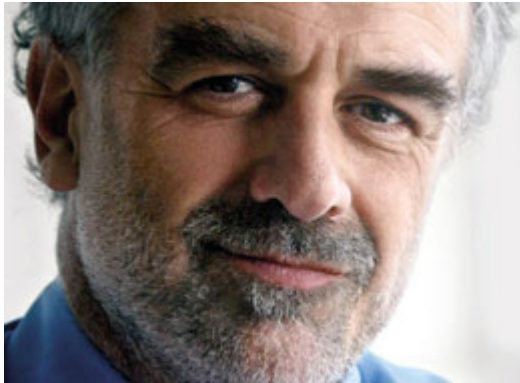


WORLD AFFAIRS

A JOURNAL OF IDEAS AND DEBATE

SPRING 2009

Case Closed: A Prosecutor Without Borders



Julie Flint and Alex de Waal

Eleven years ago, celebrating the creation of the world's first permanent International Criminal Court, UN Secretary General Kofi Annan spoke of "a gift of hope to future generations, and a giant step forward in the march towards universal human rights and the rule of law." Reflecting on the birth of the United Nations amidst the struggle against genocide, war crimes, and aggression half a century earlier, Annan noted how the idea of a world criminal court had been

stillborn, strangled by the superpower rivalry of the Cold War. Only with the triumph of Western liberalism, and the horrors in former Yugoslavia and Rwanda, had this changed. The International Criminal Court (ICC), Annan said, "is an achievement which, only a few years ago, nobody would have thought possible."

Inevitably, much in the Rome Statute that established the ICC was diplomatic compromise. As finally agreed, the statute gives jurisdiction over genocide, crimes against humanity, and war crimes. The Court, however, can act only if a country is unwilling or genuinely unable to investigate or prosecute, and the UN Security Council has the power to suspend any case for a renewable twelve-month period. Nonetheless, the ICC is an independent court with a prosecutor elected for a single nine-year term, accountable only to his own conscience and an Assembly of States Parties (ASP) consisting of the countries that have ratified the statute.

Nine months after the Rome Statute came into effect, in April 2003, the Argentinian lawyer Luis Moreno Ocampo was elected as the Court's first Prosecutor. He promised a "sexy court" that would dispense swift and telegenic justice comprehensible to faraway and often uneducated victims. Three countries referred themselves to the ICC over the next two years—Uganda, the Democratic Republic of Congo, and the Central African Republic—and in March 2005 the Security Council referred the case of Darfur. But it was not until March 2006 that the ICC took its first suspect into custody, a hitherto obscure Congolese militia leader named Thomas Lubanga Dyilo.

Kofi Annan spoke for many when he said, "Until now, when powerful men committed crimes against humanity, they knew that as long as they remained powerful no earthly court could judge them." The Nuremberg trials were victors' justice—the prosecution of those already fallen from power. The ICC is different: it promised to be a turning point in the struggle for human rights and against impunity, a landmark in the advance of global ethics. Some of the world's most committed lawyers and investigators converged on The Hague, relishing the challenges that lay ahead. The ICC's mandate was not only to identify the perpetrators of the worst crimes ever codified in

international law; it was to arrest and prosecute them. Yet the Court had no police force, three of the Permanent Five at the Security Council did not support it, and the UN Department of Peacekeeping Operations didn't want its overstretched and vulnerable peacekeepers conscripted as ICC enforcers. It also had Luis Moreno Ocampo as its lead prosecutor.

Despite the challenge of building and operating an institution in an uncertain and evolving field of law, Moreno Ocampo had a strong wave to ride—the goodwill of publics across the globe, including a powerful American human rights constituency, and some of the ablest legal minds in the business. But three years into his tenure, many in the Office of the Prosecutor (OTP) were questioning his ability to do the job. A further three years on, and the Court is in trouble—a trickle of resignations has turned into a hemorrhage, and cases under prosecution and investigation are at risk of going calamitously wrong. The Lubanga trial has come to court under a cloud of controversy over the Prosecutor's handling of evidence and charges, and an arrest warrant issued for Sudan's president, Omar al-Bashir, has set in motion a chain of events that threatens a humanitarian disaster for the victims of the war in Darfur.

The first public signal of dissatisfaction with the Prosecutor was registered in July 2006 when the Court invited Antonio Cassese, the first president of the International Criminal Tribunal for the former Yugoslavia (ICTY), and Louise Arbour, the UN High Commissioner for Human Rights, to submit *amicus curiae* briefs, a kind of peer review. Both challenged Moreno Ocampo's performance. Addressing the Prosecutor like a teacher dressing down a particularly inept student, Cassese assailed every aspect of Moreno Ocampo's investigations but especially his failure to undertake even "targeted and brief interviews" in Darfur.² Moreno Ocampo argued that Darfur was too dangerous for investigations and that victims and witnesses couldn't be protected from the wrath of the Sudan government. Cassese disagreed. He had led a UN Commission of Inquiry into Darfur in 2004 and had vigorously sought out and interviewed numerous witnesses in Darfur and Khartoum.³ Unlike Cassese, who mentioned Moreno Ocampo 36 times, Arbour made no personal reference to the Prosecutor.⁴ But she too told him how to do his job. She called for "an increased visible presence of the ICC in Sudan" and made clear her belief that Moreno Ocampo was proceeding down the wrong track. Speaking with the authority of experience, she said, "It is possible to conduct serious investigations of human rights during an armed conflict in general, and Darfur in particular, without putting victims at unreasonable risk."

