1 of this volume. We have developed quite a detailed table of contents and index to help readers make use of this wealth of thinking. My co-editors and I are particularly concerned that actors who are engaged in building capacity to document, investigate and prosecute core international crimes in domestic jurisdictions, especially in materially less resourceful countries, benefit from this potential guidance, among other available resources.

Third, the preparatory team established an expert consultation group in January 2003 on "Fact-Finding and Investigative Functions of the Office of the Prosecutor, Including International Co-operation". This concerned the risk linked to the weak fact-finding powers of the ICC Office of the Prosecutor described in section 1.3.7. above. Chapter 44 below discusses the background to this activity, the mandate and composition of the expert group, its work processes, and main issues addressed by its report. Among its suggestions were the establishment of a capacity akin to the Jurisdiction, Complementarity and Cooperation Division, and the active use by the Office of the Prosecutor of memoranda of understanding to enhance the fact-finding powers of the Office. The report has had a significant impact on practice.

The third expert group process set up by the preparatory team concerned the "Principle of Complementarity in Practice". This refers in part to the risk discussed in section 1.3.8. on high expectations, perceived impunity gaps, and the need to give proper effect to and strengthen national investigation and prosecution of core international crimes. Chapter 45 discusses this process and the main issues involved. The internal coordinator of the work of the group joined the Jurisdiction, Complementarity and Cooperation Division as its senior legal expert at the time the re-

30 *Ibid.*

31 *Ibid.*

port was completed, and another group member served as a consultant-adviser to the Division and Office more broadly for quite some time. The report could hardly have had greater impact of the Office's thinking on complementarity.

Part 3 of this volume contains two chapters on regulatory instruments. Chapter 46 concerns the draft Regulations of the ICC Office of the Prosecutor, prepared by a further expert group set up by the preparatory team, based on a tentative draft drawn up by the team. Dr. Markus Benzing, consultant-member of the preparatory team, did most of the work on the team's draft. An abridged version of the draft Regulations was adopted by the Prosecutor on 5 September 2003 as the Regulations *ad interim* of the Office of the Prosecutor (Annex 2 to Chapter 46). They were in force until 23 April 2009 when new Regulations were adopted. Chapter 46 discusses the statutory background and mandate of this expert group, how it relates to risk 1.3.5. above on perceived bias in the exercise of prosecutorial discretion (especially with regard to situation, case, incident, and crime selection and prioritisation), and how the draft Regulations, Regulations *ad interim*, and 2009 Regulations relate to each other. The author of the introduction to Chapter 46, Mr. Vasconcelos, was a member of the expert group on the draft Regulations, alongside the Chief Prosecutor of Norway and other eminent experts.

Chapter 47 concerns the draft Code of Conduct which the preparatory team crafted, in consultation with various experts. The draft Code was an integral part of the draft Regulations of the Office of the Prosecutor, but the first Prosecutor did not want to adopt a Code. As Chapter 47 shows, the Code of Conduct that was finally adopted by the second Prosecutor, Mme. Fatou Bensouda, on 5 September 2013 builds in large part on the draft Code from 2003. Mr. Nakhjavani, consultant-member of the preparatory team for the Office, did most of the drafting for the draft Code of Conduct. He is the author of Chapter 47.

Finally, Chapter 48 discusses the preparation of the first budgets of the ICC Office of the Prosecutor and their significance. The chapter considers how the budgets sought to mitigate risks such as those mentioned in sections 1.3.4. and, to a certain extent, 1.3.2. and 1.3.3. above. Co-editor Mr. Rackwitz became responsible for the preparation of a number of budgets of the Office from the second budget onwards. He has co-authored the introduction to Chapter 48. As mentioned in section 1.1. above, the first budget of the Office was prepared by the present writer,

prior to the establishment of the preparatory team and even the ICC Advance Team, and neither team ever proposed an institutional design or structure for the Office.[32] Chapter 48 explains which capacities the first budget sought to provide for, and to which extent the Prosecutor agreed. The budget was not a rigid blueprint; it simply met the requirements of specificity for budgets of international organisations, including by giving carefully considered and concise reasons for the proposals put forward.

