FOREWORD

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International Prosecutors represents an impressive and highly valuable contribution to the analysis of a subject matter where the world community is still in a learning process. The volume is a fascinating examination of the office and function of the Prosecution at international criminal tribunals from Nuremberg to the ICC. While evidently of interest to international prosecutors and their staff, as a former judge and legal counsel both at the national level and in the UN, I warmly recommend the study to much wider circles.

There might be those who, at first glance, believe that it is beyond their ability to digest a publication of this format. However, taking the Table of Contents as a point of departure, the Introduction and the Conclusions give the reader a succinct and effective overview of the volume. With the benefit of this overview, different categories of readers will be able quickly to identify the parts that are of particular interest to them. They will then find that their interest will draw them further into the material.

The value of this volume to Court Registrars and their staff is obvious, in particular because of the close interaction between the Office of the Prosecutor (OTP) and the Registry of an international tribunal. The same applies, perhaps with additional strength, to judges of international tribunals and those who aspire to become such. Judges will find Chapters 8 to 15 of particular interest.

Those who represent the accused and victims are also well advised to study the volume. The analysis contains important contributions to the understanding of the interaction between the prosecution and the defence, even to the extent that it is sometimes in the interest of justice that they cooperate within certain parameters.

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At the national level, the analysis should be of great interest and assistance to officials who interact with the OTP in various ways, in particular when responding to the requirements that flow from Part 9 of the Rome Statute of the ICC on International Cooperation and Judicial Assistance. The same applies, for partly different reasons, to officials who represent their countries in matters relating to the establishment and management of international tribunals and in particular to those responsible for advising decision-makers at the highest political level in these matters. Delegates to the Assembly of States Parties (ASP) to the Rome Statute are well advised to study the analysis.

Journalists who specialize in reporting on international criminal trials will certainly be assisted if they familiarize themselves with the fundamental principles discussed in the volume. Finally, academia will undoubtedly find the volume of greatest interest. This should apply in particular to academics who take up the editors' challenge at the end of the Conclusions to add to the array of insights provided.

Clearly, an analysis of this breadth may contain elements that could be challenged and even criticized: this is in the nature of things. What I would like to highlight within the limits of a Foreword are a few salient points that deserve to be borne in mind—in particular by those at the national level who, ultimately, are responsible for the establishment and administration of international criminal justice.

Several contributions highlight the discretionary powers of an international prosecutor. For someone with experience from the bench at the national level this comes as no surprise; this also applies there to a certain extent. However, at the international level this is *legio* and very much related to circumstances, not least a willingness at the political level to support the institutions, including the provision of adequate funding. The volume contains several interesting observations in relation to this very important element in the charge of an international prosecutor. The legal, moral, and ethical standards that must be observed by such prosecutors are addressed with special emphasis.

A very important question relating to the discretion of the prosecutor concerns the relationship between Article 16 and Article 53(1)(c) of the Rome Statute. The question is whether Article 16 on deferral at the request by the Security Council limits the independence of the prosecutor and whether Article 53(1)(c) permits the prosecutor to refrain from action if it could put a peace process at risk (see eg Chapter 8). For my part, I would like to see Article 16 on deferral of investigation or prosecution as a means of actually protecting the integrity of the prosecutor. The prosecutor should go where the evidence leads him or her without having to take into consideration matters relating to peace and security, which is the responsibility of the UN Security Council. *Fiat justitia, pereat mundus* should certainly not be the lodestar here. It is for the members of the Security Council to exercise their judgement and determine whether a situation is such that the Council should adopt a resolution under Chapter VII of the UN Charter

requesting the Court to defer for a period of 12 months, with such period being renewable. If this happens, the prosecutor is entitled to conclude, with head held high and with full integrity, that this is how the system works and how the system must work.

This also brings to the forefront the issue of peace versus justice. The volume contains several references to the idea that indictments of high-level personalities may constitute obstacles to peace endeavours. The contributors conclude that this is simply not true, and I agree. As war crimes rapporteurs in the former Yugoslavia, my co-rapporteurs and I concluded that if people at this level are indicted, sooner or later they become a burden to their country.[1]

The first steps on the path to holding high-level personalities to account have been taken. No doubt, this will have preventive effects around the world. However, it is important that the same yardstick is used in different situations. This applies in particular when the initiative is taken by the UN Security Council under Article 13(c) of the Rome Statute. Why Sudan and Libya, and not the Middle East?

The review in Chapter 9 of the way in which individual prosecutors have acted constitutes an interesting contribution to 'lessons learned'. Another lesson that may come as a surprise even to experienced national investigators is that there are fundamental differences between national and international investigations (see in particular Chapter 10).