Colleagues said Moreno Ocampo was enraged. He asserted that he was already "successfully carrying out an investigation" based entirely on evidence that could be gathered in safety outside Sudan.⁵ The Prosecutor dug in. From then on, senior staff said, it was "utter lunacy."

Although the Sudan government's minimal cooperation with the ICC ground to a halt in early 2007, court sources say that in 2006 an ICC delegation visiting Khartoum was invited to travel to Darfur. The invitation, like so many of the government's promises, may well have come to nothing. But Moreno Ocampo didn't call Khartoum's bluff. He didn't push at the door. The ICTY had made a point of opening branch offices in precisely the areas most hostile to it. Cassese's experience was that, with due care and courage, witnesses could be protected and evidence assembled. But Moreno Ocampo insisted that investigations inside Sudan were neither safe nor necessary. The OTP's original senior trial attorney for Darfur, Andrew Cayley, described the difference with the

UN inquiry: “Cassese went personally to Kober prison and interviewed very sensitive witnesses. He demanded access with nothing more than a Security Council resolution. The OTP got no further than the Hilton Hotel.”⁶ By the end of 2008, the Court had granted victim participation rights to just eleven Sudanese, as opposed to 171 Congolese and 57 Ugandans, and not a single case for witness protection on behalf of Darfurians had been presented to the judges.⁷

The Prosecutor’s next step was to issue a summons for two Sudanese whom he alleged were responsible for massacres. On February 27, 2007, he demanded that Ahmed Harun, minister of state for the interior and head of the “Darfur desk” that coordinated military and security operations in the region, and Ali Kushayb, a militia commander, present themselves in The Hague. Unlike in a domestic court, the ICC has a “Pre-Trial Chamber” of three judges who decide whether cases meet a relatively low threshold of reasonable grounds to conclude that a crime has been committed within the Court’s jurisdiction. The Prosecutor has the option of public or sealed applications, with the latter offering the possibility of surprise arrests. A summons is the most modest step of all. The Pre-Trial Chamber considered the Prosecutor’s request and, deciding that the men would never turn up of their own accord, issued arrest warrants.

Cassese damned the prosecutor’s initiative with faint praise, saying “Better tiny steps than total inertia.”⁸ Many in the OTP were dumbfounded by what several called Moreno Ocampo’s “idiotic” insistence on summonses. The ICTY had shown how effective sealed warrants could be, and the ICC professionals believed that secrecy was their best, and possibly their only, chance of having Harun arrested—when he traveled abroad, as indeed he did in the very month the summons was issued.

Was Moreno Ocampo still trying to win some cooperation from Khartoum? Colleagues find that hard to believe. Said one, “By the time Harun and Kushayb were named there had been several visits to Khartoum”—although not by Moreno Ocampo, who has yet to set foot in Sudan—“and it was abundantly clear that the Sudanese are masters at stonewalling, world-class prevaricators. It was obvious that the only way to get people delivered was a sealed warrant—unless you wanted to be seen to be doing something but not actually to be doing anything.”

The role of ICC Prosecutor was always going to be extraordinarily difficult, under competing pressures from supporters and powerful detractors like the United States. Moreno Ocampo’s greatest asset was an exemplary cadre of professional staff for whom working at the ICC was more than a career—it was a vocation. “I loved this job,” an early recruit to the OTP told us. “It was my life.” The Prosecutor had the opportunity to draw upon the accumulated expertise of existing international tribunals and some of the world’s finest lawyers and investigators. This asset was rapidly squandered. Increasingly, Moreno Ocampo’s staff found it difficult to agree with their own Prosecutor, whose penchant for publicity and extravagant claims rather than fine detail was the polar opposite of their own work ethic.

As the pressures on him mounted, Moreno Ocampo, in the opinion of many of his colleagues, began to “cut corners.” They were incredulous when he announced publicly that he planned to intercept a plane on which Harun was scheduled to fly to Saudi Arabia for the Hajj.⁹ If he really sought to arrest Harun, why advertise his own plan? The Prosecutor’s harshest critics accused him

of grandstanding: he knew, they said, that if the cases he was building ever came to court, and proved to be flawed, it wouldn't be on his watch. Some wondered if he was "making peace with the fact that he is never going to get these people arrested." Others suggested he was taking a maximalist position, very publicly, as the only way of showing the impact of the crimes committed.

