

PREFACE TO THE FIRST EDITION

In the past two decades, few legal subjects have grown in importance more dramatically than *international criminal law*, which we define as crimes proscribed by international law, whether or not they are also criminalized in states' domestic laws, and which are often prosecuted in international or hybrid international-national tribunals. International criminal law represents one of humankind's boldest ambitions: to control large-scale violence through law. The principal origins of this discipline are found, of course, in the post-WWII Nuremberg and Tokyo Tribunals, but international criminal law lay largely dormant for decades. The creation of international tribunals in the early 1990s transformed the legal landscape. Responding to nightmarish atrocities in Rwanda and the former Yugoslavia, the United Nations created the ad hoc Tribunals, which expanded the scope of both criminal law and international law in ways that seemed like a pipe dream only a few years before. Soon other tribunals followed, including those addressing crimes committed in Sierra Leone, Cambodia, Timor Leste, and Lebanon. After hard negotiations, the International Criminal Court (ICC) began operating in 2002. Within the space of a few years, a large jurisprudence of accountability for mass atrocities sprang into existence, and the development of this body of law shows no sign of abating.

For centuries, states have cooperated in bringing individual perpetrators to justice, for example through bilateral extradition treaties and other mechanisms for promoting mutual assistance in criminal matters. Over the past two or three decades, however, globalization has expanded the importance of domestic criminal law applied to conduct across borders. We call this *transnational criminal law*. Transnational and international criminal law often overlap, and some domestic criminal statutes originated in international law. But transnational criminal jurisprudence is not the same as the jurisprudence of the international tribunals. Transnational criminal law includes states' extraterritorial use of their own laws— against, for example, money laundering, corruption, torture, terrorism, and trafficking—in their own courts. It presents some of the same practical challenges as international law enforcement—for example, securing the presence of a defendant for trial and obtaining extraterritorial evidence. But it sometimes raises unique challenges—for example, issues of immunity that do not arise under international criminal law. Our ambition in this book is to cover both the international and transnational aspects of this fascinating and sometimes heartbreaking field.

Perhaps because international and transnational criminal law enforcement is so dynamic and practically important, it greatly interests students. We offer this casebook in the belief that it provides (1) a unique range of coverage and (2) a mix of perspectives that students will appreciate.

First, in terms of scope, the book covers the central features of both international and transnational criminal law. In covering these subjects, we necessarily include extensive analysis of what could be conceived of as yet another category of cross-border criminal law— *treaty crimes*—that we treat essentially as a hybrid of the first two. In our view, treaty crimes consist of activity declared criminal by international

law (like international criminal law), but enforced through the domestic criminal law of the treaty's states parties (like transnational criminal law). Although this book is designed primarily for U.S. classrooms, we believe it important, where possible, to draw on the laws and judicial decisions from countries other than the United States if for no other reason than to challenge U.S. students to re-examine familiar rules and cultural assumptions. Finally, our international, transnational, and comparative focus is applied not only to substantive crimes, but also to procedural issues of importance to this area of practice.

We recognize the ambition reflected in attempting to cover international and transnational substantive and procedural criminal law in a way that is comprehensive, accessible, and compelling. And we assume that no professor could cover all of these subjects in one course. Our hope is that the book will meet the needs of most students, while providing professors the flexibility to craft a curriculum that reflects their own interests. The coauthors have road-tested all of the chapters. Our teaching reviews indicate that various students prefer different portions of the class. They have, however, universally appreciated the melding of international, transnational, and comparative materials in one course.

Second, the different perspectives reflected throughout these pages derive principally from our own varied academic interests and professional experiences. David Luban, a legal theorist and ethicist, has written on war, terrorism, and international crime. His interests in history, and his work in professional responsibility, also permeate the book. Julie O'Sullivan is a former criminal defense lawyer and federal prosecutor; her academic focus has been on federal white-collar crime. Her practical perspectives find voice not only in the procedural and transnational portions of the book, but also in chapters that deal more generally with the application of theory to law on the ground. David Stewart practiced international law for three decades in the U.S. Department of State's Legal Adviser's Office with experience in the negotiation and drafting of international agreements, as well as policy issues in the international human rights and criminal law arenas (among others). His experience in diplomacy and international law outside the criminal sphere are reflected throughout these chapters.

