

Cambridge University Press
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Edited by David M. Crane, Leila Sadat, Michael P. Scharf
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THE FOUNDERS

The Balkan wars, the Rwanda genocide, and the crimes against humanity in Cambodia and Sierra Leone spurred the creation of international criminal tribunals to bring the perpetrators of unimaginable atrocities to justice. When Richard J. Goldstone, David M. Crane, Luis Moreno Ocampo and Robert Petit received the call, they each set out on a unique quest to build an international criminal tribunal and launch its first prosecutions. Never before have the founding international prosecutors told the behind-the-scenes stories of their historic journey. With no blueprint and little precedent, each was a path-breaker. This book contains the first-hand accounts of the challenges they faced, the obstacles they overcame, and the successes they achieved in obtaining justice for millions of victims.

David M. Crane was the first American to be named the chief prosecutor of an international war crimes tribunal since Justice Robert Jackson at Nuremberg in 1945. He is one of the most recognizable international criminal lawyers in the world, renowned as the person who brought to justice the most powerful warlord in Africa, President Charles Taylor of Liberia. Crane remains the only person to have indicted a sitting head of state for war crimes and crimes against humanity in the modern era. Crane is now leading the international effort to hold President Assad of Syria and his henchmen accountable.

Leila N. Sadat is the James Carr Professor of International Criminal Law at Washington University Law and Director of the Harris World Law Institute. Since 2012 she has served as Special Adviser on Crimes Against Humanity to the ICC Prosecutor, and in 2008 launched the *Crimes Against Humanity Initiative* to address the scourge of global atrocity crimes and draft a treaty on their punishment and prevention. Sadat recently received an Honorary Doctorate from Northwestern University and the Arthur Holly Compton Distinguished Faculty Award at Washington University. She is incoming President of the International Law Association (American Branch) and a member of the US Council on Foreign Relations.

Michael P. Scharf is Dean of Case Western Reserve University School of Law. Scharf is the author of eighteen books, including three that have won national book-of-the-year honors. During the George H. W. Bush and Clinton administrations, he served as Attorney-Adviser for UN Affairs in the Office of the Legal Adviser of the US Department of State. He is the co-founder of the Nobel Peace Prize-nominated Public International Law and Policy Group.

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FOUR PIONEERING INDIVIDUALS WHO LAUNCHED
THE FIRST MODERN-ERA INTERNATIONAL CRIMINAL
TRIBUNALS

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*This book is dedicated to
our colleagues at Nuremberg,
from whence it came*

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Contributors

Kofi Atta Annan is a Ghanaian diplomat who served as the seventh Secretary General of the United Nations from January 1997 to December 2006. Annan and the UN were the co-recipients of the 2001 Nobel Peace Prize. He is the founder and chairman of the Kofi Annan Foundation, as well as chairman of The Elders, an international organization founded by Nelson Mandela.

Hans Corell joined the Swedish Ministry of Justice in 1972 and was a member of the Swedish Delegation to the United Nations from 1985 to 1993. From 1994 to 2004, he served as Under-Secretary General for Legal Affairs and the Legal Counsel of the United Nations. In his years of service at the UN, Corell was involved in the establishment of both the ad hoc criminal tribunals and the International Criminal Court. Since his retirement from public service, he has become involved in the work of the International Bar Association; the International Center for Ethics, Justice and Public Life at Brandeis University; and the Hague Institute for the Internalization of Law. He has also been Chairman of the Board of Trustees of the Raoul Wallenberg Institute of Human Rights and Humanitarian Law at Lund University, Sweden (2006–2012). Corell's long and distinguished career in diplomacy, international justice, and foreign affairs has seen him honored with the William J. Butler Human Rights Medal, the Frederick K. Cox International Humanitarian Award for Advancing Global Justice, and the World Order Under Law Award.