The analysis of the funding of the institutions (see in particular Chapter 4) very much tallies with my own reasoning. By way of example, I was deeply concerned that the funding of the Special Court for Sierra Leone (SCSL) was not made through assessed contributions. There is actually a constitutional element here too. This becomes apparent if one makes a comparison with funding of courts at the national level. What credibility would national courts have if they were funded by different donors and not from taxes or similar official revenues? It is obvious that the same reasoning should be applied at the international level.

A clear message in this context is that the international criminal tribunals must fulfil their mandates in a fair and efficient manner. This requires a well-balanced, coherent procedural code guaranteeing a full-fledged fair trial, adequate funding, equipment, and manpower as well as full national and international support (see in particular Chapter 8).

Another important element discussed in the volume is whether establishing a historical record is compatible with holding individual perpetrators to account in a fair trial. This should also be of particular interest to judges who ultimately decide whether trials should be multi-accused or single-accused (see in particular Chapter 11).

[1] See also H Corell, 'International Prosecution of Heads of State for Genocide, War Crimes and Crimes Against Humanity' (2009) 43 *John Marshall L Rev* xxv–xli, available at <http://www.havc.se/res/SelectedMaterial/20090916headsofstate.pdf>.

The many references in the analysis to the Extraordinary Chambers in the Courts of Cambodia (ECCC) prompt me to make the following comments. The negotiations between the United Nations and the government of Cambodia began in 1997, when the government asked the UN for assistance. From the very beginning, the UN had suggested that an independent international court should be established to try the Khmer Rouge leaders. When it became clear that this was not acceptable to the government of Cambodia, the issue became whether the UN could participate in a national court as envisaged by the government, and under what conditions.

It was also extremely difficult for me, as head of the UN 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.

When, after a long negotiation process, it appeared that the UN was being asked to be part of a court that would fall short of international standards of independence, impartiality, and objectivity, the Secretary-General decided on 8 February 2002 to withdraw from the negotiations. He reached this decision because he strongly believed that the UN should not be part of a court that would fail to provide victims of the Khmer Rouge with the credible justice they deserved. In addition, UN affiliation to such a court could set a precedent for lowering international standards.[2] However, in a resolution adopted on 18 December 2002, the General Assembly forced the Secretariat back to the negotiation table with a very precise mandate.[3] As it appears from the resolution, the hands of the Secretariat were tied with respect to some of the elements in the agreement. This is also reflected in the agreement between the UN and the government, signed on 6 June 2003.

I have recently suggested that the UN archives should be opened to shed light on the efforts that were made by the Secretariat to ensure that the Chambers would be organized in a manner that respected international standards. But it will probably take a long time before this happens. As a former international civil servant I am obliged to observe the confidentiality that applies to this material. However, it can be said that the archives contain references to public statements by

[2] Part of the explanation appears in an op-ed in the International Herald Tribune of 19 June 2002, available at <http://www.nytimes.com/2002/06/19/opinion/19iht-edhans_ed3_.html?scp=1&sq=No%20justice%20for%20victims%20of%20the%20Khmer%20Rouge&st=cse>.

[3] UNGA Res 57/228.

the highest Cambodian authority at the time that it was not permissible for the political echelon in Cambodia to engage in a discussion about who should be prosecuted or not and that this was a matter solely for the organs of the ECCC.

When I was invited to write this Foreword, the editors suggested that I also include original content. In response to this challenge, I decided to focus on one element intimately connected to the role of the prosecutor and the way in which an efficient prosecution should function, namely the judges of the ICC and more specifically their qualifications, age, and the way in which they are elected.

With respect to *qualifications*, there is a constant reference to knowledge of international law. It is my firm opinion that this requirement is overstated in comparison with the need for courtroom experience. I therefore reiterate what is stated in the commentary on the article on election of judges in the 1993 CSCE Proposal for an International War Crimes Tribunal for the Former Yugoslavia:[4]

> Rules on competence and qualifications are laid down in paragraph 3. In corresponding provisions of other drafts there is a reference to knowledge of international law. No doubt, knowledge of international law in addition to the requirements proposed in paragraph 3 would be of great importance. This is, however, not specifically included in the provision. The reason is that in view of the tasks which the judges are facing it is more important that they are well acquainted with the adjudication of criminal cases in their respective states. Once the Tribunal is set up, the main feature of the work of the Court will be very similar to the work in an ordinary criminal court at the national level. A demonstrated ability to deal in a competent and expedient manner with complex criminal cases ought therefore to carry particular weight. Judges with such qualifications will no doubt rapidly acquaint themselves with the international elements of the work.

