



OXFORD

THE MAKING OF INTERNATIONAL  
CRIMINAL JUSTICE  
A VIEW FROM THE BENCH  
*SELECTED SPEECHES*

THEODOR MERON

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*To my wonderful law clerks,  
who have immensely enriched my life at The Hague  
and these speeches.*

## PREFACE

Since my election to the bench by the UN General Assembly in 2001, I have refrained, for the most part, from publishing. The one notable exception involved my general course on public international law at The Hague Academy, delivered in 2003 but prepared largely when I was still a full-time professor at New York University School of Law.

While I have generally abstained from academic writing in light of my role and duties as a judge, during the past decade I have given a number of speeches to a variety of outside audiences, ranging from diplomats, jurists, and scholars, to legal practitioners, government officials, and the survivors of horrific crimes. I did so in the belief that it is important, in promoting the new universe of international criminal justice, to speak about our achievements, our challenges, and, yes, even our frustrations. It is this same belief that has animated my decision to share a selection of my speeches in the present volume.

In identifying speeches for inclusion here and in preparing them for publication, I have endeavored to abide by three—admittedly somewhat contradictory—principles. First, I have made every effort to be comprehensive, by choosing speeches that address a wide range of topics and that chart the evolution of and prospects for international criminal justice from both substantive and practical perspectives. Although I believe these efforts at breadth have been largely successful, it is, perhaps, inevitable that many of the pieces focus on the jurisprudence and practices of the International Criminal Tribunal for the former Yugoslavia, the court on which I sit as an appeals judge and for which I served as President from 2003 to 2005.

Second, I have attempted, wherever possible, to be selective—that is, to omit those speeches or those portions of speeches that echo too loudly the content or coverage of another speech in the volume. If I have not always succeeded in my efforts to adhere to this second goal, it is because there are certain foundational ideas and events—lodestars—around which the universe of international criminal justice revolves, and without reference to which it would be difficult to find one's way.

Finally, although the perspective I have gained over the past ten years has served as a helpful guide in choosing speeches for inclusion, I have tried to ignore the seductive influence of hindsight during the editing

process and, instead, kept the speeches largely in the form in which they were delivered. What small changes I have made were primarily in the interest of enhancing clarity and reducing repetition. These being speeches and not law review articles, I have also added relatively few footnotes so as to retain and reflect the uniquely oral quality of the remarks collected here.

It is my hope and belief that each of these speeches stands on its own. Nevertheless, I have tried to organize these remarks in such a way that, when read together, they also tell a larger story about the making of international criminal justice, starting—after a few brief biographical notes—with Part I's examinations of the evolving bodies of law from which international criminal law is, in great part, derived. Part II proceeds to explore the rise of international criminal tribunals and the difficulties posed, and possibilities presented, by and for such institutions. Part III then invites the reader to reflect upon certain substantive aspects of international criminal law and upon a selection of the jurisprudence of international courts. Finally, Part IV and the Epilogue conclude with thoughts on the themes of responsibility and the role of a judge. With the exception of two formal statements made in my capacity as then-President of the International Criminal Tribunal for the former Yugoslavia and my separate and partially dissenting opinion in the *Galić* appeal judgment, the views expressed in this volume have been offered strictly in my personal capacity and not in my capacity as a judge.

Throughout the process of readying this volume for publication, I have been assisted by several individuals whose contributions and guidance have proven invaluable. I am deeply grateful for the astute advice of Merel Alstein, my excellent editor, and her attentive colleagues at Oxford University Press; the prowess and perseverance of Mohini Ramsoekh, my irreplaceable right-hand, whose task it was to type and re-type many of these speeches; and the exceptional editing of Willow Crystal, one of the outstanding law clerks with whom I have had the great pleasure of working during my first decade on the bench.

Theodor Meron

*The Hague*  
*February 2011*

## LIST OF ABBREVIATIONS

ABiH	Bosnian Muslim Army
ACLS	American Council of Learned Societies
AJIL	American Journal of International Law
CSCE	Conference for Security and Co-operation in Europe
DC	District of Columbia
DRC	Democratic Republic of the Congo
ECOWAS	Economic Community of West African States
FRY	Federal Republic of Yugoslavia
HVO	Croatian Defense Council
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICSID	International Centre for Settlement of Investment Disputes
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	international humanitarian law
ILC	International Law Commission
IMT	International Military Tribunal
JNA	Yugoslav Peoples' Army
LRA	Lord's Resistance Army (of Uganda)
MONUC	United Nations Mission in the Democratic Republic of the Congo
NATO	North Atlantic Treaty Organization
NGO	non-governmental organization
NKVD	People's Commissariat for Internal Affairs (Soviet secret police)
NYU	New York University
P-5	Five Permanent Members of the United Nations Security Council
POW	Prisoner of War
RPF	Rwandan Patriotic Front
SS	Schutzstaffel (an organ of the Nazi party)
TO	Territorial Defense
TRC	Truth and Reconciliation Commission
UDHR	Universal Declaration of Human Rights
UN	United Nations

