

# Future Perspectives on International Criminal Justice

Carsten Stahn & Larissa van den Herik  
editors



T • M • C • A S S E R   P R E S S

# FUTURE PERSPECTIVES ON INTERNATIONAL CRIMINAL JUSTICE

Carsten STAHN & Larissa VAN DEN HERIK

*editors*



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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 co-operation 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*

John DUGARD

## ABBREVIATIONS

A.Ch.	Appeals Chamber
AC	Appeal Cases
ACHPR	African Court on Human and Peoples' Rights
ACHR	African Court on Human Rights
ACIV	Advisory Council on International Affairs
ACLU	American Civil Liberties Union
AfCRC	African Charter on the Rights and Welfare of the Child
AFP	Agence France-Presse
AFRC	Armed Forces Revolutionary Council
AJIL	American Journal of International Law
ALR	Australian Law Reports
Am. J. Comp. L.	American Journal of Comparative Law
Am. U. Int'l L. Rev.	American University International Law Review
AP	Additional Protocol
ASIL Proc.	ASIL Proceedings
BAPSC	British Association of Private Security Companies
Berkeley JIL	Berkeley Journal of International Law
BiH	Bosnia and Herzegovina
Brit. YbIL	British Yearbook of International Law
CACP	Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict
Cal. L. Rev.	California Law Review
Cambridge L.J.	Cambridge Law Journal
Case W. Res. L. Rev.	Case Western Reserve Law Review
CDF	Civil Defence Forces
Chicago-Kent L. Rev.	Chicago-Kent Law Review
Chinese JIL	Chinese Journal of International Law
CLR	Commonwealth Law Reports
Colum. J. Transnat'l L.	Columbia Journal of Transnational Law
Colum. L. Rev.	Columbia Law Review
Cornell Int'l L. J.	Cornell International Law Journal
CRC	Convention on the Rights of the Child
Crim. L. Rev.	Criminal Law Review
CRPC	Commission for Real Property Claims for Displaced Persons and Refugees
CSO	Civil Society Organization
DCAF	Democratic Control of Armed Forces
Denver J. Int'l L. and Policy	Denver Journal of International Law and Policy
DoD	Department of Defense
DRC	Democratic Republic of the Congo
Duke J. Comp. & Int'l L.	Duke Journal of Comparative and International Law
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EECC	Eritrea – Ethiopia Claims Commission
EJIL	European Journal of International Law
ETS	European Treaty Series

EU	European Union
Eur J Crime Crim L & Crim Just	European Journal of Crime, Criminal Law and Criminal Justice
FARC	Revolutionary Armed Forces of Colombia
Fed. L. Rev.	Federal Law Review
FIDH	International Federation for Human Rights
Fletcher F. World Aff	Fletcher Forum of World Affairs
FPLC	Forces Patriotiques pour la Libération du Congo
GA	General Assembly
GAOR	General Assembly Official Records
GC	Geneva Convention
Geo. J. Int'l L.	Georgetown Journal of International Law
GFLCP	German Forced Labour Programme
Gonz. L. Rev.	Gonzaga Law Review
Harv. L. Rev.	Harvard Law Review
Hastings L. J.	Hastings Law Journal
HPCC	Housing and Property Claims Commission
HRLJ	Human Rights Law Journal
HRLR	Human Rights Law Review
HRW	Human Rights Watch
Hum. Rts. Q.	Human Rights Quarterly
IACHR	<i>Inter-American Court on Human Rights</i>
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICL	International Criminal Law
ICLP	International Criminal Legal Process
ICLQ	International & Comparative Law Quarterly
ICRC	International Committee of the Red Cross
ICT	International Criminal Tribunal
ICTR	International Criminal Tribunal for Rwanda
ICTY	<i>International Criminal Tribunal for the former Yugoslavia</i>
IHL	International Humanitarian Law
ILC	International Law Commission
ILDC	International Law in Domestic Courts
ILM	International Legal Materials
ILR	International Law Reports
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
Indian J. Const. L.	Indian Journal of Constitutional Law
Int'l Arb. Awards	International Arbitral Awards
Int J Refugee Law	International Journal of Refugee Law
Int. Crim L. Rev.	International Criminal Law Review
Int'l J. Refugee L.	International Journal of Refugee Law
IOM	International Organization for Migration
IR	Internal Rules
IRIN Africa	Integrated Regional Information Networks Africa
ISAF	International Security Assistance Force
Isr. L. Rev.	Israel Law Review
J. Crim. L. & Criminology	Journal of Criminal Law and Criminology
J. of Applied Soc. Psychology	Journal of Applied Social Psychology
JCE	Joint Criminal Enterprise
JEM	The Justice and Equality Movement
JICJ	Journal of International Criminal Justice