David M. Crane was appointed a professor of practice at Syracuse University College of Law in the summer of 2006, after serving from 2002 to 2005 as the founding chief prosecutor of the Special Court for Sierra Leone. He was appointed to that position by the Secretary General of the United Nations, Kofi Annan, on April 19, 2002, with the rank of Undersecretary General. Crane's mandate was to prosecute those who bear the greatest responsibility for war crimes, crimes against humanity, and other serious violations of international human rights committed during the civil war in Sierra Leone in the 1990's. Among those he indicted for those horrific crimes was the president of Liberia, Charles Taylor, the

first sitting African head of state in history to be held accountable for war crimes. David Crane was the first American since Justice Robert H. Jackson at Nuremberg, in 1945, to be the Chief Prosecutor of an international war crimes tribunal. The Special Court for Sierra Leone was nominated for the Nobel Peace Prize in 2010. Prior to serving as chief prosecutor, David Crane served over 30 years in the federal government of the United States. The positions he held during his three decades of public service include Senior Inspector General of the Department of Defense, Assistant General Counsel of the Defense Intelligence Agency, and Waldemar A. Solf Professor of International Law at the United States Army Judge Advocate General's School. Professor Crane was on the leadership council of the American Bar Association's International Law Section and served as the Chairman of the Section's Blue Ribbon Panel on the International Criminal Court's 2010 Review Session. He is also a Fellow of the American Bar Association. In 2006, he founded Impunity Watch (www.impunitywatch.net), a law review and public service blog. In 2011, he founded the Syrian Accountability Project, one of the first NGOs to work on the atrocities in Syria. Professor Crane holds a Juris Doctor degree from Syracuse University, a Masters of Arts Degree in African Studies and a Bachelor of General Studies in History, summa cum laude, from Ohio University. For his service to humanity, Case Western Reserve University in Ohio awarded him an honorary Doctor of Laws degree in May 2008, as did Ohio University in April 2017.

Richard J. Goldstone is a former justice of the Constitutional Court of South Africa and has served as a member and chairperson of a number of UN committees and commissions and NGO advisory boards. From 1994 to 1996 he served as the chief prosecutor for the United Nations International Criminal Tribunals for the Former Yugoslavia and Rwanda, and since 2004, he has been a visiting professor of law at a number of prestigious universities. Justice Goldstone has been awarded many awards for his work in the field of international criminal law and justice, including the International Human Rights Award of the American Bar Association and honorary doctorate degrees from universities in South Africa, North America, Europe, and Israel.

Luis Moreno Ocampo Following his successful legal career in Argentina, where he served as the deputy prosecutor in the "Junta trial" in 1985, Luis Moreno Ocampo became the first prosecutor of the International Criminal Court in June of 2003, a role he held until his tenure ended in 2012. In his role as chief prosecutor, Moreno Ocampo conducted investigations in seven different countries and brought charges against some of the worst violators of international law known in modern times. Moreno Ocampo has also served as a visiting professor at Stanford University and Harvard University, as a member of a number of advisory boards, and as chairman of the World Bank Expert Panel on the Padma Bridge Project. He is currently a senior fellow at the Jackson Institute for Global Affairs at Yale University.

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Robert Petit has extensive experience as an international criminal prosecutor, having worked as a legal advisor for the Office of the Prosecutor at the International Criminal Tribunal for Rwanda, a regional legal advisor to the United Nations Mission in Kosovo, a prosecutor for the Serious Crimes Unit as part of the United Nations Mission of Assistance to East Timor, and as a senior trial attorney in the Special Court for Sierra Leone. From 2006 to 2009 Petit served as the international co-prosecutor of the Extraordinary Chambers of the Courts of Cambodia, where he was responsible for prosecuting those responsible for violations of international law that occurred in that country in the 1970s. Petit has written extensively on international law and human rights laws, and in 2009, he received the Frederick K. Cox International Humanitarian Award for Advancing Global Justice from Case Western School of Law.