In other words, the main activities of the preparatory team were closely related to the risk assessment we undertook in August 2002. They were not dictated by any actor outside the team or rigid, preconceived ideas. Rather, they were shaped by a commonsensical, precautionary analysis of risks. We tried to achieve as much as possible, and to draw on the best minds available at the time. Figure 4 shows the conceptualisation of the work processes of the preparatory team.

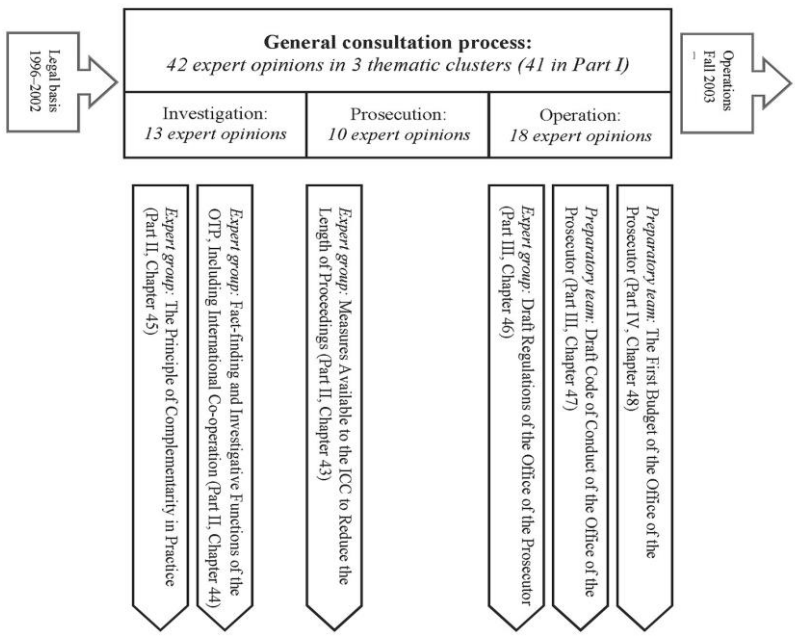

Figure 4: The conceptualisation of the 2002–2003 expert consultation processes and work products of the preparatory team.

[32] As mentioned earlier, Professor Jens Meierhenrich had obviously not been correctly informed on this matter when he wrote his book chapter on the evolution of the Office, see *supra* note 8.

1.5. From Early Institutional Construction, to Institutional Practice and the Study of Institutional Behaviour

The front of the dust jacket of this book was chosen as an illustration of how the preparatory team for the ICC Office of the Prosecutor understood its own role. It shows a construction site just outside Hamarikyu Gardens in central Tokyo, where a team of workers is engaged in careful quality control of the steel reinforcement of the ground floor of a new, earthquake-resistant building whose foundations are meticulously thought through. Similarly, the 2002–2003 preparatory team was deployed after the foundations of the Court had already been made from 1996 to 2002 by the states and civil society actors that participated in the assiduous processes of drafting and adopting the ICC Statute, Rules of Procedure and Evidence, and Elements of Crimes document. If you like, the team's modest task was to check the steel reinforcement of the ground floor, to ensure that risks and deficiencies were uncovered and addressed, before concrete would be poured following the swearing-in of the first Prosecutor. The picture on the back of the dust jacket shows the opposite scenario: an enchanting Dutch pavement being made by tilted bricks in the fishbone pattern, built on a foundation of fluffy sand, just a few hundred metres from the interim seat used by the ICC until 2015. Like the workers on the Hamarikyu site, the preparatory team aspired to contribute to as solid foundations of the Court as possible, without in any way exaggerating our role. Building on sand was simply inconceivable to us.

