

## PREFACE TO THE SECOND EDITION

---

Since the first edition of this textbook was published nearly four years ago, we have been gratified by the warm welcome it has received. For the most part, those who have taught from it have told us that its orientation and structure work well at both the introductory and advanced levels of instruction. This mirrors our own experience. While we each use it differently in our respective courses, our sense is that the vision of the volume (as articulated in the preface) remains sound. Despite the rapidity of change in this still-young and developing field, we believe our approach to the scope and organization of the problems—in particular, giving emphasis to the transnational as well as purely international criminal dimensions—continues to be the right one.

Accordingly, we have made few structural changes to the text and have instead concentrated on (i) updating the material and (ii) adjusting the presentation in those few areas where experience has indicated that a somewhat different approach might be more successful from the perspective of the students.

Overall, the aim of the book continues to be comprehensive—both in the sense of covering the truly “international” realm in which the International Criminal Court operates and the “transnational” dimension in which criminal law functions at the domestic level and across national boundaries, as well as in the sense of addressing a broad range of issues in order to provide users with the flexibility of adjusting the substantive coverage of their courses as they wish.

We have also tried to keep things simple enough to permit the book to be used at the basic level (indeed, one of us teaches an introductory elective course from it to first year students) while at the same time including enough detail to permit it to serve at the advanced level (and in fact we also use it for LL.M. purposes). This is no small challenge, and some trade-offs are inescapable, but on the whole we continue to see this as the right approach.

It should therefore come as no surprise that our Chapter 1 (Introduction) has changed little. Where the first edition referred to genocide, crimes against humanity, war crimes, and aggression as “the great crimes,” we now use the standard terminology: core crimes. In discussing U.S. sentencing policy, we have added a reference to the 2011 Supreme Court case *Tapia v. United States*. We changed two quotes from the Federal Rules of Evidence to reflect the 2011 amendments. We have also shortened and tightened the chapter and moved the discussion of the rationales for punishment into Chapter 4, just before the material on sentencing, which is a more logical place for it.

Chapter 2 (Introduction to International Law) updates the material on the vexing issue of self-executing vs. non-self-executing treaties, but otherwise remains largely the same.

Chapter 3 (Tribunals) required major updates on the international tribunals (ICTY, ICTR, hybrids). To accommodate them, we have pared back the opening discussion of Nuremberg—we don’t want the chapter to get too lengthy. We’ve added a short note on the so-called residual mechanism (the “MICT”) for concluding the

work of the ICTY and ICTR. The biggest change is in the section on the Sierra Leone Special Court, where we have added an excerpt from a terrifically interesting paper by Prosecutor David Crane, which raises crucial questions about how far a prosecutor can intrude into the political realm.

Chapter 4 (Comparative Procedure and Sentencing) needed only slight changes but now includes the material on rationales of punishment from Chapter 1.

Chapter 5 (Jurisdiction) includes some significant changes. The *Bowman* case has been “demoted” from a principal case to note material, and we have substituted the recent case *U.S. v. Belfast*. We’ve also eliminated the *Eichmann* case from the section on the protective principle, and in its place added a problem based on the UK’s Terrorism Act of 2006, which makes it a crime to “glorify” terrorism and gives that crime extraterritorial reach. At the end of the chapter we’ve added a fascinating piracy case, *U.S. v. Ali*, from the D.C. Circuit. We’ve also shortened some of the note material. Finally, we have added some data drawn from a recent article by Maximo Langer on the incidence and distribution of universal jurisdiction crimes.

Chapter 6 (Immunities) has mostly minor changes. We re-edited *Pinochet* to shorten it somewhat, and we fixed up the discussion of *Jones v. Saudi Arabia*, which was not entirely clear in the first edition. We added a short discussion about the recent U.S. Supreme Court *Samantar* decision on “foreign official immunity” (an emergent doctrine that remains unsettled) and an immunity problem for student discussion.

In Chapter 7 (U.S. Constitutional Rights in a Transnational Context), we substituted the D.C. Circuit’s opinion in *Al Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010), for the *Boumediene* decision. We did so because the *Al Maqaleh* opinion does a good job of summarizing the war between Congress and the Court over the scope of habeas review, as well as the *Boumediene* analysis. It then applies it—in a contestable way—to deny habeas jurisdiction over Bagram Air Force Base in Afghanistan. (For those who wish to remain with *Boumediene*, the edited case will be posted for your use on our website.)