KLA	Kosovo Liberation Army
Law & Prac Int'l Cts & Tribunals	Law & Practice of International Courts and Tribunals
Law & Soc'y Review	Law and Society Review
LJIL	Leiden Journal of International Law
LJN	Landelijk Jurisprudentie Nummer
Loy LA Int'l & Comp L Rev	Loyola of Los Angeles International and Comparative Law Review
LRA	Lord's Resistance Army
LRTWC	Law Reports of Trials of War Criminals
Malaya L. Rev.	Malaya Law Review
MCA	Military Commission Act
McGill L. J.	McGill Law Journal
Melbourne U. L. Rev.	Melbourne University Law Review
Mich L. Rev.	Michigan Law Review
Mich. J. Int'l L.	Michigan Journal of International Law
Mil. Law Rev.	Military Law Review
N.Y.U. J. Int'l L. & Pol.	New York University Journal of International Law and Policy
NATO	North Atlantic Treaty Organization
Neth. Q. of Hum. Rts	Netherlands Quarterly of Human Rights
New. Eng. L. Rev.	New England Law Review
NGO	Non-governmental organization
NHS	New Haven School
NIOD	Netherlands Institute for War Documentation
Nw. U. J. Int'l Hum. Rts.	Northwestern University Journal of International Human Rights
OECD	Organisation for Economic Co-operation and Development
Ohio State J. on Disp. Resol.	Ohio State Journal on Dispute Resolution
OTP	Office of the Prosecutor
PMC	Private military company
PrepCOM	Preparatory Committee on the Establishment of an International Criminal Court
PTC	Pre-Trial Chamber
PTDS	Post-traumatic stress disorder
RCADI	Recueil des Cours de l'Académie de La Haye
Rev Quebecoise de Droit Int'l	Revue Québécoise de Droit International
RPE	Rules of Procedure and Evidence
RS	Rome Statute
Rutgers-Cam. L.J.	Rutgers-Camden Law Journal
SC	Security Council
SCSL	Special Court for Sierra Leone
SG	Secretary-General
Soc. Psychology Quarterly	Social Psychology Quarterly
Stanford Law Rev.	Stanford Law Review
Statute L. Rev.	Statute Law Review
Supreme Court Econ. Rev.	Supreme Court Economic Review
SWGCA	Special Working Group on the Crime of Aggression
T.Ch.	Trial Chamber
Theoretical Inquiries L.	Theoretical Inquiries in Law
TIAS	Department of State Treaties and Other International Acts Series
Transnat'l L. & Contemp. Problems	Transnational Law and Contemporary Problems
TRC	Truth and Reconciliation Commission
Tul. J. Int'l & Comp. L.	Tulane Journal of International and Comparative Law

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TWC	Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10 (The Green Series)
U. Cin. L. Rev.	University of Cincinnati Law Review
U. Miami Inter-Am. L. Rev.	University of Miami Inter-American Law Review
U. Miami L. Rev.	University of Miami Law Review
U. Pa. L. Rev.	University of Pennsylvania Law Review
UK	United Kingdom
UKHL	United Kingdom House of Lords
UN	United Nations
UNCC	United Nations Claims Commission
UNGA	United Nations General Assembly
UNHCHR	United Nations High Commissioner for Human Rights
UNPROFOR	United Nations Protection Force
UNTAES	United Nations Transitional Administration in Eastern Slavonia
UNTS	United Nations Treaty Series
US	United States
Utah L. Rev.	Utah Law Review
Va J. Int'l L.	Virginia Journal of International Law
Vand. L. Rev.	Vanderbilt Law Review
VCLT	Vienna Convention on the Law of Treaties
Wis. Int'l L. J.	Wisconsin International Law Journal
WLR	Weekly Law Reports
Y.B. Int'l L. Comm'n	Yearbook of the International Law Commission
Yale J. Int'l L.	Yale Journal of International Law
Yale L. J.	Yale Law Journal

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