How did it go? Immediately after his election by the ICC Assembly of States Parties on 21 April 2003, Prosecutor-elect Moreno Ocampo referred several times to the work done by the preparatory team as a "miracle", and he described the start-up team as his "dream team" (Judge Silvia Fernández de Gurmendi, himself and the present writer), also at the press conference at the United Nations Headquarters following his election. He invited Judge Fernández de Gurmendi and myself for a pleasant three-day retreat at his house in Cambridge outside Boston immediately after his election, at which time we discussed informally a string of strategic and organisational questions.[33] He requested the preparatory team to complete

[33] At one stage, the Prosecutor-elect and I were enjoying a spring moment on the porch of his house in Cambridge, and I was prodded to articulate my most central advice to him. I responded that the first ICC Prosecutor should do everything in his power not to be seen as seeking the protection or favour of any government in particular. I maintained that, in my considered opinion, we had reached a level of evolution of international criminal justice

all work it had started, and the results were fed to him in unabridged and abridged versions until the final report on complementarity in practice was finalised in November 2003. He requested that the materials be made available online in connection with the public hearings organised in the Peace Palace on 17–18 June 2003, and for the general purpose of receiving further feedback from experts and members of the public. The team showed due diligence in completing what it had started, and in communicating the outcome in practical formats.

It is difficult to precisely measure the impact of the work of the preparatory team on the Office of the Prosecutor. It is for future historians to do that. What we can say is that the experts engaged by the team gave the Office a wellspring of practice-based, intellectual input, some of which is still fermenting in the Office's thinking and policy-making. Some work products only had an impact after many years: the Code of Conduct of the Office, which relies heavily on the draft prepared by the team, was only adopted by the second Prosecutor in 2013. Other contributions saw more immediate implementation: the Regulations *ad interim* were an abridged version of the draft Regulations, and the expert reports on complementarity and on fact-finding and state co-operation significantly shaped Office practice. The important, near-invisible work done on vital human resources instruments such as job descriptions and vacancy announcements set the standards that were mostly followed in later practice. Overall, the Prosecutor seemed more content than we could have expected. The mood in the Office was very positive during the summer of 2003. The Office was embraced by the human warmth and outstanding social skills of the Prosecutor.

The situation started to change in late September 2003. The first highly qualified colleagues left the Office of the Prosecutor that autumn and in 2004, leading to a broader exodus of top professionals from the Office in the subsequent years on a scale unprecedented in the history of international criminal justice. Among the professionals who left the Office at the time were Dr. Markus Benzing, Mr. Gilbert Bitti, Dr. Serge Brammertz, Mr. Ewan Brown, Mr. Andrew T. Cayley, Dr. Sangkul Kim, Mr.

where it would be possible for the ICC Prosecutor to treat all States Parties equally, and to give governments the sense of predictability that some of them may be seeking through outstanding professionalism, consistency, transparency and even-handedness in the actual work of the Office. The advice corresponded to the risk described in section 1.3.1. above. The Prosecutor-elect seemed to listen attentively.

Bernard Lavigne, Ms. Paula Matilda, Ms. Aurelie Merle, Mr. Salim A. Nakhjavani, Mr. Peter Nath, Mr. Eliseo Neumann, Mr. Peter Nicholson, Professor Christian A. Nielsen, Mr. Enrique Carnero Rojo, Mr. Christian Palme, Professor Darryl Robinson, Mr. Nicolas Sebire, Mr. Paul Seils, Dr. William H. Wiley, Mr. Ekkehard Withopf and Mr. Martin Witteveen.[34] Those who departed were from a wide diversity of backgrounds.[35]

This chapter does not require that I add further details on this most unfortunate exodus. This book is not about what transpired within the ICC Office of the Prosecutor from 2004 onwards. That is another story yet to be articulated in a balanced manner. A history of the Office will be written, hopefully by fair-minded persons who are not themselves instrumentalised, and without a leading role being played by Prosecutors in the writing projects.[36] The previous paragraph is required to place the work of the preparatory team – the object of study of this volume – in a realistic context. That is the sole purpose of its inclusion.

