International Criminal Law: Cases and Materials

THIRD EDITION

The Late Edward M. Wise
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INTERNATIONAL CRIMINAL LAW:

CASES AND MATERIALS

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To –

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&

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PREFACE

This book contains a collection of cases, materials, notes, and questions concerning international criminal law. It is designed for use as a teaching tool, not as a reference work, although it does try to provide an overview of most of the topics that fall within the scope of international criminal law. In addition to the occasional citations on specific points that occur throughout, we have included at the end of the book a short list of reference works to serve as a preliminary guide for further reading.

We have tried to keep the book short, as casebooks go, and to make it useable both by teachers who want to emphasize the increasingly important transnational dimension of U.S. criminal law and by those who want to explore the also increasingly important use of criminal sanctions to enforce norms of international law. These two developments are interrelated and it is more and more difficult, in any event, to keep them separate.

The book is divided into four parts. The first part contains a brief introduction to the field of international criminal law, the question of what crimes are international crimes, and a chapter on the general jurisdictional principles, of both national and international law, that govern efforts to extend U.S. criminal law to foreign crimes and foreign criminals. The second part contains materials dealing with the specific application of those principles (especially in the U.S.) in cases involving the Foreign Corrupt Practices Act, antitrust and securities regulation, export controls, computer crimes, narcotics and money laundering, piracy and terrorism, and torture. The third part deals with procedural aspects of trying such cases in the U.S. courts – and sometimes the courts of other countries. It covers the extraterritorial application of the U.S. Constitution, immunities from jurisdiction, mutual assistance in criminal cases, extradition, alternatives to extradition, prisoner transfer treaties, recognition of foreign criminal judgments and foreign laws, and the bearing of international human rights instruments on criminal procedure. The fourth and final part of the book deals with the prosecution of international crimes, including the Nuremberg and Tokyo precedents, the *ad hoc* tribunals for the former Yugoslavia and for Rwanda, the Rome Statute of the International Criminal Court, and the substantive law of the international crimes of aggression, genocide, crimes against humanity, and war crimes.

Our main focus, in the first three parts, is on relatively recent decisions of the United States courts and the effect of contemporary globalization on U.S. criminal law. We have tried, above all, to convey a sense of the "international

flavor" that is developing in federal prosecutions.* As a result of this particular focus, some topics have been slighted that might figure more prominently in a longer, more comprehensive work on international criminal law. Nevertheless, we believe that the fourth part of the book provides the students an in-depth account of that other burgeoning area, the prosecution of grave crimes at the international level. In choosing material in this part, we have been particularly conscious of the value in directing students to international sources of material that are not always obvious to students and faculty in American Law Schools.

Our basic aim, in short, has been to construct a set of teaching materials that will provide students with a grounding in the transnational issues likely to arise in federal criminal cases and also in the law that has been produced as a consequence of international efforts to impose criminal responsibility on the perpetrators of human rights atrocities.

This book tries to provide a picture of the present state of a rapidly expanding and changing field. Events no doubt will quickly overtake much of what we present. We only hope that, in the meanwhile, teachers and students will be persuaded through using this book to regard international criminal law as an exciting field, worthy of their continuing attention as it grows and develops, as it inevitably will, in new directions.

We thank the American Law Institute for permission to reprint sections from the Restatement (Third) of the Foreign Relations Law of the United States, © 1987, The American Law Institute; and other copyright holders including the Virginia Journal of International Law, Jack L. Goldsmith & Eric Posner (quotation on p. 29); the American Society of International Law (excerpt on p. 378-9 from 94 AJIL 535-36 (2000), © The American Society of International Law); the Academy of Political Science (excerpt on pp. 669-70 from the Political Science Quarterly, 1947); and Alfred P. Rubin (quotation on p. 827).

Since the writing of the first edition, Edward Wise passed away. In the first edition he acknowledged the support provided for work on this book by both the Law School and the Humanities Center of Wayne State University. He specifically thanked Dean Joan Mahoney and the Director of the Humanities Center, Professor Walter F. Edwards. He also stated that it would be remiss in not acknowledging the significant influence of Gerhard O. W. Mueller, who first introduced him to the problems of international criminal law, defined in the most comprehensive possible fashion, decades ago.*

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* For a preliminary sketch, *see* Ellen S. Podgor, Essay, *Globalization and the Federal Prosecution of White Collar Crime*, 34 AM. CRIM. L. REV. 325 (1997).