UNAMID	African Union United Nations Mission in Darfur
UNGA	United Nations General Assembly
UNMIL	United Nations Mission in Liberia
UNOSOM II	United Nations Operation in Somalia II
UNSC	United Nations Security Council
UNTS	United Nations Treaty Series
USA	United States of America
USSR	Union of Soviet Socialist Republics
WTO	World Trade Organization

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# *Introduction*



THE SEVEN AGES OF MAN  
(CHARLES HOMER HASKINS PRIZE  
LECTURE)\*

The uniform topic assigned to the Haskins Lectures, 'A Life of Learning', is particularly challenging because it compels an inquiry into the private domain, the piercing of the veil on essentially private experiences: motivation, achievement, and failure. Striking the right balance between self-satisfaction and saying something that may be of interest to this distinguished audience is quite a challenge. But there is no question that what we write and when we write can only be explained by our own life experiences. Avoiding autobiography would depart from the tradition of the Haskins Lectures and would provide an artificial and disingenuous reading of one's work.



This leads me to the inevitability of some personal comments. I was born in 1930 in a small town in Poland to a middle-class Jewish family and had a happy but, alas, short childhood. By the age of nine I was out of school for the duration of the war. Ghettos and work camps followed, with most of my family falling victim to the Holocaust. When the war ended, I emerged, lucky to be alive, with a hunger for school, for learning, for normality. In 1945, I left Poland for Palestine and faced the daunting task, never quite accomplished, of catching up with six lost years. High school and military service followed, then studies at the law schools of the

\* Delivered at the Annual Meeting of the American Council of Learned Societies in Pittsburgh, Pennsylvania, USA, on 9 May 2008. The text of this speech first appeared as *A Life of Learning: Charles Homer Haskins Prize Lecture for 2008* (ACLS Occasional Paper No 65, New York: ACLS, 2008), © Theodor Meron. Used by permission and modified from the original publication.

University of Jerusalem, Harvard University, and the University of Cambridge. At Jerusalem I started focusing on international law. At the two Cambridges I worked on hardly anything else. Jerusalem gave me a solid legal foundation, but I found the old-fashioned educational system, largely based on memorization, to be uninspiring. It was at Harvard, with its analytical method, that I became comfortable with the law, especially international law, and knew it was to be my vocation.

The imprint of the war made me particularly interested in working in areas which could contribute to making atrocities impossible and avoiding the horrible chaos, the helplessness, and the loss of autonomy which I remembered so well. At Harvard, I was fortunate to become a student of and a research assistant to two masters of international law—one specializing in humanitarian law and the law of war, the other in human rights—who became my mentors and models, and with whom I worked on an attempted codification of the law of state responsibility. They were Richard Baxter, later a judge of the International Court of Justice, and Louis Sohn. As it happened, much of my later scholarship and practice found expression in these two areas. My World War II experience was never far away.

When in Cambridge, England, as a Humanitarian Law Scholar, I was approached by another person to whom I owe a great deal of my legal education: Shabtai Rosenne, the legal adviser of the Israeli Foreign Ministry. He offered me a job, which I accepted. I would have preferred an academic job, but none was in sight. I stayed in the Israeli Foreign Service for about twenty years, resigning in 1977 and moving permanently to the United States, where I joined NYU School of Law as a professor of international law.

I have, of course, been very, very lucky. My life has provided me with unusual experiences and my writings have grown of these windows of opportunity. Yet, looking back, I can see something imperfectly resembling an integral whole emerging from the discrete segments. That does not mean that the goal of complete coherence was achievable or even desirable. A combination of chance and seized opportunity has been critically important in shaping my career. Situations, circumstances, needs, and institutional compulsions have often been controlling factors. But when the opportunity arose, I chose activities that fit my chosen purposes.



