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## INTRODUCTION TO *ESSAYS ON INTERNATIONAL CRIMINAL JUSTICE*

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This collection, written by a brilliant and prolific scholar and practitioner of international criminal justice, is an insightful and important contribution to the existing literature. Authored by an individual steeped in the jurisprudence of the *Ad hoc* Tribunals, as well as the legal traditions of Spain and much of the Spanish speaking world, the book serves as a bridge from the world of the *Ad hoc* Tribunals to the new world of the International Criminal Court (ICC) as well as from the International Criminal Court to national legal systems, particularly Spain and Colombia. The chapters it contains take as their premise the central role of the International Criminal Court in the system of international criminal justice that developed over the past two decades since the fall of the Berlin wall, but places the current operations of the ICC in historical and juridical context.

Each chapter in this collection is copiously footnoted and thoroughly researched, making it an important reference tool for scholars and practitioners in the field. Additionally and importantly, the chapters explore, without polemic, areas of controversy and dissent and thoughtfully and scrupulously set forth arguments for and against particular doctrinal choices. Where Professor Olasolo inserts his own views, as he properly does, those are clearly and forthrightly labelled as such. Well written and concise, the chapter address some of the most interesting current issues in the practice of the ICC: the question of complementarity before the Court itself (chapters 2 and 3); its application before national legal systems (chapters 4 and 5); forms of joint and indirect perpetration (chapters 6 and 7); the role of victims in criminal proceedings before the ICC (chapter 8) and finally, the role of legal clinics in continental Western Europe, and more particularly the operation and establishment of the Utrecht Legal Clinic on Conflict, Human Rights and International Justice (chapter 9).

The scholar will find much of interest and importance in the chapters on doctrine and its application, particularly in the extraordinarily helpful analysis of the Court's early case law as well as the jurisprudence of the ICTY. Professor Olasolo's experience as not only a scholar but practitioner of international criminal law is evident in his creative thinking about what kinds of preparatory acts might give rise to liability in the ICC for attempt, for example, and in thoughtfully analysing the relationship between national measures of transitional justice such as conditional amnesties and the admissibility criteria of the ICC Statute. His careful analysis of the text of the ICC Statute as well as its ancillary instruments, combined with his thorough knowledge of the law and his participation in the

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Statute's negotiation as a member of the Spanish delegation, make his analyses particularly cogent and rigorous.

Finally, this book is obviously of tremendous current value. As this introduction was being written, the Security Council unanimously adopted Resolution 1970, which, among other things, referred the situation in Libya to the International Criminal Court, demonstrating the international community's belief in the Court's preventive value (as well as its possible punitive effect). This kind of role for the Court was identified in the first chapter of this collection, on 'The Role of the International Criminal Court in Preventing Atrocity Crimes through Timely Intervention', which thoughtfully and presciently analyses the relationship between the 'responsibility to protect' doctrine and the operations of the Court.

Books such as this are long in the making and represent a tremendous effort on the part of their authors. This book – representing the fruit of Professor Olasolo's thinking over several years – is no exception. It is a superb contribution not only to the literature on the International Criminal Court, but to the operations of international criminal justice itself. Containing constructive criticisms as well as imaginative thinking about how the ICC might respond in future cases, it demonstrates not only the author's ability as a legal scholar, but his commitment to a world in which the commission of atrocity crimes becomes less and less frequent, and their prevention and punishment becomes increasingly effective.

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## FOREWORD

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### THE LAW IN THE TWENTY-FIRST CENTURY

Writing a foreword to Professor Hector Olasolo's new book on international justice is part of the ongoing dialogue we have had since he was appointed to Utrecht University.

I first encountered Professor Olasolo when, shortly after the International Criminal Court began its work, he joined the Chambers as legal officer of Judge Sylvia Steiner. She was the single judge in the first pre-trial proceedings of the Court. In those days, our conversations were brief and usually occurred at unconventional hours when we would meet at the doors of the Court. When I was leaving late in the evening, he would be returning to work. Hector used to come to the court house at eleven at night to take advantage of the quietness to prepare his arguments. Hector's remarkable diligence and dedication was acknowledged by this institution in which his career was born and developed.

Since his transition to the academic field, our dialogue revolved around substantive issues of the International Criminal Court. As an academic, Professor Olasolo retains his conviction in the need to strengthen international criminal law, and in particular the International Criminal Court as an institution through which a strong international justice system can be attained. Like few others, Professor Olasolo has transformed his knowledge of the internal functioning of the International Criminal Court's into theoretical knowledge. He uses his experience at the Court in order to identify and analyse the major theoretical challenges faced by the innovative system of justice created by the Rome Statute.

The majority of academic works on the Rome Statute focus on the Court's level of compliance with the fundamental guarantees established by states: the principles of legality and culpability, the presumption of innocence, due process of law. Such scrutiny is welcome. The International Criminal Court is in the process of building its foundation which must be solid. Academic scrutiny ensures technical control and will, with time, consolidate the different views of authors influenced by their own national legal traditions. This process of academic discussion and synthesis is fundamental because it distils the criminal procedure mechanisms that the Court implements and will make them universal.

