

PREFACE TO THE THIRD EDITION

Echoing what we wrote in the preface to the second edition, we continue to be gratified by the warm welcome this book has received, and nothing has changed in our overall approach of giving emphasis to the transnational as well as purely international criminal dimensions.

The most visible change is that we have removed the former Chapter 10, which studies the effect on criminal enforcement of treaty rights, using extradition to face the death penalty as our case study. No teacher who used the second edition reported teaching that chapter, so in the interest of saving space we removed it. (We will make the chapter available to interested readers on request.) That means that the numbering of subsequent chapters is different from the previous edition.

There have been significant changes in the legal landscape since the last edition, which our revisions take into account. Naturally, some chapters have not changed much, but even in those chapters we have replaced older cases with more recent ones. Only three chapters remain unchanged: Chapter 17 (formerly 18) on defenses, and the final two chapters, on crimes against women and on alternatives to criminal prosecution. Chapter 1 has in places been reworded for improved clarity, but otherwise remains unchanged.

What follows is a brief explanation of the changes in other chapters.

Chapter 2 (Introduction to International Law) now includes an excerpt from the articles on treaty interpretation in the Vienna Convention on the Law of Treaties (art. 31 and 32), which is useful for other chapters. Its discussion of state sovereignty now briefly introduces the Responsibility to Protect concept, which is discussed as well in other chapters; and we have added a paragraph on Singapore's *Yong Vui Kong* decision in the section on *jus cogens*. Otherwise it remains the same.

Chapter 3 (Tribunals) required major updates on the international tribunals. We have updated the discussions of the ICTY and ICTR, which have now completed their work, and added a description of the Specialist Chambers of Kosovo. We have likewise brought the discussion of Cambodia's Extraordinary Chamber and the Lebanon Tribunal up to date. We deleted the brief discussion of the Timor-Leste tribunal that appeared in the previous edition. The most important addition is a new sub-section on the Extraordinary African Chambers that tried Hissène Habré.

Chapter 4 (Comparative Procedure and Sentencing) is amended to reflect relevant changes in foreign law and to provide more current statistics on the practice of international tribunals.

Chapter 5 (Jurisdiction) includes some significant changes. The discussion of the principles of international jurisdiction have been updated to incorporate relevant provisions of the new Restatement of the Law Fourth, Foreign Relations Law of the United States in place of the Third Restatement excerpts in the previous editions. We replaced *U.S. v. Ricardo*, 619 F.2d 1124 (9th Cir 1980) with the more recent drug conspiracy case *U.S. v. Rojas*, 812 F.3d (5th Cir. 2016). We significantly shortened the excerpts from the ICJ's 2002 Arrest Warrant opinions on universal jurisdiction.

Chapter 6 (Immunities): We replaced *Guinand* with *U.S. v. Al Sharaf*, 189 F.3d 45 (DCD 2016) on diplomatic immunity and replaced *Killeen* with *Rana v. Islam*, 305 FRD 53 (SDNY 2015) on consular immunity. We condensed the excerpt from the House of Lords' opinions in *Pinochet*, and added discussion of immunities before international criminal tribunals, including an excerpt from the ICC Pre-Trial Chamber's 2017 in *Al-Bashir*. We also added some discussion of the ILC's 2017 Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction.

Chapter 7 (U.S. Constitutional Rights in a Transnational Context) has relatively minor changes: brief discussions of *Hernandez v. United States*, 759 F.3d 249 (5th Cir 2014) and subsequent decisions, and added discussion of *United States v. Allen*, 865 F.3d 63 (2d Cir. 2017).

Chapter 8 (Obtaining Evidence Abroad): We replaced *In re Clerici with Supervitamins, S.A.*, 2017 WL 5571037 (ND CA 2017). In addition, we replaced references to the 2003 US-Japan MLAT with comparable provisions of 2015 US-Kazakhstan MLAT.

Chapter 9 (International Extradition and Its Alternatives): We added discussion of the 2014 ECHR *Trabelsi v. Belgium* decision regarding "life without parole" (LWOP) and the 2017 UK decision in *Rwanda v. Nteziryayo* [2017] EWCH 1913.

Chapter 10 (Organized Crime; formerly 11) we added mention of the Supreme Court's decision in *Boyle v. United States*, 556 U.S. 938 (2009), updated Italian criminal code section 416*bis* to reflect the increase in statutory penalties, and updated the note on extraterritorial application of civil RICO to reflect the Second Circuit's decision in *Norex Petroleum Ltd v. Access Industries Inc.*, 631 F.3d 29 (2d Cir. 2010).

Chapter 11 (International Trafficking). We replaced excerpts from/references to the 2013 Trafficking in Persons Report with comparable excerpts from the 2017 TIPS report. Similarly, we replaced references to the 2013 international narcotics control strategy report with comparable references to the 2017 INCSR. We shortened discussion of trafficking in drugs (1988 illicit trafficking in narcotics and psychotropic substances convention) and firearms (2001 Firearms Protocol) in order to include a new section D on expanding efforts to address illicit trade in Cultural Objects and Antiquities.

In Chapter 12 (Money Laundering), we have updated the statutory material. The rest of the chapter remains the same.

In Chapter 13 (Corruption), we updated enforcement statistics and added an excerpt from the 2017 Department of Justice FCPA enforcement policy.

