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General Editors' Preface

Globalization and the decline of State sovereignty are prominent among the clichés of the age. The rise of 'international criminal law' and in particular of international criminal tribunals is often said to reflect these phenomena. The extent to which this represents the reality of international criminal law is a question of importance, both for the future of attempts to promote the broad aims of international justice, and more generally for the understanding of the bases upon which international law rests. Dr Broomhall's study subjects these developments to a critical analysis, and offers a balanced and informed assessment of their true significance. His sharply focused study of one particular aspect of globalization is a valuable contribution to the contemporary debate.

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Preface

As this work was being finalized, press releases from governments, non-governmental organizations and the United Nations celebrated the entry into force of the Rome Statute of the International Criminal Court, even as the newspapers and broadcast news were filled with reports of escalating violence in Israel and the Occupied Territories and of a potential shift of military action towards Iraq in the next phase of the American-led 'war on terrorism'. In an important—if often oblique—sense, the work that follows is about the stark divide between the former celebrations and the latter crises.

This work takes the developing field of international criminal law as a prism through which to view a basic tension at work in the world today: that between the sovereignty of States—and especially of very powerful ones—and the pursuit of collective goods like peace, justice, and human rights. With some adjustments, the international regulation of climate change, of peace and security, of HIV/AIDs, or of weapons of mass destruction (to name but a few) might equally have made the point. Nonetheless, this work looks at specific aspects of the emerging system of international justice, and in particular of the International Criminal Court, to underscore the point that the pursuit of global responses to common problems has not prevented States from fundamentally shaping these responses in ways that serve their own interests, notwithstanding claims of 'globalization', the 'decline of sovereignty', and the ascendancy of 'international civil society'. The events of September 11, 2001 and their aftermath have only made us more aware of the fragility of efforts to establish collective, multilateral regimes for contemporary international crises.

An underlying assumption of this author is that the machinery of international justice that is presently putting down roots and articulating its institutions and principles in the international system is ultimately viable; international justice *could* work. There will be those who say it should not work (as among conservative circles in the United States and elsewhere) and there will be some who say it cannot work, urging that we turn our attention instead to truth commissions or processes of democratization or something else. There will be many who say that international justice could, should, and will work, but who will offer no or unrealistic solutions for, and little or no acknowledgement of, the enormous difficulties facing the project. International justice can work; but to work in a legitimate and a politically, legally, and financially viable way requires that problems be honestly appraised and the first steps taken towards defining solutions. At this early stage, with the Rome Statute having just entered into force, this work aims to provide a modest step towards such an approach.

This book arose from a Ph.D. thesis produced at the School of Law of King's College London and, like any thesis, it owes its positive qualities to many people (its negative ones being solely my own). I owe warm thanks to my supervisor, Professor Rein Müllerson, for his unfailing support and rich juridical imagination. My work in the human rights community has also enriched my thinking, and for that I owe deep thanks to the Lawyers' Committee for Human Rights and its Executive Director, Michael Posner. For their many years of love and support, I dedicate this work to my parents, Sylvia and Norman.

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Introduction

Since the early 1990s, international criminal law has undergone a pace of development unknown since the days of the Nuremberg Tribunal. Norms have been refined and expanded, institutions established, and seminal judgments handed down both nationally and internationally. Above all, these developments crystallized in the July 1998 adoption of the *Rome Statute of the International Criminal Court* (the 'Rome Statute' or 'the Statute')[1] which entered into force with unforeseen rapidity on 1 July 2002.

