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Introduction: International Criminal Law – Lessons from Teaching Strategies

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INTRODUCTION: INTERNATIONAL CRIMINAL LAW — LESSONS FROM TEACHING STRATEGIES

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The general importance of a symposium on methods of teaching International Criminal Law is not obvious. However, this symposium is not limited to a discussion of ways to apply general pedagogical approaches to a particular topic. Instead, it touches upon and reflects comparative perspectives on a major jurisprudential puzzle.

The broader significance of the present symposium derives from the special nature of International Criminal Law (ICL): It is a field of great and growing importance, involving extremely complex issues, yet there is incomplete consensus regarding its scope and structure. If confusion and controversy are to be minimized as ICL principles are applied to an expanding range of activities, a coherent conception of ICL must be developed and disseminated. In the meantime, legislators and jurists must solve practical problems on the basis of whatever policy insights they can develop, and pioneer teachers of ICL who hope to give their students a sound policy foundation in this field must make hard choices concerning the scope and structure of their courses.

The great and growing importance of ICL is easily illustrated. The field embraces such established international crimes as genocide, war crimes, slavery, and high-seas piracy, plus such developing international crimes as aircraft hijacking, attacks on diplomats, hostage-taking and torture. It also addresses such issues of criminal law coordination as extradition, transfer of punishment, and judicial cooperation in developing criminal evidence.

ICL problems are complex because of the numerous sources of law implicated by ICL measures. Laws on both the international and national levels must be addressed, including not only those that mandate suppression of threats to public order but also those that protect accused persons' rights. Moreover, which law may prove relevant, especially on the national level, is not always easy to predict. For example, concerns regarding U.S. freedom of speech under the U.S. Constitution slowed U.S. acceptance of the Genocide Convention, and narrow domestic conceptions of criminal jurisdiction prevented the U.S. from as-

serting the right to punish most foreign terrorist attacks upon U.S. citizens until a few years ago.

The lack of consensus concerning the scope and structure of the field can be described in both practical and theoretical terms. On the practical side, bribery of foreign officials has been made a crime under U.S. law but not under the laws of most other nations, yet such questions as whether the U.S. is guilty of unwarranted meddling or whether other nations are remiss in failing to suppress transnational corruption are not even being asked.

Also of interest is the practice of most Civil Law nations of refusing to extradite their own citizens while reserving the option of prosecuting their citizens for foreign crimes, contrasted with the willingness of Common Law nations to extradite citizens — and their inability to punish their own citizens for nearly all foreign crimes. Are these contrary practices so nearly equal in merit that they should perpetually coexist, rather than one supplant the other? No one in either set of nations seems to have advocated adoption of the other's approach.

Next, there is the problem of international crimes. A few examples are sufficient. The first is terrorism, which has been the target of several international suppression proposals. However, no definition of terrorism has ever been adopted in any international criminal cooperation instrument. Does this indicate that there is no real international motivation to suppress terrorism, or does it merely illustrate some kind of technical difficulty in translating concepts between legal systems?

A second example involves the Iranian calls for the killing of author Salman Rushdie because of his negative novel concerning Islam. Does either the Ayatollah Khomeini's encouragement of Moslems to commit murder in England or the offering by a head of an Iranian religious foundation of a reward for such a killing amount to an "international crime?" This question is difficult to answer because there is no general definitional standard for an international crime; instead, there is merely consensus that certain kinds of conduct constitute a non-exhaustive list of examples of international crimes.

Professor Cherif Bassiouni of Chicago, who convened this symposium, has analyzed the characteristics of these examples and found that they jeopardize in varying degrees one or more of seven international "elements."[1] However, his attempt to quantify the international threat posed by various international crimes produces curious results: Aggres-

1. M.C. BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL 38-40 (1987)[hereinafter INTERNATIONAL CRIMINAL CODE].

sion tops the list with a score of 63, but theft of nuclear materials has a score of only 8 while traffic in obscene publications has a score of 38. Bribery of foreign officials has a score of 30. It is difficult to determine what score to assign to death threats against foreign authors.

A third example may serve to underline just how fundamental the problems posed above really are. It involves a boy in the Pyrenees with a pellet gun who peppers Spanish and French victims on both sides of the border. In the absence of a definitional criterion, it is difficult to see why that could not be called an international crime — it is both international and criminal.