As internal criticism grew louder, Moreno Ocampo listened less and took closer personal charge than ever. Many in the Investigations Division felt sidelined; in the Prosecutions Division, insufficiently consulted. A senior team member said the Prosecutor was "the most complicated and difficult" manager he had ever worked for, emotionally volatile and obsessed with micromanaging. Some tried to raise concerns, privately deploring the absence of "a culture in which objectivity and a critical review of the evidence with all its shades drives the institution." A key member of the OTP left, saying privately that he was fearful of having to defend an indefensible position a few years down the line. A second followed, saying the Prosecutor ran the OTP like a medieval kingdom. A third told us the OTP was run "like a police state," with a "culture of fear" that was "very real," and "sapping." He quit too.

Senior ICC staff who had worried over Moreno Ocampo's earlier caution were now puzzled by his zealous pursuit of the biggest culprits he could identify—and especially his determination to charge President Bashir with genocide, including for his policies toward the displaced camps in Darfur. Their concern was not so much that the Prosecutor was aiming too high, but the cavalier way in which he went about it. "The Prosecutor doesn't have the reflexes of a prosecutor, bringing to bear a sound judgement as to what is legally doable," one told us. Another said: "He cut corners in the Court's core business." Several felt he would have been better advised to confine his charges to the events of 2003-04, when, according to the Court's own crime base data, about 90 percent of the killings took place.

Non-attributable criticism became a feature of ICC culture, to the extent that the "Hague Justice Portal" Web site published, for the first and only time, an anonymous critique by a legal scholar who, from internal clues, had probably been a member of the Prosecutor's staff.¹⁰ Using words like "inept," "pernicious," and "unrealistic" to describe Moreno Ocampo's strategy, the author deplored "a crisis of maturity within the Prosecutor's own office" and called for urgent attention to the crisis, including by the ASP, the only body with the power to remove the prosecutor.

The most strenuous public advocates of the Court also began to express their worries, albeit mainly in private. In September 2008, Human Rights Watch (HRW) wrote to the Executive Committee of the ICC to express serious concern over poor management practices in the OTP and about the effect this was having on the Court's investigations (and to criticize the prosecutor's "due process violations" in a matter relating to his own behavior, of which more later). HRW said the departure of senior staff in the OTP was having "a direct impact on the efficiency of investigations, and is particularly regrettable where due at least in part to the failure to develop a sufficiently supportive work environment." "Many experienced investigators have left the ICC since 2005," it said, for two reasons: "burn out" caused by the fact that there were "simply not enough of them to handle the rigorous demands for conducting investigations," and the "perception that the input of investigators is not sufficiently valued within the OTP, leading to dissatisfaction." Despite the attention the Prosecutor lavished on NGOs, there is no sign that he took this criticism seriously.¹¹

The HRW letter does not tell the whole story. It was not only investigators who were leaving. Those

who left included Silvia Fernandez de Gurmendi, the first cabinet chief of the OTP; senior legal adviser Morten Bergsmo; legal adviser Gilbert Bitti; DRC team leader Bernard Lavigne; Uganda team leader Martin Witteveen; Andrew Cayley—in the opinion of a former ICTY colleague, “the most effective lawyer I have ever seen”; chief analyst Paul Seils; and Deputy Prosecutor Serge Brammertz, now Prosecutor of the Yugoslavia tribunal.

Argentinians would have been less surprised at the controversies swirling around Moreno Ocampo. His international face is that of the man who helped put the Argentine junta behind bars, a fearless prosecutor who followed the chain of command to its zenith. As a young man aged just 32, he had been assistant to chief prosecutor Julio César Strassera in the trial of nine senior figures of the military dictatorship that ruled Argentina from 1976 to 1983. It was the first prosecution of senior government officials for the mass killing of civilians since the Nuremberg trials, and it resulted in five convictions. But even in those heady days of the mid-eighties, Moreno Ocampo had his critics. Strassera disliked his love of the media spotlight; many prosecution witnesses, victims of some of the worst human rights abuses on the continent, shied away from him.

“No survivor wanted to talk to him,” says Miriam Lewin, a distinguished investigative journalist who is herself a survivor of the Naval Mechanics School, the most brutal of the dictatorship’s torture centers. (Of the more than 5,000 people interrogated there, only 150 survived.) “It was only a year after democracy came to Argentina after a long and cruel dictatorship. We were all afraid because nobody knew if the military were going to come back. Many of us carried our passports in our pocketbooks. We wanted guarantees we were not going to be taken and tortured again. Moreno Ocampo didn’t understand how difficult it was to come back to the country after being tortured and held in a concentration camp. We felt he didn’t respect us at all. We found him distant and unaware of what was going on. He was never supportive. He never accompanied us as victims.”

