

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/19921007cscer eportoncroatia.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/19930209cscproposalwar crimestribunal.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 Klamberg, 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

the process both the Libyan government and the Office of the Prosecutor asked the Pre-Trial Chamber to declare the case against al-Senussi inadmissible before the ICC. The ICC Pre-Trial Chamber determined that competent domestic authorities in Libya were conducting domestic proceedings against al-Senussi and that Libya was neither unwilling nor unable to fulfil its responsibilities vis-à-vis international law. Therefore, the Pre-Trial Chamber ruled that the case against al-Senussi was inadmissible before the ICC. With respect to the details of the case, reference can be made to a study by Academie Diplomatique Internationale and the International Bar Association.⁷

To me it is very difficult to understand how the Pre-Trial Chamber could come to the conclusion that courts in a country that has been under a dictatorship for decades are able to try cases against main actors of this regime. Is it really possible to find professional, independent and impartial judges who are able to hear cases against actors of this kind in such a country? I do not think so. It is therefore of greatest importance that the principle of complementarity is applied with utmost caution in situations like the one in Libya. Reference can also be made here to the chapter by David Scheffer.

With respect to the policy to focus on those “most responsible,” I think that this is the proper way to proceed. At this stage in the development of international criminal justice this is important. It is at this level that the violence committed is orchestrated, and it is therefore crucial that the prosecutor focus on those who are ultimately responsible for the atrocities. At the invitation of the John Marshall School of Law, I have developed my own thoughts on this topic.⁸

Lastly, with respect to the policy of contributing to prevention of future crimes, this must of course be the fundamental objective of the criminal justice system at both the national and international levels. This is also why it is so important that the same yardstick is used, in particular when the UN Security Council decides whether to apply or not to apply Article 13 (b) of the Rome Statute. It is sad to note that the Council falls short in this respect. The examples mentioned by Luis Moreno Ocampo are telling. Why Darfur and Libya, but not the Middle East or Burundi?

With respect to the different cases referred to, I have followed the situation in Kenya with particular attention in view of the fact that I had the privilege of assisting Kofi Annan in his capacity as chairman of the Panel of Eminent African Personalities. This Panel was established by the African Union in 2008 after the disastrous election in 2007 that generated the violence that led to the Kenyan cases

⁷ Academie Diplomatique Internationale and the International Bar Association: *International Justice and Diplomacy Case Studies*, forthcoming. See also Mark S. Ellis, *Trial of the Libyan regime – An investigation into international fair trial standards*, Nov. 2015, available at www.ibanet.org/Article/NewDetail.aspx?ArticleUid=759f1431-4e10-450d-998e-21349fd8bf26.

⁸ Hans Corell, *International Prosecution of Heads of State for Genocide, War Crimes and Crimes Against Humanity*. In: *The John Marshall Law Review* [43:xxv 2009] (pp. xxv–xli), available at www.havc.se/res/SelectedMaterial/20090916headsofstate.pdf.

before the ICC. For six years, this panel was engaged in supporting the Kenya National Dialogue and Reconciliation.

In an article published in 2014, I expressed my concerns about these cases.⁹ The point I made was that the Kenyan cases before the ICC went wrong from the very beginning, and there was a serious risk that they might become unmanageable at the trial stage. This has now come true.

The investigation produced two main cases, originally with six suspects, involving charges that included the following crimes against humanity: murder, deportation or forcible transfer of population, persecution, rape, and other inhumane acts. However, the charges were either not confirmed or were withdrawn concerning all these six suspects.

The problems that I foresaw have also been confirmed by the present ICC Prosecutor Fatou Bensouda. The following is a quote from an interview with her in *Foreign Affairs* in 2017:

In the Kenya cases, three people have already been indicted for interfering with witnesses. Arrest warrants have been issued against them. But Kenya, which has the obligation to surrender them, is not doing that. In the Kenya situation, what we have seen was really unprecedented. The level of witness tampering and obstructing the court has resulted in either having to withdraw the case, as I did in the Kenyatta case [against Kenya's president, Uhuru Kenyatta], or one of the judges declaring a mistrial, as in the Ruto case [against Kenya's deputy president, William Ruto].¹⁰

It is my firm conviction that the lesson that the ICC must draw from these cases is what I was taught as a law clerk many years ago: if someone is going to be indicted as a suspect for very grave crimes, by definition this person should be arrested and put in detention on remand. Otherwise, he or she will try to evade the trial and may also engage in interfering with the evidence.

With respect to the contribution on the ECCC by Robert Petit, I am not surprised at his criticism of the manner in which this court was set up. He even suggests that “if anyone had wanted to create an institution destined to fail he or she would have been hard-pressed to find a better model than that envisioned for the ECCC.”¹¹ For my part I am of the firm opinion that the ECCC should never be used as a model for any future effort of this nature.