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[34] I have never publicly disclosed the circumstances leading to my own departure from the Court on 31 December 2005. I decided to leave in late September 2003, when observing the response of the Prosecutor to a detailed report submitted to him by Dr. Guido Hildner (then Chief of Human Resources of the Court), Mr. Gilbert Bitti and me, dated 21 September 2003. This matter – a critical juncture in the evolution of the ICC Office of the Prosecutor – constitutes the first and last disagreement between the Prosecutor and me during my time at the ICC. It is correct, as Dr. Alexander Muller states in his Foreword to this book, that I decided to leave out of concern to preserve my integrity. The leaders of Registry and several judges, as well as some key external stakeholders of the Court, asked me to stay on for some time as the Office was at the most sensitive phase of its establishment. I decided to do so for two years. When I commenced my position as Senior Researcher at the Peace Research Institute Oslo (PRIO) on 1 January 2006, the position had been on hold for me for more than one year. Professor Jens Meierhenrich makes a double error of fact when he says that I left the Court in October 2003, and that my departure was linked to the creation of the Jurisdiction, Complementarity and Cooperation Division (see Meierhenrich, 2015, p. 106, *supra* note 8).

[35] It is therefore not correct to explain the departures by reference to cultural differences, as one well-intentioned civil society defender of the Court did at the time.

[36] In the preparation of this volume, the co-editors have made sure to avoid discussions with the ICC Office of the Prosecutor about its contents, subject-matter or positions. As regards the chapters written by persons who were members of the Office when the book was finalised in 2017 – Mr. Xabier Agirre (Chapter 2), Dr. Fabricio Guariglia (Chapter 16), and Mr. James K. Stewart (Chapter 35) – their chapters were written in 2003 when they were not members of the Office, and we have communicated individually with each one of them directly about the editing of their chapters, not with the Office. The 2015 anthology *The First Global Prosecutor: Promise and Constraints. Law, Meaning, and Violence* takes a very different approach, where, according to his "Prologue", Mr. Moreno Ocampo was involved in the project leading to the book over a three-year period (see *supra* note 8, pp. 3–4).

But I realise that the paragraph may have other, unintended consequences. A number of former colleagues in the ICC Office of the Prosecutor have confided in me a sense of fear – even shedding tears in my presence – at what they have described as intimidation. If the paragraph above resonates with them and provides some relief, then I think that would be a welcome side-effect, also for the Office itself and its relationship with colleagues who helped to build it. This would be in the interest of the moral standing of the Office. It should also be in the interest of those professionals who chose not to leave the Office during the critical years or who have joined it later, whose legacy may have become dimmed by perceptions of opportunism or wavering integrity. Such perceptions in the community of peers outside the Court would be unfair to those who worked hard to uphold basic standards of professionalism and helped the Office through the difficult period.

By the time of writing in March 2017, Prosecutor Bensouda had put in place a leadership team that was seeking to rectify the situation within the Office. Her efforts seemed to have had conciliatory effects within the Court and *vis-à-vis* some exacting but sincere States Parties. But the Office also needs to reconcile with those highly competent professionals who were part of the unprecedented exodus described above. Without truthful acknowledgment, trust in the Office will not be fully restored. Only then can the Office come fully to terms with itself.