The weekly news magazine *Noticias* has described the 1980s as Moreno Ocampo’s “human rights period” and quotes him as saying he finished it “without a peso.”¹² It was then, he told the magazine, that he said to himself: “I want to work for worthy causes, but I also want to make money.” As a young man, Moreno Ocampo had funded his legal studies by working as a carpenter, his family having fallen on hard times two generations earlier. Now he made a fortune, according to *Noticias*, by continually seeking “new commercial niches.” First, he took on corruption in business and public administration, making extensive use of secret cameras; then what a colleague called “gender discrimination” cases, representing some of Argentina’s wealthiest women in family disputes; until finally, in the new millennium, twice married and with four children, he became “the lawyer of the powerful,” representing some of Argentina’s most controversial public figures, including the former Economy Minister Domingo Cavallo, on whose watch the Argentine economy collapsed,¹³ and a Catholic priest, Julio Grassi, charged with 17 counts of sexual abuse of young boys in his care.

The Grassi case has been characterized by threats, violence, attempted bribery, and severe criticism of Moreno Ocampo’s comportment.

“I was disgusted by Moreno Ocampo’s behavior in the months he worked for Grassi,” says psychiatrist Enrique Stola, who treats two of the boys who accused Grassi. “My patients, ‘Ezequiel’

and 'Gabriel,' were attacked on radio and television, threatened, and beaten, and Moreno Ocampo did not say a single word." Stola said he was "deeply ashamed and saddened that a homeless child who had dared to accuse a powerful priest like Grassi should be afraid of a man who claimed to defend human rights."

More than six years after Moreno Ocampo's involvement with the Grassi case ended, prosecuting attorney Juan Pablo Gallego continues to speak out against the methods he used while on the priest's high-powered legal team. "Without any evidence whatsoever, Moreno Ocampo falsely accused Gabriel of attempting to blackmail Grassi and of bearing false witness," he told us. "He also provided Grassi with secret cameras. One of these cameras was used to identify the place where Gabriel was staying, and soon after he was brutally attacked there by persons unknown."

From his earliest days in the public eye, Moreno Ocampo has massaged his public image and since moving to the ICC has done his best to ensure that internal controversies do not get outside airing. Court sources say that several former colleagues have received letters from his legal adviser threatening legal action if they speak to the media. Despite this, there has been a growing chorus of criticism of the Prosecutor's handling of cases. The first to come to trial has been that of Thomas Lubanga, leader of the Congolese Patriotic Union (UPC) accused of widespread rape and killing in northeast Congo. Lubanga was arrested in his own country and charged with genocide and crimes against humanity. But the Congolese authorities made no serious effort to investigate the case and, when it became clear that he was likely to be released, the ICC pounced. In March 2006, Lubanga was taken from prison under UN armed escort in the dead of night and flown to The Hague in a French military plane.

The ICC had something to celebrate: a suspect in custody at last. Congolese human rights groups and women's groups joined in the celebrations. But when the charges against Lubanga were restricted to recruiting and deploying child soldiers, they expressed surprise at "the limited charges brought" and warned that "these charges risk offending the victims and strengthening the growing mistrust in the work of the International Criminal Court in the DRC and in the work of the Prosecutor specifically."¹⁴

The Lubanga case quickly became an embarrassment. When the ICC opened its Congo investigation, the UN Mission in Congo (MONUC) provided thousands of documents—such as weekly situation reports and child protection reports—to the OTP. Because they were mostly routine first-line reporting, MONUC officials expected the Prosecutor to use them as "lead evidence" only—signposts of what had happened, where and when, so that ICC investigators could follow up. Files like these are not the product of rigorous criminal investigations and none of those who compile them would expect them to stand up to courtroom scrutiny. But because they contained sensitive information including named sources, MONUC insisted that they stay confidential.

Moreno Ocampo's investigative strategy relies on a "small team" approach—defended by the Prosecutor on grounds of economy, but criticized by investigators, governments, and victims. Thus the Prosecutor relied heavily on the MONUC reports for his case against Lubanga. In November 2007, the judges demanded that these confidential reports be shared with the defense—obliging the OTP to go back to the UN to ask it to revisit the confidentiality agreement. MONUC duly set staff members to work screening each and every document to see if it contained sensitive

information. After seven months and three missed deadlines, Judge Sir Adrian Fulford ran out of patience and halted all proceedings, ruling that “the trial process has been ruptured to such a degree that it is now impossible to piece together the constituent elements of a fair trial.” He ordered Lubanga’s release. Moreno Ocampo appealed, seeking a compromise under which the judges—not the defense—would see the confidential documents. The UN agreed, the Appeal Court conceded, and Lubanga stayed in prison.

Moreno Ocampo had scraped through. But the drama revealed a recurrent weakness: the Prosecutor had cut corners. He had orchestrated a drumbeat of public expectation, and had set trial dates before his case was ready. Moreno Ocampo was preoccupied with the wrong court—that of public opinion.