At the same time, it is necessary to analyse the less classical aspects of the system created in Rome. Criminal jurisdiction, like currency and the flag of a state, constitutes one of the principal elements of national sovereignty. The existence of the International Criminal Court with the capacity to investigate and prosecute the

heads of state of States Parties constitutes both a confirmation and a departure from the principles of Westphalia. It is a departure from the traditional forms of international relations, accepted by the sovereign states that have signed the treaty. Therefore it is not a revolution, but rather an evolution from one legal system to another that is substantially different. Legal academia of the twenty-first century must analyse this new legal system that has a universal aspiration and does not pertain to a single government but helps to coordinate multiple national governments.

This departure reflects a new world, a new demand from all of the world's citizens. The citizens of the twenty-first century, forming part of different communities, are citizens of a city like Tripoli, a country like Libya; they belong to regional groups like the Arab League and the African Union. They are also part of the United Nations. They are using new technologies to request respect for their rights from local, national, regional and global leaders. The Rome Statute is following this new trend; it created an institutional framework to protect the rights of any citizen under the jurisdiction of the Court. Its creation modifies the dynamic of the national, regional and global institutions without changing their rules. Academia must develop these different perspectives and distinguish which questions are to be resolved at the local level by a mayor, who corresponds to the prime minister, and which call for regional or global resolution.

In this sense, the work that Professor Olasolo presents to us in this volume follows this innovative approach. In his inaugural lecture, as a professor at Utrecht University, he addresses the fundamental question of the preventative role of the International Criminal Court. That is the mission established by the States Parties in the preamble of the Rome Statute: 'to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes'.

Professor Olasolo addresses this issue by analysing the preventative effects of the Court's actions, not only by means of a final sentence, but through timely intervention, during the phase, of the investigation or even during the preliminary examination of a situation.

After eight years' experience as Prosecutor of the Court, in which we have conducted several preliminary examinations, I am pleased that the inaugural lecture of Professor Olasolo addresses this issue. It is a pioneering, in-depth and rigorous analysis of the possibilities that the procedural framework of the Rome Statute and the Rules of Procedure and Evidence provide to the International Criminal Court. It can help the Office of the Prosecutor, to develop, in an effective manner, legal actions aimed at preventing crimes against humanity, war crimes or genocide.

The preventative role of the International Criminal Court is of tremendous relevance; it requires theoretical discussions and factual analysis of its impact, and can make the difference between life and death for the people of Darfur or Ivory Coast.

The book carries this lesson. It contains a different and innovative aspect of the issue. It is accompanied by a collection of chapters of the highest quality about the

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latest developments in a number of issues concerning substantive criminal law, criminal procedure, criminal policy, international cooperation and judicial assistance, and international relations, in which the author demonstrates the comparative character and multidisciplinary nature of his legal education and research.

The work of Professor Olasolo breaks new ground in the academic field of international criminal law, as an analysis of the system as a whole. I therefore wish to express my congratulations for this work.

Luis Moreno Ocampo  
Prosecutor, International Criminal Court

The Hague, 27 April 2011

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## PRELIMINARY REFLECTIONS

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### THE PREVENTATIVE ROLE OF THE INTERNATIONAL CRIMINAL COURT

Scholars and commentators frequently state that the adoption of the Treaty of Rome for the establishment of a permanent International Criminal Court in July 1998 marked a historic milestone in the development of International Human Rights Law, International Humanitarian Law and in particular, International Criminal Law. Nevertheless, the interpretation of the penal provisions encompassed in the Statute has been difficult.

The Court has achieved considerable progress since it became operational in March 2003. However, these advances have faced manifold challenges: (inter alia) the lack of timely political will of the States Parties in enforcing the warrants of arrest issued by the Court; the complex nature of international criminal law, which is still in the making and lacks a general theory; and the different legal backgrounds and training of judges.

Professor Hector Olasolo has in recent years written thought-provoking essays which provide theoretical and practical problems arising from the interpretation and application of the Rome Statute in situations and cases thus far before the Court. In each one of the chapters compiled in this publication the author delves into the doctrine, offering his vision on the scope of the ICC provisions, while contrasting them with national legislation and critically examining the most recent jurisprudence of the Pre-Trial, Trial and Appeals Chambers of the ICC.

As a young scholar, Professor Hector Olasolo is already a known and respected author of books, essays and articles in which he continually explores the panorama of international criminal law, what he has referred to as a passionate calling. This passion, coupled with his professional experience in international criminal tribunals – including his work as a Legal Officer at the International Criminal Court – have led him to offer us with this collection of chapters, some of them unpublished until now. His compilation provides an enormous source of easy reference to students, academia and legal actors in the field of international law.