We also added two cases to chapter 7 that deal with a question that did not receive as much attention in the last edition: that is, when aliens in U.S. territory can claim rights: *Bluman v. Federal Election Comm’n*, 800 F.Supp.2d 281 (D.D.C. 2011), *aff’d*, 132 S. Ct. 1087 (2012) (First Amendment right to make campaign contributions denied); *United States v. Portillo-Munoz*, 643 F.3d 437 (5th Cir. 2011) (Second Amendment right to bear arms denied to an undocumented alien). We added a reference to *United States v. Jones*, 132 S. Ct. 945 (2012) (the GPS tracking case), and a note on the recent litigation over the scope of *Bivens* actions where aliens (and citizens) seek to sue U.S. officials for actions in the U.S. and abroad. We added some additional references to law review commentary published by Chimène Keitner and Judge Jose A. Cabranes. Finally, note was made of a split in the circuits on the question whether a coerced statement has to be admitted into trial against a defendant to support a Fifth Amendment claim, or whether uses such as admission of the statement during preliminary or bail hearing will suffice.

Because there have been no major developments in the areas of obtaining evidence abroad and extradition, Chapters 8 and 9 required only modest updating to include recent treaties and references to significant case law.

In Chapter 10 (The Effect of Treaty Rights, as Construed by International Tribunals, on Domestic Criminal Enforcement: The Death Penalty), we updated the statistics on treaty accessions and death penalty issues; added references to the Supreme Court’s decisions in *Graham v. Florida*, 130 S. Ct. 2011 (2010) (Eighth Amendment outlaws imposition of a sentence of life imprisonment without parole for non-homicide, juvenile offenders) and *Miller v. Alabama*, 2012 WL 2368659 (2012) (Eighth Amendment

forbids a sentencing scheme that mandates life in prison without parole for juvenile homicide offenders); added a note on the European Court of Human Rights' decision in *Babar Ahmad v. United Kingdom*, App. Nos. 24027/07, 11949/08, 36742/08, 66911/09, 67354/09 (Eur. Ct. H.R. April 12, 2012) (upholding extradition from U.K. to U.S. to face potential life sentences without parole in a supermax facility); added information on *García v. Texas*, 131 S. Ct. 2011 (per curiam) (denying stay of execution in consular notification case), the proposed Consular Notification Compliance Act of 2011 (S. 1194), and consideration of drafting a uniform state statute to implement the consular notification requirements.

In Chapter 11 (Organized Crime) 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).

As an introductory overview, Chapter 12 (Trafficking in Persons, Drugs and Arms) remains short and required only modest updating without significant change.

In Chapter 13 (Money Laundering), we added a note about FATF's forty recommendations (issued Feb. 15, 2012); updated Article 19 of the Swiss law on narcotics and psychotropic substances, as amended, and Article 305*ter* on money laundering, as amended; revised the willful blindness discussion to reflect the Supreme Court's decision in *Global-Tech Appliances Inc. v. SEB, S.A.*, 131 S. Ct. 2060 (2011); and added a note regarding Congress's post-*Santos* definition of "proceeds" (18 U.S.C. §1956(c)(9)).

In Chapter 14 (Corruption), we updated enforcement statistics, mentioned where necessary *Skilling v. United States*, 130 S. Ct. 2896 (2010), and replaced reference to the Canadian statute and *R. v. Watts*, with an analysis of the United Kingdom's Bribery Act of 2010 which is more onerous than the FCPA. We also summarized the 2013 legislation that empowers certain UK officials to enter into deferred prosecution agreements with companies in discrete types of cases. (We have posted *R. v. Watts* on the website for those who wish to continue using it.) We also made brief mention of the latest hot cases (Lindsey Manufacturing (*United States v. Aguilar*), *United States v. Carson*, etc.), and expanded on our explanation of the dispute between the government and the defense over the scope of the term "foreign official" in cases where the person bribed is an employee of a state-owned entity.

