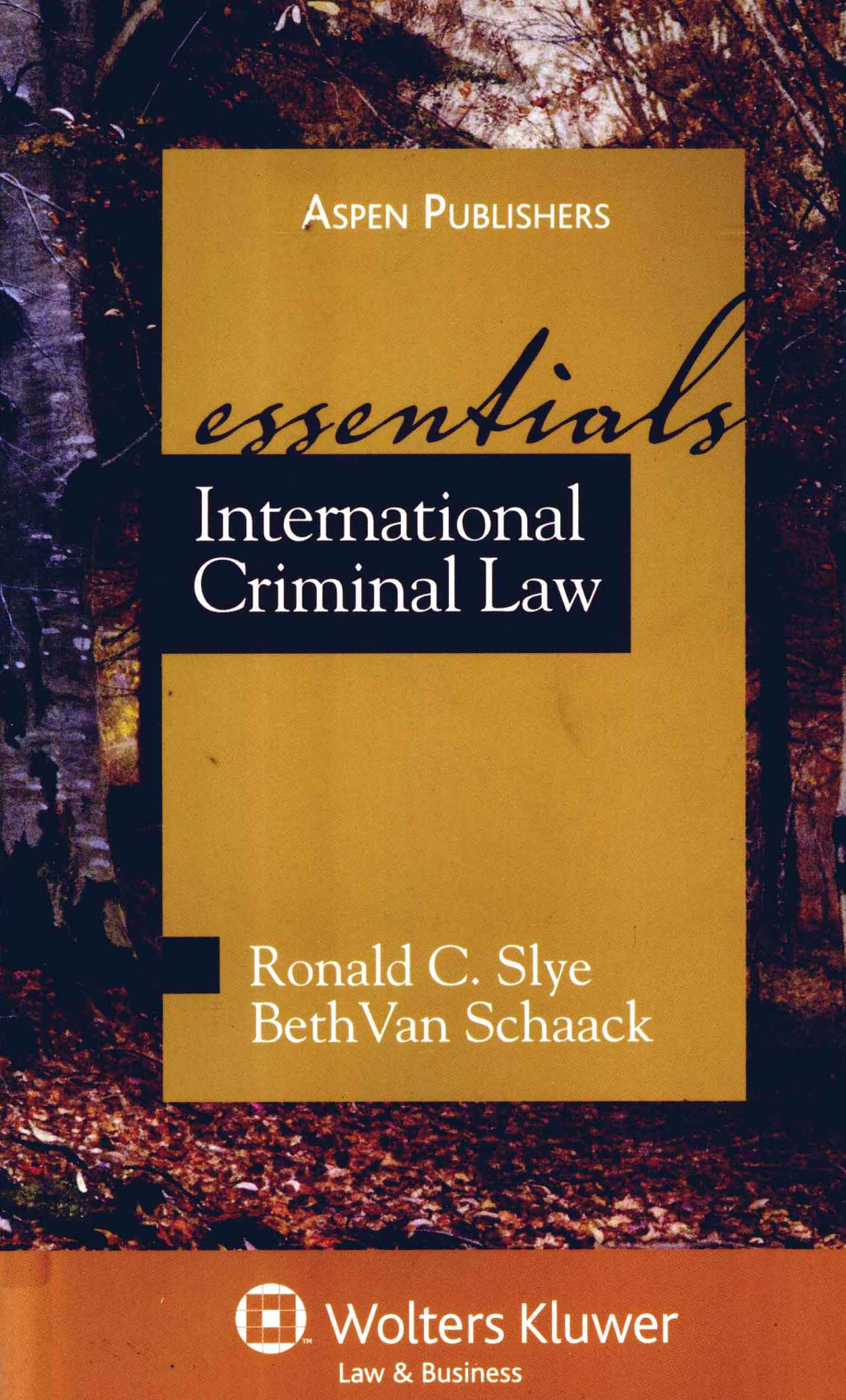
ASPEN PUBLISHERS
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International Criminal Law
Ronald C. Slye
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Preface