We discovered that, despite our different backgrounds, we agreed on what the book should cover and on what basic approach to take in covering it. That approach is, of necessity, both practical and theoretical. We believe that students should be provided with a firm foundation in the law and practical realities of international and transnational criminal practice. At the same time, to equip them to respond effectively to further developments, students must be exposed to the history, policy, and theory of that law and practice. We should note that—as might be expected given the scope of this work and the varied experiences of its authors—we occasionally viewed the same issues very differently. Although each chapter has one and sometimes two principal authors, all of us have carefully reviewed each other's work, sometimes with spirited critiques and always with multiple revisions. We believe that ultimately these differences contribute to a challenging and balanced book that will appeal to a range of professors and students.

Some additional background regarding our choice of topics, and ordering of those topics, may be in order. To make the book self-contained and accessible to law students at all levels of preparation, we include introductory chapters on the nature of criminal law and the benefits and challenges of attempting cross-border criminal accountability (Chapter 1), the fundamentals of public international law (Chapter 2), and the historical development of international and hybrid criminal tribunals with some attention to domestic prosecutions (Chapter 3). We do not require, as a

prerequisite for the course, that students have taken substantive criminal law, criminal procedure, or even international law. We have found that by covering these preliminary chapters, students are ready to tackle the more advanced topics that follow. Indeed, we have successfully taught this material as a first-year elective more than half a dozen times. We strongly encourage professors to start with Chapter 1, even if the students enrolled in a course have taken substantive criminal law, because it identifies themes and questions that will echo throughout the course and that are revisited in the concluding chapter.

The second part of the book focuses on topics—many of them, for lack of a better word, “procedural” in nature—that have particular relevance to transnational practice. These include comparative criminal procedure and sentencing (Chapter 4), jurisdiction (Chapter 5), immunities (Chapter 6), U.S. constitutional rights in a transnational context (Chapter 7), obtaining evidence abroad (Chapter 8), and international extradition and its alternatives (Chapter 9). We also include a discussion of the effect of treaty rights on domestic criminal enforcement—covering also the important subject of interpretation in international law—in the context of extradition to meet the death penalty and the international and U.S. litigation involving consular notification issues (Chapter 10).

Two notes are appropriate with respect to Part II of the book. First, we have found that a number of these chapters, though perhaps most pertinent to transnational practice, should find their way into a class that focuses on international (rather than only transnational) criminal law. Comparative criminal procedure and sentencing, jurisdiction, immunity, and extradition are four logical candidates. Second, our focus in some of these chapters is on U.S. law, while in others we include separate sections on U.S. law. We believe this approach is practical and natural given the focus of this part. Graduates who pursue careers in international criminal justice will often work for the U.S. government, agencies, or law firms that represent foreign clients in U.S. courts. Federal procedural rules and statutes, applied transnationally, will be their daily fare.

The third portion of the book focuses on substantive transnational crimes, including organized crime (Chapter 11); trafficking in persons, drugs, and arms (Chapter 12); money laundering (Chapter 13); corruption (Chapter 14); and terrorism (Chapter 15). We selected a variety of transnational crimes—all of which are also “treaty crimes”—to permit those who adopt our conception of the course to pick among these offerings according to their interests. Others who wish to focus only on transnational crime could create an entire course out of Chapters 1 through 13. The crimes we chose reflect varieties of criminal conduct that have serious implications for international stability, security, and development. Most of these chapters include substantial comparative and international elements, focusing not only on U.S. domestic law, but also on cognate offenses from at least one other country and applicable international treaty regimes.

Although those committed to a strictly international criminal law focus may be tempted to forgo assignments in Part III, we believe that it is very helpful to expose students to at least some of these transnational materials. First, it is likely that students, if they practice in this area, will practice in the transnational sphere. Second, students need a firm grounding in what interests can—as a legal, practical, or political matter—be effectively vindicated through domestic prosecutions before they can evaluate the necessity for, or efficacy of, an international criminal law regime. Finally, as we believe the materials will demonstrate, it is increasingly difficult to separate “domestic” from “international” criminal law and enforcement. The globalization of criminal activity, the multiplication of international agreements concerning

criminal law and enforcement, and international tribunals' willingness to apply international human rights norms to domestic processes mean that the distinction between truly "international" law and municipal law is quickly blurring.