However, it is also difficult to see why anyone would worry about the classification of this conduct as an international crime unless specific consequences flowed from this classificiation, and that is where ICL's doctrinal weakness is most apparent. Some international crimes are said to be subject to universal jurisdiction — meaning that they can be punished or should be punished by any nation that obtains custody of an accused — while others are subject to normal extradition rules. Why is there but one classification for crimes having such different consequences? If the crimes are dissimilar, it seems illogical to lump them together; if they are alike in crucial respects, disparate treatment of them requires explanation.

The foregoing may provide some tangible reference points for theoretical descriptions of the problems of achieving a consensus on the scope and structure of ICL. As Professor George Schwartzenberger of London commented decades ago, the term "International Criminal Law" could be used to denote one or more of six possible aspects of interaction between and among laws of nations and international law.[2] Most discussions of ICL seem to focus on three such interactions — criminalization at the national level mandated by international law, coordination of national systems mandated by international law, and coordination of national systems based on mutual interests. However, even in these interactions, there remain problems of determining the circumstances under which international law can or should preempt national laws and of finding the degree to which different nations actually have mutual interests.

One massive scholarly attempt to survey and inventory measures involving such interactions that have been adopted or widely advocated was the International Criminal Code project directed by Cherif Bas-

2. Schwartzenberger, *The Six Possible Meanings of International Criminal Law*, in INTERNATIONAL CRIMINAL LAW 5 (G.O.W. Mueller & E. Wise eds. 1965).

siouni with participation by several dozen scholars from around the world, including many of the contributors to this symposium.[3] That code sought to identify and define substantive offenses and suitable enforcement measures in a manner reminiscent of the U.S. "restatements," working with the existing law, but remedying apparent inadequacies. The result was the most concise and clearly presented schematic of international crimes and their consequences ever produced.

Whatever the quality of that code as a reflection of past practice and current progressive wisdom, it did not present a coherent approach. As Professor Claude Lombois of Paris dryly remarked of it, "It is not required that a code express a philosophy, but it is not forbidden for it to have one."[4]

The fact that such an ambitious and well-thought-out project failed to produce a satisfactory vision of ICL is daunting, but an explanation for the failure must be attempted. What distinguished the code project from prior — unsuccessful —efforts to articulate a coherent view of ICL was its careful attention to prior international instruments. Its axiom that extradition or prosecution was proper for all international crimes is but an echo of Hugo Grotius' medieval exhortation regarding "common crimes."[5] The failing of the code could be based on its attention to prior practice or on its assumption that all crimes that have been the subject of multilateral conventions are suitable for Grotius' "common crimes" treatment.

Either possibility seems equally plausible. Attention to past practices in a field that has long been recognized as confused in terms of overall policy concerns is obviously dangerous. Likewise, assuming that a medieval writer's conception of obligations in such a complex field is valid and that his conception of "common crimes" corresponds to the conduct that has been the subject of multilateral conventions in the 19th and 20th Centuries is equally dangerous.

This writer has described elsewhere his own views on how this problem might be overcome,[6] but for now the problem persists. As a result, the lack of consensus as to the ways in which international and transnational forces shape, or should shape, international criminal law must be

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3. INTERNATIONAL CRIMINAL CODE, *supra* note 1; M.C. BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE (1983).

4. Derby, *Codification of International Criminal Law*, in NEW HORIZONS IN INTERNATIONAL CRIMINAL LAW 41 (M.C. Bassiouni ed. 1985).

5. H. Grotius, *De Jure Belli ac Pacis, Liber Tres*, in QUIBUS JUS NATURAE ET GENTIUM, ITEM JURIS PUBLICI PRAECIPIA EXPLICANTUR (1913).

6. Derby, *An Analytical Framework for International Criminal Law*, *1* TOURO L. REV. 57 (1985).

admitted, and there must be a degree of tentativeness in assessing the suitability of any existing or proposed ICL measures.

A degree of tentativeness may be inevitable, but the present condition of ICL doctrine falls far short of that standard. The lack of simple answers to basic questions like the ones posed above implies the existence of serious doctrinal gaps or inadequacies. Unless some effort is made to segregate areas of controversy from areas of agreement and to find the lowest common denominators among rival conceptions of this undisciplined discipline, practical exigencies will force practitioners to address narrow problems equipped with little more than hunches concerning the policy implications of the available alternatives. This may result in measures that thwart important policies in order to serve minor ones, and it may further confuse scholars of ICL who strive to trace its policy patterns by studying "accepted practices."

The basic responsibility for making sense of the chaos in this field falls to the professors of ICL. They alone have the time, the motivation, and the resources to develop and disseminate useful frameworks or fragments of frameworks upon which doctrine can grow.