As head of the UN delegation negotiating the agreement with Deputy Prime Minister Sok An, I was extremely concerned. As a matter of fact, about a month after the agreement on the SCSL was signed in January 2002, Secretary General Kofi Annan decided to withdraw from the negotiations with the government of

⁹ Hans Corell, *Challenges for the International Criminal Court*. In: *The Winter 2014 Issue of the International Judicial Monitor*, available at www.judicialmonitor.org/archive_winter2014/specialreport1.html.

¹⁰ *The International Criminal Court on Trial – A Conversation with Fatou Bensouda*. FOREIGN AFFAIRS 48–53 (Jan./Feb. 2017).

¹¹ See Petit, Chapter 7, this volume, at 126.

Cambodia. We had simply lost confidence in the process, which had gone on for several years.¹²

However, on December 18, 2002 we were forced back to the negotiating table by the General Assembly through Resolution 228. As I have explained in other writings, in some respects our hands were tied, which is also reflected in the agreement between the UN and the government, signed on June 6, 2003. The following is a quote from my address at the sixth annual International Humanitarian Law Dialogs in 2012:

Let me just say that, as a professional judge, I was extremely concerned when the U.N. Secretariat was forced back to the negotiation table by the U.N. General Assembly in December 2002. In some respects our hands were tied. Now, some of the things I warned against have actually occurred. I am sure that today even people without courtroom experience realize that the solution chosen for the ECCC should not be used as a model for any future effort of this nature. The U.N. imprint should not be given to institutions over which the organization does not have full administrative control.¹³

Robert Petit also says that he came to find that in Cambodia, the level of political interference, perceived or real, was beyond anything he had previously experienced and refers to the “ultimate disagreement” that he and his Cambodian co-prosecutor had over who to prosecute. For my part, I certainly foresaw this during the negotiations, which were the most difficult that I have ever conducted. This is why I must go into some detail in my comments on the ECCC.

First, I must be very clear about the fact that, during the negotiations, we never discussed who should be prosecuted for the simple reason that international law requires an independent prosecutor to decide this. I also kept in mind a communication from Prime Minister Hun Sen to the United Nations in 1999 in relation to a trial of a Cambodian citizen at the national level. In this communication to the UN he said that he had “no rights whatsoever to charge this or that person, or to pre-determine how many people will stand trial.”¹⁴ From Robert Petit’s contribution it is, however, very clear that this is precisely what happened.

This is also why there are, as he says, “some clear oddities with the statute starting with a conflict resolution mechanism that obviously foresaw fundamental

¹² Part of the explanation appears in my op-ed in the *International Herald Tribune* of June 19, 2002, available at www.globalpolicy.org/component/content/article/163/28839.html.

¹³ Hans Corell, *Reflections on International Criminal Law over the Past Ten Years*. Keynote Address at the Sixth Annual International Humanitarian Law Dialogs, held at Chautauqua, N.Y., on Aug. 26–28, 2012, pages 56–58, available at www.havc.se/res/SelectedMaterial/20120827corellkeynoteicl.pdf.

¹⁴ Identical letters dated March 19, 1999 from the Permanent Representative of Cambodia to the United Nations addressed to the Secretary-General and to the President of the Security Council: Annex: Declaration of Prime Minister Hun Sen of the Kingdom of Cambodia on the Issue of the Trial of Ta Mok, UN Doc. A/53/867, S/1999/298 (Mar. 19, 1999) at 2 (citing Mok as an exception), available at www.un.org/en/ga/search/view_doc.asp?symbol=S/1999/298.

disagreements between the internationals and their national counterparts.”¹⁵ The reason for these oddities is the so called super-majority that was introduced in the process from the outside. The supermajority is regulated as follows in Articles 3 and 4 of the ECCC agreement.

A decision by the Trial Chamber, composed by three Cambodian judges and two international judges, shall require the affirmative vote of at least four judges. A decision by the Supreme Court Chamber, composed by four Cambodian judges and three international judges, shall require the affirmative vote of at least five judges. This means that if there is no unanimity, at least one international judge would have to agree with the majority decision. Let me quote what I have said about this in the past:

It was also extremely difficult for me, as head of the U.N. delegation, to keep the negotiations on track, not least because many were involved, partly behind the scenes. One particular problem was the introduction of the super-majority idea brought in from outside. As a judge, I saw this as extremely problematic. It may be that one can handle this feature in the judgment itself. But a judge knows that a court hands down a magnitude of interlocutory decisions in a major trial. How does one deal with a super-majority there? The Co-Prosecutors and the Co-Investigating Judges were other complicating factors (see in particular Chapters 2, 5, and 6). In my opinion, the tribunal should have been an international tribunal with a single prosecutor and a majority of international judges.¹⁶

This brings me to the co-prosecutors and the co-investigating judges. The General Assembly resolution meant that the UN delegation had to accept this madness. But how should one deal with situations where the national and international co-prosecutors or co-investigating judges were in disagreement? This is why we invented the Pre-Trial Chamber, composed of three national and two international judges. As I have explained in detail to two researchers, the only task of this chamber was to settle such differences.¹⁷ The fact that this chamber has been given other tasks in the internal ECCC rules is in my view not in conformity with the agreement between the UN and the government.