The movement to establish a permanent international criminal court ('ICC'), revived after almost half a century's dormancy, has enjoyed broad and enthusiastic support from governments and non-governmental organizations ('NGOs') alike. This is a surprising turnaround for an institution that during the Cold War tended to be derided as Utopian, when it was mentioned at all. Great hopes have now been vested in the Court. United Nations Secretary-General Kofi Annan called the ICC 'a gift of hope for future generations'[2] and (with many others) lauded it as a means to promote the rule of law, to render accountable the perpetrators of the worst atrocities, and to deter future abuses. If fulfilled in the Court's actual practice, such achievements would make its establishment a major turning point in the development of the post-War international legal order.[3] Rather than turning a blind eye to egregious acts of governments against the population of their own or other countries, the international system of the twenty-first century will, we are led to hope, respond effectively to redress and even to prevent the heinous acts which so plagued the twentieth.

Are these hopes justified? How likely is the promise attributed to the ICC to be fulfilled? Accountability for abuse of power, the prevention of atrocities, and reparation for victims are to be wished and striven for, without doubt.

[1] 17 July 1998, U.N. Doc. A/Conf.183/9, as corrected by the procès-verbaux of 10 November 1998 and 12 July 1999; reprinted in M. Cherif Bassiouni, *The Statute of the International Criminal Court: A documentary history* (Ardsley, NY: Transnational, 1998) 39. For a survey of efforts to establish an international criminal court up to and through the Rome Diplomatic Conference, see M. Cherif Bassiouni, 'Historical Survey: 1919–1998' in ibid. 1; for the negotiating dynamics of the Conference, see Philippe Kirsch and John T. Holmes, 'The Rome Conference on an International Criminal Court: The negotiating process' (1999) 93 A.J.I.L. 2; a detailed examination of the negotiation of various parts of the Statute is found in Roy S. Lee, ed., *The International Criminal Court: Issues, negotiations, results* (The Hague: Kluwer, 1999); an article by article explication of the Statute is found in Otto Triffterer, ed., *The Rome Statute of the International Criminal Court: Observers' notes, article by article* (Baden-Baden: Nomos, 1999).

[2] 'Secretary General says establishment of International Criminal Court is major step in march towards universal human rights, rule of law', U.N. Press Release L/2890 (20 July 1998), at 4.

[3] Lamberto Dini ('. . . it will mark not only a political but a moral stride forward by international society'), ibid. at 5, and M. Cherif Bassiouni, 'Preface' in Triffterer (1999), n. 1 above, at xix ('. . . the United Nations' most significant accomplishment since its establishment in 1945').

Nonetheless, oversimplifications will not achieve these aims. This study hopes to go beyond the seemingly straightforward statements proffered in support of the ICC and of international justice generally: statements which conceal a host of assumptions about international law, the international system, and inter-State relations which are anything but simple and indisputable. To accept such assumptions without reflection in fact hampers our ability to foresee accurately the problems and promise of the emerging system of international justice and, more importantly, to find the means of making the system work more effectively. One might be excused for believing that the need for a just and effective means of enforcing the legal norms within ICC jurisdiction, for want of which millions have died in the past half-century, demands a clear-eyed assessment of the international system and its dynamics. To strive, if imperfectly, towards such an assessment can only facilitate the discernment of the regime best able, given the present system and its present constraints, of halting and redressing the abuses that have so far regularly—even systematically—taken place. Ultimately, the task is therefore to ask, if the system has not so far been able or willing to enforce international criminal law with regularity, on what terms will it be willing and able to do so in the foreseeable future, and does the system coalescing around the ICC fulfil those terms? Such questions can only be approached through a careful understanding of both the emerging machinery of international criminal law and the international system in which it is embedded.

It is a central theme of this work that between international criminal law and the international system as it presently exists there is a relationship of tension, of conflicting demands, sometimes of contradiction. Between the sovereignty-limiting rationale of the Nuremberg legacy and the sovereignty-based control over enforcement that continues to characterize the present, essentially Westphalian, system there lies a gulf that is yet to be spanned, even in the wake of the Rome Statute's entry into force. The regular enforcement of criminal law has always required coercion, and the authority to deploy coercive power internationally remains firmly in the hands of States—States that make their decisions on the basis of national interest calculations bearing no necessary relationship to the needs of international justice. It may be that the tension between regular enforcement and the discretion of sovereign States will lessen over time as the end of the Cold War, the establishment of the ICC, and the process of globalization bring about changes in the international environment of legitimation in which States operate. Enforcement decisions take place in an increasingly 'legalized' context in which pressure to vindicate the rule of law is sometimes great. Nonetheless, the fundamental conditions of the modified Westphalian system of the post-War era show little sign of radical change, and extra-legal (economic, strategic, and political) factors related to national interest continue to inform crucial decisions. Important changes have been wrought and great progress toward account-