In my view, the ASP should actually discuss whether list B is appropriate in the context of appointing criminal court judges.[5] If the intention is to allow persons with no courtroom experience whatsoever to sit on the Court, the ASP may be wise to abolish list B. To elect persons to the ICC who have no courtroom experience is in my view simply not appropriate no matter what other qualifications these candidates may have. And if the qualifications laid down in list B are considered so important in this context, surely it should be possible to find within the now 120 states parties to the Rome Statute judges who also have such

[4] See 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 9 February 1993, p 151, available at <http://www.havc.se/res/SelectedMaterial/19930209csceproposalwarcrimes-tribunal.pdf>.

[5] For the purposes of the election of judges, there are two lists of candidates: *List A* which contains the names of candidates with established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; and *List B*, which contains the names of candidates with established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court.

qualifications. There might also be a way of amalgamating the two lists into one, where the list B elements are added as a special merit to the list A requirements.

The states parties to the Rome Statute should also engage in a profound discussion of *the question of age*. The Rome Statute places no limit on the age of judicial candidates, nor does it impose a mandatory retirement age. The Independent Panel on International Criminal Court Judicial Elections, of which I am a member, conducted informal research, which is compiled in Annex III to its report.[6] Out of the 118 states parties that were examined, 22 are listed with the remark 'insufficient information'. The remaining 96 states parties impose mandatory age limits or retirement ages for high-level court judges, including judges of supreme courts and constitutional courts. The age at which such restrictions are imposed range from 55 to 75 years. Against this background the Panel suggested that the ASP or its Advisory Committee on nominations consider this issue with the possible goal of developing a practice whereby states parties would not nominate candidates who would reach a certain maximum age during the course of their elected terms.

In my view this is extremely important. Furthermore, a closer look at the annex reveals that, out of the 96 states parties that provided information about retirement age, 76 states parties, or 80 per cent, have a retirement age which is 70 years and below. This fact should serve as an important indicator. Undoubtedly, the effectiveness of the ICC and its standing will be affected if persons who are no longer considered suitable to serve on national courts are elected to perform the even greater challenge of a judge on an international criminal court. My considered opinion is therefore that the ASP should not elect persons who will pass 70 before their nine-year term expires. If it transpires that the ICC consists of judges who are no longer regarded as suitable for service on the bench in their own countries, there is a clear risk that the ICC lose respect.

With regard to *the method of electing judges*, I believe that it would be wise for the ASP to appoint, under existing rules, a committee of independent experts to evaluate the candidates. The task of the committee should, first, be to identify the most qualified candidates. The committee should then look at the six judges who are leaving the ICC and their qualifications. Thereafter, the committee should look at the remaining 12 judges and their qualifications. Based on this information, and taking into consideration all the other requirements under the Rome Statute, the committee should propose six candidates who would bring about the best composition of the ICC as a whole. Those six candidates should then be presented as a so-called 'clean slate' which could be accepted by the ASP.

If delegations to the ASP consult with experts at the national level, they would surely get the message that an international criminal court should not be constituted by employing a method, including vote trading and similar unworthy

[6] The Report is available at <http://iccindependentpanel.org/>.

features, where qualifications and competence are not solely at the forefront. It should also be emphasized that there is a tremendous difference between, by way of example, the judges serving on the International Court of Justice and judges serving on an international criminal court. Hearing complex criminal cases is an extremely demanding charge that requires a thorough knowledge of criminal court administration and the methodology of criminal justice. Furthermore, listening for hours to witnesses and others who appear in the courtroom, maybe through translation, is very demanding both mentally and physically. This should be borne in mind by the ASP.

Let me end these remarks by emphasizing that they should in no way be understood as criticism of the present judges of the ICC. What I have raised here are systemic questions which are the sole responsibility of the ASP.

Reverting to *International Prosecutors*, I would like to conclude by affirming that the volume will be of great assistance in the further development of the international criminal justice system. Basically, what the whole matter boils down to is respecting international law in the fields of human rights, humanitarian law, and international criminal law. In this work there are many who contribute and have distinct roles to play, among them those who serve in international criminal tribunals where the prosecutors constitute a decisive category.

However, in the final analysis, the responsibility for supporting the international criminal justice system rests with the members of the United Nations and in particular with their heads of state and government whether they act at the national or the international level. The statements by the General Assembly and the Security Council supporting the rule of law both at the national and the international level and expressing commitment to the Charter of the United Nations and international law must be honoured.

The past 20 years represent an unprecedented development in the field of international criminal law. But much remains to be done. The international criminal tribunals constitute a crucial contribution here. What is needed is a firm commitment on the part of the members of the United Nations, and in particular the members of the Security Council, to support international criminal justice.