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Emne: Letter concerning need for external review of serious misconduct by members of the ICC OTP

Dear Ambassadors, Ms. Rosemary McCarney and Mr. Marc-André Blanchard,

The Norwegian Helsinki Committee would like to share with you a public [letter](#) that we recently sent to the Prosecutor of the International Criminal Court, Mrs. Fatou Bensouda, urging her to authorise an independent inquiry of professional and ethical misconduct in her Office. The letter refers to revelations of ICC irregularities by a range of respected international media since late September 2017.

As we see it, the inquiry should include the role of the first Prosecutor of the Court, Mr. Luis Moreno-Ocampo, and his Chef de Cabinet 2003-2006, Mrs. Silvia Fernández de Gurmendi, who later became President of the Court.

We know that Mrs. Gurmendi wants to become the next UN High Commissioner for Human Rights. However, we are concerned that possible future revelations about her previous role in the ICC may undermine a successful performance as High Commissioner for Human Rights, a matter of great importance to our organization.

Attached is the letter to Mrs. Bensouda (as an appendix to this collection), as well as a recent article in Mediapart concerning the letter and its background. We include both the French original of the article and our translation into English.

Sincerely,
Ana Pashalishvili

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Mrs. Fatou Bensouda
Prosecutor
International Criminal Court

Oslo, 12 March 2018

Mrs. Fatou Bensouda, Prosecutor of the ICC,

The [Norwegian Helsinki Committee](#) – a Norway based internationally oriented human rights organization – would like to raise our concerns related to serious allegations in respected media outlets that members of your Office helped the first Prosecutor of the International Criminal Court (ICC), Mr. Luis Moreno-Ocampo, to make money by assisting persons suspected of having aided ICC crimes in Libya, as well as some broader issues linked to the heritage of the first Prosecutor.

Reports based on leaked emails from Mr. Moreno-Ocampo have appeared in, *inter alia*, Mediapart, Der Spiegel, the Sunday Times and NRC Handelsblad, detailing highly problematic activities and improper relationships between Mr. Moreno-Ocampo and members of the Office of the Prosecutor. A recent policy brief, “A Prosecutor Falls, Time for the Court to Rise”, further points to a range of issues of alleged professional and ethical misconduct of the first Prosecutor as well as its consequences on the current functioning of your Office.¹ Its authors – Prof. Morten Bergsmo, Mr. Wolfgang Kaleck, Dr. Sam Muller and Dr. William H. Wiley – are all respected, experienced and knowledgeable persons in the international criminal law community; some of them were formerly senior members of the Office of the Prosecutor and leaders of the advance team that established the ICC.²

We fully endorse your recent statement at the 54th Munich Security Conference that, “accountability for Rome Statute crimes is an essential component of promoting human security”. The Norwegian civil-society community has since the adoption of the Rome Statute of the ICC in 1998 wholeheartedly supported the fundamental principles

¹ The policy brief is available at <http://www.toaep.org/pbs-pdf/86-four-directors/>.

² See their contributions in: Morten Bergsmo, Klaus Rackwitz and SONG Tianying (editors), *Historical Origins of International Criminal Law: Volume 5*, Torkel Opsahl Academic EPublisher, Brussels, 2017, available at <http://www.toaep.org/ps-pdf/24-bergsmo-rackwitz-song>.

underpinning the new institution, and challenged States Parties and other states to provide full support for the effective functioning of the Court.

The Norwegian Helsinki Committee has close contact with victims and witnesses of international crimes and knows by first-hand experience the importance of timely prosecution and reparations. We believe that the wider ICC system of justice – including by enhancing national capacity and willingness to prosecute core international crimes – is potentially a great step in fighting impunity worldwide and thereby preventing such crimes to take place in the future. However, to reach this goal, we need an ICC functioning according to the highest ethical and professional standards.

This is the background for why we address the circumstances that undermine trust in and credibility of the ICC. We are aware of external pressures on the Court and that there are powerful actors on the global scene that may wish the Court to fail. For the Court to strengthen its authority there should, in our view, be thorough, transparent and broad inquiries into breaches of professional and ethical standards by members of the Office of the Prosecutor. These inquiries must include the role of the first Prosecutor, as well as his Chef de Cabinet at the time, Mrs. Silvia Fernández de Gurmendi, former President of the ICC, including for possible abuse of former staff members.

