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Excerpt
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PART I

Putting It All in Context

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Introduction

Hans Corell

It was with great expectations that I accepted the invitation to write the introduction to a book in which the main part would be personal reflections and perspectives by the founding chief prosecutors of the International Criminal Tribunal for the Former Yugoslavia (ICTY); the International Criminal Tribunal for Rwanda (ICTR); the Special Court for Sierra Leone (SCSL); the International Criminal Court (ICC); and the Extraordinary Chambers in the Courts of Cambodia (ECCC). I was deeply involved in the establishment of all these courts or tribunals, and I therefore looked forward with great interest to the contributions by the prosecutors, as well as the contributions by the other authors, who I had come to know over the years.

The reason for this invitation is of course my involvement with the creation of these institutions. It materialized through a series of coincidences. When I graduated from law school back in 1962, my plan was to become a judge in my own country, Sweden. I therefore immediately took up a position as a law clerk in a circuit court in the countryside. This was the first step in a 10-year period during which I would serve, first, as a law clerk and, later, as a judge in two circuit courts and in two courts of appeal. The main focus of the work in these courts was criminal law. In 1972, I was asked to join the Ministry of Justice to do legislative work. After 13 years in this Ministry, the last three years as the chief legal officer, I became the legal adviser of the Ministry for Foreign Affairs in 1984.

In January 1994, when I had served in this position for over nine years, I received a telephone call from UN Secretary General Boutros Boutros-Ghali, who invited me to join his team as under-secretary general for legal affairs and the legal counsel of the United Nations. For 10 years, from March 1994 to March 2004, I held this position at the crossroads between law and politics – three years with Boutros Boutros-Ghali and seven years with Kofi Annan.

During my time as legal adviser of the Ministry for Foreign Affairs, I represented my country in many international contexts. Among my obligations was also to be the

head of the legal department in the Ministry and to supervise our work in the sixth (Legal) Committee of the United Nations General Assembly. As a matter of fact, my obligations spanned from human rights to the law of the sea. By way of example, during all these years, I was the agent of my government before the European Court of Human Rights.

With respect to international criminal law, a crucial moment came in August 1992, when the Conference on Security and Cooperation in Europe (CSCE), now the Organization on Security and Co-operation in Europe (OSCE), appointed me a war crimes rapporteur in Bosnia and Herzegovina and Croatia. In accordance with the rules, the two states would appoint a second rapporteur. The two rapporteurs would then nominate a third rapporteur. The two states nominated my colleague Helmut Türk, who was the legal adviser in the Ministry for Foreign Affairs in Austria. It goes without saying that in nominating a third rapporteur we had to look for a woman. We found a very competent colleague in Gro Hillestad Thune, the Norwegian member of the Council of Europe Commission of Human Rights.

The three of us started working immediately. We visited Croatia between September 30, and October 5, 1992. Two days later, on October 7, 1992, we delivered our first report, suggesting among other things that a committee of experts from interested states should be convened as soon as possible in order to prepare a draft treaty establishing an international *ad hoc* tribunal for certain crimes committed in the former Yugoslavia.¹ This, our first report, is referred to in William Schabas' contribution on the UN Commission of Experts established pursuant to Security Council Resolution 780 (1992). As CSCE rapporteurs, we had several very positive contacts with the members of the Commission.

For security reasons we were not able to visit Bosnia and Herzegovina, and thus no action had been taken by the CSCE with respect to our proposal for a committee of experts. On November 24, 1992, we offered to make an interim report on Bosnia and Herzegovina analyzing the relevant penal law, and to draft a convention establishing an international *ad hoc* tribunal to deal with war crimes and crimes against humanity committed in the former Yugoslavia. On December 15, 1992, the CSCE Council accepted our proposal, foreseeing continuing consultations in the matter with the UN Commission of Experts.