Leila N. Sadat is an internationally renowned human rights expert known for her expertise in public international law, international criminal law and foreign affairs. The James Carr Professor of International Criminal Law at Washington University School of Law, and Director of the Whitney R. Harris World Law Institute since 2007, she is a dedicated teacher and award-winning scholar who has published more than 100 books and articles in leading journals, academic presses, and media outlets throughout the world. In December 2012, International Criminal Court Prosecutor Fatou Bensouda appointed her as Special Adviser on Crimes Against Humanity. In 2008, she launched the Crimes Against Humanity Initiative, an international effort to study the problem of crimes against humanity and draft a global treaty addressing their punishment and prevention. The draft treaty is now available in eight languages and is currently being debated by the UN International Law Commission and governments around the world. From 2001 to 2003 Sadat served on the US Commission for International Religious Freedom. Bilingual in English and French, Sadat has lectured or taught at academic institutions throughout the world, and holds or has held leadership positions in many professional associations and learned societies. Prior to joining the faculty at Washington University, she practiced international commercial law in Paris, France.

William Schabas holds positions at a number of universities across the globe. He was the director of the Irish Centre for Human Rights at the National University of Ireland, Galway, and an invited visiting scholar at the Paris School of International Affairs (*Sciences Politiques*). Schabas has published extensively in the fields of international law and international human rights law, and his writings have been translated into Russian, German, Spanish, Portuguese, Chinese, Japanese, Arabic, Persian, Turkish, Nepali, and Albanian. As a result of his contributions to the field of international criminal law, Schabas has been awarded the Vespasian V. Pella Medal for International Criminal Justice of the Association internationale de droit pénal

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and the Gold Medal in the Social Sciences of the Royal Irish Academy, as well as honorary doctorate degrees from several universities.

Michael P. Scharf is the Dean of Case Western Reserve University School of Law and the Joseph C. Hostetler – BakerHostetler Professor of Law. Scharf is the author of eighteen books, including *Balkan Justice*, which was nominated for a Pulitzer Prize in Letters in 1997; *The International Criminal Tribunal for Rwanda*, which was awarded the American Society of International Law's Certificate of Merit for outstanding book in 1999; *Peace with Justice*, which won the International Association of Penal Law's book of the year award for 2003; *Enemy of the State*, which won the International Association of Penal Law's book of the year award for 2009; *Shaping Foreign Policy in Times of Crisis* (Cambridge University Press, 2010); and *Customary International Law in Times of Fundamental Change* (Cambridge University Press, 2013). During the elder Bush and Clinton administrations, Scharf served in the Office of the Legal Adviser of the US Department of State, where he held the positions of Attorney-Adviser for Law Enforcement and Intelligence, Attorney-Adviser for United Nations Affairs, and delegate to the United Nations Human Rights Commission. In February 2005, Scharf and the Public International Law and Policy Group, an NGO he cofounded and directs, were nominated for the Nobel Peace Prize by six governments and the prosecutor of an international criminal tribunal for the work they have done to help in the prosecution of major war criminals, such as Slobodan Milošević, Charles Taylor, and Saddam Hussein. During a sabbatical in 2008, Scharf served as Special Assistant to the Chief Prosecutor of the Cambodia Genocide Tribunal. A graduate of Duke University School of Law (Order of the Coif and High Honors), and judicial clerk to Judge Gerald Bard Tjoflat on the Eleventh Circuit Federal Court of Appeals, Scharf is an internationally recognized expert who has testified before the Senate Foreign Relations Committee and the House Armed Services Committee and has appeared frequently in the national news media. He is also host of the radio program, "Talking Foreign Policy," produced by Cleveland's NPR Station and syndicated in Florida, Texas, North Carolina, and Maine. In 2013, Scharf offered the first ever international law MOOC, via Coursera, which has enrolled 120,500 students from 137 countries to date. In 2016, he was ranked as one of the top 20 most-cited authors in the field of international law.