ability made, but an institutionalized rule of law, in the robust sense, remains fundamentally at odds with the world system as it now exists. Taken to its logical extreme, routine enforcement of international criminal law would call for a qualitatively different approach to the deployment of coercive power, that is, to the management of international peace and security; but such deployment remains a pre-eminently 'politicized' area of international law. Given that a fundamental change in the system is unlikely (and indeed looks less and less likely in the context of the counter-terrorism drive which has followed the events of 11 September 2001) the best remaining hope for the entrenchment of international criminal law as a regular feature of the international system is the development of a deeply rooted culture of accountability that leads to a convergence of perceived interests and of behaviour on the part of the States responsible for enforcing this law. The ICC and related developments may in fact contribute to the emergence of such a culture, although the present signals are not uniformly positive.

This study consists of this Introduction and three further parts. In Part I, the Nuremberg legacy is set apart from other areas of law that are sometimes included under the rubric of 'international criminal law'. The unique character of this legacy appears in setting the 'core crimes' of international criminal law apart from the primarily domestic law that has developed to deal with the burgeoning phenomenon of transnational crime ('inter-State criminal law'), as well as from the international instruments that call on States to prohibit conduct domestically ('suppression conventions') and the norms that apply to States rather than to individuals (so-called 'international crimes of State'). The distinguishing features deriving from Nuremberg lie in the engagement of individual responsibility directly under international law, and in the subsidiary doctrines that make the effective imposition of that responsibility possible. The latter doctrines include the absence of the defences of prior legality and of superior orders, as well as loss of immunity for acts committed in the course of official functions. Having described the unique cluster of doctrines that make up 'international criminal law' in this narrow sense, Part I goes on to examine how the principles of clarity and non-retroactivity have been brought to bear upon international criminal law, in particular in the negotiation of the Rome Statute of the ICC. It then treats the rationale that legitimates the intrusion of international criminal law into the otherwise sacrosanct domain of sovereignty. This rationale rests on two basic principles underlying the core of international criminal law: 'international peace and security' and 'the collective conscience of humankind'. While of uncertain scope, these principles can be characterized as a condition of membership in the international community and as justifying an infringement of sovereignty to that extent.

With the scope of international criminal law so defined, Part I concludes by raising questions that the enforcement of this law provokes. By calling

for the regular enforcement of international criminal law, is the accountability literature calling for the international recognition of 'the rule of law'?[4] If so, the proposition need not be controversial so far as the formal aspects of this doctrine (clarity, non-retroactivity, impartial and non-discriminatory application of the law, etc.), originally developed with a view to municipal law, are concerned. Yet calls for the 'rule of law' with respect to international criminal law often carry with them an express or implied endorsement of a reduction in sovereignty and an increased willingness to use force in support of this law. As such, this trend in opinion comes into conflict with basic characteristics of the post-War modified 'Westphalian' system. The latter system establishes a divide between the increasing legal regulation of areas once considered purely sovereign or internal, and the abiding role of the independent discretion of States acceding to, interpreting, and applying international law in practice. State discretion is not unfettered, free of all constraints, but it is a discretion in which law is but one constraint, and in which diplomatic, economic, strategic, and other 'political' factors also have an integral role.