On February 9, 1993, my two co-rapporteurs and I presented our final report.² In this report, we proposed that a war crimes tribunal for the former Yugoslavia should be established on the basis of a convention. A treaty was the only legal avenue

¹ Report by Rapporteurs (Corell-Türk-Thune) under the CSCE Moscow Human Dimension Mechanism to Croatia of Oct. 7, 1992, available at www.havc.se/res/SelectedMaterial/19921007cscerreportoncroatia.pdf.

² Proposal for an International War Crimes Tribunal for the Former Yugoslavia by Rapporteurs (Corell-Türk-Thune) under the CSCE Moscow Human Dimension Mechanism to Bosnia-Herzegovina and Croatia of February 9, 1993, available at www.havc.se/res/SelectedMaterial/19930209cscceproposalwarcrimestribunal.pdf.

for the CSCE. At the same time, the question of establishing such a court was discussed in the UN Security Council. The CSCE therefore immediately forwarded our proposal to the United Nations. On February 22, 1993, the Security Council decided to establish the International Criminal Tribunal for the Former Yugoslavia (ICTY), mainly on the basis of the report just delivered by the UN Commission of Experts. I thought that this was a very positive development when, on May 25, 1993, the Council adopted Resolution 827 (1992) approving the Statute of the ICTY.

On March 6, 1994, I took up my position as the UN Legal Counsel, while the ICTY was in the process of being established. A month later, on April 6, 1994, the genocide in Rwanda broke out, and I became involved in the establishment of another tribunal, the International Criminal Tribunal for Rwanda (ICTR). As these two ad hoc tribunals started their work, in 1998, I was the representative of the secretary general at the Rome Conference that adopted the Rome Statute of the ICC. Later, I chaired the UN delegations when we negotiated the agreements establishing the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC). When the Rome Statute entered into force in 2002, I was also involved in the first phase of the establishment of the International Criminal Court (ICC).

The first contribution in the book is by Leila Nadya Sadat. In a very limited space she provides a learned and very enlightening description of the journey of international criminal justice over the past century. This part is of utmost importance since it will assist readers by providing a genuine background on the efforts that led to the creation of the tribunals described in the book. She is very well placed to make this contribution because of her knowledge and experiences in the field of international criminal law.

As a matter of fact, in 2008 she launched the Crimes Against Humanity Initiative with the aim of working toward a global convention on crimes against humanity.³ As a result, the question of elaborating such a convention is now on the agenda of the UN International Law Commission with Sean Murphy as the Commission's special rapporteur on the subject matter. Even though crimes against humanity is among the crimes defined in the Rome Statute of the ICC, it is important to have a specific convention on these crimes for several reasons: one being that it will facilitate cooperation among states in combating these crimes.

In her contribution, Leila Sadat points to the many difficulties that remain in establishing international criminal justice. As a matter of fact, she maintains that the difficulties cannot be overestimated.

A major problem that Leila Sadat focuses on is the fraught relationship that the ICC has with the UN Security Council. She maintains that the Council has neither backed the ICC with the power that it could have exerted in the cases that were

³ Reference is made to <http://law.wustl.edu/harris/crimesagainsthumanity/>.

brought before the ICC in situations that the Council had referred to the prosecutor. Nor has the Council been able to avoid the temptation of blocking the referral of situations to the prosecutor through the use of the veto. I completely share this view, and I have constantly maintained that the Council has to use the same yardstick when it applies the Rome Statute in these situations.⁴

Toward the end of her contribution Leila Sadat maintains that justice works best when it is consistently and even-handedly applied and that this requires faith, focus, financing and commitment by world leaders. Just as the personnel of these new institutions have been asked to do their jobs, it is now the turn of the politicians of the world to do theirs. In my view, this is a fundamental requirement for establishing the rule of law at the national and international level. I will revert to this question toward the end of this introduction.