In your statement of 5 October 2017, you refer to investigation by the Independent Oversight Mechanism (IOM). We do not know the outcome of this investigation; however, the IOM has serious limitations and cannot deal with important aspects of the issue at hand, such as the role of the first Prosecutor after he stepped down as Prosecutor. According to a statement by the ICC Bar Association, “the IOM is ill-equipped if not unable to properly and thoroughly investigate the broad range of allegations that are of concern here”.³

A further statement by the Women’s Initiatives for Gender Justice, “A critical time for the ICC’s credibility”, calls for strengthening ethical and professional oversight of the work of the ICC, including by establishing organs external to the Court.⁴

Allegations subsequently articulated in the media further accentuate the need for an independent inquiry of your and your Office’s relation with Mr. Moreno-Ocampo. According

³ ICC Bar Association, “ICCBA Statement on Allegations Against Former ICC Prosecutor”, 29 November 2017.

⁴ The Women’s Initiatives for Gender Justice, “A critical time for the ICC’s credibility”, 12 October 2017.

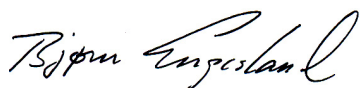
to media reports, you had frequent contact with Mr. Moreno-Ocampo, also seeking his advice, after you commenced your service as Chief Prosecutor in 2012.⁵

As an urgent measure, we ask you to use your “full authority over the management and administration of the Office” to conduct credible and transparent reviews of the legacy of the first Prosecutor in order to establish relevant facts of professional and ethical misconduct. We think that the credibility of the review will depend on appointing *external* experts, who are and will be perceived as fully independent.

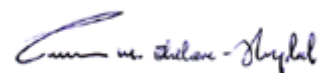
In a situation where there exist credible reports of serious misconduct – and even a pattern of weak professional and ethical standards – in an institution of such importance as the ICC, there will always be different views on ways to resolve the issue. We know that many friends of the Court prefer low-profile measures, if any at all; not to give ammunition to actors that are hostile to the Court. But this is not a question of communications strategy or external relations.

We are convinced that for the Court to fulfil its mandate – which is in itself difficult – a transparent and broad inquiry by external experts is necessary to restore trust in the Office of the Prosecutor. Such a process is not incompatible with the independence of the Office, and it need not be costly. We fear that lack of such trust will weaken the ICC in future investigations and prosecutions, undermining its role as a custodian of justice for victims of international crimes.

Best regards,



Bjørn Engesland
Secretary General



Gunnar M. Ekeløve-Slydal
Deputy Secretary General

⁵ See <https://theblacksea.eu/stories/article/en/icc-ocampo-bensouda-fallout>.

Helsinki Committee calls for independent investigation of ICC irregularities¹

By Stéphanie Maupas

The human rights organization has written to the Prosecutor of the International Criminal Court to demand that she establish "broad and transparent" inquiries of the internal functioning of her Office. The demand is based on the exposure in Mediapart, since the end of September 2017, of a series of major irregularities within the ICC.

The Norwegian Helsinki Committee, an influential organization for the defence of human rights, requests in a [letter of 12 March to the Prosecutor of the International Criminal Court \(ICC\)](#), Fatou Bensouda, that she launch "transparent and broad inquiries into breaches of professional and ethical standards" committed by members of the Court.

According to the NGO, the inquiries should be entrusted to an external expert in order to determine "the role of the first Prosecutor", Luis Moreno-Ocampo, "as well as his Chef de Cabinet at the time, Mrs. Silvia Fernández de Gurmendi [later President of the ICC]", in the alleged misconduct.

The letter of the Helsinki Committee follows the international journalist investigation [The Secrets of the Court](#), published at the end of September 2017 by [The European Investigative Collaborations \(EIC\)](#), based on documents obtained by Mediapart, and revealing a series of major dysfunctions within the ICC (conflicts of interests, biased investigations, offshore fortune...), mostly related to its former Prosecutor Luis Moreno-Ocampo.