* *See* Edward M. Wise, *Gerhard O. W. Mueller and the Foundations of International Criminal Law*, *in* CRIMINAL SCIENCE IN A GLOBAL SOCIETY: ESSAYS IN HONOR OF GERHARD O. W. MUELLER 45 (Edward M. Wise ed., 1994).

Ellen S. Podgor expresses appreciation to Stetson University College of Law for their support in the writing of this third edition and to Georgia State University College of Law for their support in the writing of both the first and second edition of this book. She also thanks students of Georgia State University College of Law, University of Georgia School of Law, Stetson University College of Law and the students from the Temple Tel - Aviv and Rome Summer Abroad Programs, as well as students who participated in online classes that used this book. Additionally she thanks Elizabeth Adelman, Rhea Ballard-Thrower, Darby Dickerson, Anne Emanuel, Janice Griffith, Steven Kaminshine, Paul Kurtz, Christine Nwakamma, Molly O'Brien, Dianne M Oeste, Louise Petren, and David Shipley and research assistants Daniel R. Cotta and Christina L. Kimball . To the late-Edward Wise she expresses everlasting thanks for everything he taught this writer during the writing of the first edition of this book and to Roger Clark for his wisdom and humor in the writing of this second and third edition.

Roger Clark appreciates the support of the Rutgers University School of Law, especially Librarians David Batista, Hays Butler and Lucy Cox, as well as the research and technical assistance provided by Keith Chapman, Eric Bonnette, William McLaughlin, Jackie Morfesis, Marshall Kizner and Milosz Pierwola.

Ellen S. Podgor
Roger S. Clark
October 2009

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INTRODUCTION

§ 1.01 The Scope of International Criminal Law

What is meant by "international criminal law"? In a broad sense, the subject covers all of the problems lying in the area where criminal law and international law overlap and interact. It is a field that has undergone an enormous expansion in recent years. This expansion is a result both of (a) increasing "globalization" of criminal conduct and consequently of national criminal law, and (b) increasing reliance on criminal sanctions to enforce norms of international law, especially norms of international human rights and humanitarian law.

International criminal law can be subdivided, in a rough and ready way, into three main sets of topics. These three topics are: [A] International Aspects of National Criminal Law, [B] Criminal Aspects of International Law: International Standards of Justice, and [C] Criminal Aspects of International Law: International Criminal Law *Sricto Senso*. The term "international criminal law" sometimes has been used to refer to one or another of these three sets of topics standing alone. Thus, in an early essay on "International Criminal Law," Sir John Fischer Williams thought that only the third of these topics had "an interest for the international lawyer." SIR JOHN FISCHER WILLIAMS, CHAPTERS ON CURRENT INTERNATIONAL LAW AND THE LEAGUE OF NATIONS 232, 244 (1929). It is more usually understood nowadays in its broad sense to designate a field that includes all three. (The following discussion of these three subfields is based, in part, on Edward M. Wise, *Terrorism and the Problems of an International Criminal Law*, 19 CONN. L. REV. 799, 801-08 (1987).)

[A] International Aspects of National Criminal Law

The first set of topics comprising international criminal law includes at its core questions concerning the extent to which national courts are permitted to assume jurisdiction over extraterritorial crime, the choice of the applicable law (usually the forum's) in cases involving such crimes, and the recognition of foreign penal judgments. These are all questions about how the courts of one country should act in criminal cases involving a foreign component. They are the counterpart on the criminal side of the questions dealt with in civil cases under the heading "conflict of laws" or "private international law." Taken together, they constitute international criminal law more or less in the original meaning of the term.

The term "international law" (indeed, the word "international") was coined by Jeremy Bentham in the 1780s to describe what older usage called the "law of nations"; the term "private international law" was invented by Joseph Story

in 1834. An equivalent of the term "international criminal law" appeared in German in 1862. Similar cognates came into use in other European languages (but not English) during the 1870s, to designate the branch of law concerned with topics such as jurisdiction, choice of law, and the effect of foreign judgments in criminal cases.