Reading Michael P. Scharf's excellent contribution on Robert H. Jackson and the Nuremberg Tribunal reminded me of Telford Taylor's *The Anatomy of the Nuremberg Trials*. The book had just been published when I was appointed war crimes rapporteur in 1992, and I read it with great interest and admiration. This deepened my interest in the trials of the International Military Tribunal and also of the personalities involved in the trials, in particular, Chief US Prosecutor Robert H. Jackson. I have been privileged to learn more about him in later years, after I became a member of the board of directors of the Robert H. Jackson Center in Jamestown, NY. Through the annual International Humanitarian Law Dialogs, initiated by David M. Crane and held in Chautauqua, NY, I have also been privileged to meet regularly with the present international prosecutors. In 2016, the Dialogs were held on 29 and 30 September in Nuremberg in connection with the seventieth anniversary of the judgments of the International Military Tribunal – a very solemn occasion at which Michael Scharf also spoke.

The insightful contribution by William Schabas on the Balkan investigation and the UN Commission of Experts established by Security Council Resolution 780 (1992) is very important in understanding the complex background to the establishment of the ICTY. As I have already explained, there were several very positive contacts between the members of the UN Commission and the CSCE rapporteurs. As a matter of fact, on January 24, 1993, before completing our final report, we met with three of the members of the UN Commission, namely Chairman Fritz Kalshoven, Cherif Bassiouni and William Fenrick. We further had consultations with Bassiouni on legal and technical issues the day after. As it appears from our final report, during our talks, the members of the Commission expressed the view that the

⁴ See, e.g., Hans Corell, *The Mandate of the Security Council in a Changing World*. In: *International Law and Changing Perceptions of Security*. Eds. Jonas Ebbesson, Marie Jacobsson, Mark Klamburg, David Langlet and Pål Wrangé. Leiden/Boston: Brill/Martinus Nijhoff Publishers (2014) (pp. 39–58), available at www.havc.se/res/SelectedMaterial/20142224ilperceptionsofsecurity.pdf.

Commission was not mandated to occupy itself with the question of the establishment of an international criminal court. However, they demonstrated a profound interest in the establishment of such a court, and as CSCE rapporteurs, we were able to draw on their thinking in this field.

Against this background it is also of great importance to read William Schabas' description of the Balkan investigation as a background to the contribution by Richard J. Goldstone.

The first contribution from the founding prosecutors comes from Richard J. Goldstone. It reminds me of the worry that we felt in the UN when the Venezuelan prosecutor, who had been appointed chief prosecutor of the ICTY in October 1993, resigned only three days after he had taken up his position in January 1994. So, when I arrived in the UN in March 1994, there was no chief prosecutor in the ICTY. This was of great concern to us, and the search for a suitable candidate was ongoing. We should also remember that this was happening at the same time as the genocide in Rwanda. When I was informed that Richard Goldstone had been mentioned as a candidate, I was extremely pleased. At long last, the ICTY would become operational.

No doubt, the chief prosecutor would face tremendous challenges. Basically, with the exception of the lessons from the Nuremberg trials, organizing the work in the Office of the Prosecutor would be like navigating in uncharted waters.

When Richard Goldstone makes reference to the first trial, the *Tadić* case, I recall that some thought that this case was not prominent enough to be the first case to be dealt with by the ICTY. My immediate reaction when I heard this argument was that under no circumstances should the UN, and in particular the Office of Legal Affairs, express opinions about who should be prosecuted before an international court. The prosecutor is independent and must go where the evidence leads him or her. As a matter of fact, based on my own experiences from the judiciary in my country, I thought that it was wise to start with a case that was not too complicated and that would allow the different organs of the tribunal to develop their working methods. I therefore note with sympathy Richard Goldstone's hindsight reflection that it was an advantage having a middle-level defendant as the first to face trial in the ICTY.

