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Historical Origins of International Criminal Law: Volume 5

Morten Bergsmo, Klaus Rackwitz and SONG Tianying (editors)



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FOREWORD BY ALEXANDER MULLER

In mid-summer 2002, I requested Carla Del Ponte – the Chief Prosecutor of the International Criminal Tribunal for the former Yugoslavia (‘ICTY’) – to release Professor Morten Bergsmo, then a Legal Adviser in her Office, so that he could join the Advance Team of the International Criminal Court (‘ICC’) with the responsibility to co-ordinate the establishment of its Office of the Prosecutor. The delegates of states parties overseeing the Advance Team – which I led – had agreed to this, and so did Del Ponte. Professor Bergsmo was the natural choice for this task: he had worked for the 1992–1994 United Nations Commission of Experts for the former Yugoslavia; he was the first lawyer hired by the ICTY Office of the Prosecutor; he had been the official representative of the ICTY and the International Criminal Tribunal for Rwanda to the ICC negotiating process from 1996 to 2001, making important contributions to Articles 15, 42, 53, 54 and 99 of the ICC Statute; and he had been asked to prepare the first budget of the ICC Office of the Prosecutor. He joined the Advance Team on 1 August 2002, and became a staff member of the ICC on 1 November 2002. Professor Bergsmo led the preparatory team for the Office of the Prosecutor from the first day, working in partnership with a co-editor of this book, Mr. Klaus Rackwitz, a German judge who served as a consultant for the ICC Advance Team during August–September and November–December 2002, and joined the Court full-time on 2 January 2003. Two other prominent members of the preparatory team were the young consultants Dr. Markus Benzing and Mr. Salim A. Nakhjavani, the latter being the author of Chapter 47 of the present volume. Professor Bergsmo enjoyed broad autonomy in the co-ordination of the preparatory team, but formally he reported to me as head of the ICC Advance Team until 1 November 2002, then to Judge Bruno Cathala as director of Common Services, until he assumed his duties as the Senior Legal Adviser to the first ICC Prosecutor upon his swearing-in on 16 June 2003.

This book is about the work undertaken by the preparatory team led by Professor Bergsmo between 1 August 2002 and 16 June 2003, including some processes started during this period but only completed by the team during the subsequent months, the latest in November 2003. It was a period of extraordinary optimism, participation, creativity and unity of purpose. I look back to those months as some of the most energetic

months in my professional life to date. Whereas my responsibilities concerned mostly the Chambers and Registry, I observed closely the remarkable efforts of Professor Bergsmo and his team, universally respected and appreciated among the colleagues, from security guards and administrative support staff to President Philippe Kirsch.

Professor Bergsmo instituted a series of consultations on topics reflecting his analysis of the needs and challenges that would face the Office of the Prosecutor: how to deal with the principle of complementarity in practice; how to ensure that the Office would have adequate access to potential evidence in territorial states; how to address the problem of length of proceedings before the Court; the need for an advanced code of conduct to avoid personal misconduct in the Office; the need for Regulations guiding the exercise of prosecutorial discretion; and the need to ensure adequate quality of staff and a proper role for professional expertise such as that of analysts. This book contains the outcome of these consultation processes. Professor Bergsmo did what every smart justice innovator should do: he engaged experts widely, drawing on more than 75 leading experts, most of whom had longer professional experience than him. Neither did he place himself at the centre of the consultation processes. Rather, he carefully crafted their mandates, composed the expert groups, and defined the topics they should address, and then gently herded the processes along.

Looking back on the topics chosen and papers produced, we see the foresight of Professor Bergsmo, based on his clear understanding of the role of international criminal law and justice. In our internal discussions at the Court in 2002–2003, he coined terms such as ‘impunity gap’ and ‘positive complementarity’, years before the adoption of the resolution at the 2010 ICC Review Conference on positive complementarity and wider recognition of the importance of national capacity development. It is exactly in this area of rule of law activity that there has been so much development since the Court became operational.

The past 14 years have shown that setting up a new international jurisdiction is very challenging. In the first months, the media often asked me whether the ICC ‘would work’. My answer to that somewhat naive question was always: “We’ll know in about 10 years”. When I was asked the same question in 2012, I still did not feel I could fully answer it. What I do know is that knowledge-gathering initiatives like the work of Professor Bergsmo are key. Judge Cathala (the first ICC Registrar) and I liked to say both in-house and externally that in setting up the ICC we wanted to make new mistakes, not the same errors others made before us.