Following our revelations, Fatou Bensouda, the current Prosecutor, who was Ocampo's deputy for eight years, referred to an internal body at the ICC, the Independent Oversight Mechanism, to investigate the actions of two named female employees. This was the former spokesperson, Florence Olara, and an analyst at the Office of the Prosecutor, Jennifer Schense. In doing so, the Court responded in a minimum way to the revelations by the press, attempting to relegate to past practices the facts denounced and placing all the responsibility on two officials for acts resulting from operating methods of the Court itself.

Like the Helsinki Committee now, several voices have asked for weeks that an independent inquiry should take place, including the [ICC Bar Association](#), which brings together defence lawyers and victims, and the NGO *Women's Initiative for Gender Justice*. "In many respects, the revelations could be considered emblematic of an underlying culture within the Court", the NGO pointed out in a [statement](#).

This is essentially what the Helsinki Committee as well supports, which also relies on [an article](#) published following the revelations of Mediapart by four heavyweights of international criminal justice, including Morten Bergsmo, former Chief of the Legal Advisory Section, ICC Office of the Prosecutor, and Bill Wiley, the first investigator employed at the ICC. Evoking "a climate of fear and intimidation", they recount how, in September 2003, Luis Moreno-Ocampo and his Chef de Cabinet, Silvia Fernández de Gurmendi, had tried to put pressure on them to be able to employ a diplomat, a national of one of the countries having allowed for the election of the Prosecutor. In short, thanks for service rendered.

Accidental timing or not, the letter of the Helsinki Committee was sent to the Prosecutor two days after the end of the mandate of Silvia Fernández de Gurmendi as President of the ICC. According to several sources, the Argentine diplomat now aims to become High

¹ Translation by the Norwegian Helsinki Committee of [article](#) published on Thursday, 15 March 2018, by Mediapart.

Commissioner for Human Rights (OHCHR) in Geneva, a position that will be available in September. Asked by email, Silvia Fernández de Gurmendi did not answer.

Member of the Argentine delegation at the diplomatic conference which created the ICC in 1998, Silvia Fernández de Gurmendi then became Chef de Cabinet of the first Prosecutor, Luis Moreno-Ocampo, from 2003 to 2006. According to New Zealand researcher Chris Mahony, the Argentine diplomat was a “key player” in the election of her Argentine compatriot at the top of international justice.

In 2009, after a new digression in the Ministry of Foreign Affairs in Buenos Aires, she returned to The Hague with a mandate as judge for nine years. Then, elected by her peers, she became the head of the ICC in 2015.

When, in December 2017, two months after revelations from the Secrets of the Court, then President Gurmendi spoke about the troubles of the ICC before the Assembly of States Parties – a kind of Parliament of the Court, made up of its 123 Member States – she announced that she had compiled an inventory of existing texts on disciplinary authority for mistakes by employees of the ICC and its elected officials, judges, prosecutors and clerks. She promised a timetable to fill the many gaps. And finally, she gave assurance that the Independent Oversight Mechanism was fully operational.

However, a few days after being referred to by the Prosecutor, the Director of the Oversight Mechanism announced that he was ready to leave his post to join UNICEF. He has still not been replaced to this day.

Moreover, the independence of the Mechanism is also questioned by an episode dating back to 2016. A complaint had been filed against the President and the Prosecutor. They then ordered the Mechanism to conduct an investigation. And the latter used the services of an employee of the Registry (an organ placed under the authority of the Presidency), who had been given time to investigate the case ...

Since its establishment in The Hague in July 2002, the history of the International Criminal Court is adorned with various dysfunctions, conflicts of interests, small arrangements, and sometimes even amateurism. Among the states that support it, NGOs, or its staff, two schools of thought have been opposing each other since its first steps. Those, in a minority, who fear that its slides will undermine its credibility, weakening its deterrent force. They therefore ask the Court to reform so as not to provide weapons to its opponents.

