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UNDERSTANDING INTERNATIONAL CRIMINAL LAW

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Ellen S. Podgor



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PREFACE

International criminal law is a developing area of the law. Events throughout the world change the landscape on a daily basis. It is a new area because tribunals and the International Criminal Court are of recent vintage. But it is also an old area of law in that history provides many lessons.

This book is intended as an overview of this area of the law. It is divided into four parts. The first part provides a general overview, with definitions to key terms that will appear throughout the book. It covers the area of jurisdiction, as this is the starting point in determining the applicability of using international law. The second part covers selected areas of international criminal law. It is not exhaustive of all areas of international or transnational law. Choices of specific crimes to cover were made on the basis of showing a diversity of topics, new and developing areas such as computer crimes, and the older more traditional areas such as piracy. It provides materials on both violent and non-violent crimes. Areas of immediate importance, like terrorism and narcotics trafficking, are discussed. The third part covers procedural issues. It includes constitutional issues, immunities, obtaining evidence from abroad, obtaining people from abroad, and post conviction issues such as prisoner transfers. The final part of this book covers the international aspects of international criminal law. In addition to examining what constitutes an international crime, it looks at human rights issues, international tribunals, and the International Criminal Court.

Although the book includes an enormous amount of material, it also excludes an incredible amount of important material. As such, it is not intended as a definitive source to resolve a legal matter, but rather as a general overview to begin the study of international criminal law. Because of the continual changes in this area, it is important to realize that updating is necessary.

This book would not be without several very important people. For one, the late Edward M. Wise, who I had the pleasure to work with on the first edition of the casebook, *International Criminal Law: Cases and Materials*. Also an important person, in my continual study of international criminal law, is Roger S. Clark, my co-author on the second edition of the casebook. Thanks also go to Librarians Elizabeth Adelman and Nancy Johnson, Dean Janice Griffith, Interim Dean Steven Kaminshine, Associate Dean Anne

Emanuel, Christine Nwakamma, and research assistants Jonathan Warren and Shannon Varner Alexander. Mistakes in this book, however, are all mine. And for these I hope you will let me know so that they can be corrected in later editions of this work.

Ellen S. Podgor

November 2004

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PART ONE
GENERAL PRINCIPLES

Chapter 1

INTRODUCTION

§ 1.01 Scope of International Criminal Law

It is difficult to provide a concrete definition of the term international criminal law because its boundaries are loosely constructed and expanding. Increased globalization through worldwide communication, transportation, and economic expansion has made international law a topic of enormous importance. Accompanying this globalization, however, come a host of criminal activities that require punishment. These activities can be both a national and international concern. As such, criminal law issues that arise in the international setting, and international issues that arise in the context of national criminal law, provide the starting point for a discussion about international criminal law.

It could be argued that international criminal law is very limited, including only the law that arises in an international body. Approaching international law in a *stricto sensu* would include the law that comes from international courts such as Nuremberg, the *ad hoc* Tribunal in Yugoslavia, and most recently the International Criminal Court (ICC). Although these bodies clearly are encompassed within international law, there are in fact many other instances where international law plays a role in the national law of a state.

[A] International Aspects of National Criminal Law

Although international criminal law initially focused on questions related to jurisdiction, today there are many issues of an international nature that surface in different nations' systems of criminal law. National legal systems cannot operate in a vacuum. Crimes routinely cross the borders of different nations. In addition to questions related to extraterritorial jurisdiction, procedural issues such as obtaining evidence from abroad, extradition of individuals, and questions of immunity become areas for consideration in national legal systems. National systems can also be faced with decisions of whether to proceed against conduct that violates international law.

Some may designate the crimes that cross borders as "transnational crimes." Like international criminal law, the term transnational crime is problematic. As noted by Professor Gerhard O.W. Mueller, the term "transnational crime" "did not have any juridical meaning" when initially

used, and “does not have one now.”¹ Crimes that could be seen as transnational would include those that might easily cross borders, such as computer criminality and money laundering. Issues, however, that might occur solely within one state also can be influenced by international law.