I have just come back from Mali, where I held exchanges on reforming the justice system at the highest level. In the past year, I have had similar exchanges in the Ukraine. What is evident from such discussions is that the ICC can only do so much when it comes to formulating an adequate response to mass atrocity crimes. With the knowledge I now have, I would even say it is less than I thought possible 14 years ago. National capacity is the key. A prosecutor serves a community and that is where the most effective justice response can be forged and implemented. The so-called ‘international community’ is still only a ‘community’ in a very limited way. The real communities exist much closer to the ground.

This volume is of critical importance to build that national capacity. It contains the lessons of people who made many mistakes and who hope others will make only new ones, so that the words of the preamble of the ICC Statute become a reality: “that the most serious crimes of concern to the international community as a whole [...] not go unpunished and that their effective prosecution [is] ensured by taking measures at the national level and by enhancing international cooperation”.

Mr. Rackwitz remained in the ICC Office of the Prosecutor for a number of years, becoming a mainstay and pillar of the Office during difficult times. For several years, he was the person in the Office who states parties and civil society would trust and rely on. Later he brought this credibility to Eurojust, before he assumed the directorship of the International Nuremberg Principles Academy in 2016.

Professor Bergsmo had already advised me in November 2003 of his intention to leave the ICC. He felt that his integrity was at risk. The leadership of the Registry stood fully behind Professor Bergsmo and pleaded with him to delay his departure, as did key actors from outside the Court. He did so, and during the next two years the Legal Advisory Section which he led oversaw the drafting of more than 70 memoranda and produced the ICC Legal Tools which later revolutionised open access to legal sources in international criminal law. Since his departure from the Court at the end of 2005, Professor Bergsmo has exercised intellectual leadership in the field of international criminal law, most recently through the publication of the first four volumes of *Historical Origins of International Criminal Law*. He directs the Centre for International Law Research and Policy which, among other qualities, is the first international law institution that systematically seeks to broaden discourse communities to include younger Chinese, Indian and other non-Western actors.

The younger colleagues he brought into the preparatory team – Dr. Benzing and Mr. Nakhjavani – already left the Court in 2003 and 2004. I

have sometimes asked myself what the Court would look like if it were composed of persons such as Dr. Benzing, Professor Bergsmo and Mr. Nakhjavani – highly talented and with sterling integrity. This book shows some of the work their small preparatory team accomplished in just over one year. I hope it will serve as a guide, not only for the ICC going forward, but also when working on other international justice mechanisms. The world needs them.

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Historical Origins of International Criminal Law: Volume 5

Morten Bergsmo, Klaus Rackwitz and SONG Tianying (editors)

This volume is about the birth of the Office of the Prosecutor of the International Criminal Court. It concerns the strategy and activities of the preparatory team for the Office between 1 August 2002 and November 2003. The emphasis is on the thinking of the team and dozens of experts it consulted. Part 1 of the book contains 41 chapters by some of these experts, including Xabier Agirre, Richard J. Goldstone, Fabricio Guariglia, Mark B. Harmon, Daryl A. Mundis, Bernard O'Donnell, Mohamed C. Othman, John Ralston, Christopher Staker, William A. Schabas, James K. Stewart and Clint Williamson. Their reflections are relevant to builders of capacity to prosecute core international crimes also at the national level.

Part 2 has chapters on three expert-group reports that the preparatory team organised: on the length of proceedings, fact-finding and state co-operation, and complementarity in practice. Introductions by actors involved at the time explain the background, main issues, and impact of the reports. Parts 3 and 4 contain three chapters on governance documents prepared by the team with experts: the draft Regulations of the Office, the draft Code of Conduct, and budgetary documents.

In Chapter 1, Morten Bergsmo, the co-ordinator of the preparatory team, analyses its risk-assessment and strategy, as well as challenges that subsequently beset the ICC Office of the Prosecutor. He calls for accurate historical research on the institutions of international justice and, beyond that, for a sociology of international justice. He argues for renewed commitment to integrity as a binding legal standard.

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