In Part IV we turn to international criminal law *stricto sensu*, commencing with a detailed examination of the structure and functioning of the International Criminal Court (Chapter 16), applicable modes of participation and *mens rea* (Chapter 17), and possible defenses (Chapter 18). Chapters focusing on the great international crimes follow: crimes against humanity (Chapter 19), genocide (Chapter 20), and war crimes (Chapter 21). (NB: The crime of aggression—not yet defined for purposes of the International Criminal Court—is treated in our discussion of Nuremberg in Chapter 3, the ICC in Chapter 16, and war crimes in Chapter 21; once the ICC's Assembly of States Parties reaches agreement on this subject for purposes of the Rome Statute, it may merit its own chapter.) We chose to include two chapters on particular types of major international crimes—torture (Chapter 22) and sexual violence (Chapter 23)—because of their current importance *and* because they provide effective platforms to explore other themes or legal issues. For example, the torture chapter provides an excellent vehicle for exploring lawyers' professional roles and responsibilities in advising on, as well as litigating, issues in international and transnational criminal law. The sexual violence chapter details the historical neglect of this horrific category of crime and illustrates how international criminal norms can evolve—being translated first into legal proscriptions and ultimately into accountability.

We conclude the book in Chapter 24 by exploring means other than criminal prosecutions that have been used to address the aftermath of societal conflict. We focus on truth and reconciliation commissions, but also talk about lustration, civil remedies, and their variations. This chapter recognizes that societies emerging from mass violence have a variety of aims—including rebuilding their social fabric—and may require remedies or mechanisms in addition to, or in lieu of, criminal proceedings. Special emphasis is given to the question of context, that is, to the truism that there is no one-size-fits-all means of restoring peace and achieving justice in the aftermath of atrocity. Attention must be devoted to the particular circumstances of the given society at issue—including that society's history, culture, resources, security and political situation, priorities, and needs. This chapter permits students to return to some of the fundamental issues posed in the first chapter, such as how can "justice" be achieved after atrocity? What communities or audiences are addressed through these prosecutions, and where the international community and the victimized society have different interests, which should prevail? What are the purposes of criminal trials in traumatized societies? Are those purposes practically achievable given the nature of criminal law and international politics? What crimes should be subject to international sanction; when should they be investigated and prosecuted in national, hybrid, or international tribunals; and why? Should "justice" achieved through criminal accountability ever be sacrificed to achieve societal peace and security?

We recognize that international and transnational criminal law raise many hot-button political issues. Given how closely the subject connects with international diplomacy and armed conflict, it could hardly be otherwise. Human rights groups contend with states over issues of international criminal accountability. But they also contend with each other, just as developing states contend with developed states, former colonies with former colonialists, internationalists with nationalists, peace groups with war fighters, lawyers with politicians, and defendants' rights advocates with champions of accountability. Our aim has been to present all points of view as fairly and objectively as possible.

Nearly every week brings new wrinkles and new developments in international and transnational criminal law. It is one of the fastest-evolving legal subjects, perhaps because it is still so young. Many of the cases and issues in this book are headline grabbers that students will instantly recognize. Some no doubt will be yesterday's news by the time the book is published. A Web site accompanies the book, www.internationalcriminallaw.com, and we will do our level best to keep it current.

The new and rapidly changing nature of this discipline also demands of authors a large measure of humility. As noted, we have taught this subject many times and have tried to include within this text all that we think is necessary and important. We invite readers to let us know if they think that the selection or ordering of subject matters is deficient. Also as noted, we have tried to be both accurate and evenhanded in our presentation of contested or controversial subjects. Here, too, we wish to hear from you if you have objections to our presentation. Finally, although this text is designed primarily for U.S. classrooms, we have taken pains to include non-U.S. materials and to introduce comparative elements wherever possible. We wish to avoid a U.S.-centered view of the world, and strongly believe that students will understand their own legal culture, and international law, best when they also understand alternative national approaches. Any and all suggestions about sources we have overlooked would be most gratefully received. We can be contacted by e-mail at david.luban@gmail.com, osullijl@law.georgetown.edu, and stewartd@law.georgetown.edu.