The number of persons who have written on one aspect or another of ICL is very large, and includes many non-professors. Yet, the number who have dared to address the overall subject or to attempt to relate one of its branches to another is very small. Moreover, even writings of the latter kind do not necessarily fulfill the need for a state-of-the-art, lowest-common-denominator, immediately useful conception of the field. Scholarly writings tend to advance new, individualistic theories, or to be impractically abstract.

In fact, one of the few occasions professors have for focusing on basics within their fields of experitise is when they are planning their approach to teaching that field. It is at that point that they are forced to decide which topics should be included, which are the most basic, and which are interelated. At that point they must consciously evaluate descriptions of doctrine to reject or downplay unduly controversial ones and highlight widely-accepted ones. In sum, at that point, the professor must hazard a coherent conception of the field.

That is why the symposium articles that follow are not only of interest to would-be teachers of ICL. They contain more than teaching tips — they contain precious insights into the nature of what is to be taught in the name of ICL, imbedded in the reports of what are probably about half of the total number of living teachers of this subject. The views of these authors are particularly valuable because they come from a wide range of legal cultures, so that similarities and differences

of approaches can be examined in order to identify any parochial influences.

The countries represented include: Belgium, Brazil, Canada, Hungary, Israel, Italy, the Netherlands, the Soviet Union, the United States, and Yugoslavia.[7]

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The most basic question of all for ICL is whether to treat it as one field or as a mere intersection of such fields as national criminal procedure, international law, administrative law, military law, aviation law, and maritime law. In view of the persistent problems in giving ICL a coherent structure, one might have expected at least some professors to choose the latter approach.

However, this explanation is not born out. All of the writers advocate treating ICL as a subject unto itself, and Professor Davor Krapac of Yugoslavia notes that such treatment is proper because ICL meets criteria for "independence" derived for general application by another Yugoslavian scholar.

The second most basic question is the scope of the field. The possible categories for inclusion would be one or more of the following: 1. Nuremburg crimes — aggression, war crimes, and crimes against humanity — which seem uniquely international in nature; 2. Crimes that are subjects of multilateral conventions, which may be said to reflect multinational interests; 3. Extradition, generally, which may be said to reflect bilateral interests; and, questions of deportation or criminal jurisdicition, which might be considered as primarily reflecting unilateral interests of individual nations. Although a narrower scope might have seemed plausible, all of the symposium contributors favored inclusion of all the above topics within their courses.

The third question to be addressed is how to describe the relationships among topics within the field. At least three responses seem possible. The first is to treat each topic separately, ignoring the possibility of interrelationships. A second would be to focus solely on the impact of international law on the criminal processes of a given nation. A third would be to focus on responsiveness of one nation's criminal processes to the needs of other nations. A possible fourth approach would be to attempt to describe the interactions of the various relevant legal systems in a comprehensive way.

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7. The current issue contains the reports from Belgium, Canada, Hungary, Israel, the United States, and Yugoslavia. Reports from the remaining nations will be presented in the following issue of this journal.

This writer favors a comprehensive reconciliation of the competing demands of different legal systems, but it is not clear that any of the symposium authors have taken a firm position on this issue. Readers must form their own opinions concerning the authors' positions on this question, which has crucial implications for the proper structuring of ICL doctrine.

A careful evaluation of the proposed approaches in this symposium is not likely to settle all major issues concerning the nature of ICL. However, it may do a great deal to organize dialogue within this field by indicating areas of agreement and segregating them from areas of controversy.

At least one area of consensus can be noted off-hand. Works by Bassiouni and Prof. Ved P. Nanda of Denver dominate the English-speaking world as ICL texts. An early entry edited by G.O.W. Mueller and E. Wise,[8] has been superseded by a two-volume anthological treatise edited by this team,[9] a three-volume anthological treatise edited by Bassiouni,[10] a Practising Law Institute (PLI) book edited by both,[11] and two books by Bassiouni, both featuring the draft international code and bibliographic materials, and the second featuring a draft statute for an international criminal court and new analytical material.[12]

Only the Mueller & Wise book was specifically designed as a teaching text, featuring the documents-and-readings format familiar to U.S. law teachers. The multi-volume treatises are invaluable references, but their endless series of analytical and descriptive articles — and their substantial prices — make them questionable candidates for use as a basic course text.

The Nanda & Bassiouni PLI book is somewhat more plausible as a course text. It includes a series of practice-oriented articles on impressive recent developments in the field, which could be assigned periodically during the course in connection with related topics.

Bassiouni's books containing the draft international code could also serve as course texts. The code functions as a restatement of the law, while the accompanying commentary and bibliographic materials reveal major issues and provide guidance on how to locate both primary and secondary materials of relevance.