Richard Goldstone's reference to the establishment of the ICTR reminds me of the resistance that we experienced from the government of Rwanda during the establishment of this tribunal. As a non-permanent member of the Security Council at the time, Rwanda had voted against the establishment of the tribunal, in part because it was not authorized to apply the death penalty. In November 1994, I was therefore sent to Rwanda to convince President Bizimungu, Vice President Kagame and Prime Minister Twagiramungu that they should cooperate with the tribunal. I will never forget my security officers' remark when we flew over the country: "There are now more houses than people down there." That was a genocide exploding in my face!

David J. Scheffer's reference to issues of corruption and maladministration within the ICTR – though not involving the chief prosecutor – reminded me of all the work we had to carry out in the UN Secretariat to deal with this. It took a long time before we had identified individuals who could run the tribunal's registry properly.

The pioneering efforts by Richard Goldstone, the other prosecutors and others who served in the ICTY and ICTR deserve respect. No doubt, this has contributed to raising the awareness of the importance of establishing justice in order to gain peace. These efforts have now become part of the rule of law paradigm that is a precondition for creating peace and security in the world.

Also, the establishment of the two tribunals is an interesting example of how an international treaty can be construed based on how realities develop. The fact that the members of the UN Security Council thought that it was within their competence to establish the two tribunals is a very important development in international law. It is also against this background that Article 13 (b) of the Rome Statute should be understood. According to this provision, the ICC may exercise its jurisdiction with respect to a crime referred to in Article 5 in the Statute in accordance with its provisions "if – – [a] situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations." In this way, the competence that the Council asserted in 1993 and 1994 is confirmed also in the Rome Statute of the ICC.

David M. Crane's reflections and perspectives on the SCSL is fascinating reading. It is a firsthand illustration of the complexities that an international prosecutor is faced with when opening an investigation in a particular situation. It is also highly instructive as a description of the dilemmas that the ICC Prosecutor has to deal with in the situations that he or she encounters. David Crane's contribution also reminds me of my positive experiences when negotiating the agreement between the UN and Sierra Leone on the establishment of the SCSL.

For my part, I have no doubt whatsoever that the government of Sierra Leone was deeply committed to creating a genuine, independent and impartial tribunal. My counterpart was Solomon Berewa, then Minister of Justice. He was very cooperative and fully understood that an agreement with the UN must observe the standards that apply with respect to criminal justice under international law. In particular, since the court would have both national and international judges, he fully understood that the majority of the judges in the chambers had to be international judges. As a matter of fact, when the government of Sierra Leone made its first nomination of judges in the court, their proposal included a judge from another country.

Furthermore, if someone had suggested to me when I signed the agreement with Solomon Berewa on January 16, 2002 that Charles Taylor would stand trial before the SCSL, I would not have believed it. And yet, this is what happened.

There is one situation that I have often revisited over the years, namely a meeting with a group of traditional chiefs in Sierra Leone, a few of them women, who wanted to see me. One of the reasons was the discussion concerning the court's personal jurisdiction, which in the final agreement was limited to "persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law."⁵ During my first visit to Freetown, I had seen terrible things: children who were mutilated, with maybe a hand or a foot cut off. I was made aware that the perpetrators were often very young and that they might have been victims themselves in a sense – taken from their families, maybe drugged and taught to commit these atrocities. The question was if these children should also be brought to justice.

In the meeting, one of the chiefs rose in a dignified manner and asked what he should tell his people, who were aware that there were so many perpetrators among them, when the UN offered a court that could only try a few persons. I thought for a moment and then said that this was the position of the UN, and that it would simply not be possible to bring all these perpetrators to justice. Even the best organized criminal justice system would crumble if it had to hear so many cases. I then referred to Nelson Mandela and the manner in which he had dealt with the situation in South Africa when he finally came out of prison: the Truth and Reconciliation Commission. In Sierra Leone, there was already an agreement at the national level that there would be a Truth and Reconciliation Commission and that this Commission would work in parallel with the Special Court! The Chief looked in silence at his colleagues around the table for a few moments. And then they all slowly nodded, likewise in dignified silence.

