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## “The Vulnerability of ‘An Idea Whose Time Has Come’”

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Book Review



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## “The Vulnerability of ‘An Idea Whose Time Has Come”

### Abstract

“The Vulnerability of ‘An Idea Whose Time Has Come”

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**The Founders: Four Pioneering Individuals Who Launched the First Modern-Era  
International Criminal Tribunals, Edited by David M. Crane, Leila N. Sadat and Michael  
P. Scharf.<sup>1</sup>  
Chelsea Rubin<sup>2</sup>**

The international criminal law experiment has become synonymous with mass atrocities and post-conflict reconstruction since the 1990s. As conflict has continued, so too has the development of international criminal bodies for the prosecution of those most responsible. If the editors of *The Founders: Four Pioneering Individuals Who Launched the First Modern-Era International Criminal Tribunals* have a project, it is to illustrate the practical challenges and barriers to the formation of this type of justice. Traversing thousands of miles—from the offices of New York bureaucrats to the Kono District of Sierra Leone; from Courtroom 600 in the Palace of Justice to the Killing Fields of Choeung Shek and S-21—the authors outline, in great anecdotal detail, the process of navigating the murky political waters of international justice.

While there have been countless scholarly works published on the various judicial bodies that have emerged to administer international justice for those responsible for war crimes and crimes against humanity,<sup>3</sup> *The Founders* is the first first-hand account, written by the founding international prosecutors about their experiences.<sup>4</sup> The text aims to address this gap in the literature. A collection of essays written by the founding prosecutors of each of the major international criminal law tribunals founded since the late 1990s—the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the International Criminal Court—with contributions from various other international law scholars, *The Founders* aims to provide readers with first-hand accounts of the challenges the founding prosecutors faced, the obstacles they overcame, and the successes they achieved in obtaining justice for millions. As Hans Corell writes in the book’s introduction, its purpose is to act as 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.”<sup>5</sup> While the scope of this purpose is arguably too limited, hindering the impact of the stories themselves, the book meets this limited mandate.

### **I. Practitioners and Academics: Blurring the Lines**

A unique compilation of expert perspectives, *The Founders* is an account, by the prosecutors first appointed, of the establishment of each of the major tribunals of the late twentieth and early twenty-first centuries. While Richard J. Goldstone, David Crane, Luis Moreno Ocampo, and Robert Petit write the four chapters that comprise the “meat” of this text (on the International Criminal Tribunals for the former Yugoslavia and Rwanda, the Special Court for Sierra Leone, the

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<sup>1</sup> (Cambridge University Press, 2018) [*The Founders*].

<sup>2</sup> Juris Doctor, Osgoode Hall Law School (2019).

<sup>3</sup> See e.g. Antonio Cassese et al, *International Criminal Law: Cases and Commentary* (Oxford University Press, 2011); William A Schabas, *An Introduction to the International Criminal Court*, 5th ed (Cambridge University Press, 2017); Gideon Boas, William A Schabas & Michael P Scharf, eds, *International Criminal Justice: Legitimacy and Coherence* (Edward Elgar, 2012).

<sup>4</sup> *The Founders*, *supra* note 1, back cover.

<sup>5</sup> *Ibid* at 18.

International Criminal Court, and the Extraordinary Chambers in the Courts of Cambodia, respectively) there are a total of ten authors contributing to this 159-page text.

The book is divided into two parts, each containing a number of chapters. Each individual chapter is written by a separate author, some of whom are practitioners in the transnational legal space (prosecutors, United Nations (UN) bureaucrats, et cetera), while others are noted academics in the field. The book is noteworthy if only for this reason: It is a compilation of the thoughts of the seminal experts in the field, both in the practical and academic realms. The authors include:

1. Kofi A. Annan: former Secretary General of the UN;
2. Hans Corell: former Under-Secretary General of the UN for Legal Affairs and Legal Counsel of the UN;
3. Leila N. Sadat: Special Adviser on Crimes Against Humanity (International Criminal Court) and international human rights expert;
4. Michael P. Scharf: former official under the George H. W. Bush and Clinton administrations, Special Assistant to the Chief Prosecutor of the Cambodia genocide trial;
5. William A. Schabas: professor at various universities, renowned expert on international law and international human rights law;
6. Richard J. Goldstone: chief prosecutor for the UN International Criminal Tribunals for the former Yugoslavia and Rwanda;
7. David M. Crane: founding prosecutor of the Special Court for Sierra Leone;
8. Luis Moreno Ocampo: first prosecutor of the International Criminal Court;
9. Robert Petit: international co-prosecutor of the Extraordinary Chambers of the Courts of Cambodia; and,
10. David J. Scheffer: current UN Secretary-General's expert on UN Assistance to the Khmer Rouge Trials, former US Ambassador at large for war crimes and head of the US delegation at UN talks to establish the International Criminal Court.