In subsequent years, continental jurists debated the exact nature of the relationship between international criminal law, so defined, and private international law. Earlier writers, from the fourteenth century on, had treated questions arising in connection with divergent criminal laws as a problem of conflict of laws. Story devoted a chapter of his treatise on the conflict of laws to "penal laws and offenses," although it was only six pages in length and dealt mainly with whether foreign penal law could be "enforced" in the United States. (He thought not.) JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS (1834). Yet he also thought of private international law as a "branch of public law." For nineteenth-century continental jurists preoccupied with the "scientific" or systematic arrangement of the law, private international law was a part of private law, criminal law was a part of public law, and the division between private and public law was too sharply drawn to permit anything connected with public law to be treated as part of private international law. Since international criminal law, as first conceived, was primarily a matter of national dispositions regarding the power and competence of a particular country's criminal courts, neither could it be classified as part of public international law. Assertions of power over events taking place abroad might ultimately be subject to limiting principles derived from international law; but the more immediate concern was with the antecedent question of what national law provided that judges should do in cases involving foreign crime. Since national rules regarding such questions did not seem to fit under any other legal rubric, they came, by a process of elimination, to be regarded as occupying a field of their own, which was designated "international criminal law." Some scholars rejected the view that this new field was wholly separate from private international law. Nonetheless, that it was separate came to be the commonly held view in Europe, and implicitly in the United States where, absent standard texts on the subject, international criminal law largely fell into a kind of legal limbo.

International criminal law in its original sense also can be regarded as including, by extension, on the one hand, exceptions from criminal jurisdiction, such as diplomatic immunity and asylum, and, on the other, forms of transnational cooperation, such as extradition, that enable states to circumvent the ordinary restrictions on their power to enforce criminal law outside their own borders. These subjects do not fit exactly within international criminal law as originally defined. Immunities from jurisdiction derive, in large part, from principles of public international law, whereas international criminal law was supposed to be primarily a matter of a state's own rules governing the exercise of its power to punish foreign crimes and crimes committed by foreigners. Extradition, likewise, is not so much a matter of national rules governing the exercise of penal powers, as it is a matter of international obligation, or at least

an "international legal transaction" falling rather more clearly within the realm of international law.

Yet it is hard, once one starts talking about a state's jurisdiction over foreigners and foreign crime, to avoid questions of immunity and extradition and other forms of international cooperation in criminal matters. These are connected topics that almost naturally have to be discussed together. There are other instances as well in which it seems inadequate to insist on a crisp distinction between national and international law; hence the tendency to attenuate the distinction and to speak instead about "transnational law." In dealing with problems of criminal law that cut across national boundaries, it is particularly difficult to keep questions of national and international law apart. As a result, international criminal law, practically from the beginning, has been treated as including virtually the whole gamut of problems connected with transnational aspects and applications of domestic systems of criminal law.

[B] Criminal Aspects of Public International Law: International Standards of Criminal Justice

A second distinct group of topics that also has been designated as "international criminal law" concerns international standards of criminal justice, that is, principles or rules of public international law that impose obligations on states with respect to the content of their domestic criminal law. International standards may require states to respect the rights of persons accused or suspected of crime, or to prosecute and punish certain so-called "international offenses." Both kinds of standards appear in the older body of international law on state responsibility for injury to aliens. More recently, guarantees for persons accused of crime generally have been cast in the form of treaty provisions and other instruments (especially those adopted by the United Nations General Assembly) on human rights; indeed, a large part of contemporary law on the international protection of human rights is directed at setting standards of performance for domestic criminal procedure. A significant part of the United Nations program located in Vienna that deals with crime prevention and criminal justice has been devoted to standard-setting. *See* ROGER S. CLARK, THE UNITED NATIONS CRIME PREVENTION AND CRIMINAL JUSTICE PROGRAM: FORMULATION OF STANDARDS AND EFFORTS AT THEIR IMPLEMENTATION (1994). Likewise, obligations to prosecute specific types of offenders through the medium of local criminal law have tended to be imposed more and more by general conventions ("suppression conventions") – those dealing, for instance with piracy, the slave trade, traffic in narcotics, war crimes, genocide, torture, hijacking of aircraft, crimes against diplomats and other "internationally protected" persons, hostage-taking and other forms of terrorism, transnational organized crime, traffic in persons, and corruption. By virtue of these treaty obligations, states are required to cooperate in specified ways in suppressing certain kinds of conduct supposedly reprehended by the world at large. The conduct on the part of individuals which states are required to suppress is not necessarily itself a violation of international law; these so-called