And those who think that pointing out its malfunctions may weaken it and play into the hands of its enemies. And these enemies are many. They count all those who fear that tomorrow they have to be accountable to the ICC for their war crimes and their mass crimes. “We know that many friends of the Court prefer low-profile measures, if any at all; not to give ammunition to actors that are hostile to the Court”, says Norwegian Helsinki Committee Secretary-General, Bjørn Engesland. “We fear that lack of such trust will weaken the ICC in the future investigations and prosecutions, undermining its role as a custodian of justice for victims of international crimes.”

Le Comité Helsinki réclame une enquête indépendante sur les dérives de la CPI

PAR STÉPHANIE MAUPAS
ARTICLE PUBLIÉ LE JEUDI 15 MARS 2018



Luis Moreno Ocampo (à dr.), ancien procureur de la CPI, le 18 mars 2006. Au premier plan : Fatou Bensouda, l'actuelle procureure. © Michael Kooren/Reuters

L'organisation de défense des droits de l'homme a écrit à la procureure de la Cour pénale internationale afin que soient diligentées des enquêtes « *larges et transparentes* » sur le fonctionnement interne de son bureau. Cette demande fait suite aux révélations de Mediapart qui a mis au jour, fin septembre 2017, une série de dérives majeures au sein de la CPI.

L'antenne norvégienne du Comité Helsinki, une influente organisation de défense des droits de l'homme, demande dans un courrier adressé le 12 mars à la procureure de la Cour pénale internationale (CPI), Fatou Bensouda, de diligenter des enquêtes « *larges et transparentes sur les violations des normes professionnelles et éthiques* » commises par des membres de la Cour.

D'après l'ONG, les investigations devraient être confiées à un expert extérieur à la CPI afin de déterminer « *le rôle du premier procureur* », Luis Moreno Ocampo, « *ainsi que celui de son chef de*

cabinet de l'époque, Silvia Fernández de Gurmendi [par la suite présidente de la CPI – ndlr] », dans les faits reprochés.



Luis Moreno Ocampo (à dr.), ancien procureur de la CPI, le 18 mars 2006. Au premier plan : Fatou Bensouda, l'actuelle procureure. © Michael Kooren/Reuters

Le courrier du Comité Helsinki fait suite à l'enquête journalistique internationale *Les Secrets de la Cour*, publiée fin septembre 2017 par l'European Investigative Collaborations (EIC), sur la base de documents obtenus par Mediapart et révélant une série de dysfonctionnements majeurs au sein de la CPI (conflits d'intérêts, enquêtes biaisées, fortune *offshore*...), pour la plupart en lien avec son ancien procureur, Luis Moreno Ocampo.

À la suite de nos révélations, Fatou Bensouda, l'actuelle procureure, qui fut l'adjointe d'Ocampo pendant huit ans, avait saisi une instance interne à la CPI, le mécanisme de contrôle indépendant, pour enquêter sur les agissements de deux employées pointées du doigt. Il s'agit de l'ancienne porte-parole, Florence Olara, et d'une analyste du bureau du procureur, Jennifer Schense. Ce faisant, la Cour répondait *a minima* aux révélations de la presse, tentant de reléguer à des pratiques passées les faits dénoncés et faisant porter à deux fonctionnaires toute la responsabilité d'actes résultant pourtant des méthodes de fonctionnement de la Cour elle-même.

Comme le Comité Helsinki aujourd'hui, plusieurs voix demandent depuis des semaines une enquête indépendante, dont l'Association du barreau de la CPI, qui rassemble avocats de la défense et victimes, et l'ONG Women for Gender Justice. « *À bien des égards, les révélations pourraient être considérées comme emblématiques d'une culture sous-jacente au sein de la Cour* », pointait cette ONG dans un communiqué.

C'est en substance ce que soutient aussi le Comité Helsinki, qui s'appuie par ailleurs sur un article publié à la suite des révélations de Mediapart par quatre pointures de la justice internationale, dont Morten Bergsmo, ancien juriste en chef du bureau du procureur, et Bill Wiley, premier enquêteur embauché à la CPI. Évoquant « *un climat de peur et d'intimidation* », ils y racontaient notamment comment, en septembre 2003, Luis Moreno Ocampo et sa cheffe de cabinet, Silvia Fernández de Gurmendi, avaient tenté de faire pression sur eux pour pouvoir embaucher un diplomate, ressortissant de l'un des pays ayant permis l'élection du procureur. Bref, des remerciements pour service rendu.