The perspectives of these founding prosecutors provide a unique and unparalleled perspective into the formation of international criminal justice institutions and the international criminal justice project as a whole. Prosecutors play a particularly important role in the formation of these institutions. With no governing framework, operative legal structures, or precedents to follow, it is—more often than not—the founding prosecutor that shapes (and reshapes) the structure of the judicial body. Framed by multinational *realpolitik*, national priorities, and political objectives, Goldstone, Crane, Moreno Ocampo, and Petit sought to give modern life to Justice Robert H. Jackson's opening statement at the International Military Tribunal at Nuremberg: “[C]ommon sense ... 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... .”<sup>6</sup>

The contributing perspectives of this vast array of authors is, perhaps ironically, simultaneously both the book's greatest strength and weakness. What these authors represent is a cross-section of international law's best and brightest—ranging in nationality (Ghanaian, Swedish, American, to name a few), political affiliation (from American “right-wing” to Swedish “left”),

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<sup>6</sup>Address, (Opening Statement delivered at the International Military Tribunal, Courtroom 600, Palace of Justice, 21 November 1945), Robert H Jackson, “Second Day, Wednesday 21 November 1945: Morning Session” in *Trial of Major War Criminals Before the International Military Tribunal*, (International Military Tribunal, 1945) 98 at 99.

and experiences.<sup>7</sup> The chapters reflect this diversity of perspectives within the *international justice* community (of both practitioners and academics). However, there are two unfortunate ramifications of this, one of which is perhaps more obvious than the other. First, various chapters, written by different authors, each of whom possesses their own writing style, leads to an overall disjointed text. Second, while the perspectives are “varied” in the sense of being numerous, no challenging or different political perspectives are offered. Each author seems to work from the premise of the inherent good of the international criminal law project—a project which is, even by those who support it, recognized as not without controversy.<sup>8</sup> Despite the fact that the authors span the variety of the political spectrum,<sup>9</sup> it would be remiss to call the practice of international criminal law and the institutions that guide it universally accepted. The authors do not share a belief in the inherent good of international law, but, rather, that it can serve good purposes, ranging from the strengthening of domestic institutions (in Sierra Leone)<sup>10</sup>, to the prevention of absconding from justice (at the International Criminal Court).<sup>11</sup> Perhaps this is a structural problem; former prosecutors tend to share similar beliefs in the strength of the institutions they established, and the legitimacy of their exercise. This is not a reflection of the inherent good of the practice of international law broadly per se, but of each prosecutor’s belief in the legitimacy of the court he represents.<sup>12</sup> However, it is in the contextual background of the book, written by academic practitioners, that opposing perspectives could have been offered. A focus on a variety of *perspectives*—as opposed to just a variety of *authors*—would have strengthened the overall efficacy of *The Founders*.

## II. “First-Hand” vs. “Colloquial”: Challenges of Flow and Structure

While their aims are laudatory, and perhaps overdue, the various “founders” fall short on execution. In attempting to provide various perspectives, the book is disjointed, hindering its

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<sup>7</sup> While Caucasian males aged 50-70 are over-represented, this is a function of the profession at the time that the Tribunals were being developed, not of the book per se.

<sup>8</sup> See e.g. Alison Marston Danner, “Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court,” Guest Lecture Series of the Office of the Prosecutor, (2005) 97 AJIL 510 at 510. Professor Danner is an Associate Professor of Law at Vanderbilt University and is widely recognized for her expertise in the legitimacy of international criminal tribunals, including regarding the concept of “joint criminal enterprise” and command responsibility (*ibid*).

<sup>9</sup> Michael P Scharf, for example, served as a legal advisor in the George H.W. Bush administration before serving at the Cambodia genocide trials. See “Michael P Scharf” (27 November 2019), online: *Case Western Reserve University: School of Law* <[www.case.edu/law/our-school/faculty-directory/michael-p-scharf](http://www.case.edu/law/our-school/faculty-directory/michael-p-scharf)> [perma.cc/BBV4-P5CP].

<sup>10</sup> See David M Crane, “Dancing with the Devil: Prosecuting West Africa’s Warlords: Building Initial Prosecutorial Strategy for an International Tribunal after Third World Armed Conflicts” (2005) 37 Case W Res J Intl Law 1.

<sup>11</sup> See Till Papenfuss, “Interview with Luis Moreno-Ocampo, Chief Prosecutor of the International Criminal Court” (25 January 2012), online: *IPI Global Observatory* <[www.theglobalobservatory.org/2012/01/interview-with-luis-moreno-ocampo-chief-prosecutor-of-the-international-criminal-court](http://www.theglobalobservatory.org/2012/01/interview-with-luis-moreno-ocampo-chief-prosecutor-of-the-international-criminal-court)> [perma.cc/SCF4-HX83].