As I told the researchers, it is an irony that we find a positive effect of the super-majority rule here. According to Article 7 of the agreement, a decision of the Pre-Trial Chamber, against which there is no appeal, requires the affirmative vote of at least four judges. In order to stop a prosecution before the ECCC, at least one international judge on the Pre-Trial Chamber would have to support such a decision. Otherwise the prosecution would go ahead in accordance with Article

¹⁵ See Petit, Chapter 7, this volume. ¹⁶ See *supra* note 6.

¹⁷ John D. Ciorciari and Anne Heindel, *Experiments in International Criminal Justice: Lessons from the Khmer Rouge Tribunal*, 35 *MICH. J. INT'L. L.* 358–442 (2015), available at www.mjilonline.org/wordpress/wp-content/uploads/2015/04/35.2.Experiments-in-International-Criminal-Justice-Lessons-from-the-K.pdf.

7, paragraph 4: “If there is no majority, as required for a decision, the investigation or prosecution shall proceed.”

I saw no other way of protecting the integrity and the dignity of the proceedings than to use the super-majority rule here. Irrespective of the final outcome, at least there would be a public hearing of the case in question before the ECCC. And afterward the general public would be in a position to form an opinion as to whether the final judgement was just.

The lesson from the ECCC process should be that it is important that those involved at the political level listen to people with courtroom experience. I know that some are trying to put the blame for the manner in which the ECCC were created on the UN Office of Legal Affairs. In my view this is utterly unfair. We realized that the manner in which the government wanted to shape the ECCC was not acceptable. Kofi Annan understood this and withdrew from the negotiations. Now we know what happened and can see the result. Robert Petit’s description proves the point. The trial of the Khmer Rouge leaders should have been entrusted to an international court designed along the lines of the SCSL, or there should have been a truth and reconciliation commission.

Furthermore, after the signing of the agreement on June 6, 2003, it took an inordinate time before the ECCC would become operational. It is noteworthy that it took until the autumn of 2005 until my successor Nicolas Michel could contact Robert Petit to inform him that he had been shortlisted for the post of international co-prosecutor with the ECCC.

For my part, the ECCC have been a delicate issue for the simple reason that I have no doubt whatsoever that the international judges and prosecutors would do their very best to contribute to a positive result and manage this institution as best as they could. And despite the ECCC’s structural flaws and functional challenges, I am sure that many Cambodians have welcomed the trials and think that the ECCC have had positive effects in Cambodia. Reference can also be made here to what David Scheffer says in his contribution.

At the same time, I have a very clear memory of my meeting with representatives of the non-governmental organizations in Cambodia during the negotiations. They were not interested in a court. What they wanted was a truth and reconciliation commission that could explain what had happened to their near and dear. But the government was not interested in such a commission.

The final chapter in the volume is by David Scheffer. It is a very enlightening and thoughtful contribution, which should be read in view of the fact that, for many years, he represented his country dealing with matters relating to international criminal justice. In 2012–2017 he also served as the UN secretary general’s special expert on UN Assistance to the Khmer Rouge Trials. This means that he has special knowledge about the political realities in connection with decision-making

regarding these matters at the national and international level. His contribution should therefore be read with great attention, in particular by politicians.

The main focus in this contribution is the cost of international criminal justice, which he describes as a favorite boogeyman for the critics of the tribunals. It is therefore interesting to take part of all the figures that he details with respect to the costs for justice both at the national and international level, and also the comparison of this cost with other expenditures, not least when it comes to military spending.

It is easy to agree with him that any commitment to the rule of law does not come cheaply, but compared to other societal costs it is a bargain. For my part, I have always maintained precisely this and that the preventive effect of the national criminal justice system must be transferred to apply also at the international level. Another similarity is that the system is implemented not only to punish those who commit crimes, but in particular to achieve crime prevention.

It is against this background one should view the role of the UN Security Council. If the Council could join hands in situations where it is obvious that the Council must exercise its responsibility to protect, it would send a very powerful signal around the world and contribute to preventing the kind of conflicts that generate the atrocities that international criminal justice has to deal with.

David Scheffer's description of the funding of the tribunals is very important. In his view, the reality is that governments and their taxpayers probably will keep balking at spending strained public monies on such ventures. In his view, it will therefore become increasingly necessary in future years to create new funding sources from the private and non-governmental sectors. In this context he also refers to the funding of the SCSL and the ECCC through voluntary contributions.