In Chapter 15 (Terrorism) we added the Special Tribunal for Lebanon's important 2011 decision defining the customary international law on terrorism, and slightly shortened the discussion of international terrorism conventions. In the section on terrorism in U.S. law, we deleted David Luban's essay on the war and criminal-law paradigms (which will still be available on the web site for those who wish to assign it). We have replaced the circuit court opinion in *Holder v. Humanitarian Law Project* with the Supreme Court opinion (which had not been written when the first edition of the book went to press) and deleted the *Al-Arian* case, which *HLP* has superseded. Some of the material from *Al-Arian* has been retained in the new discussion notes following *HLP*.

We added a new note discussing the controversy over whether the Iranian exile group Mujahedin e-Khalq should be removed from the list of designated foreign terrorist organizations—a controversy over whether this is fundamentally politicized because the MEK are "our" terrorists opposing the current Iranian government. We have also replaced the excerpt from *Hamdan v. Rumsfeld* that was in the first edition with a summary of the decision in a note. That excerpt focused on whether the Bush administration's military commissions violated legal standards, and we believe that

since the passage of the Military Commissions Act and its 2010 amendment, the details of the argument are no longer pressing enough to include the case. (Another excerpt from *Hamdan* remains in Chapter 21.)

We have also extensively updated the section on military commissions to discuss the events and controversies of the past three years. We also added a note on the significant issue of whether the military commissions have criminalized mere group membership, an issue that is pending as the Court of Military Commissions Review's decisions in *Hamdan* and *Al-Bahlul* make their way to the Supreme Court.

Chapter 16 (The International Criminal Court) has been completely re-written. After a reasonably comprehensive introduction, the Chapter focuses more closely on the requisites of jurisdiction and admissibility, as well as the UN Security Council's role. On the theory that the Prosecutor's office is the gateway through which the Court's docket is largely set, the first major section discusses the goals of the ICC and the Office of the Prosecutor's policies in selecting investigations and pursuing cases. Thus, it begins with a piece by Margaret DeGuzman, discussing the expressive function of the Court, and then excerpts two prosecution policy memos—one on preliminary examinations and the other on the “interests of justice.”

These serve as introduction to the next two sections' case studies on the Ugandan and Sudanese cases. The Uganda study begins with a reading from Adam Branch that exhibits extreme skepticism about the value of the ICC's intervention in that situation; this reading is meant to be somewhat controversial and to force to students to examine what the Court is meant to achieve. The Sudanese study begins with Kurt Mill's description of the relationship between the African Union and the ICC, which highlights the complexity of the politics surrounding the Court. We believe that these two situations are best suited to provide contexts in which a variety of important subjects can be explored, including: questions that arise from self-referrals and invited self-referrals (Uganda), difficulties the Court encounters when a state resists the Court's efforts (Sudan), enforcement problems (both), the “peace v. justice” controversy, as well as questions regarding the place of “politics” in the ICC functioning (both), charges that the ICC has become an “African Court” (primarily discussed with respect to Sudan), issues related to the UN Security Council's actions (or lack of action) (primarily Sudan), the question of how to treat victims' wishes and alternative methods of addressing atrocity (Uganda), issues surrounding contested complementarity, and the perennial challenges to ICC prosecutions of nationals of non-states parties (Sudan). The *Al-Senussi* complementarity decision is included at the conclusion of these case studies.

Throughout these sections, other situations are also discussed, as appropriate. The Procedural Rights section has been updated to capture the Court's precedents. It also highlights the seeming conflict between the Office of the Prosecutor and the Pre-Trial and Trial Chambers as well as the mediating role of the Appeals Chamber. The Chapter concludes with an examination of the role of victims in the Court's functioning, including an excerpt from the Appeals Chamber's *Prosecutor v. Lubanga* decision allowing victims to lead and challenge evidence at trial. Note that, given recent developments, discussion of the crime of aggression, which used to be in this chapter, has been moved to Chapter 21.

Chapter 17 (Modes of Participation and *Mens Rea*) has also been substantially revised to tighten the focus and eliminate distracting, and unnecessary, complexities. The focus here is on how so-called “masterminds,” who engineer atrocities but rarely get their hands dirty, are charged as principals rather than accessories. With respect to the *mens rea* discussion, we use Pre-Trial Chamber II's decision in *Prosecutor v. Bemba* as the principal reading; in that case, the Chamber held that the

default *mens rea* under ICC Article 30 does not include *dolus eventualis* or recklessness. In the discussion of modes of participation, we begin with a brief discussion of conspiracy and proceed to Joint Criminal Enterprise liability (excerpting *Prosecutor v. Tadic*).