Looking back at our risk assessment in August 2002 – which informed the work of the preparatory team – how did its predictions hold up during 2004 to 2012? Figure 5 attempts to map the relevancy and weight of the same eight risks identified in August 2002. It shows a different map, where most of the risks have less importance, except the length of proceedings. But three risks which we had not foreseen in the preparatory team – or during the ICC negotiations of Article 42 and other provisions of the Statute for that matter – feature prominently: the problem of inadequate leadership of an institution as fundamentally important to the international legal order as the ICC Office of the Prosecutor; its corrosive effect on trust in the Office (also among judges of the Court, who in some periods would rule against the Office on almost every third motion); and its negative consequences for the organisational culture of the Office. The

second Prosecutor has since 2012 made significant progress in overcoming these problems.[37]

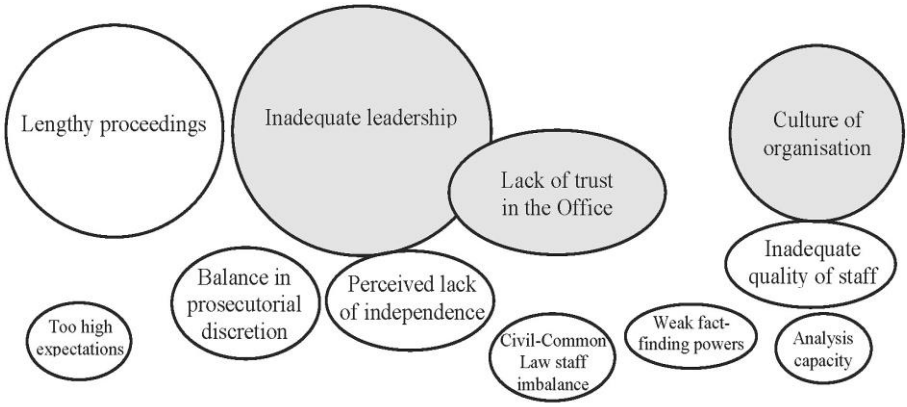

Figure 5: Actual risks faced by the ICC Office of the Prosecutor during 2004–2012. Risks not foreseen by the preparatory team for the Office are in grey.

This begs the question how this could happen. The birth and making of the ICC Office of the Prosecutor lends itself well to deeper studies of the limits of international law and organisations. It is an intriguing case study of the sharp contrast between the elaborate legal infrastructure of the ICC and the limitations of those individuals who were elected to first run the Court. On the one hand, the legal infrastructure was developed through a massive, collective effort of the international community. On the other hand, the first Prosecutor of the Court was elected in an almost careless manner. The legal infrastructure and the idea of the Court speak to the noble aspirations of individuals, civil society actors and governments around the world. These aspirations have so far been let down. Why does the international community allow such a fundamental contrast between the making of the law and the making of the institution to occur? Are we really unable to reduce this contrast? The law on institutions such

[37] Professor Jens Meierhenrich places this in a political science context: "The long and winding road of institutional development in the OTP has given rise to virtuous as well as pathological dynamics in the investigation and prosecution of international crimes. Or, to use the language of political science, the downstream effects of institutional development in the early stages of the OTP have substantially increased the costs of institutional adaptation in more recent years. Over the next decade, Bensouda will have to contend with these costs" (see Meierhenrich, 2015, p. 98, *supra* note 8).

as the ICC contains standards of requisite integrity. Are these standards taken seriously enough when constructing international organisations, international criminal jurisdictions included?

To address these questions properly, our knowledge-base on the organisations in question needs to be sound. The very limited work done on the early history of the ICC Office of the Prosecutor has been interesting for me to read, although it deserves to have had better access to accurate and more adequate information.[38] The promising sub-discipline of history of international criminal law should include in its scope international justice institutions, not just the decisions they produce, treaties and other sources of international criminal law.[39] This volume is only a tentative beginning of a history on the birth of the ICC Office of the Prosecutor in 2002–2003. It will hopefully encourage others to make more detailed and profound contributions in years to come, based in part on further analysis of materials contained in this book and some of the other materials that remain untapped. Time permitting, there may also be a second, expanded edition of this volume. Professor Jens Meierhenrich wisely recognises in his book chapter on the evolution of the Office of the Prosecutor, that "[f]uture research is required – preferably on the ground, not from hundreds of thousands of miles away – on the *specific* paths or trajectories down which the OTP travelled during the first decade of its operation".[40]

As he seems to recognise, the study of the behaviour of the international criminal justice institutions is just as important as their history. We need a sociology of international criminal justice. Not only is international criminal justice strong enough to withstand the kind of scrutiny that sociology of law requires, but the institutions can benefit greatly from serious

[38] I enjoyed Professor Meierhenrich's chapter, 2015, see *supra* note 8, despite its factual errors and gaps concerning the time period of 2002–2003, surely caused by lack of access to relevant materials at the time of writing.