A look at the titles compiled in this volume demonstrates the present challenges to international criminal justice. The range of the themes examined is broad in scope. Issues covered by this publication include, inter alia: the criteria for admissibility of situations and cases; the application of such criteria to national jurisdictions; the right of victims to participate in proceedings; the complexity in defining

concepts such as indirect perpetration and co-perpetration in international criminal law; and the need for the amendment of national legislations in order to enable cooperation with the Court. In all these, Professor Olasolo provides important academic and practical contributions that no doubt will fuel expert debate and hopefully assist in the creation of a body of national and international criminal law jurisprudence that is more consistent with the values and principles of the Rome Statute. One chapter in this volume that particularly caught my attention and motivated me to share some reflections is ‘The Role of the International Criminal Court in Preventing Atrocity Crimes through Timely Intervention: From the Humanitarian Intervention Doctrine and *Ex Post Facto* Judicial Institutions to the Notion of Responsibility to Protect and the Preventative Role of the International Criminal Court’. It is noteworthy to mention that this chapter was first delivered by Professor Olasolo on 18 October 2010 during his inaugural lecture as Professor of International Law and International Criminal Procedure at the prestigious University of Utrecht in the Netherlands.

It is widely acknowledged that the entry into force of the Rome Statute and the subsequent establishment of the International Criminal Court were significant steps towards ending impunity for the commission of international crimes and thus, to promote peace and reconciliation. ‘There will be no peace without justice’ was the motto that was coined and incessantly repeated to provide legitimacy for the Court’s mandate. I personally support this guiding principle.

Looking back at history – from the Nuremberg to the Tokyo tribunals to the 1993 and 1994 atrocities and genocide that took place in the former Republic of Yugoslavia and Rwanda respectively – the international community has recognised the need to set up an effective mechanism to prosecute and thereby deter the commission of future atrocities. The *Ad hoc* Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR correspondingly) were created to put an end to impunity for crimes already committed and no special attention was given to the plight of victims. Nevertheless, these tribunals were essential since they drew the attention of the international community to the need for the creation of a permanent judicial body. Their jurisprudence served as a basis for drafting the Rome Statute. In particular, the *Ad hoc* Tribunals were responsible for defining crimes of sexual violence as war crimes and crimes against humanity, which later led to the inclusion of these crimes within the Rome Statute. The *Ad hoc* Tribunals have therefore been relevant in the development of modern international criminal law. However, what has not yet been evaluated – and it does not yet seem possible – is the importance they played in fighting impunity at the international level and their role in achieving equality, peace and reconciliation in the territories of the former Yugoslavia and Rwanda.

These questions are also applicable to the International Criminal Court and its role in achieving peace, which cannot be limited only to its judicial function or to the prosecution of important political or military leaders around the world for crimes already committed. Professor Olasolo explores this possibility (ethical and categorical imperative, I would say), that the International Criminal Court also

has a crucial function in its global responsibility to protect victims before their fundamental rights are violated.

The long-standing doctrine of humanitarian intervention was abandoned for different reasons ranging from global geopolitics and international real-politik. In 2005, the international community renewed its commitment and agreement to act through the United Nations as part of its 'responsibility to protect' civilians from atrocities when their governments fail to do so (World Summit, 14–16 September 2005).

In his chapter, Professor Olasolo clearly exposes the fundamentals of international law that enshrine the responsibility to protect, while emphasising that prevention is a natural role that must be fulfilled by the Court as part of its mandate. He provides an original perspective on how a series of preventive actions and timely intervention can be offered by the ICC to the international community in order to prevent the commission of international crimes.

From section III and until the end of the chapter, he portrays distinct scenarios of the two dimensions of the Court's preventive mandate: general prevention and timely intervention. 'Atrocious crimes are not inevitable', says Professor Olasolo. This is an affirmation that I share and that draws from a profound confidence in the mission of the Court. The ICC can intervene with concrete warnings to future atrocities (section IV) and during the commission of such crimes (section V).

As I write this commentary, atrocities which could have been prevented are ongoing in different parts of the world. Some of these situations have been referred to the Court by the United Nations Security Council for investigation by the ICC Prosecutor. These ongoing similar situations around the world could provide a historic opportunity for the ICC to open these new perspectives within the preventive mandate of the International Criminal Court. This would undoubtedly make the ICC a unique institution, to become a judicial mechanism that integrates three fundamental areas of international law (criminal, humanitarian, human rights) effective in protecting life, liberty, and freedom of all human beings. A court that fulfils its mandate as clearly provided for at the second paragraph of the preamble of the Rome Statute which reads '[m]indful that during this century millions of children, women and men (who) have been victims of unimaginable atrocities that deeply shock the conscience of humanity'.

One day, this will become possible through cooperation between the ICC and the international community and efforts of scholars like Professor Olasolo, whose contribution prompts debate among those interested in international criminal justice. I thank him for his efforts in renewing our conviction and commitment to the International Criminal Court and in a universal system of criminal justice that protects humanity against serious crimes.

Elizabeth Odio Benito

Judge and Former Vice-President, International Criminal Court

The Hague, May 2011