Listening to Moreno Ocampo’s opening statement on January 26, 2009—“Lubanga’s group recruited, trained and used hundreds of children to kill, pillage and rape”—one might have been forgiven for thinking that killing, pillage, and rape were on the charge sheet. They weren’t. The charges were still recruiting and deploying child soldiers. Moreno Ocampo’s presentation reminded one observer of “a student who hadn’t prepared properly for his final exam.”¹⁵ More importantly, it raised expectations among victims that would never be addressed in court. To the dismay of many ICC staff, Moreno Ocampo had removed the chief trial attorney for the case—Ekkehard Withopf, an experienced trial lawyer—a month before the trial opened. Now he left The Hague without listening to the defense’s opening statement and headed for the World Economic Forum in Davos, where he made headlines by reversing an earlier position and announcing that he was examining the possibility of prosecuting Israeli commanders over alleged war crimes committed in Gaza.¹⁶

Like all human rights activists, women’s rights groups are reluctant to do anything that might undermine the ICC. Their determination to prosecute crimes against women makes them especially determined to see the Court succeed. The Court has an excellent record in gender equality in its hiring practices and the Prosecutor goes out of his way to emphasize the importance of prosecuting and deterring rape. But gender activists have their own special reasons for mixed feelings about Moreno Ocampo. Their worries are not pedophile priests in Argentina, but the Prosecutor’s personal conduct at the Lord Charles Hotel, in the verdant hills of South Africa’s wine country.

The scandal came to light on October 20, 2006 when the Prosecutor’s Public Information Adviser, Christian Palme, filed an internal complaint alleging that Moreno Ocampo had “committed serious misconduct . . . by committing the crime of rape, or sexual assault, or sexual coercion, or sexual abuse” against a South African journalist nineteen months earlier.¹⁷ Palme argued that the Prosecutor’s conduct had caused serious harm to the reputation of the Court and called on the States Parties to remove him.

The full story of what happened in the Lord Charles Hotel, three days before the Security Council referred the conflict in Darfur to the ICC, is unlikely ever to be known. Moreno Ocampo has denied committing rape. But there is no evidence that he has denied the veracity of a recording which suggests that his behavior in the hotel fell far short of the “high moral character” demanded by the

Rome Statute.¹⁸

For Yves Sorokobi, Moreno Ocampo's spokesperson, March 28, 2005, began with a phone call from the journalist, thanking him for having arranged an interview with Moreno Ocampo but saying the Prosecutor was making her "a little nervous." "I have a problem because he doesn't want to leave," she told Sorokobi, who later reported the conversation to Palme. "I'm trying to leave and go to the beach but the Prosecutor wants to come with me, so what should I do? . . . I think he has ulterior motives." Later that day, the journalist called Sorokobi again and told him that the Prosecutor had, in Sorokobi's words, "forced himself on her." Two days later, the two spoke for a third time and Sorokobi recorded the conversation. Although the journalist is weeping, and often unintelligible, she can be heard saying: "He took my [house and car] keys . . . Had to do that to get out of this . . ." Sorokobi told Palme, who recorded their conversation: "She said that was the only way he would let her go."

In December 2006, after interviewing the Prosecutor and the journalist, a panel of ICC judges found Palme's complaint "manifestly unfounded" and asked him "to obtain all copies of taped conversations between Ms [...] and Mr Sorokobi and hand them to the President for destruction." Soon after, Moreno Ocampo dismissed Palme, summarily and immediately, for "serious misconduct." Palme appealed to the Court's internal Disciplinary Advisory Board, which recommended that he be reinstated. Moreno Ocampo ignored the recommendation. Palme then appealed to the Administrative Tribunal of the International Labor Organisation (ILOAT), which has jurisdiction to settle labor disputes in many international organizations.¹⁹ The ILOAT judgment,²⁰ made public on July 9, 2008, was harshly critical of the Prosecutor and fully exonerated Palme, quashing his dismissal. It found that his complaint was neither made falsely nor with malicious intent. Rather, the Tribunal said, Palme had "reasonable grounds" for believing sexual misconduct by Moreno Ocampo: the journalist, it said, had "indicated unambiguously that the prosecutor 'took [her] keys' and she had consented to sexual intercourse 'to get out of [the situation].'" Sorokobi's evidence was "secondary evidence but, depending on the circumstances, it may have been probative in criminal proceedings."

The ILOAT found that Moreno Ocampo had committed a "breach of due process" in firing Palme and ordered the ICC, on behalf of the Prosecutor, to pay Palme 248,000 euros. Human Rights Watch's letter of September 2008 drew attention to the ILOAT ruling, the economic costs to the court—"already under strain to account responsibly for its budget to states parties"—and the impact on staff morale. The rights group said it was "disturbed" that the Prosecutor had ignored the recommendation of the Court's own Disciplinary Advisory Board.