[39] *Historical Origins of International Criminal Law: Volumes 1–4* do contain several chapters on the contributions made by institutions to the development of international criminal law, but with an emphasis on the doctrinal development of the discipline of international criminal law. The historical study of the institutions of international criminal justice called for here goes wider. The inclusion of this book as Volume 5 in the series *Historical Origins of International Criminal Law* signals a willingness to make an initial contribution towards addressing this lacuna in the literature.

[40] Meierhenrich, 2015, pp. 122–23, see *supra* note 8. Perhaps he should suggest a second edition of the anthology in which his chapter appears, to correct some of its fact-sensitive errors (which undermine his otherwise important contribution).

research on patterns in the power relations in and around the courts in question, in the country- and social-backgrounds of those who serve the institutions, and in decisions made by judges and prosecutors. Such scholarship is the converse of tabloidised exposure of individual failures or scandals, which may not help institutions or their main stakeholders to affect real change. Durable sociology of law goes deeper and can generate insights that help us to improve the institutions. A follow-up project to this volume is concerned with exactly that.

1.6. Hammarskjöld, Integrity and the Election of Prosecutors

For the more immediate horizon, I reiterate the common wish of the three co-editors that this book will help those who are engaged in developing national capacity to investigate and prosecute core international crimes. They face many practical and resource constraints, and they need all the support they can get. This book gives them access to the thinking of more than 50 leading practitioners and experts from around the world, who all advised the construction of the ICC Office of the Prosecutor. Some of the features of that Office are unique and do not correspond to the jurisdictional and political realities of national criminal justice. But the overwhelming majority of the advice offered concerns issues specific to criminal justice for core international crimes or has some general applicability in fact-rich cases. The index should guide users quickly to issues of interest, and the table of contents also gives a subject-matter overview of what the book contains. The chapters on the group-expert reports, the draft Regulations and Code of Conduct, and the first budget of the ICC Office of the Prosecutor all contain an introduction that identifies the main issues involved in the report or governance document in question. As explained above, Chapter 43 concerns the principle of complementarity in practice and it touches the idea of 'positive complementarity'. In a sense, one of the two objectives of the co-editors of this book is exactly to make a modest contribution towards so-called positive complementarity or facilitation of national capacity development.

We are fortunate to co-edit texts written by distinguished practitioners and experts, colleagues who have not only made sacrifices to keep the wheels of justice turning in different jurisdictions, but who are behind the main war crimes cases prosecuted in recent decades. Part 1 is really the combined product of this circle of peers.

Indeed, one of the main rewards of my service to the ICC was to work with the colleagues first in the preparatory team for the Office of the Prosecutor and then in the Legal Advisory Section of the Office.[41] I have already mentioned my co-editor Mr. Rackwitz, with whom I had the pleasure of working for the duration of my time at the Court, and Dr. Benzing and Mr. Nakhjavani, two younger and highly intelligent lawyers. Other colleagues in the Legal Advisory Section during 2003–2005 included Dr. Claudia Angermaier, Mr. Gilbert Bitti, Mr. Enrique Carnero Rojo, Dr. Sangkul Kim, Dr. Philippa Webb and Ms. Anna Wijsman-Ivanovitch, and a solid group of interns from around the world.[42] Between 2003 and 31 December 2005, the small team of the Section had, among other results, drafted 73 memoranda,[43] completed the first version of the Legal Tools,[44] and implemented a training programme of 40 guest lectures at the Office of the Prosecutor.[45]

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41 As mentioned above, the author was the Senior Legal Adviser and Chief of the Legal Advisory Section until 31 December 2005.