There is one element in David Crane's contribution that is of particular interest to me: his remark that competent judges at the international level remain a challenge. Based on my own courtroom experience, I can only emphasize this element. I have developed my thoughts about this in another context, and in my view, to elect persons to the ICC who have no courtroom experience whatsoever is simply not appropriate – no matter what other qualifications these candidates may have.⁶

Another striking part in David Crane's contribution is his recollection of his departure from Sierra Leone after his successor Desmond de Silva took over. In the helicopter carrying him across the bay to Lungi Airport, he said a prayer to get him safely to the airport, as a couple of these helicopters over the years had simply stopped working and dropped into the bay. He was terrified. I had exactly the same experience when I had performed my very last official function as the UN legal

⁵ Statute of the Special Court for Sierra Leone, Art. 1, ¶ 1 (Jan. 2002), available at www.rscsl.org/Documents/scsl-statute.pdf.

⁶ Hans Corell, *Reflections on the Role of International Prosecutors and the Judges of the International Criminal Court*. In: *Foreword to: International Prosecutors*. Eds. Luc Reydam, Jan Wouters and Cedric Ryngaert. Oxford University Press (2012) (pp. v–xi), available at www.havc.se/res/SelectedMaterial/internationalprosecutors_prelims.pdf.

counsel, namely representing Secretary General Kofi Annan at the inauguration of the SCSL courthouse in Freetown in March 2004. Like David, I made it to the airport in the helicopter. But sadly, a few days later I heard that it had fallen out of the sky, and the pilot and the soldiers onboard had lost their lives.

Luis Moreno Ocampo's contribution brings back many memories of the intense work involved in the creation of the ICC during the 1990s. The basic draft of the Rome Statute was provided by the International Law Commission, which is serviced by the Codification Division of the UN Office of Legal Affairs. The work was then pursued by the sixth (Legal) Committee of the General Assembly. In the summer of 1998, the Rome Conference for the establishment of the ICC was convened. As the representative of the secretary general at the conference, I had excellent support from Executive Secretary Roy S. Lee and Secretary of the Committee of the Whole Mahnoush H. Arsanjani. The conference was a great success. On July 17, 1998, the Rome Statute was adopted. The requirement for entry into force was 60 ratifications. These were received in record time. On July 1, 2002, the ICC Statute entered into force, and the judges were sworn in on 11 March 2003.

On April 21, 2003, Luis Moreno Ocampo was elected ICC prosecutor by the Assembly of States Parties to the Rome Statute. With respect to his contribution, I noted with particular interest the key policies for implementing the mandate of the Office of the Prosecutor: "a) complementarity, b) focusing on those bearing the greatest criminal responsibility, and c) maximize the Office of the Prosecutor contribution to the prevention of future crimes."

As regards the policy to fully respect the principle of complementarity this is of course one of the cornerstones in the Rome Statute. It is obvious that the primary objective of dealing with the crimes defined in the Rome Statute is that justice is done at the national level. At the same time, it is obvious that the national justice system may not function properly in areas where these grave crimes have been committed.

In my view the situation in Libya is an example of this dilemma. On February 26, 2011, the UN Security Council adopted Resolution 1970 (2011) referring the situation in Libya since February 15, 2011 to the ICC prosecutor. Under the Rome Statute, states have the right to challenge the admissibility of cases brought before the ICC. While the ICC retains the authority to determine whether it has the jurisdiction to try a case, a challenge may be raised if, for example, a state with jurisdiction claims that it is investigating and prosecuting the case.

After a preliminary examination of the available evidence surrounding the charges against Saif al-Islam Gaddafi and Abdullah al-Senussi, ICC Prosecutor Luis Moreno Ocampo concluded that there was no "genuine national investigation or prosecution" taking place to satisfy the criteria for deference to national authorities. Libyan officials, for their part, argued that the trials of Gaddafi and Senussi were of national importance and should be conducted in Libya. However, during