UN High Commissioner for Refugees Ruud Lubbers had resigned in February 2005 following allegations of sexual harassment less grave than those against Moreno Ocampo—and many in The Hague believed the Prosecutor ought to follow his example. Details of the affair had emerged just as the OTP was drafting a code of conduct for investigators, and some were dismayed when Moreno Ocampo made clear he intended to fight on. But the Palme case was obscured, the day after the ILOAT judgement was made public, by Moreno Ocampo telling the *Washington Post* of his most ambitious application yet: to have the Sudanese president arrested on charges of genocide, crimes against humanity, and war crimes. We have been told, by several sources, that

Moreno Ocampo at first ruled out pursuing the Sudanese leadership. By the autumn of 2007, however, he had his sights on the president. In the words of one former colleague, “He jumped to the very top. He did not wish to have advice from attorneys.” In addition, investigations into the Darfur case had diminished rather than expanded, and the Prosecutor was continuing to rely heavily on secondary material, including the 2005 Cassese Commission’s sources—many of whom were unnamed and could therefore never be produced in a courtroom.

In December 2007, Moreno Ocampo signaled his direction publicly in a briefing to the Security Council. Before going to New York, he had drafted a presentation outlining his theory that Bashir had designed a “two-stage” genocide—massacres in the villages in 2003-04, and then the “slow death” of the Fur, Masalit, and Zaghawa tribes in displaced camps. Colleagues had expressed concern, questioning the strength of his argument for genocide in the camps, and Moreno Ocampo reluctantly accepted a revised text. To their dismay, he repeated his original claims when he spoke in New York. “This is typical Moreno Ocampo,” says Palme. “He would constantly tear up and destroy texts, forcing sometimes all night sessions working and re-working texts. The worst times were before the ASP and before the UNSC Darfur reports.”

There is much speculation, inside and outside the ICC, at how Moreno Ocampo arrives at his figures for death rates in Darfur. Unpublished UN monitoring figures for 2008 range from 60 to 350 violent fatalities a month, for an average of about 130. The activist group Genocide Intervention Network has a similar number, of around 150 a month.²¹ Moreno Ocampo has a very different figure. Speaking at a conference at Yale University on February 6, this year, the Prosecutor claimed that “as of today, 5,000 people are dying each month in Darfur,” including through “slow death” by hunger and disease.²² The OTP itself possesses no specialist epidemiologists or demographers who might generate such figures, and no one working in Darfur proposes figures even remotely close to these. While some estimates for mortality during the peak of the crisis in 2004 generated figures this high, a specialist review of mortality data undertaken by the U.S. General Accountability Office²³ wrote off high-end estimates as unreliable. In the last two years, relief agencies have warned of increasing malnutrition whenever the World Food Program cuts its rations or fighting erupts, but there is no evidence of a generalized famine on the scale that the Prosecutor insists is underway. Moreno Ocampo’s arithmetic is simply fantastical.

Most of the controversy over the Bashir case has focused on the prudence of indicting a head of state in a fragile country prone to conflict. After a decade of attempts to coerce or overthrow the regime, the U.S. and European governments decided in 2001 to pursue the path of negotiation, leading in January 2005 to a peace agreement that brought a commitment to democratic elections and an end to twenty-one years of war between north and south. Slowly and painfully, with many setbacks and much resistance from the Sudan government, the key provisions of the “Comprehensive Peace Agreement” are now being implemented. There are serious problems still, especially over delineation of the north-south border, but a ceasefire has held most of the time, the northern army has withdrawn from almost all parts of the south, and a power-sharing government is functioning. Elections have been scheduled for this year and a referendum on self-determination for South Sudan for 2011. In Darfur, international efforts have focused on sustaining humanitarian access and deploying an international peacekeeping force, now approaching its mandated size of 26,000 men.

All this could be endangered by targeting Bashir directly. Many Sudanese fear that an arrest

warrant could make things significantly worse, perhaps bringing about the very sorts of atrocities that the ICC is meant to deter. Moreno Ocampo disagrees. “For people in Darfur, nothing could be worse,” he told *Foreign Policy* magazine.²⁴ “We need negotiations, but if Bashir is indicted, he is not the person to negotiate with.” Not even Darfur’s rebel Justice and Equality Movement (JEM) has a position as militant as this—in Doha, Qatar, on February 17, JEM signed a “Declaration of Intent” with the government for a peaceful settlement of the conflict.

During the seven months that the ICC judges deliberated, Bashir made his position perfectly clear: “We are not looking for problems, but if they come to us we will teach them a lesson they won’t forget.” Moreno Ocampo dismissed this and other warnings in his speech to the Security Council in December: “The facts are that victims of crimes committed in Darfur are 3 million African citizens, that justice will promote peace . . . Threats against victims, peacekeepers, and aid workers should be seen for what they are—criminal intent—and not rewarded with promises of impunity.”²⁵ Although the Prosecutor is obliged to consider the interests of victims when bringing a prosecution, this section of his report ran to just four lines and failed to consider that the three million had a very obvious interest in a humanitarian operation that was keeping them alive. Minutes after the arrest warrant was issued, Khartoum began expelling relief agencies, threatening at least 70 percent of humanitarian aid to 4.7 million people.