42 During this period, the Section benefited from working with 50 Law Clerks from more than 30 countries, including Brazil, Cambodia, Egypt, Ghana, India, Indonesia, Japan, Mexico, Russia, South Korea, Sri Lanka and Uzbekistan. The gender representation was 54 per cent female and 46 per cent male. Half the Clerks had a civil law background, 35 per cent common law, and 15 per cent possessed trans-systemic expertise. Many of these Law Clerks have moved on to become leaders in the field of international criminal law and justice.

43 These included 38 memoranda of law and 35 other memoranda, amounting to almost 700 pages. The legal memoranda touched on the full range of legal issues before the Office of the Prosecutor during this period. A number of interesting questions were subjected to analysis. Academia would find this an interesting resource if it were made available.

44 This included the alpha version of the Case Matrix application, rudimentary Elements and Means of Proof Digests, and a Proceedings Commentary. All but the Proceedings Commentary have later been made public and have attracted large user-communities. The Proceedings Commentary covered pre-trial proceedings and certain procedural issues that arise at various stages of proceedings. It consisted of in-depth analyses of articles, rules and regulations relevant to the proceedings of the Court. It adopted an impartial approach in the analysis of the provisions, so that, if differing interpretations of a provision existed, all of them would be reflected in the text. In particular, Mr. Bitti, Dr. Angermaier and Mr. Carnero Rojo worked on this tool. By 31 December 2005, it was recognised within the ICC Office of the Prosecutor that the Legal Tools should be made available to the general public, as most people do not have access to the privileged resource environment of the Court. For more information on the ICC Legal Tools Project, see Morten Bergsmo (ed.), *Active Complementarity: Legal Information Transfer*, Torkel Opsahl Academic EPublisher, Oslo, 2011, 572 pp. (http://www.legal-tools.org/doc/2cc0e3/).

45 The Legal Advisory Section created a Guest Lecture Series to attract distinguished academics and practitioners in relevant fields to facilitate the exchange of views between

In my remarks at a farewell dinner hosted by the Norwegian Ambassador to the Netherlands in December 2005, on the occasion of my departure from the ICC and The Hague, I quoted Mr. Dag Hammarskjöld: "Be grateful as your deeds become less and less associated with your name, as your feet ever more lightly tread the earth".[46] The words were sincerely felt, not self-congratulatory. Why are they relevant to this chapter? They were written by an economist and former politician who at the time of writing had been United Nations Secretary-General for three years. Capturing the value of detachment, the sentence concerns the deeper purpose of international civil service – but are we fully conscious of its relevance? Mr. Hammarskjöld did write about integrity in ways that are closer to the conflicts of interest we discuss when we occasionally touch upon the subject of integrity in the daily practice of international organisations: "if integrity in the sense of respect for law and respect for truth were to drive him into positions of conflict with this or that interest, then that conflict is a sign of his neutrality and not of his failure to observe neutrality – then it is in line, not in conflict, with his duties as an international civil servant".[47] This is directly relevant to the risk of perceived

Court members from all organs and external experts on topics relevant to the work of the Court, thereby providing a common learning environment beneficial to the whole Court. The lectures covered a broad range of issues, from theoretical topics of international criminal law to more practical matters related to the investigation and prosecution of core international crimes. Among the guest lecturers were Professor Philip Allott, Professor Kai Ambos, Justice Louise Arbour, Professor M. Chérif Bassiouni, Emeritus Professor Theo van Boven, Professor Sydney M. Cone III, Professor Eric David, Professor Mireille Delmas-Marty, Professor John Dugard, Judge Chile Eboe-Osuji, Professor George P. Fletcher, Justice Hassan B. Jallow, Professor Emeritus Frits Kalshoven, Professor Martti Koskenniemi, Professor LIU Renwen, Mr. Ken Macdonald QC, Professor Allison Marston Danner, Judge Theodor Meron, Professor Daniel Nsereko, Professor Diane F. Orentlicher, Colonel William K. Lietzau, Sir Geoffrey Nice QC, Professor Philippe Sands QC, Professor James Silk and Dr. Patrick J. Treanor. I was impressed by the anticipation and respect many of these eminent experts displayed towards the Court in connection with their guest lecture. It was a valuable reminder of the extent of trust placed in an international organisation such as the ICC, and the corresponding responsibility of its high officials and staff not to betray this trust which is, at one and the same time, the guardian of the Court and the adjudicator of its legitimacy.