In Chapter 14 (Terrorism) we have made numerous small updates. A larger change is that we have shortened the discussion of UN counter-terrorism resolutions, replacing the extended excerpt from Professor Scheppele's manuscript with a summary. In the section on material support for terrorism, note material reflects developments in case law consequent on *Humanitarian Law Project*.

We have extensively updated the section on military commissions to discuss the events and controversies that have cropped up since the last edition. In addition, we shortened the note material to make for more concise reading assignments.

Chapter 15 (The International Criminal Court) has been rewritten substantially to reflect recent political events and pressing legal issues in the work and functioning of the ICC. It discusses the ongoing challenges the ICC faces in its attempts to secure legitimacy amongst different stakeholders, including African states. In order to make the material more manageable, the segment on the ICC's procedural and evidentiary framework has been replaced by new material on current areas of controversy that have seen rapid developments since the previous edition: the criterion

of “gravity” as a factor in admissibility, the doctrine of complementarity, the law and practice of sentencing, and victim participation and reparations.

Chapter 16 (Modes of Participation and *Mens Rea*) has been updated in light of the ICC’s jurisprudence on modes of liability. The sections on Article 25(3)(c) and Article 25(3)(d) have been revised in light of the recent ICC pronouncements on the objective and subjective elements of accessorial responsibility. The discussion of command responsibility now includes an excerpt from the 2016 judgment of Trial Chamber III in *Prosecutor v. Bemba*, the first conviction under Article 28 of the ICC statute. Regrettably, the Appeals Chamber decision reversing Bemba’s conviction came too late to include discussion or excerpts of its new doctrine of command responsibility. We do, however, include brief discussion over Colombia’s controversial decision to revise its doctrine of command responsibility in connection with the peace agreement between the government and the FARC.

Chapter 17 (Defenses) has no changes.

Chapter 18 (Crimes Against Humanity) has several notable changes. As in previous editions, we introduce the concept by examining the statutory changes from Nuremberg to the ICC; but the material has been compressed and reorganized for greater clarity. The biggest change to the chapter is in the section on the “state or organizational policy” element of the crime. Here, we retained but shortened Judge Kaul’s dissent in the Kenya Article 15 decision. But we have added a longer excerpt from Judge Eboe-Osuji’s opinion in the *Ruto and Sang* case, along with a shorter excerpt from Judge Herrera Carbuccia’s dissenting opinion in the same case. We have also added a brief discussion of the draft Convention on Crimes Against Humanity.

Chapter 19 (Genocide) is mostly unchanged. The one major modification is in the note material to *Krstić*, on the question of what constitutes a substantial part of a protected group. We have added discussion of the ICTY’s opinion on this topic in *Mladić*, and also discussion and excerpts from the European Court of Human Rights’s *Vasiliauskas* case. In the final section of the chapter, on state responsibility to prevent genocide in other states, we have added note material about Syria and the assaults on the Rohingya minority in Myanmar.

Chapter 20 (War Crimes and the Crime of Aggression) has significant changes. Now that the Assembly of States Parties of the ICC has activated the crime of aggression, we have expanded the treatment of this crime—including retitling the chapter, which in previous editions was simply “War Crimes.” Our new section on aggression includes a discussion of the opt-in/opt-out controversy that came close to derailing the activation of the crime. We also include discussion material and questions on whether preemptive (“anticipatory”) attacks against military threats, or humanitarian military interventions, are acts of aggression under the statute (and if so, whether they might constitute the crime of aggression). We have added an additional topic: whether cyber attacks against another state are acts of aggression. To facilitate discussion, we include an excerpt from an article on the law of cyber-warfare by Michael Schmitt.

In the discussion of the war crimes, our chief update has been to incorporate material from the U.S. Defense Department’s Law of War Manual, which was issued after the previous edition of this book was published. In the discussion of the *Tadi* test for the geographical scope of an armed conflict, we have added a discussion of the recent U.S. Military Commission decision on the temporal limits of armed conflict. It addresses the issue of when the U.S. conflict with Al Qaeda began. Our section on proportionality retains the previous edition’s excerpt from the *Prli* trial judgment, but adds to it the 2017 Appeals Chamber judgment that reversed it, and Judge Pocar’s

dissent. We have also added note material on the Israeli Supreme Court's *Beit Sourik* analysis of proportionality and necessity, and a discussion by a U.S. commander of how proportionality assessments were done in the Iraq War. Finally, we have updated information about U.S. drone attacks.

Chapter 21 (Torture) retains the structure and the readings from the last edition, although we have shortened some of the excerpts. The introduction now includes a brief discussion of evolving public opinion on the use of torture in interrogations, and also President Donald Trump's pro-torture statements. Our updates incorporate discussion of the SSCI torture report and Republican and CIA rebuttals. There are also two new readings in the chapter: a blog post summarizing the Israeli Supreme Court's recent *Abu Ghosh* torture decision (which is not yet available in English), and an article by moral philosopher Jeff McMahan to the readings in the section on the torture debate. Finally, because so much public discussion concerns the question of whether torture "works," we have added a section at the end discussing what is known (and not known) about this issue.

In Chapter 22 (Sexual Violence) has no significant changes.

In Chapter 23 (Alternatives) nothing has changed.

As before, and in the continued expectation that there could be still another revision of this text in four or five years, we encourage users to provide us feedback about what works and what does not, about material that might usefully be included or excluded, or about any other changes or modifications which might be considered. The field of international law is anything but static, and our hope is that this text can remain current and relevant as a primary instructional tool.

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