David J. Scheffer holds an endowed professorship and is Director of the Center for International Human Rights at Northwestern School of Law. He currently serves as the UN Secretary General's Special Expert on United Nations Assistance to the Khmer Rouge Trials. Scheffer was the US Ambassador at Large for War Crimes Issues from 1997 to 2001, and he led the US delegation at the UN talks to establish the International Criminal Court. He was also closely involved with the establishment of the earlier ad hoc tribunals. He has published many works on

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international legal and political issues, and his book *All the Missing Souls: A Personal History of the War Crimes Tribunals* received the 2012 Book of the Year Award from the American National Section of the International Association of Penal Law.

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Foreword

The common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power.

US Chief Prosecutor Robert H. Jackson, in his opening statement before the International Military Tribunal at Nuremberg in 1945

Throughout history, men of great power have destroyed their own people. Yet it is only recently that mankind has stepped forward and sought to hold those responsible for atrocity accountable. In the past, there was little of this, and the beast of impunity nibbled around the edges of civilization. A commentator once said that the history of mankind is the history of war and the history of war is the history of mankind: an apt point to make.

In the twentieth century, tens of millions of human beings were destroyed at the hands of their own governments. Yet history and circumstance pointed to a possible better place. In the midst of this bloody century there were four bright and shining years that augured well for the future. From 1945 to 1949, the United Nations was formed, the Nuremberg Principles adopted, and key human rights instruments, such as the Universal Declaration of Human Rights, the Genocide Convention, and the Geneva Conventions, were passed. In this short time, the cornerstone of the modern international criminal law paradigm was laid down.

Yet the shadow of the Cold War almost washed away this new hope for humanity. The geopolitical dynamic that split the world almost in half saw both sides look away from human rights abuses and atrocities in order to maintain a political check against the other. This was the true age of the dictator, as strongmen used the standoff between the West and the Soviet bloc to their advantage to seek, establish, and maintain absolute power. When the Iron Curtain rusted and finally fell, mankind paused and considered new ways of holding those who violated international law accountable. Could this be the beginning of the end of conflict, a true democratic world peace supervised by a renewed United Nations?

This apparent new world order quickly slid into a new world disorder. The Balkans, the Great Lakes region in East Africa, West Africa, and Cambodia demanded attention and action. The international community could not simply

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look away as it had for the past several decades. Could the world establish accountability mechanisms for current events?

During the 1990s, the United Nations stepped in to do just that. Bold action was needed to address atrocities not just in specific contexts, but to establish a court of last resort to deal with the most egregious of international crimes. Through the remarkable cooperation between the United Nations, its Security Council, and sovereign states, these tribunals and courts were brought into being, representative of mankind's hope that the rule of law was more powerful than the rule of the gun.

What you will come to understand and appreciate in this historic book is how four individuals' pioneering efforts helped to shape these extraordinary bodies. As secretary general of the United Nations (1997–2006), I played a role in the creation of these tribunals and courts, but their administration and functioning depended on the independence and integrity of those who served in them, especially the prosecutors. Hearing their experiences firsthand through the narratives in this text illuminates the immense challenges and triumphs of these unique individuals in their pursuit of justice. I have always supported the need for an international body of law to prevent and hold accountable those who would commit mankind's worst crimes. It is my hope that the experiences found in this book will be but the first steps in what may be a long but worthwhile journey toward justice for mankind.

At the end of the day, the bright red thread woven into the fabric of modern international criminal law is politics. If there is a political will to do so, mankind can face down the beast of impunity. What follows shows what good that political will can do, as well as hard work, perseverance, and a little bit of luck.