46 Dag Hammarskjöld, *Markings*, Ballantine Books, New York, 1983, p. 125. The quoted entry is dated 31 December 1956. The Swedish original – *Vägmärken* – was first published by Albert Bonniers Förlag AB in 1963. Dag Hammarskjöld was Secretary-General of the United Nations Organisation from 1953 to 1961.

47 Dag Hammarskjöld, quoted in W.H. Auden, "Foreword", in *ibid.*, p. xviii.

lack of independence in dealings with governments, as discussed in section 1.3.1 above.

But this was only the starting point of Mr. Hammarskjöld's understanding of integrity in international civil servants. He saw service as "self-oblivion", as striving towards "an unhesitant fulfilment of duty".[48] When a team of international civil servants recognises this higher dimension of the customary requirement of "persons of high moral character",[49] it leaves no stone unturned to make the foundations of their organisation as strong as possible. Such recognition creates a sense of unity of purpose, reducing the energy and time spent on conflict. Power is perceived more as the cumulative efforts of the team and the results they yield, rather than a personal stick to wield. This was the situation in the preparatory team for the ICC Office of the Prosecutor and during the first months of the life of the Office. This was the situation during the first years of operation of the Office of the Prosecutor of the ex-Yugoslavia Tribunal.[50] This is how the United Nations Organisation was built during difficult years in the late 1940s and 1950s. Mr. Hammarskjöld provided a credible moral leadership to the Organisation, combined with high competence and extensive practical experience.

If States Parties do not elect persons of adequate integrity, a young international organisation may be stillborn for many years and taxpayers' money may be wasted before it meets basic expectations of functionality. Even if a government doubts the integrity of a candidate for Prosecutor of the International Criminal Court, it may still be tempted to back him if it predicts that he will be sympathetic to its interests, perhaps out of indebtedness for being elected or established co-operation over some years. Worse, a government may possess information that the candidate does not have the requisite integrity, but nevertheless support him – or fail to raise objections when his candidacy is discussed – because it expects that he will be weak or compromised and therefore a pliant instrument should its

48 *Ibid.*, p. vii.

49 Rome Statute of the International Criminal Court, 17 July 1998, in force 1 July 2001 ('ICC Statute') Article 42(3) (http://www.legal-tools.org/doc/7b9af9/).

50 That Office not only enjoyed well-known leaders such as Chief Prosecutor Richard J. Goldstone (see Chapter 38 below), but it was guided by unassuming giants of the practice of international criminal justice such as Mr. Terree A. Bowers, Mr. Mark B. Harmon (Chapter 21), Ms. Teresa McHenry, Mr. John Ralston (Chapter 5) and Dr. Patrick J. Treanor (Chapter 4).

interests become threatened during his term. Both modes of thinking are short-sighted. In effect, both make a mockery of the statutory requirements of "high moral character",[51] "integrity"[52] and "the highest standards of […] integrity".[53] If States Parties do not take these standards for what they are – binding legal requirements – we cannot expect that the high officials of international organisations like the International Criminal Court will give them proper effect when they fill the organisation with staff. If we want international organisations to work according to their design, ethics cannot be an afterthought in their construction and management.

[51] ICC Statute, Articles 36(3)(a) and 43(3), see *supra* note 49.

[52] *Ibid.*, Article 36(3)(a).

[53] *Ibid.*, Article 44(2).