[B] Criminal Aspects of International Law

At one level, international crimes can be seen as those crimes expressly prohibited by an international criminal law system. Crimes against humanity, genocide, and war crimes are examples of crimes that have been prosecuted by international tribunals. A broader definition, however, might include crimes that violate customary international law or treaties among countries. Narcotics trafficking and terrorism are examples of crimes that have emerged as issues requiring an international response. In addition to substantive questions of whether the conduct constitutes a crime under international law, there are also procedural questions that accompany these issues.

As such, the line between what will be considered international criminal law and what will not be included within this definition is extremely fuzzy. The definition will in part be determined by the individual deciding the question. This book uses a broad definition to cover crimes with international aspects in national law and also criminal aspects of what is considered to be international law.

§ 1.02 Sources of International Criminal Law

[A] Generally

International law is primarily consensual in nature.² The *Restatement (Third) of the Foreign Relations Law of the United States* provides that “[a] rule of international law is one that has been accepted as such by the international community of states (a) in the form of customary law; (b) by international agreement; or (c) by derivation from general principles common to the major legal systems of the world.”³ One finds similar language in the Statute of the International Court of Justice where it states that the sources for deciding international law questions are: “(a) international conventions, whether general or particular, establishing rules expressly recognized by the

¹ Gerhard O.W. Mueller, *Transnational Crime: Definitions and Concepts*, in *COMBATING TRANSNATIONAL CRIME* 13 (Phil Williams & Dimitri Vlassis eds., 2001).

² For an example of the consensual nature of international law, see Article 59 of the Statute of the International Court of Justice which states, “[t]he decision of the Court has no binding force except between the parties and in respect of that particular case.”

³ The *Restatement (Third) of the Foreign Relations Law of the United States* § 102(1) (1986).

contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilian nations; (d) . . . judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.”⁴ As such, much of international law comes from generally accepted norms among nations and from agreements reached by countries. “General principles common to major legal systems, even if not incorporated or reflected in customary law or international agreement, may be invoked as supplementary rules of international law where appropriate.”⁵

[B] The *Lotus* Case

The classic international law case that resolves a jurisdiction issue is *The Case of the S.S. Lotus (France v. Turkey)*.⁶ The case involved a collision between a French ship (*Lotus*) and a Turkish Ship (*Boz-Kourt*). Eight Turkish nationals were killed as a result of this collision. The Turkish authorities investigating this case arrested the captain of the *Lotus*, a French national, and the captain of the *Boz-Kourt*, who was Turkish. Lieutenant Demons, the captain of the *Lotus*, objected to the jurisdiction of the Criminal Court in Turkey. Both captains received a sentence from the court.

The case arose in the Permanent Court of International Justice, a court that was the predecessor of the present International Court of Justice (ICJ), when the French government protested the decision of the Turkish court. The argument of France was that only the state under whose flag the vessel sails has authority to proceed with this case. The issue was complicated by the fact that both France and Turkey were parties to the Convention of Lausanne of July 24, 1923, which provided that questions of jurisdiction be decided “in accordance with the principles of international law.” Both Turkey and France agreed to submit the question to the Permanent Court of International Justice.⁷

The international tribunal was left to wrestle with questions of how to interpret a treaty, what role the “law of the flag” (the flag under which the ship sails) would play in the decision, whether the Turkish Penal Law properly permitted this action, and if it did permit this action should this law be trumped by international law. Arguments presented by the parties also raised issues of when a country could proceed beyond its territorial jurisdiction in a criminal matter, and when a country would be precluded from exercising jurisdiction outside of its territory. Importantly, the court looked at the Convention of Lusanne, thus using a treaty upon which the parties

⁴ The Statute of the International Court of Justice, Art. 38 (1945).

⁵ *Id.* at § 102(4).

⁶ 1927 P.C.I.J. (ser. A) No. 10.

⁷ A question regarding reparations was also submitted to the court.