THE LEGACY OF AD HOC TRIBUNALS IN INTERNATIONAL CRIMINAL LAW

In the post-Nuremberg era, two of the most important developments in international criminal law are the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Created through UN Security Council resolutions, with specific mandates to prosecute those responsible for serious violations of international humanitarian law, the ICTY and the ICTR played crucial roles in the development of international criminal law. Through a series of chapters written by leading authorities in the field, The Legacy of Ad Hoc Tribunals in International Criminal Law addresses the history of the ICTY and the ICTR and the important aspects of the tribunals’ accomplishments. From examining the groundwork laid by the ICTY and the ICTR for greater international attention to crimes against humanity to the establishment of the International Criminal Court, this volume provides a comprehensive overview of the impact and lasting roles of these tribunals.

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The Legacy of Ad Hoc Tribunals in International Criminal Law

ASSESSING THE ICTY’S AND THE ICTR’S MOST SIGNIFICANT LEGAL ACCOMPLISHMENTS

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Contributors

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Before joining the Temple faculty, Professor deGuzman was an Adjunct Professor at Georgetown University, where she taught graduate courses in international human rights law. She also clerked on the Ninth Circuit Court of Appeals and practiced law in San Francisco for six years, specializing in criminal defense. Professor deGuzman also served as a legal advisor to the Senegal delegation at the Rome Conference where the ICC was created and as a law clerk in the Office of the Prosecutor of the International Criminal Tribunal for Former Yugoslavia. She was a Fulbright Scholar in Darou N’diar, Senegal.

Professor deGuzman received her PhD in 2015, from the Irish Center for Human Rights, National University of Ireland; her JD from Yale Law School in 1999; her MALD from Fletcher School of Law and Diplomacy, Tufts University; and BScFS from Georgetown University School of Foreign Service.

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**Stuart Ford,** Associate Professor of Law, John Marshall Law School, Chicago. Professor Ford has published articles on the International Criminal Court, the International Criminal Tribunal for the Former Yugoslavia, the Special Court for Sierra Leone, the responsibility to protect doctrine, crimes against humanity, and genocide. In 2015, Professor Ford received John Marshall’s Faculty Scholarly Achievement Award. His current research explores the effectiveness of international criminal tribunals, with the goal of improving their success. He is currently Co-Chair of the American Society of International Law’s International Courts and Tribunals Interest Group and is a past Chair of the American Association of Law Schools’ Section on International Human Rights. He spent the summer of 2015 as a Visiting Professor at the International Criminal Court where he helped the Office of the Prosecutor develop performance metrics for its investigations and prosecutions.

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from Attorney General Janet Reno for “Service to the United States and International Justice.”

In 2003, Professor Gordon joined the US Department of Justice Criminal Division’s Office of Special Investigations, where he helped investigate and prosecute Nazi war criminals and modern human rights violators.

Professor Gordon has trained high-level federal prosecutors in Addis Ababa at the request of the Ethiopian government, as well as prepared prosecutors for the Khmer Rouge leadership trial at the Extraordinary Chambers in the Courts of Cambodia in Phnom Penh and trained lawyers and judges at the War Crimes Chamber for the Court of Bosnia and Herzegovina. He is one of the world’s foremost authorities on incitement to genocide, and his book *Atrocity Speech Law: Foundation, Fragmentation, Fruition*, proposing a new paradigm for international hate speech law, was published by Oxford University Press in 2017.

Professor Gordon co-wrote the US Supreme Court amicus brief on Holocaust and Darfur Genocide survivors in the case of *Yousuf v. Samantar*. He also represented the International League for Human Rights at the International Criminal Court Conference in Kampala, Uganda. He serves as a consultant for the International Nuremberg Principles Academy and is an adviser on hate speech issues for the Sentinel Project on Genocide Prevention’s Advisory Council. Professor Gordon is also on the Council of Advisors for the Global Institute for the Prevention of Aggression.