Less attention has been paid to the substance of the arrest warrant and the fact that the Pre-Trial Chamber threw out the genocide charges, Moreno Ocampo’s principal reason for prosecuting despite the obvious risks. The judges wrote that “the Prosecution acknowledges that it (i) does not have any direct evidence in relation to Omar Al Bashir’s alleged responsibility for the crime of genocide and (ii) its allegations concerning genocide are solely based on certain inferences that, according to the Prosecution, can be drawn from the facts of the case.”²⁶ In a remarkable humiliation for Moreno Ocampo, they proceeded (with one dissenting opinion) to dismiss those inferences.²⁷

This will not have come as a surprise to the Prosecutor’s most informed critic, his former senior trial attorney for Darfur. “Serious disagreement remains as to whether Al Bashir and the Sudanese government intended actually to destroy, in part, the Fur, Masalit and Zaghawa peoples of Darfur,” Andrew Cayley wrote beforehand in a commentary on the genocide charges.²⁸ “It is difficult to cry government-led genocide in one breath and then explain in the next why 2 million Darfuris have sought refuge around the principal army garrisons of their province. One million Darfuris live in Khartoum where they have never been bothered during the entire course of the war.” Rony Brauman, a founder and former president of Médecins Sans Frontières—which has teams on the ground in Darfur—heaped scorn on the Prosecutor. “Can one seriously imagine Tutsis seeking refuge in areas controlled by the Rwandan army in 1994?” he asked. “Or Jews seeking refuge with the Wehrmacht in 1943?”²⁹

For Western nations committed to the ICC, and with interests in political stability and cooperation, Moreno Ocampo looks a lot less attractive than he once did. The political efforts required to halt ICC activity at the Security Council would be great, and few Western governments wish to risk the wrath of domestic human rights constituencies by appearing to wobble on an abusive regime. The effort needed to convince States Parties to remove the Prosecutor would be even greater, requiring them to admit that they appointed the wrong man to begin with.

Africans were once the most passionate supporters of the ICC: half of the countries that first ratified the Rome Statute were African, and three of the first four cases were referred by African governments. Now they, too, are having second thoughts. They don't see the Court dealing with cases outside Africa. They worry that warrants like those against Bashir and the Congolese opposition leader Jean-Pierre Bemba (seized in Belgium with a sealed warrant in May 2008) may be turning criminal prosecution into a selective political instrument. Many who struggle for human rights fear that abusive governments have been handed exactly the pretext they need for refusing any international cooperation. Sudanese whose vocation is human rights find themselves torn: they want to see Moreno Ocampo pursue the highest ranking suspects and establish the principle that there can be no impunity for the most horrific crimes, but they remain fearful of a backlash in which ordinary Sudanese will once again find themselves in the firing line. They also fear that their hopes for a relaxation of Sudan's security laws and expectations for moderately free elections will be dashed when Bashir concludes that the Republican Palace is his safest, and perhaps only, safe house.

Moreno Ocampo is a man who diminishes with proximity. Six years after he became Prosecutor, the priceless human capital invested in his office is draining away. Lawyers and investigators who served in the OTP, and who count among the brightest and the best of their profession, say they believe the Court's reputation, and perhaps even its life, is at risk. Their desire to make a success of the court remains as strong as ever it was—but not under the current Prosecutor. "My time in the ICC was a mixture of a fascinating time and a terrible time," one of these exiles said shortly before Moreno Ocampo demanded Bashir's arrest. "The Prosecutor was erratic, so irrational sometimes that you felt despair. He uses his charisma in a negative way. Everyone in the OTP felt disrespected. But I still have a dream that one day—along with some other good people—I will be able to return."

1. Jess Bravin, 'For Global Court, Ugandan Rebels Prove Tough Test,' Wall Street Journal, June 8, 2006.
2. Antonio Cassese, 'Observations on Issues Concerning the Protection of Victims and the Preservation of Evidence in the Proceedings on Darfur Pending Before the ICC,' ICC-2/05, August 25, 2006.
3. Cassese compiled a list of 51 individuals he considered should be investigated for crimes. But he held back from genocide, 'the crime of crimes', and later said Moreno Ocampo should have done the same, 'filing charges that are more appropriate and easier to prosecute, such as war crimes and crimes against humanity.' Antonio Cassese, 'Flawed International Justice for Sudan,' The Daily Star, July 16, 2008.
4. Louise Arbour, 'Observations of the United Nations High Commissioner for Human Rights invited in Application of Rule 103 of the Rules of Procedure and Evidence,' ICC-02/05, October 10, 2006.
5. 'Prosecutor's Response to Arbour's Observations of the United Nations High Commissioner for Human Rights Invited in Application of Rule 103 of the Rules of Procedure and Evidence,' ICC-02/05, October 19, 2006.
6. Andrew Cayley, 'Witness Proofing—The Experience of a Prosecutor,' Journal of International Criminal Justice, 6, 2008, p. 780
7. Women's Initiative for Gender Justice, 'Gender Report Card of the International Criminal Court 2008,' The Hague, 31 December 2008, pp. 54 and 76.