We then focus on the “control theory” articulated by various Chambers to separate principal from accomplice liability. We start with Article 23(3)(a)’s co-perpetration standard (excerpting Trial Chamber I’s judgment in *Prosecutor v. Lubanga*, including Judge Fulford’s dissent). Because of charging choices thus far, “indirect” perpetration and co-perpetration appear to be important subjects, and we cover them by, *inter alia*, excerpting Thomas Weigend’s analysis in *Perpetration Through an Organization*. We also go through accomplice liability and cover the relevant ICC precedents on Article 25(3)(b)-(d). We discuss, *inter alia*, the current dispute within the ICTY Appeals Chamber regarding whether “specific direction” is required for aiding and abetting liability. Finally, in the concluding section on command responsibility, we excerpt Pre-Trial Chamber II’s confirmation decision in *Prosecutor v. Bemba*.

Chapter 18 (Defenses) has no changes.

Chapter 19 (Crimes Against Humanity) has been updated in several respects. The opening discussion of the origins of the concept has been corrected to take into account the findings of the historian Peter Holmquist. The discussion of the “group discrimination” requirement has been updated to include the very problematic dicta from the ICC’s Pre-Trial Chambers in the Kenya Authorization of Investigation and *Muthaura* decisions, which seemingly revive the discredited theory that civilian populations must be of the same group character—even though the PTC’s chief precedents, the *Bemba* and *Katanga* cases say the opposite. We have also added a section on the nature of the “State or organizational policy” requirement, quoting from the majority opinion in the Kenya case and excerpting Judge Kaul’s interesting dissent. We have slightly shortened the *Kupreski* case. The section of Problem on Crimes Against Humanity has been moved to a more logical place in the chapter, after the case law rather than before it, and we have removed a couple of the problems that in our experience do not teach very well. In our final note, we call attention to the current effort by some scholars to establish an international convention on crimes against humanity.

Chapter 20 (Genocide) has several changes. The *Akayesu* case and the U.N. Darfur Report have been slightly re-edited to include some important paragraphs inadvertently omitted in the first edition. Most importantly, we have deleted the ICC’s Bashir decision, which was reversed.

Chapter 21 (War Crimes) has significant changes. The discussion of targeted killings has been updated to discuss the U.S. drone program. We added a new section on the war crime of inflicting disproportionate “collateral” civilian damage, with new readings: the ICTY report to the prosecutor on war crimes allegations against NATO in the Kosovo war, and the ICTY’s recent *Prli* case, coupled with related readings about the destruction of the Old Bridge at Mostar. We have updated the discussions of direct participation of hostilities, and also the issue of the geographical demarcation of armed conflict. To avoid the chapter becoming excessively lengthy, we have moved the war crime of humiliating treatment of prisoners to Chapter 22, section C.1. Finally, we have added a brief discussion of the changes to the Rome Statute regarding the crime of aggression. (Because investigations of the crime have been deferred until 2017, we decided that a lengthy discussion is out of place.)

Chapter 22 contains minor updates, but the basic structure of the chapter remains the same. Section C.1 contains new material about humiliating treatment of prisoners, which was in Chapter 21 of the previous edition.

In Chapter 23 (Sexual Violence), we added a section on the ICC's definition of the crime against humanity of rape, in which we excerpted a definitional discussion from the Pre-Trial Chamber II's confirmation decision in *Prosecutor v. Bemba*; added a note regarding the ICC's recent attempts to deal with issues of cumulative charging in *Bemba*; added notes regarding the scope of Regulation 55 and the Appeals Chamber's decision regarding whether the Trial Chamber could add charges during trial under that authority in *Prosecutor v. Lubanga*; and added a note regarding forced marriage and an excerpt regarding that "new" crime against humanity in the judgment in the Special Court of Sierra Leone's decision in *Prosecutor v. Brima*.

In Chapter 24 (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.

David Luban  
Julie O'Sullivan  
David P. Stewart

May 2014