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Ms. Larkin received her JD from Stanford Law School in 2016, where she served as president of the Stanford International Law Society, submissions chair of the Stanford Journal of International Law, and coach of the Stanford Vis International Arbitration team.

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Professor McDermott Rees’s research interests are primarily in the fields of human rights and international criminal law. Her research has been published in leading journals, including the American Journal of International Law, Leiden Journal of International Law, Journal of International Criminal Justice, International Criminal Law Preview, and Law, Probability, and Risk. Her monograph, Fairness in International Criminal Trials, was published by Oxford University Press in 2016. Her work has been cited as legal authority by numerous leading international and national courts, including the International Criminal Court and the Supreme Court of India.

Valerie Oosterveld is an Associate Dean at the University of Western Ontario, Canada. Her research and writing focus on gender issues within international criminal justice. She is a member of the Royal Society of Canada’s College of New Scholars, Artists, and Scientists. She teaches courses in the field of international law. She is the Deputy Director of Western University’s Centre for Transitional Justice and Post-Conviction Reconstruction, and is affiliated with the Department of Women’s Studies and Feminist Research. Professor Oosterveld is the co-author of one of Canada’s leading texts on public international law – International Law: Doctrine, Practice, and Theory (Irwin Law). This text has twice been cited by the Supreme Court of Canada.

Before joining Western Law in July 2005, Professor Oosterveld served in the Legal Affairs Bureau of Canada’s Department of Foreign Affairs and International Trade. In this role, she provided legal advice on international criminal accountability for genocide, crimes against humanity and war crimes, especially with respect to the International Criminal Court, the International Criminal Tribunals for the Former Yugoslavia and Rwanda, the Sierra Leone Special Court, and other transitional justice mechanisms. She was a member of the Canadian delegation to the International Criminal Court negotiations and subsequent Assembly of State Parties. She also served on the Canadian delegation to the 2010 Review Conference of the Rome Statute of the International Criminal Court in Kampala, Uganda.
Michael P. Scharf, Dean of the Law School, Case Western Reserve University. He is also the Director of the Frederick K. Cox International Law Center and Joseph C. Hostetler – BakerHostetler Professor of Law. He is the host of “Talking Foreign Policy,” a radio program broadcast on WCPN 90.3 FM. In addition, Dean Scharf serves as Managing Director of the Public International Law and Policy Group, a Nobel Peace Prize-nominated NGO that provides pro bono legal assistance to developing states and states in transition. In 2013, Scharf headed the Blue Ribbon Committee that drafted a statute for a War Crimes Tribunal for Syrian atrocities.

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During the first Bush and Clinton Administrations, Scharf served in the Office of the Legal Adviser of the US Department of State, where he held the positions of Attorney-Adviser for Law Enforcement and Intelligence, Attorney-Adviser for United Nations Affairs, and delegate to the United Nations Human Rights Commission. In 1993, he was awarded the State Department’s Meritorious Honor Award “in recognition of superb performance and exemplary leadership” in relation to his role in the establishment of the International Criminal Tribunal for the former Yugoslavia.

Dean Scharf graduated from Duke University School of Law, with Order of the Coif and High Honors. He was a judicial clerk to Judge Gerald Bard Tjoflat on the Eleventh Circuit Federal Court of Appeals. He is the author of over 100 scholarly articles and 18 books, including The International Criminal Tribunal for Rwanda, which was awarded the American Society of International Law’s Certificate of Merit for outstanding book in 1999, and Enemy of the State: The Trial and Execution of Saddam Hussein which won the International Association of Penal Law’s book of the year award for 2009. His last four books have been published by Cambridge University Press. Dean Scharf continues to teach International Law and was ranked as 17th most cited author in the field since 2010 by the Lieter study, issued in June 2016.