<sup>12</sup> To argue that there is an “inherent good” in the practice of international criminal law—despite this author’s personal beliefs—would be a mischaracterization of both the academic literature and political practice. For US National Security Adviser John Bolton’s recent statements on the ICC, see e.g. Siobhán O’Grady, “John Bolton Isn’t Alone in Condemning the ICC” (11 September 2018), online: *The Washington Post* <[www.washingtonpost.com/world/2018/09/11/john-bolton-isnt-alone-condemning-icc](http://www.washingtonpost.com/world/2018/09/11/john-bolton-isnt-alone-condemning-icc)> [perma.cc/3FF5-HDZT]. See also John R Bolton, “The Risks and the Weaknesses of the International Criminal Court from America’s Perspective” in Olympia Bekou & Robert Cryer, eds, *The International Criminal Court* (Routledge, 2018) ch 18. Further, I note that the use of the pronoun “he” here is intentional; the fact that all of the founding prosecutors are male however is a subject for another reviewer.

impact. Part one is an academic exercise into the purpose of the international criminal law experiment—helpful context, but done in any number of excellent texts in much greater detail.<sup>13</sup> Part two reads as a separate text entirely, focused on the personal experiences of the founders themselves. Simply put, the strength of the text lies in part two; the book would be of greater value, to both academics and practitioners, if the contributions in part two were expanded and part one was left to the academic realm. If the purpose of the text is to give the first-hand account of the prosecutor’s stories—as it purports to be—then the inclusion of part one, especially in its underdeveloped, over-simplified current form does only a disservice to this goal.

The disjointed nature of the book is not limited to the division between part one and part two. Each chapter reads as its own soliloquy; the author’s individual journal of their time in their respective position or musings on their assigned subject. While not problematic on its face, this has two practical implications. First, the chapters are separate stories, hindering the overall flow (and thus readability) of the book; second, perhaps more importantly, the editors do not account for overlap between the stories themselves. This is an inevitable extension of true, first-hand recounting of similar situations. It makes sense that each of the four founding prosecutors would face similar challenges when trying to establish their respective criminal tribunal. This is particularly true given the limited time frame in which these tribunals were set up (approximately 1991–2001) and the fact that they were organized through the same founding institution (the United Nations).

This is not a flaw of writing, nor, per se, one of editing. Rather, it is a flaw of conception and structure. There is no way to editorialize the stories of these authors without sacrificing the overall point of the book, to provide a first-hand account of these stories. However, in conducting the exercise of compiling these stories, the editors seem not to account for this overlap. It seems that this weakness—the overlap between the challenges these authors faced—is, in fact, a hidden strength of this book: an instance where the past could shed some light on the present. However, though the book presents the problem, it does not grapple with it in any meaningful way. Perhaps this is not its purpose. The book is, explicitly and intentionally, apolitical in nature. However, in assuming this apolitical stance, it misses an opportunity to engage with the stories being told, preferring just to tell them and let the reader form their own opinions.

### III. Viewing the Present Through the Past: Short of Expectations but Not of Aims

In his poignant opening remarks at the inaugural ceremony of the permanent premises of the International Criminal Court, then Secretary-General Ban Ki-moon focused on the future. The purpose of the international criminal law project is inherently forward looking, “[i]ts success will be the legacy we leave for future generations.”<sup>14</sup> While the editors of this book arguably succeed in their aim—to provide a first-hand account of the founding of the primary bodies of international criminal law—the book is seemingly out of touch with the broader criminal law project. It is backward, not forward looking.

As a collection of essays written primarily by practitioners, alongside limited notable academics, *The Founders* is uniquely positioned to grapple with the practical challenges of

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<sup>13</sup> See e.g. William A Schabas, “Introduction” in William A Schabas, ed, *Cambridge Companion to International Criminal Law* (Cambridge University Press, 2016) 1 [Schabas, *International Criminal Law*]; Göran Sluiter, “Ad Hoc International Criminal Tribunals (Yugoslavia, Rwanda, Sierra Leone)” in Schabas, *International Criminal Law*, 117.

