PREFACE TO THE FOURTH EDITION

Echoing what we wrote in the preface to the third edition, we continue to be gratified by the warm welcome this book has received, and nothing has changed in our overall approach of giving emphasis to the transnational as well as purely international criminal dimensions.

There have been a number of significant changes in the legal landscape since the last edition, which our revisions take into account. Naturally, some chapters have not changed much, but even in those chapters we have replaced older cases and readings with more recent ones. We have also updated our expository material and rewritten some of it for improved clarity and conciseness. Throughout, we have aimed to shorten individual units where possible, without sacrificing breadth of coverage. The 2022 Russian invasion of Ukraine has required updates in several chapters, especially in the discussion of aggression in Chapter 20.

What follows is a brief explanation of the changes in other chapters. All chapters have, to varying degrees, been revised; what follows lists only significant additions and deletions.

Chapter 3 (International Criminal Tribunals) required major updates on the international tribunals. We have added sections on the Special Court for the Central African Republic and Colombia's Special Jurisdiction for Peace. We have now folded the section on crimes of sexual violence into Chapter 22.

Chapter 4 (Comparative Criminal Procedure and Sentencing) has been amended slightly to reflect relevant developments in foreign law and procedure and to provide more current statistics on the practice of international tribunals.

Chapter 5 (Jurisdiction) includes some significant changes to the section on transnational application of U.S. criminal statutes. These reflect the increasing importance of the strong territorial presumption and the diminished role of *Bowman*. We rewrote the expository material to explain these developments, removed the *Belfast* case, and replaced it with United States v. Sota, 948 F.3d 356 (D.C. Cir. 2020), which better represents the courts' current approach. For the same reason, we removed the *Bowman* flow chart, which is now more misleading than helpful.

Chapter 6 (Immunities) was trimmed. We shortened the excerpts from United States v. Al Sharaf, 189 F.3d 45 (DDC 2016), Rana v. Islam, 305 FRD 53 (SDNY 2015), the House of Lords opinions in *Pinochet*, and the ICJ's 2002 Arrest Warrant decision to include a somewhat more detailed discussion of the immunities of international organizations under U.S. law in light of the U.S. Supreme Court's decision in Jam v. International Finance Corp., 139 S. Ct. 759 (2019), which has some potential criminal law implications. We also noted that the U.S. Supreme Court has held that FSIA does not preclude a U.S. criminal prosecution of a foreign state's agency or instrumentality in Türkiye Halk Bankasi A.Ş. v. United States. We also replaced the excerpts from the ILC's 2017 Draft Articles on Immunity of State Officials from Foreign Criminal Jurisdiction with those from its 2022 report to the UN General Assembly.

Chapter 7 (U.S. Constitutional Rights in a Transnational Context) has relatively minor changes.

Chapter 8 (Obtaining Evidence Abroad) was rewritten first to emphasize the challenges that face defense counsel in obtaining exculpatory evidence from abroad. For example, we were more pointed about the fact that MLATs, informal information exchanges, and the processes provided in the Stored Communication Act are not available to defendants. The second major change was to reorient the chapter to separate efforts by U.S. prosecutors to secure evidence abroad and situations in which persons abroad are seeking evidence in the United States. We trimmed where appropriate, notably taking out discussion of the Harare scheme, the Third Restatement's section 442 (which has been superseded by the Fourth Restatement), and the extended discussion of the Microsoft litigation (which was mooted by the CLOUD Act). We moved the discussion of MLATs to follow the letters rogatory section and before the U.S. compulsory process section because it made more sense there given DOJ policy and likely prosecutorial preferences. In the compulsory process section, we added a discussion of blocking statutes, BNS subpoenas, and the Anti-Money Laundering Act's expansion of the scope of so-called PATRIOT Act subpoenas to foreign banks. We also discussed the trial subpoenas available to the defense under Fed. R. Crim. P. 17 and the depositions procedure under Fed. R. Crim. P. 15. We omitted much of the constitutional discussion, believing that these cases were sufficiently covered in Chapter 7, but we thought it appropriate to add a note on the limits of the Sixth Amendment compulsory process and due process guarantees in securing for the defense the availability of foreign witnesses and evidence.

Chapter 9 (International Extradition and Its Alternatives) now includes discussion of the 2014 ECHR Trabelsi v. Belgium decision regarding "life without parole" (LWOP) and the 2017 UK decision in Rwanda v. Nteziryayo [2017] EWCH 1913.

Chapter 10 (Organized Crime) required only a few adjustments.

In Chapter 11 (Trafficking in Persons, Drugs, Arms, Cultural Objects, and Antiquities) we updated the notes and references and included appropriate excerpts from the 2022 Trafficking in Persons Report, the 2022 International Narcotics Control Strategy Report, and the 2023 UN Narcotic Drugs Report.

In Chapter 12 (Money Laundering) we shortened the Morais reading because the relevant content was not up to date. We updated the discussion on the non-criminal Swiss money laundering regime and reproduced the current Article 260*ter*. In the U.S. section, we adjusted some notes, including adding coverage of the use of cryptocurrency for laundering and the relevant portions of the Anti-Money Laundering Act of 2020 (AMLA).

In Chapter 13 (Corruption), we updated the materials as appropriate, including references to the latest SEC/DOJ Resource Manual and DOJ enforcement policy. We discussed the Second Circuit's decisions in United States v. Hoskins, noting their relevance to the questions of accessorial, agency, and territorial liability under § 78dd-3. We also discuss the Eleventh Circuit's guidance on what constitutes an "instrumentality." We shortened the discussion of alternative theories of liability.