This reminds me that, when we prepared the report to the Security Council about the SCSL, I forgot to advise Secretary General Kofi Annan about the constitutional problem that funding through voluntary contributions entail. Within the Secretariat, we concluded that the intention of the Council was that the SCSL would be financed from voluntary contributions from UN member states. The secretary general's view was that the only realistic solution was financing through assessed contributions, in other words contributions decided by the General Assembly, and he provided reasons for this opinion. I have, in another context, expressed regret that we did not advise the secretary general to include in his report yet another argument in favor of assessed contributions, namely the constitutional argument.¹⁸ One should make a comparison with funding of courts at the national level. If national courts were funded by different donors and not from taxes or similar official revenues, what credibility would they have? This reasoning should actually be applied at the international level as well.

David Scheffer also believes that there will be a continuing need to build hybrid tribunals if national courts do not meet the challenge of accountability. This is

¹⁸ See *supra* note 12.

probably true. This could be through either regional treaty arrangements among interested nations, as suggested in 1993 by the CSCE rapporteurs for Bosnia and Herzegovina and Croatia before the Security Council took the initiative. It could also be achieved by treaty between the United Nations and one or more relevant governments. If the latter approach is utilized it is my sincere hope that the SCSL will be used as a model and not the ECCC. In case there is a regional treaty arrangement, I believe that this could actually be supported by the UN Security Council adopting a resolution under Chapter VII of the UN Charter, ordering states to assist this court. This is what I had in mind, if the CSCE alternative had been adopted back in 1993.

Finally, in a more general perspective the lesson that must be drawn from the establishment of these international tribunals and courts is that international criminal justice is an absolutely necessary component in order to establish the rule of law at the national and international level. Leila Sadat stresses that it is now the turn of the politicians of the world to do their job. Luis Moreno Ocampo says that the twenty-first century needs national leaders with global vision. David Scheffer stresses that it is important to ensure that lawmakers understand the value of achieving accountability for atrocity crimes, not only as an imperative requirement in societies built on the rule of law, but also as a primary tool in preventing further atrocities, which are manmade calamities that always cost societies far more to rectify than to prevent.

I could not agree more. Ever since I left the United Nations in 2004, I have constantly focused on the need for the rule of law and statesmanship, not least by those who represent the permanent five members of the UN Security Council. The world needs statesmen and stateswomen who understand that they must contribute to creating a world society where humans can live in peace and dignity with their human rights protected.

Against this background I am closing by quoting the following five recommendations from the Final Communiqué of the 26th Annual Plenary Meeting of the InterAction Council of Former Heads of State and Government in 2008:

Therefore, the InterAction Council recommends:

- Insisting that states observe scrupulously their obligations under international law, in particular the Charter of the United Nations and encouraging the leading powers to set an example by working within the law and abiding by it, realising that this is also in their interest;
- Affirming the commitment to settle international disputes through peaceful means and urging states to accept the compulsory jurisdiction of the International Court of Justice;
- Acknowledging that there are situations that require the Security Council to act with authority and consequence in accordance with the principle of the responsibility to protect;

- Calling for universal ratification of the Rome Statute of the International Criminal Court and the full cooperation with the Court on the part of all states;
- Calling for all states to devote resources to education on global ethics, the foundations of international law and the meaning of the rule of law at the national and international level¹⁹

The result of this meeting is that there is now available a short guide for politicians on the rule of law.²⁰ The guide is freely accessible for downloading and printing from the web in 23 languages, with more to come.

The person who gave us the idea of elaborating this guide was former Chancellor Helmut Schmidt of Germany. It is important that the main actors at the political level in the world are aware of their responsibility for the rule of law both at the national and international level. A crucial component of the rule of law is to establish criminal justice and deal with the impunity that threatens international peace and security. It is therefore also necessary that politicians understand the important role that prosecutors play in this work.

This book is a valuable contribution to the efforts of enlightening persons at the political level, as well as the general public, about many things that have to be kept in mind in establishing international criminal justice. Despite the challenges it is worth the struggle. The rule of law must be the cornerstone upon which civilization advances. What you will read next is how part of that cornerstone was put in place.

¹⁹ Available at <http://interactioncouncil.org/final-communicu-29>.

²⁰ *Rule of Law – A Guide for Politicians*. A guide elaborated under the auspices of the Raoul Wallenberg Institute of Human Rights and Humanitarian Law at Lund University, Sweden, and the Hague Institute for the Internationalisation of Law (HiiL), the Netherlands, available at <http://rwi.lu.se/what-we-do/academic-activities/rule-of-law-a-guide-for-politicians-2/>.