International criminal law (ICL) can be, and is, taught in a number of different ways depending on the text utilized and the interests and expertise of the particular professor. ICL can be taught as a subset of public international law, with an emphasis on relevant treaties and customary international law and the institutions and organizations that adjudicate ICL. ICL can also be taught as a specialized criminal law course, with an emphasis on the elements of crimes, the burdens on the prosecution and defense, and the parties' strategic moves in the adversarial or inquisitorial context. Given that many professors come to the field with a domestic law background, the course can also be taught as the transnational extension of domestic criminal law. This approach would focus on interstate cooperation in law enforcement matters. It is hoped that this book will complement all of these approaches.

With these different approaches in mind, we discuss the major institutions and international crimes, emphasizing some of their unique features. In these materials, we do not dwell on the minutiae of ICL on the assumption that the cases highlighted in the primary text will. Instead, the book outlines the origins and elements of the major international crimes and identifies doctrinal areas that remain the subject of litigation, advocacy, and negotiation. We also present some of the jurisdictional issues surrounding the major fora in which ICL norms are adjudicated: international tribunals, hybrid tribunals, and

domestic courts. In addition to these more standard topics, we have endeavored to fill in some gaps in what is usually taught in a two- or three-unit course on ICL. For example, we have included chapters on the history of the field and the sources of ICL that are more detailed than what is provided by many primary texts. In addition, we have included a chapter on a defense that is almost ubiquitous in ICL—that of *nullum crimen sine lege*—that provides insights into ICL reasoning and rhetoric. In so doing, we hope to convey some of the deep structure of the field, with all its uncertainties, inconsistencies, *lacunae*, and idealism. Throughout the book, we move between macro and micro perspectives to convey the full panoply of issues presented by this relatively new area of law. As a result, this book is meant to operate only partially as a comprehensive "nutshell" text for the field of ICL. Taken as a whole, we hope this book will provide a useful framework for understanding the fascinating field of ICL.

Although we touch on some central questions of procedure concerned with enforcement and adjudicative jurisdiction, we primarily approach the field as one of substantive international law adjudicated before international, or quasi-international, institutions. We are thus concerned with the origins, elements, and evolution of international crimes. In this regard, we focus on what we consider to be the core ICL crimes: genocide, crimes against humanity, and war crimes. These are also termed *atrocity crimes* in the literature to distinguish them from other crimes that may also be the subject of international law, such as drug trafficking or money laundering. These atrocity crimes are within the subject matter jurisdiction of the ad hoc tribunals and the International Criminal Court (ICC). These are also the crimes over which many states can by treaty or statute exercise universal jurisdiction. As such, although most of the case law mentioned in the text forms part of the jurisprudence of the international (and hybrid) criminal tribunals, we occasionally address proceedings in national

courts because ICL is subject to a high degree of concurrent jurisdiction, with domestic and international authorities having a role to play in ensuring comprehensive and complementary enforcement.

From this core, we also venture into the periphery by providing materials on the crimes of aggression and the so-called treaty crimes (such as torture and terrorism). The prohibition against torture is universally accepted. Nonetheless, as a result of the so-called "war on terrorism," the definition of torture is today contested. The crimes of terrorism and aggression give rise to unique conceptual difficulties. The crime of international terrorism, to the extent that there is such a concept in general international law, is often implicated in circumstances in which the prohibitions against war crimes, crimes against humanity, and even genocide may be equally applicable. Nonetheless, a strong sentiment has emerged that terrorism *stricto sensu* is something altogether different and deserves separate treatment in the canon of ICL. The crime of aggression is also a disputed concept, in part because it has the potential to complicate determinations of threats to the peace that are textually committed in the United Nations Charter to the "political" branches—the Security Council and, to a lesser extent, the General Assembly. A determination in a penal proceeding that the crime of aggression has occurred has the potential to contradict political determinations involving the same situation or state and thus to invite institutional conflicts.