Kofi A. Annan
Geneva
May 2017

Preface

This extraordinary book project began over a glass of wine during the annual International Humanitarian Dialogs at the world famous Chautauqua Institution in 2015. Each year, most of the world's international chief prosecutors gather to reflect upon the various issues and challenges pertaining to modern international criminal law. The prosecutors are all friends, and the meetings are informal and collegial. One evening, sitting together on the famous porches of the Athenaeum Hotel while we sipped our wine, I asked my colleagues, somewhat rhetorically, whether any one of us ever actually had asked for the unique job of being a chief prosecutor of an international war crimes tribunal? Not one of us actually asked for, sought out, or applied for the positions we would eventually fill in Yugoslavia, Rwanda, Sierra Leone, or Cambodia, even as prosecutors of the International Criminal Court.

As it turns out, as we went around telling our selection stories, we all got what we called “the phone call.” Unexpected, surprising, and/or “out of the blue,” so to speak, we received that call asking us whether we would consider being a chief prosecutor. Four of us got the call not only to be prosecutors, but also to help create a brand new tribunal.

After we all left Chautauqua, as I flew home to Maggie Valley in North Carolina, I realized that there have only been five individuals who have created an international justice mechanism. Four of us exist in the modern era. The first was Robert H. Jackson, who had passed decades earlier. As I continued to mull this over, I came to the realization that no chief prosecutor has ever written about how they created the prosecution office of their tribunals. Wouldn't it be amazing if I could get my colleagues who created the five modern international tribunals to write about that experience in a book? Hence the idea of *The Founders* was floated by those founding chief prosecutors, and each agreed to write a chapter on their experiences in the creation of the tribunals in Yugoslavia, Rwanda, Sierra Leone, the ICC, and Cambodia. As one of those founders for the tribunal in Sierra Leone, I would write that chapter.

Of course these important experiences needed context, so I reached out to the best and brightest in the field of international criminal law to help edit and write those

contextual chapters. This book contains amazing chapters on the role that Robert H. Jackson played in creating the cornerstones for our modern international criminal law paradigm written by Michael P. Scharf; Leila N. Sadat tracks the evolution of the general principles that make up modern international criminal law; William Schabas provides the reader an overview of the early investigatory steps related to the Balkans, as the international community considered the creation of its first modern international tribunal; Hans Corell, so instrumental in helping to create each of the modern tribunals as UN Legal Counsel, was invited to introduce this volume; and *The Founders* finishes with the important perspectives about the founding of the tribunals by David J. Scheffer, the architect of the United States' role in modern international criminal law and some of the tribunals themselves, such as the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the International Criminal Court.

We all met over breakfast in September 2016 at Nuremberg, Germany, for the tenth annual International Humanitarian Law Dialogs. It is from this meeting that there was mutual agreement to write *The Founders*. All agreed that Richard J. Goldstone would compose a chapter on the creation of the Yugoslav and Rwandan tribunals, I would cover the Special Court for Sierra Leone, Luis Moreno Ocampo would write about the International Criminal Court, and Robert Petit would report on the Extraordinary Chambers in the Courts of Cambodia. All of us felt that context was very important, and so the topical arrangement was conceived, as well as who should write those chapters. Thus you now have before you *The Founders*.

I gratefully acknowledge the steady and professional guidance of my fellow editors, Leila N. Sadat and Michael P. Scharf. Their experience in the details of writing a book such as this was invaluable. Of course there were a myriad of students and research assistants involved, as always, in the background, but whose work was critical in the creation of this book. Special recognition goes to Colin Tansits, our project secretary, who patiently helped to put the manuscript into a presentable form. Other students who helped immensely were Casey Kooring and Sean Mills. All are from Syracuse University College of Law.

I want to acknowledge the vision of John Berger and his team at Cambridge University Press, who enthusiastically agreed to publish for the first time the experiences of all four founding chief prosecutors in one book. This was not meant to be just an academic work, but a book that would highlight the human dynamic of bringing justice to victims of atrocity. It's edgy, it's honest, and it's frank. The authors, hopefully, were at the vanguard of mankind's ability to hold accountable those who prey on their own citizens and nibble away at the edges of civilization. *The Founders* will show that we started something amazing.

David M. Crane
 Maggie Valley, North Carolina