8. 'Ma i massacri continuano con la complicità del Sudan', La Repubblica, February 28, 2007.
9. Harun somehow got wind of the plan—it is believed through an Ocampo aide who was being less than discreet in New York—and cancelled his flight.
10. The Controversial Actions of the Prosecutor of the International Criminal Court: a 'Crisis of Maturity'? The Hague Justice Portal, September 15, 2008.
11. The Prosecutor did not respond to letters written by others, including one of us (Alex de Waal) in June 2008.
12. 'Los Veraderos Negocios de Moreno Ocampo' (The Real Business of Moreno Ocampo), Noticias, December 7, 2002.
13. Like Moreno Ocampo himself, Cavallo was never as popular in Argentina as he was abroad. As minister, he presided over a crippling recession and 66% devaluation of the peso. After resigning in 2001, he was accused of approving more than \$100 million in illegal arms sales while in office.
14. Beni Declaration by women's rights and human rights NGOs from the Democratic Republic of the Congo on the Prosecutions by the ICC, Beni, North Kivu, DRC, September 16, 2007.
15. Lisa Clifford, 'Ocampo Underwhelms in Landmark Trial,' Institute for War and Peace Reporting, January 29, 2009, http://www.iwpr.net/?p=acr&s=f&o=349621&pc_state=heniacr2009
16. Israel is not a party to the Rome Statute and most lawyers say the ICC could only become involved if someone with dual nationality was responsible for crimes and his other nationality made him subject to ICC jurisdiction. Moreno Ocampo himself ruled out ICC involvement just two weeks earlier. <http://www.rnw.nl/internationaljustice/icc/theicc/090115-icc-gaza>
17. Christian Palme, 'Complaint against ICC Prosecutor Luis Moreno Ocampo Concerning Serious Misconduct,' October 20, 2006. www.innerecitypress.com/ocampocomplaint.pdf
18. Article 42.3 of the Rome Statute: "The Prosecutor and the Deputy Prosecutors shall be persons of high moral character, be highly competent in and have extensive practical experience in the prosecution or trial of criminal cases. They shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court."
19. The ICC response to the ILOAT is remarkably intemperate, accusing Palme of 'pernicious and self-serving misappraisal of his own "evidence",' and 'bewildering arrogance'. It also claims that 'the alleged rape victim denied unambiguously that she had been raped by the Prosecutor.
20. See <http://www.ilo.org/public/english/tribunal/fulltext/2757.htm>
21. Genocide Intervention Network, 'GI-Net End of 2008 Summary,' February 2009, http://www.genocideintervention.net/files/u1/GINET_-_Year_End_Review_-_2008.pdf. The GI-Net figure includes deaths in JEM's attack on Omdurman, which are excluded from the UN data because they did not occur in Darfur.
22. Possibly Moreno Ocampo has taken the UN's headline figure of 300,000 death and divided it by 60 months of crisis to arrive at 5,000 per month—but this would not be a credible approach given that all data indicate that the vast majority of those deaths occurred between 2003 and early 2005. The ICC's own investigators produced a figure of 35,000 violent deaths in 2003-04 and many fewer since.
23. General Accountability Office, 'Darfur Crisis: Death Estimates Demonstrates Severity of Crisis, but Their Accuracy and Credibility Could Be Enhanced,' GAO-07-24, November 9, 2006.
24. 'Seven Questions: Luis Moreno-Ocampo,' Foreign Policy, February 2009. http://www.foreignpolicy.com/story/cms.php?story_id=4698&page=0
25. Eighth Report of the Prosecutor of the International Criminal Court to the UN Security

Council Pursuant to UNSCR 1593 (2005), December 2008, para 85.

26. ICC, Pre-Trial Chamber I, "Decision on the Prosecution's Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir," March 4, 2008, Para 111.

27. It was followed the very next day with Pre-Trial Chamber III comprehensively revising the charges laid against Jean-Pierre Bemba. Each of Moreno Ocampo's three highest-profile cases has been savaged by the respective judges.

28. Andrew Cayley, 'The Prosecutor's Strategy in Seeking the Arrest of Sudanese President Al Bashir on Charges of Genocide,' *Journal of International Criminal Justice*, Vol. 6, 2008, 829-840.

29. Rony Brauman, 'The ICC's Bashir Indictment: Law Against Peace,' *World Politics Review*, July 23, 2008, <http://www.worldpoliticsreview.com/article.aspx?id=2471>.

Julie Flint is a journalist and researcher. Alex de Waal is a researcher, writer, and activist on African issues. They are co-authors of *Darfur: A New History of a Long War*.

©2009 Heldref Publications · Helen Dwight Reid Educational Foundation · 1319 Eighteenth Street, NW, Washington,

DC · 20036 · webmaster@heldref.org

<http://www.worldaffairsjournal.org/2009 - Spring/full-DeWaalFlint.html>