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FOREWORD

The primary responsibility for punishing crimes of international concern such as genocide, crimes against humanity and war crimes belongs to national criminal jurisdictions. This may seem an odd proposition with which to begin a foreword to a book on international criminal courts. However, it is important to understand that international criminal courts such as the *ad hoc* tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) and the International Criminal Court (ICC) are only needed where national courts either cannot or will not act. In the case of the ICC, this underlying rationale is embodied in the fundamental principle of complementarity; the ICC will act only where States are unwilling or unable genuinely to investigate or prosecute genocide, crimes against humanity and war crimes.

Viewed in this light, international criminal courts can be seen to have two roles. First, an international court may act as a court of last resort, ensuring that perpetrators of the most serious international crimes are not granted impunity if national courts cannot or will not act. Second, the development of international criminal courts has encouraged States to exercise their responsibility to prosecute and punish international crimes by strengthening their relevant domestic mechanisms. For example, many States have recently reviewed, adopted or amended their legislation governing the domestic prosecution and punishment of genocide, crimes against humanity and war crimes. This includes laws creating specialized domestic courts such as those in Kosovo and Bosnia and Herzegovina which are included in this edition of *Archbold: International Criminal Courts*, as well as legislation pertaining to regular domestic civilian and military courts. These national courts will be the primary actors in putting an end to impunity for serious international crimes.

International criminal courts will only be able to try a limited number of cases at any time. One cannot and should not expect these courts immediately to put an end to serious international crimes or to substitute for the efforts of national courts. International criminal justice in the broad sense is a collective responsibility. National and international institutions must work together in accordance with their respective mandates as part of an interdependent system of criminal justice. Recent years have seen an expansion of the number and kind of institutions which play a part in this system. For example, hybrid domestic-international tribunals have recently been set up to try alleged perpetrators of international crimes in places including Sierra Leone and East Timor.

These different courts rely on, learn from and cooperate with each other in many different ways. The ICC itself was established to overcome the limitations of relying on *ad hoc* tribunals such as the ICTY and ICTR, by creating a standing court which is immediately available with broad geographical jurisdiction. The experiences—both positive and negative—of the *ad hoc* tribunals also served to guide the drafters of the Rome Statute in designing many of the features of the ICC. In its early stages, the ICC took into account the practice of the *ad hoc* tribunals in preparing the Regulations of the Court and other documents. The jurisprudence of the *ad hoc* tribunals and national courts has

already been referred to in pleadings before the ICC. Meanwhile, national and international courts have begun to refer to the Rome Statute in their jurisprudence.

International criminal justice also involves much broader cooperation between courts and States, international organizations and civil society. For example, the Rome Statute obligates States Parties and other States accepting the jurisdiction of the ICC to fully cooperate in the investigation and prosecution of crimes before the Court. Cooperation of States will be particularly important to obtaining the necessary arrest and surrender of persons to the ICC. The ICC will also need cooperation from all relevant parties in obtaining evidence, in providing logistical support in relation to investigations and the protection of victims and witnesses and in enforcing sentences of convicted persons. The ICC in turn may cooperate with and provide assistance to States in relation to national investigations or trials. Obtaining State cooperation has also been an issue faced by the ICTY and ICTR, and will be an issue for any international tribunal.

The second edition of *Archbold: International Criminal Courts* comes at an opportune time. The ICC has just begun its judicial activities. Within two years of the judges and the Prosecutor taking office, three States Parties had referred situations on their territory to the Prosecutor, and the Security Council had referred a situation occurring on the territory of a non-State Party. Investigations are ongoing in three of these situations—the Democratic Republic of Congo; Uganda and Darfur, Sudan—and the first arrest warrants have been issued in the situation in Uganda. This edition incorporates the pertinent developments since the entry into force of the Rome Statute, including most notably the Regulations of the Court adopted by the judges on May 26, 2004 and subsequently accepted by the States Parties. As such, this edition will serve as a useful resource for practitioners in the first cases before the ICC.

This edition will undoubtedly also be of great assistance to practitioners before other courts, including both national and international courts, as well as others interested in the law and practice of these courts. Chapters on the establishment, structure and powers of international criminal courts provide the context in which these courts operate. In addition to addressing the specific procedural issues confronted by the ICC, ad hoc tribunals and Special Courts, the book details the substantive international criminal law; as well as issues such as defences, sentencing, compensation and reparations; which may also apply before national courts. Moreover, by bringing the different international courts and other related developments together in one text, *Archbold: International Criminal Courts* reflects and may contribute to the interdependent nature of the relationship that exists among different national and international courts in the areas of genocide, crimes against humanity and war crimes.

I therefore recommend this book both to those interested in the law and practice of specific international criminal courts and to those interested more generally in the emerging system of international criminal justice.

Philippe Kirsch
November 2005

PREFACE

The second edition of *Archbold: International Criminal Courts: Practice, Procedure, and Evidence* is long overdue. The law, practice and procedure have evolved considerably since the inaugural edition in 2002. The jurisprudence of international criminal courts continues to break new ground in the quest for an all-embracing and coherent system of international criminal justice.

In 2004 the international community lost one of its most eminent Judges, Sir Richard May, who was the Consulting Editor on the first edition of *Archbold International*. His passing away has left an immense void. For so long, Sir Richard had been the face of the ICTY, as he tirelessly and with steadfast authority and intuition presided over important and historic international trials. He provided us with invaluable advice and inspiration for *Archbold International*, which we will always miss and always remember.

We dedicate this new edition to Sir Richard May and his enduring contribution to international criminal justice.