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8. INTERNATIONAL CRIMINAL LAW (G.O.W. Mueller & E. Wise eds. 1965).

9. A TREATISE ON INTERNATIONAL CRIMINAL LAW (M.C. Bassiouni & V. Nanda eds. 1973).

10. INTERNATIONAL CRIMINAL LAW (M.C. Bassiouni ed. 1986-87).

11. INTERNATIONAL CRIMINAL LAW: A GUIDE TO U.S. PRACTICE AND PROCEDURE (V. Nanda & M.C. Bassiounui eds. 1987).

12. See *supra* notes 1 and 3.

In the end, however, these works are not sufficient to serve alone as basic texts. As a result, even teachers in the English-speaking world must assemble their own basic materials. The materials they select and the order in which they assign them for reading may reveal a great deal about their conception of ICL.

An example may make the point. Although several international crimes relate to abuses of internationally protected human rights, such as slavery, apartheid and torture, a course on ICL would not necessarily involve examination of general human rights documents that guarantee freedom of expression, cultural autonomy and so on. However, inclusion of such documents could be justified either on the basis that they constitute the foundations upon which all human rights rely or on the basis that they might be relevant to particular ICL issues that are not yet well-defined, such as an international crime of gross deprivation of some of these basic rights.

Similarly, a course on ICL would not necessarily examine primary authority relating to criminal jurisdiction in great detail. Jurisdictional doctrines are relatively well-settled, except for the U.S. use of extraterritorial jurisdiction to prosecute foreign conduct adversely affecting competition in U.S. markets. However, an emphasis on jurisdictional materials could be justified on the basis that it is worth noting that some jurisdictional bases are more widely accepted than others, and that some assertions of jurisdiction are on firmer ground than others.

Finally, a course on ICL would not necessarily focus on theoretical articles examining the common characteristics of international crimes, attempting to determine what characteristics of novel conduct would qualify that conduct as an international crime. There are ample international crimes to study, plus issues concerning extradition and other forms of cooperation in suppressing crimes that can easily fill the course without indulging in such speculative matters.

However, in a course with the more normal focus, if the question of the death threats against Salman Rushdie arose, the students would be ill-equipped to follow a discussion of whether those threats might amount to international crimes. That is because it would seem that the legal classification of this conduct, for ICL purposes, would seem to focus on the fact that a solicitation occurred in Iran to commit a crime in the United Kingdom that would have the effect of punishing someone for exercising an internationally protected human right in the United Kingdom.

In contrast, a course featuring the atypical focuses described above would equip the students with the tools to deal with such a question.

As a result, the mere fact of a teacher's choosing such an atypical focus might indicate either that teacher's attitude towards the volatility of ICL or that teacher's attitude towards the Rushdie affair.

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This writer's own views on selection and organization of materials may also provide a useful example.

The first time I taught ICL, I was dismayed to find that the Mueller & Wise text was utterly unavailable, so I sought to replicate its structure in updated photocopied materials. However, I quickly found that my students could not adjust to the compartmentalization of the subject matter. They were constantly concerned with how such matters as extradition related to such matters as crimes against humanity and how international and national laws interact.

As a result of that experience and more consideration on my part of how the pieces of ICL fit together, I would now be inclined to divide the course along the following lines:

I. Unilateral criminal process
   - A. Jurisdiction to adjudicate
   - B. Jurisdiction to prescribe
   - C. Jurisdiction to enforce

II. International limits on unilateral process

III. Bilateral cooperation in criminal process
   - A. Extradition
   - B. Transfer of prisoners
   - C. Judicial assistance
   - D. Other matters

IV. Internationally mandated cooperation

V. Internationally mandated action

Many academics will doubtless recognize my approach as reflecting the structure of a course on conflicts of laws or, as other systems call it, private international law. This conception of ICL — focused on individual accountability and treating ICL as a public law counterpart of private international law — is quite controversial.

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Careful analysis of the teaching strategies of other professors of this field will reveal their various conceptions and enable both veterans and novices to develop a meaningful impression of the current status of ICL doctrine.

One of the benefits of such insights could be the development of a comprehensive and coherent conception of ICL that would achieve a

wide consensus. This would greatly facilitate further theoretical and practical work in this field.

That may be too much to hope for. However, it could easily result in more academics daring to join the ranks of those who profess ICL, and in more courses in ICL being offered. This would greatly expand the number of devotees of this field, improving the prospects that practical measures will be sensitive to relevant policies and that someone will find a way to capture the full policy significance of this field in a way that will be meaningful to all serious students of ICL.