The Israeli Foreign Ministry provided me with an invaluable experience writing legal opinions, participating in international conferences, and

litigating cases. It helped me gain a practical perspective. Soon after my arrival in Jerusalem, I joined the team suing Bulgaria before the International Court of Justice in the case of the *Aerial Incident of 27 July 1955* during the height of the Cold War.<sup>1</sup> It was a tragic case, in which an El Al passenger plane strayed over Bulgaria and was shot down, causing the death of all the passengers and crew. Bulgaria contested jurisdiction and admissibility, and the claim was dismissed. But one of the more interesting legal issues was whether in such a case, where the contacts with the territorial state were not deliberate and voluntary, there was an obligation for the claimant to exhaust local remedies in Bulgaria before suing before the International Court. In an article published in the *British Year Book of International Law* in 1959, I argued that there was no such obligation and suggested parameters for the applicability of the doctrine of local remedies.<sup>2</sup> I had already published law review articles based on my studies at Harvard and my doctoral dissertation, but the local remedies article was the first in which my practice resulted in a discrete contribution to the theory of international law.

In 1961 I joined the Permanent Mission of Israel to the United Nations in New York. As a representative on the Fifth Committee (Administrative and Budgetary), most of my work involved the administrative problems of the United Nations and its Secretariat. I became concerned about the growing politicization of the Secretariat, its slide from an international to a multinational institution, the discrimination against women, and the absence of adequate due process provisions. My first articles on the Secretariat quickly followed.

My UN period ended with the Six-Day War in June 1967, a traumatic period in which, from the perspective of a diplomat in New York, the future and the survival of Israel were very much at stake. In June, shortly after the fighting was concluded with a victory for Israel, I was offered the job of the Legal Adviser of the Foreign Ministry in Jerusalem to succeed Shabtai Rosenne, who was being moved to New York. It was, in many ways, a baptism of fire. Within weeks of my arrival in Jerusalem, I was requested to advise the Prime Minister as to whether the establishment of civilian settlements in the occupied West Bank, the Golan Heights, and Gaza was allowed by international law. In a secret legal opinion recently brought to light by the historian Gershom Gorenberg in

<sup>1</sup> *Case Concerning the Aerial Incident of July 27th, 1955 (Israel v Bulgaria)* (Preliminary Objections: Judgment of May 26, 1959) [1959] ICJ Rep 127.

<sup>2</sup> Theodor Meron, "The Incidence of the Rule of Exhaustion of Local Remedies" (1959) 35 *British Year Book of International Law* 83.

*The New York Times*<sup>3</sup> and subsequently reported by Donald Macintyre in *The Independent*<sup>4</sup> and Christiane Amanpour on CNN, I wrote that the establishment of civilian settlements violated the Fourth Geneva Convention as well as private property rights of the Arab inhabitants. The Israeli government chose to go another way and a wave of settlements followed, making the prospects for a political solution so much more difficult. Although I knew that this was not the kind of opinion that the Prime Minister wanted to receive, I had no doubt that legal advisers must be faithful to the law. To the credit of the Israeli government, I must note that there were no repercussions, of which I was aware, from my unpopular opinion. Of course, the opinion fit naturally into my interest in human rights and humanitarian law. It dealt not only with rights and obligations of states, but with rights of inhabitants.

In 1971, I became Israel's ambassador to Canada, a position I held until 1975. This was a period in which I had time to write, and to teach part-time at the University of Ottawa. During this period I wrote my first articles for the *American Journal of International Law*, of which Richard Baxter was editor-in-chief. Over the years, the *American Journal* became the principal vehicle for publishing my writings; indeed, articles in the *Journal* at times preceded publication of books on the same subjects. I was honored to serve as the co-editor-in-chief of the *Journal* in the 1990s. During those years in Ottawa, I also wrote my first book, *Investment Insurance in International Law* (1976), partly because of my interest in the law of state responsibility and partly to prove to myself that I was capable of writing a technical book on the law.

During that period, the call of academia was becoming irresistible. I obtained a year's leave from the Foreign Ministry to go to New York on a grant from the Rockefeller Foundation to write a book about the UN Secretariat, *The United Nations Secretariat: The Rules and the Practice* (1977). The merit principle, the need to depoliticize, due process, and women's rights were among the principal topics covered. Of course, I was building on the experience I gained as a representative on the General Assembly's Fifth Committee. During that period I also taught at NYU School of Law, and was soon invited to join the full-time faculty.

This was a difficult and critical period in my life. I was looking for ways to leave the foreign service and to enter the academy. NYU was beckon-

<sup>3</sup> Gershom Gorenberg, 'Israel's Tragedy Foretold' *The New York Times* (New York, 10 March 2006) Opinion A21.

<sup>4</sup> Donald Macintyre, 'Israelis were warned on illegality of settlements in 1967 memo' *The Independent* (London, 11 March 2006) News 27.