Part II examines, in six chapters, how this tension between the normative curb on sovereignty represented by the doctrines of international criminal law and the factual role of State discretion in the processes of international law has played out, and is likely to play out, in the development of select areas essential to the promotion of international justice. Chapter IV finds in the basic features of the Rome Statute a balance between the needs of a credible system of justice and the desire to induce wide State support for the ICC, with the result that real strengths in the definitions, general principles, and some of the mechanisms of the Rome Statute are tempered by the fact that the ultimate effectiveness of the Court remains in the hands of States, individually and collectively. In Chapter V the 'complementarity' mechanism of the Rome Statute, whereby States (and particularly those where the crime took place, or those of which the nationals stand accused) are given priority in proceeding against international crimes, is shown to be one of the real potential strengths of the ICC regime, although issues such as the role of prosecution in relation to peace and reconciliation remain, along with the related question of amnesties that it raises. Should the territorial or national State fail to act, Chapter VI argues that the Rome Statute provides at least an indirect rationale for the use of universal jurisdiction by other States, although serious questions arise in attempting to apply this

[4] For example, Diane Orentlicher, 'Settling Accounts: The duty to prosecute human rights violations of a prior regime' (1991) 100 Yale L.J. 2537; M. Cherif Bassiouni, 'Searching for Peace and Achieving Justice: The need for accountability' and Madeline H. Morris, 'International Guidelines Against Impunity: Facilitating accountability' in M. Cherif Bassiouni and Madeline Morris, eds., *Accountability for International Crime and Serious Violations of Fundamental Human Rights* (1996) 59 Law & Contemp. Probs. 9 and 29 respectively.

doctrine in practice. In Chapter VII a potential block to national proceedings is examined, as the developing law of immunities reveals something of a conflict between the needs of justice and the functioning of inter-State relations, with the result that one of the central tenets of the 'accountability' school (that immunities are unavailable with respect to international crimes) must now at least in part be brought into question. Should national proceedings for any reason be blocked, the ICC will become the main forum for ensuring accountability, and Chapter VIII shows how the Rome Statute mechanisms for State (and Security Council) cooperation, essential to the functioning of the ICC, leave the likelihood of effective enforcement open to question. More than this, the ultimate success of the Court will, it seems, depend on the willingness of the Security Council to support the enforcement of ICC decisions. Yet Chapter IX shows that the United States has to date made strenuous efforts against a Court that could have even an extremely narrow jurisdiction over its own nationals, seriously reducing the prospects for Security Council backing.

The concluding part of this study, Part III, offers a discussion of whether the changes that have taken place or are underway in the international system are likely to lead to increased regularity in future enforcement practice. It is sometimes asserted that the end of the Cold War, globalization, or the alleged decline of sovereignty could lead towards an international society significantly more committed to strong and regular compliance with international law. Yet while the end of the Cold War did broaden the possibilities for Security Council action, and accelerated the development of international criminal law, it did not fundamentally alter the role of State decision-making in the key decisions underlying the enforcement of international criminal law and of international peace and security. As to the decline of sovereignty and globalization, which have given rise to extensive debates, it can be asserted that the institution of sovereignty, at least in areas relevant to international criminal law, is in no danger either of being replaced or of its importance being radically diminished in the foreseeable future. Indeed, the relatively secondary role of the United Nations in the U.S.-led response to the events of 11 September 2001 makes it clear that the development of robust multilateral institutions in the area of peace and security is less likely than ever. Recent developments thus do not provide evidence of the formal changes to the international legal order that would be required in order to establish the preconditions for regular, impartial enforcement. Nonetheless, the growth of international civil society and an intensified interdependency between States has (especially in light of the end of the Cold War) created a new 'legitimation environment' in which States are under increased pressure to justify their decisions and account for their conduct towards their own citizens. The international rule of law is therefore related to the concept of legitimacy and it is possible that, although deep changes to the international system are unlikely,

developments in the decision-making environment in which States operate may considerably heighten future support for enforcement. It is in this context that the impact of the ICC and international criminal law are most likely to be felt.

Part I

International Criminal Law