Hasard du calendrier ou pas, le courrier du Comité Helsinki a été adressé à la procureure deux jours après la fin du mandat de Silvia Fernández de Gurmendi comme présidente de la CPI. Selon plusieurs sources, la diplomate argentine pourrait désormais viser la tête du Haut-Commissariat aux droits de l'homme (HCDH) des Nations unies à Genève, dont le poste se libère en septembre. Interrogée par courriel, Silvia Fernández de Gurmendi n'a pas répondu.

Membre de la délégation argentine lors de la conférence diplomatique au cours de laquelle avait été créée la CPI en 1998, Silvia Fernández de Gurmendi était ensuite devenue cheffe de cabinet du premier procureur, Luis Moreno Ocampo, de 2003 à 2006. Selon le chercheur néo-zélandais Chris Mahony, la diplomate argentine avait été un « *acteur clé* » de l'élection de son compatriote argentin au sommet de la justice internationale.

En 2009, après une nouvelle parenthèse au ministère des affaires étrangères à Buenos Aires, elle est revenue à La Haye avec en poche un mandat de juge pour neuf ans. Puis, élue par ses pairs, elle a pris la tête de la CPI en 2015.

Lorsqu'en décembre 2017, soit deux mois après les révélations des *Secrets de la Cour*, la présidente Gurmendi s'exprime sur les dérives de la CPI devant l'Assemblée des États parties – sorte de parlement de la Cour, formé de ses 123 États membres –, elle annonce avoir dressé l'inventaire des textes existants,

permettant de sanctionner les fautes des employés de la CPI et de ses élus, juges, procureurs et greffiers. Elle promet un calendrier pour combler les nombreuses lacunes. Et assure enfin que le mécanisme de contrôle indépendant est pleinement opérationnel.

Pourtant, quelques jours après avoir été saisi par la procureure, le directeur dudit mécanisme de contrôle a annoncé qu'il s'apprêtait à quitter son poste pour rejoindre l'Unicef. Il n'a toujours pas été remplacé à ce jour.

Par ailleurs, l'indépendance du mécanisme est aussi remise en question par un épisode remontant à 2016. Une plainte avait été déposée contre la présidente et la procureure. Elles ont alors ordonné au mécanisme de conduire une enquête. Et ce dernier a utilisé les services d'un employé du greffe (un organe placé sous l'autorité de la présidence), détaché le temps d'enquêter sur l'affaire...

Depuis son établissement à La Haye en juillet 2002, l'histoire de la Cour pénale internationale est émaillée de dysfonctionnements divers, de conflits d'intérêts, de petits arrangements et même parfois d'amateurisme. Que ce soit au sein des États qui la soutiennent, des ONG ou de son personnel, deux écoles s'opposent depuis ses premiers pas. Ceux, minoritaires, qui craignent que ses dérives n'entament sa crédibilité, rendant caduque sa force de dissuasion. Ils lui demandent dès lors de se réformer pour ne pas fournir d'armes à ses adversaires.

Et ceux qui pensent que pointer ses dysfonctionnements risque de l'affaiblir et de faire le jeu de ses ennemis. Et ces ennemis sont légion. Ils comptent tous ceux qui craignent demain de devoir rendre des comptes devant la CPI pour leurs crimes de guerre et leurs crimes de masse. « *Nous sommes conscients des pressions externes exercées sur la Cour et du fait que des acteurs puissants sur la scène mondiale pourraient souhaiter que la Cour échoue* », explique donc le Comité Helsinki dans son courrier.

« *Nous savons que de nombreux amis de la Cour préfèrent des mesures discrètes, le cas échéant ; ne pas donner de munitions à des acteurs hostiles à la Cour* », dit son secrétaire général, Bjørn Engesland. « *Nous*

craignons que l'absence de confiance n'affaiblisse

les futures enquêtes et poursuites de la CPI, sapant son rôle de justice pour les victimes de crimes internationaux. »

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