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Professor Trahan attended the International Criminal Court’s Special Working Group on the Crime of Aggression and the International Criminal Court’s Review Conference in Kampala, Uganda. She is the Chairperson of the American Branch of the International Law Association’s International Criminal Court Committee, and a member of the Association of the bar of the City of New York’s Task Force on National Security and the Rule of Law, as well as the International Law Association’s Committee on Use of Force. She has also taught at Columbia University, Fordham Law School, Brooklyn Law School, The New York School,
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The first half of the 1990s was a period of wide support for international law and international courts, both criminal and civil. In May of 1993, the United Nations International Criminal Tribunal for the former Yugoslavia (ICTY) was established as a minimal response from the United Nations Security Council to the egregious war crimes and crimes against humanity that were being committed in the former Yugoslavia. The United Nations International Criminal Tribunal for Rwanda (ICTR) and hybrid tribunals followed and ultimately, in the middle of 1998, the Rome Statute for the International Criminal Court (ICC). In 1994, the United Nations Convention on the Law of the Sea came into operation and established the International Tribunal for the Law of the Sea. In 1995, the World Trade Organization established its Appellate Body as a court of final instance to entertain appeals from reports issued by panels in disputes between WTO members.

The ICTY enjoyed the fullest support from the United States and received its crucial economic and political assistance. That support continued when the Security Council, in 1994, established the ICTR. Significantly, the United States did not object when the ICTY’s exercise of jurisdiction included Kosovo at a time, during 1999, when NATO forces, under the leadership of the United States, used military force against the Serb Army of Slobodan Milosevic in order to protect the Albanian population.

The support for international law and international courts during the 1990s did not continue. With regard to the ICC, in 2001 the United States, among other measures, “unsigned” the Rome Statute. In more recent times that Court has been under relentless attack by the African Union and increasingly criticized by governments that were among its traditional supporters. That change is particularly apparent with regard to my own country, South Africa, where a withdrawal from the Rome Statute remains an open question. In recent months there have been attacks on the WTO by the Trump Administration, which is preventing vacancies on the Appellate Body from being filled. China, India, Russia, and the United States continue to remain outside the ICC. The United States remains the only large nation that has failed to ratify the United Nations Convention on the Law of the Sea.

It is in that context that this book could not be more timely. It contains an impressive analysis of the legacy of the ICTY and ICTR. While no one can expect
Foreword

a perfect record from any human endeavor, the fourteen chapters provide an exhaustive and careful analysis of just about every aspect of the work of the ad hoc tribunals. They include the important development and recognition of gender-related crimes, superior responsibility, fair trial standards, incitement as a war crime, and rules of evidence and procedure. There is an impressive analysis of the jurisprudence of the ad hoc tribunals and its contribution to the advance of international criminal law. There is an evaluation of the roles the ad hoc tribunals played in the target countries and, at the same time, recognition that in the area of reconciliation the tribunals appear to have enjoyed little success.

There are many allusions to the relationship between politics and the work and legacy of the ad hoc tribunals. This includes the political platform that the ICTY inadvertently gave to Milosevic and Seselj, who insisted on self-representation, and the problems that disruptive defendants create for the presiding judges. Other chapters consider sentencing issues and the difficulties they present for courts that have to consider massive crimes that frequently include thousands of victims.

There are legitimate and helpful criticisms of aspects of the work of the tribunals. They include the inaccessibility and undue length of many of the judgments and inadequacy of the steps taken, to ameliorate the unavoidable distance of the tribunals from the scenes of the crimes and the homes of the victims.

In the concluding chapters, Michael Scarf and Milena Sterio state that “it is this book’s conclusion that overall, the tribunals have contributed significantly to the development of international criminal law and international humanitarian law, and that they will continue to influence future prosecutions at the International Criminal Court, as well as future efforts to instill international justice.” That conclusion is amply justified by the excellent analyses contained in the book.

This work will be enjoyed by all interested in the history of modern international criminal law and it will be an indispensable resource and reference for all students of the subject.