In Chapter 14 (Terrorism) we have made numerous small updates. We have condensed the discussions of the comprehensive anti-terrorism convention, U.S. statutory definitions of terrorism, and UNSCR 1373; in addition, we have re-edited Holder v. Humanitarian Law Project (it is shorter now). In the discussion of the post-9/11 military commissions we have broken out a subsection on the controversies and scandals that continue to surround it and brought these up to date. We replaced the excerpts from the 2009 report of the UN Security Council's Counter-Terrorism Committee with some from its 2023 report. The chapter contains a new concluding section on compensation for terrorism victims.

Chapter 15 (The International Criminal Court) was trimmed. The excerpts from the OTP's position papers on preliminary examinations and interests of justice have been pared down. We instead discuss the OTP's practice on these issues in the context of developments in the Afghanistan situation and the Comoros litigation. We have also condensed the discussion of the *Al-Senussi* admissibility decision, replaced excerpts from the *Lubanga* judgment on victim participation with a summary of the holdings, and shortened the excerpts from the *Lubanga* reparations judgment. The text has been updated throughout the chapter to reflect relevant developments in ICC jurisprudence. Notably, the section on sentencing now contains notes on the sentencing judgment in *Ongwen* and its implications for the ICC's recognition of traditional justice mechanisms.

Chapter 16 (Modes of Participation and *Mens Rea*) has been shortened and updated in light of the ICC's jurisprudence on modes of liability, in particular the ongoing differences between ICC judges on the notion of control over the crime and indirect perpetration. We have replaced the excerpt from the 2016 judgment of Trial Chamber III in Prosecutor v. Bemba with the Appeals Chamber judgment reversing Bemba's conviction and added some notes on its relevance for the future of command responsibility.

Chapter 17 (Defenses to International Criminal Prosecutions) has major changes, mostly to the sections on duress and necessity. The discussion of necessity as a defense to torture has been folded into Chapter 21 (Torture and Cruel, Inhuman, and Degrading Treatment or Punishment). We have added an excerpt from the ICC Trial Chamber's judgment in the *Ongwen* case discussing the defense of duress. We also briefly discuss other defenses raised by *Ongwen*, including insanity and his forcible conscription as a child soldier in the Lord's Resistance Army.

Chapter 18 (Crimes Against Humanity) has been shortened but remains substantially unchanged. The prior edition's discussion of whether the crimes require a discriminatory intent has been shortened to a brief note because the issue has lost relevance.

Chapter 19 (Genocide) has several changes. In our discussion of Article 9 of the Genocide Convention, we now include discussion of the Ukraine v. Russia genocide case in the ICJ. We added a new section on the concept of cultural genocide, which includes discussion of Lithuania's *Vasiliauskas* case, Mike Pompeo's statement accusing China of genocide in Xinjiang, and recent events in Ukraine. We shortened the excerpt from the Darfur report, moving some of its material to the section on the meaning of ethnicity under the Convention.

Chapter 20 (War Crimes and the Crime of Aggression) has significant changes, mostly to the section on aggression. The 2022 Russian invasion of Ukraine has made the issue salient in a way we did not anticipate in the last edition, so we have now expanded the discussion significantly. One new reading is an excerpt from the UN General Assembly's "Uniting for Peace" resolution, which was invoked in UNGA resolutions condemning Russian aggression. We have broken out a separate subsection on humanitarian intervention and preventive war, although the material is only a slight expansion of note material from the last edition.

Chapter 21 (Torture and Cruel, Inhuman, and Degrading Treatment or Punishment) has one major change: It includes a new section called "Torture and Evidence," which discusses the admissibility of so-called derivative evidence from torture victims. We added this because since the previous edition there have been significant litigation developments on the issue in both the Guantánamo military commissions and the ICC. We also rewrote the introductory background material.

In Chapter 22 (Sexual Violence) we trimmed some of the readings while bringing the chapter up to date by reference to notable relevant convictions. In the notes following *Akayesu*, we cut down the discussion of ICTY/ICTR precedents, sharpened the discussion of the relevance of consent, added notes on the victimization of men, transgender, gender non-conforming, and non-binary persons, and on intersectionality in charging. We created a separate section for forced marriage, using it as an example of an evolving norm. Under "Charging Considerations," we omitted the entire discussion listed as a subsection entitled "Pleading Rules." The portions of continuing relevance we added to the section on *concursus delictorum*. In that section, we trimmed the discussion of U.S. constitutional rules and updated the final reading regarding the ICC's analysis.

Chapter 23 (Alternatives to Prosecution After Atrocity) has been shortened and contains numerous small updates, notably on recent efforts to establish Truth and Reconciliation Commissions in the United States.

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 that might be considered. The field of international criminal law is anything but static, and our hope is that this text can remain current and relevant as a primary instructional tool.

Neha Jain
David Luban
Julie O'Sullivan
David P. Stewart

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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. Neha Jain, the newest member of our team, brings a broad comparative perspective to the book. Educated in India and the United Kingdom, she has taught both domestic and international criminal law at U.S. law schools and co-directed the Academy of European Law at the European University Institute, where she was Professor of Public Law. Her scholarship ranges broadly from the fundamentals of international law to comparative criminal law to issues of gender in international criminal law.

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 be equipped 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).

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 10); trafficking in persons, drugs, and arms (Chapter 11); money laundering (Chapter 12); corruption (Chapter 13); and terrorism (Chapter 14). 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 14. 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 15), applicable modes of participation and *mens rea* (Chapter 16), and possible defenses (Chapter 17). Chapters focusing on the great international crimes follow: crimes against humanity (Chapter 18), genocide (Chapter 19), and war crimes (Chapter 20). We chose to include two chapters on particular types of major international crimes—torture (Chapter 21) and sexual violence (Chapter 22)—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 23 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.

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 neha.jain@eui.eu, luband@georgetown.edu, osullij1@georgetown.edu, stewartd@law.georgetown.edu.