Our focus is primarily on *international* criminal law. We do, however, make reference to some crimes that more accurately may be considered *transnational* crimes. Transnational criminal law encompasses crimes with a transnational dimension that are prohibited and prosecuted primarily at the domestic level (although they may also be the subject of multilateral treaties). The emphasis on transnational implies that the borders of at least two states are crossed in some fashion during

the inception or commission of the offense, or where the offense creates direct or indirect effects on more than one country. For some crimes, this transnational dimension is inherent to the offense itself (as in export crimes or various forms of trafficking or smuggling). Other crimes may be committed domestically or transnationally, depending on the circumstances (such as mail fraud or money laundering).

In light of our focus on substantive law, this book gives only cursory treatment to procedural issues relevant to the domestic prosecution of crimes with international dimensions, such as questions of extradition, transnational mutual assistance, choice of law, and the recognition of foreign penal judgments. On the whole, we think these topics are best taught as specialized courses in transnational criminal law and procedure. Although the international community is increasingly generating international law to address these dimensions of transnational crime, solutions are largely the product of the unique constitutional, statutory, and jurisprudential frameworks of individual nations and adjudicative institutions. We also spend little time on the growing international body of criminal procedural and evidentiary law being developed by the ad hoc criminal tribunals. Although the international law governing criminal procedure and evidence presents a fascinating and *sui generis* blend of elements from the common law and civil law traditions, this material is also best covered in a specialized procedural or comparative law course. The field of international criminal procedural law is destined to continue to evolve in the next few years as the ad hoc tribunals wind down their work and the ICC becomes the primary game in town.

Although ICL is ultimately a course of substantive law, it is impossible to consider the relevant law without reference to background issues of state sovereignty, foreign policy, national security, and the exercise of power in international relations. The international community and individual states do not resort to ICL in a vacuum. Rather, choosing to implement a

regime of international criminal justice is a political choice. The decision to pursue criminal trials is influenced by a number of variables often at odds with the legalistic principles underlying criminal justice in its platonic state. Thus it is important to consider what role ICL is playing in the particular historical moment in which it has been invoked and what other options may have been available to elites with decision-making power. These other options — such as amnesties, reparations, efforts at reconciliation and rehabilitation, symbolic memorials, and so on — are the subject of our final chapter on alternatives to ICL. ICL is often an exercise in idealism reflecting the belief in a world governed by law and altruism rather than power or apathy. At the same time, it is a course on the limits of such idealism in the face of *realpolitik*.

Although ICL is at its height of codification, the field is still very much in a state of evolution, and the ad hoc tribunals and the ICC continue to issue important judgments that resolve outstanding doctrinal issues. This text, by providing the basic framework for understanding the field of ICL, will lay the foundation for understanding and assimilating new developments when they inevitably occur. Although the contexts and institutions of ICL may vary, the substantive law is converging to a certain extent, making this one of the most dynamic topics of public international law and a fascinating addition to a course of legal study.

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November 2008

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part I

The Discipline of International Criminal Law

This part addresses fundamental questions concerning international criminal law as a distinct discipline of public international law. It begins here by tackling the question of what areas of law the field of international criminal law encompasses. This preliminary definitional discussion is followed in Chapter 1 by a concise history of this body of law, with reference to key treaties, instruments, institutions, and historical moments. Chapter 2 introduces the primary institutions that adjudicate international criminal law and the way in which these institutions mediate, accommodate, and threaten the principle of state sovereignty—a foundational principle of international relations. Chapter 3 addresses the way in which international criminal law is made, with reference to the traditional sources of public international law. Chapter 4 discusses the justifications for raising certain crimes to the international level; in other words, why a particular set of killings should trigger international, as well as domestic, jurisdiction. Finally, Chapter 5 considers the way in which tribunals