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## FOREWORD

International criminal law is both a new and an old science. It is new in the sense that for many it started with the *ad hoc* tribunals for the Former Yugoslavia and Rwanda and the Pinochet case. But it is old in that it has a rich history, both in respect of international cooperation in the suppression of national crime, mainly through extradition procedures, and in respect of the prosecution of international crimes. Before the advent of the *ad hoc* tribunals the literature on international criminal law was tentative, academic and speculative. That it was tentative is illustrated by the debate over whether international criminal law existed at all as a separate legal discipline or whether it was simply a branch of transnational criminal law. There were professional treatises on extradition law, but much of the literature was academic and speculative in that it was devoted to the dream, or fantasy, of a permanent international criminal court. All of that has changed. We have *ad hoc* international tribunals, hybrid international tribunals, and a permanent international criminal court. No one can today dispute the existence of international criminal law as a separate body of law. This has had a major impact on the literature of international criminal law, which has become more ‘professional,’ concerned with the definition of crime and general principles, and the technicalities of procedure, and less academic. While this is to be welcomed in that it marks the coming of age of international criminal law, it results in the minimization of the rich jurisprudential foundations of the science.

The present work does not suffer from this problem. Instead it achieves a balance between old and new, between the professional and the jurisprudential aspects of international criminal law. The book comprises a collection of essays produced within the framework of the Marie Curie Project of the Grotius Centre for International Legal Studies of the University of Leiden and brings together contributions by both recognized scholars and younger, aspiring scholars. The result is a study which presents a broad picture of the present state of international criminal law.

The book is rich in history, with studies of the Nuremberg and Tokyo trials and of the implications of the trial of Adolf Eichmann. The words of Hannah Arendt on the banality of evil arising from her observations of the Eichmann trial deservedly receive attention as we grapple to understand the horrors of genocide and the minds of its perpetrators. Legal theory too receives attention. One school of jurisprudence that is generally dismissed, or overlooked, in studies of international courts is that of legal realism. Happily, this is not a fault of the present study. One chapter examines the international criminal process from a realist perspective, while another considers the role of Judge Antonio Cassese in the development of customary international law. The emphasis on legal realism and the role of the judge is to be welcomed. If international criminal courts are to succeed it is essential that scholars engage in critical studies of the performance of individual judges and the judicial process.

Many of the principal issues facing international criminal law are addressed. These include defining aggression, the search for a rational formulation of joint criminal enterprise, evidence before the *ad hoc* tribunals and the need for an international system of criminal procedure that embraces both the inquisitorial and accusatorial systems. Interna-

tional criminal law is not the preserve of international courts. Consequently, chapters are devoted to the relationship between national courts and international courts. Here issues such as complementarity, restorative justice and universal jurisdiction are addressed. Novel features of the International Criminal Court are considered in chapters dealing with prosecution for the recruitment of child soldiers, victim participation in legal proceedings and remedies for war victims. Issues that have yet to be resolved are dealt with in chapters dealing with the prosecution of corporations before the International Criminal Court and the problem presented by the use of private security firms in armed conflict. Finally, there is a chapter on ‘situational gravity’ which confronts the controversial question of the unfairness in a system which allows African situations to be dealt with by the International Criminal Court – because African States are parties to the Rome Statute – but leaves unchecked other grave situations (such as Gaza) which escape the jurisdiction of the Court.

Today the existence of international criminal law is beyond question. But it is a new branch of legal science which has yet to be fully tested. The *ad hoc* tribunals have succeeded in providing definitions of many international crimes, giving form to many general principles and addressing the phenomenon of competing systems of criminal procedure. National courts too, in recent times, have contributed substantially to the development of international criminal law. But the real test lies ahead: the performance of the International Criminal Court. At this stage the Court has not had an opportunity to properly perform. Serious questions arise, however, about the ability of judges, mainly from the world of diplomacy and national judicial systems, to build on the experience of the past and to produce a coherent jurisprudence that is truly ‘international’ and reflects the shared understanding of nations on the principles and goals of international criminal law. Counsel, mainly schooled in some national legal system, must likewise adjust to the new legal system. There is therefore a great need for guidance at this time, for judges, counsel and scholars. The present work is well suited for this purpose with its scholarly examination of history and jurisprudence and its portrayal both of issues already considered by international tribunals and those yet to be addressed. It is a mosaic of scholarship that advances our understanding of the achievements, failures and challenges of international criminal law. The Marie Curie Project of the Grotius Centre of the University of Leiden and the editors, Larissa van den Herik and Carsten Stahn, are to be congratulated on producing such a fine collection of essays.

*The Hague, May 2009*

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