We are deeply honoured that Sir Adrian Fulford, Judge of the ICC, has agreed to be the Consulting Editor of the book. Sir Adrian is currently centrally involved in the foundational work of the ICC as the ground for the first cases is primed. We are most grateful for his insightful comments on the ICC Regulations, which have been included, and for all the assistance he has provided with this edition. Sir Adrian has added to and embellished Chapter 1, the Introduction, which was written by Sir Richard May for the first edition. We look forward to working together in the invigorating years ahead for *Archbold International*.

In the tradition of *Archbold*, we have not altered the structure of the original book. The new work incorporates the latest developments and up to date jurisprudence before the ad hoc International Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR), the Special Court for Sierra Leone, and the Special Panels for Serious Crimes in East Timor (the mandate of which ended on May 20, 2005). In particular, the chapters on trial procedure and evidence have been substantially supplemented, as the courts have continued to fuse common law, civil law and other traditions to fashion a fair and workable system.

The ICC awaits its first cases with investigations underway in various countries. The next edition will surely include the first jurisprudence from the ICC. As with the first edition, however, we have included all the relevant documents from the ICC, and in addition, references to the ICC Regulations recently adopted by the Judges.

Judge Philippe Kirsch, the President of the ICC, has written the Foreword for this edition, providing his thoughts on the future of the ICC, for which we owe him many thanks. He deserves the highest praise for his vision and efforts in steering the ICC in these critical formative years.

Two new courts to try international crimes have emerged: the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes committed during the period of the Democratic Kampuchea and the Iraqi Special Tribunal (IST). We have incorporated the legislation of these courts and references to them throughout the

chapters. Furthermore, references to the relevant documents for the specialised courts in Kosovo, Bosnia and Herzegovina, and the *Lockerbie* case appear in this edition. In this way, we hope that the book will serve as a resource for those involved with the full spectrum of courts dealing with international crimes and that useful comparisons may be drawn.

In the same vein, the chapter dealing in brief with the international crimes of terrorism and related crimes and extradition procedures remains for completeness, even though some have indicated it may be out of place in a book on international criminal courts. The relationship between these areas of international criminal law and the mandates of international criminal courts should be a subject of interest and of study for those working in these fields and with practices often extending across them. Increasingly, jurisprudence and procedure from one field is cited or becomes relevant in another.

The Appendices, however, have been amended and scaled down, leaving only certain documents printed in full, with the balance cited with the exact web addresses where the full document can be located for ease of reference for the reader. Due to space limitations we have only been able to include the most essential documents from the ICC and the ad hoc Tribunals, but not the special courts (although websites are included for these courts and the relevant provisions are cited in full in the chapters and referenced in the tables). The modern trend is increasingly to use the web as the basis for research where the most up-to-date versions of documents can always be obtained. Textbooks will not in the future include lengthy documents (which often become outdated after going to print) if they are readily available on the internet. *Archbold International* is hopefully setting a worthy example in this respect.

Following requests from many practitioners, we have, in reorganising the Appendices, included the web references for the international treaties most cited before international courts so that these documents are easily accessible. We trust that the right balance has now been struck between substantive commentary and reference documents.

We are indebted to so many people for the new edition:

We wish to thank Sebastian van de Vliet, Head of the Office of Legal Aid and Detention Matters at the ICTY, and the staff of his office, in particular Sam Shoamanesh, for contributing the final chapter, Chapter 20, to the book on legal aid and defence counsel matters. It will provide priceless guidance to the defence side before all courts. The chapter is packed with the "inside" details of how the system functions in practise. We are immensely grateful for this outstanding contribution. It must be noted that the views expressed in the chapter are those of the author alone and do not necessarily reflect the views of the ICTY or the United Nations in general.

Our gratitude is also expressed to Norman Farrell, Legal Co-ordinator, Office of the Prosecutor, ICTY, and former Chief, Appeals Section, Office of the Prosecutor, ICTY and ICTR, and to Vladimir Tochilovsky, Legal Adviser and Trial Attorney, Office of the Prosecutor, ICTY, for their views and most helpful input in respect to certain sections of the book.

There are many to whom we have turned for advice, new ideas and encouragement and who have consistently supported us: Judge Richard Goldstone, Mohamed Othman, Geoffrey Nice Q.C., Joanna Korner

PREFACE

Q.C., David Tolbert, Professor Guy Goodwin-Gill, Steven Kay Q.C., Fahrudin Ibrisimovic, and Michael Mansfield Q.C.

We have been extremely fortunate to have a number of excellent research and editorial assistants as part of our team: Caroline Buisman and Susan Park have dedicated so much of their time to the production and polishing of this edition; it would not be of the high standard without their relentless efforts. We also wish to thank for their first-rate work: Christopher Black, Michelle Butler, Alex Demirdjian, and Maxim Kogen. The unflagging dedication of all of the assistants has been hugely appreciated and has directly contributed to the success of the book. It is hoped that they will continue to work with us on developing *Archbold International*.

Our publishers, Sweet & Maxwell, deserve the biggest thanks. They have kept the entire project on track and provided never-ending assistance. The second edition aims to consolidate the profile and use of the book in international criminal law circles, largely due to the enterprise and loyalty of our publishers.

We will continue to review and update the work as the law and procedure alters and expands with a view to further editions in the future. It is essential that Judges, practitioners, governments, academics and all those affected by international criminal law are kept abreast of the current state of the law in a field which is certainly a growth industry.

International criminal courts have assumed a permanent and distinguished position on the international stage and within national jurisdictions to try serious international crimes. It can no longer be lamented that such crimes will go unpunished, even though the court system is in its infancy when compared with our domestic traditions. It can be claimed with some justification that due respect is being given to the international rule of law.

The law is stated as at October 1, 2005.

Rodney Dixon
London

Karim Khan

October 2005

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