<sup>14</sup> United Nations, Press Release, SG/SM/17685-L/3255 “International Criminal Court’s Success Will Be Legacy for Future Generations, Secretary-General Says at Inauguration of Its Permanent Premises” (19 April 2016), online: *UN Meetings Coverage and Press Releases* <[www.un.org/press/en/2016/sgsm17685.doc.htm](http://www.un.org/press/en/2016/sgsm17685.doc.htm)> [perma.cc/TR2L-QCWF].

international criminal law, particularly the politicization of such justice projects. The authors do an excellent job of noting this challenge: Goldstone, Crane, Moreno Ocampo, and Petit each discuss political challenges that posed barriers to either the establishment of their respective tribunal or its ability to operate impartially. For those interested in international criminal law, the power of these institutions is considered in tandem with an explicit recognition of their limits. Those advocating for the referral of ongoing situations in Iran, Syria, and North Korea<sup>15</sup> to the International Criminal Court recognize that the barriers to such a referral are primarily political, not legal. However, other than a brief sentence in David J. Scheffer's "Closing Perspectives," there is no mention of these political realities moving forward. The challenges are discussed; the politicization of justice and these individuals' fight to maintain the impartiality of these institutions is a recurrent theme, appearing in nearly every individual essay. However, the authors fail to note the importance of these challenges to the practice of international law; though the challenges are articulated, the ramifications of the challenges are not. A logical extension of this book—perhaps a hypothetical "part three"—*could*, and, to be in line with the broader international criminal justice project, *should* include a discussion of these political and practical (*i.e.*, financial) barriers to justice and their relevance to future international criminal prosecution. Without a "part three"—discussing the ramifications of these experiences and tying them into the broader academic discussion of the international criminal law project, either currently or moving forward—the book lacks a sense of cohesion and a broader purpose.

In the current international geopolitical system, where nationalism and sovereignty are increasingly lauded, and multilateralism is considered expensive and inefficient, such lessons are vital.<sup>16</sup> The international criminal law experiment is a manifestation of the political will of numerous sovereign states, each with their own political regime. Political regimes fuse power and social purposes; power can be separated from social purposes, particularly in the face of opposing momentum. The founders understood the precarious nature of their task: Political will and domestic "buy-in" are necessary to the exercise of international criminal justice. Without sovereign consent, international courts have no jurisdiction. However, while such consent is necessary for the administration of justice, impartiality on the part of those working for the court is necessary for the court's efficacy. This lesson is of unparalleled value in the Trumpian-era of international law. Its absence is a notable gap from the book, and an unfortunate missed opportunity.

International criminal justice was—and in many ways still is—an idea whose time has come. However, its maintenance is not a given. As the lack of response to the Syrian conflict has shown, its acceptance is tenuous. While *The Founders* meets its goal—illustrating the first-hand accounts of the founding prosecutors' challenges in establishing, operating, and legitimizing these institutions—its primary failing is in the deliberate decision not to go beyond this analysis. When historical experiences are discussed the clichés begin to roll: How can we understand our present or our future if we cannot understand the past? If we do not learn from history is it not doomed to repeat itself? And yet, especially with broad pedagogical projects like international criminal justice, history is too often an abstraction. Historian Stephen Fry, in a recent speech, discussed the explosion of "family history," particularly the BBC's programme, "Who Do You Think You Are?"

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<sup>15</sup> Russia and China have used their veto authority at the UN Security Council to prevent international intervention in these conflict zones. Russia has moved to protect Iran and Syria from multilateral intervention, and China has done the same with North Korea. See *e.g.* Graham Melling & Anne Dennett, "The Security Council Veto and Syria: Responding to Mass Atrocities Through the 'Uniting for Peace' Resolution" (2017) 57 *Indian J of Intl L* 285.

<sup>16</sup> See Claudia Flores, "The United Nations Needs Reform, Not Criticism of its Purpose" (25 September 2017), online: *Fortune* <[www.fortune.com/2017/09/25/donald-trump-united-nations-speech](http://www.fortune.com/2017/09/25/donald-trump-united-nations-speech)> [perma.cc/7TPA-89KJ].

The programme traces the lineage of various celebrities, charting their family history. In a letter one viewer told Fry, “I never knew what the Holocaust meant until I saw your programme.”<sup>17</sup> Fry reflects on this comment: “We might find this a little odd, but it tells us that many people cannot see links between facts and historical narratives, unless those facts are brought absolutely to life, mediated by personality.”<sup>18</sup> The “humanness” and perspective of individual personalities bring historical experiences to life, giving such experiences practical applicability in the modern setting. In failing to apply the founders’ narratives to the current realities of the international criminal justice project *The Founders* meets its mandate but falls short of meeting its potential.

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<sup>17</sup> Stephen Fry, “The Future’s in the Past” (8 July 2006), online: *The Guardian* <[www.theguardian.com/theobserver/2006/jul/09/featuresreview.review](http://www.theguardian.com/theobserver/2006/jul/09/featuresreview.review)> [perma.cc/W5M3-95GH].

<sup>18</sup> *Ibid.*