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A Treatise on International Criminal Law

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BOOK REVIEW

A TREATISE ON INTERNATIONAL CRIMINAL LAW

Compiled and edited by M. Cheriff Bassiouni and Ved P. Nanda
(Charles C. Thomas, publisher)
1973
Volume I, 751 pages, $26.50
Volume II, 426 pages, $19.50

In spite of the doubts as to its existence expressed by Georg Schwarzenberger in his classic essay,[1] "international criminal law" has now secured a substantial measure of acceptance and recognition as an independent discipline, incorporating elements of both international and criminal law, while introducing factors and considerations not found in either. Moreover, as these timely two volumes so well illustrate, it is a multicultural discipline, drawing on the legal attitudes and cultural mores of a great variety of civilizations in North and Latin America, Western and Eastern Europe, Africa and Asia.

Still, the parameters remain somewhat unclear, or in the words of the editors—Professors M. Cherif Bassiouni of the DePaul University Law School and Ved. P. Nanda of the Denver University Law School—"nebulous."[2] A primary goal of the editors, which is in large part fulfilled, is to remove this nebulosity.

These volumes are both an updating and an expansion of Mueller and Wise's pioneering book on the same subject.[3] Together, the Bassiouni and Nanda volumes constitute an immense work of 1,177 pages and 47 contributors from 22 different countries. Most, if not all, of the subjects introduced by Mueller and Wise are more comprehensively covered in these volumes, as are a variety of subjects of current significance not found in Mueller and Wise.[4]

This breath of coverage may cause some purists to question whether all the areas treated properly fall within the international criminal law category. Some might argue, for example, that it is not a function of a United Nations peace-keeping force, at least as these forces have developed in practice, to enforce international criminal law, but rather to act as a buffer between belligerents in order to allow them to resolve their differences through procedures for peace-

1. Schwarzenberger, *The Problem of an International Criminal Law*, 3 CURRENT LEGAL PROBLEMS 263 (1950).

2. Preface, Vol. I, at xi.

3. G. MUELLER & E. WISE, INTERNATIONAL CRIMINAL LAW (1965).

4. For example, the problem of international narcotics control and the enforcement machinery of international criminal law.

ful settlement. The argument to the contrary is that, theoretically at least, UN forces may be employed under Chapter VII of the Charter to enforce the peace against an aggressor state, which, under the Nuremberg principles, would be committing a crime against peace.[5] But we need not linger long over such semantic squabbling. There is much in these volumes to interest and enlighten the international lawyer, the criminal lawyer and the international criminal lawyer alike. Indeed, the very breadth of the coverage poses problems for the reviewer, because it is difficult, no impossible, to do justice in the context of a brief review to the work of all the forty-seven authors whose essays appear in these volumes. Rather, one must limit oneself to a description in broad outline of the areas covered and attempt to set forth an admittedly personal view of some, but by no means all, of the highlights. Failure to mention a particular author's work should therefore in no way be viewed as an adverse reflection on its quality.

The first volume, in the words of the editors, "deals essentially with the penal aspects of international law,"[6] and begins with an exploration of the doctrinal and theoretical bases of international criminal law. In an introductory essay,[7] Gerhard O. W. Mueller, Professor of Law, New York University, and Douglas Beshavov, Assistant Corporation Counsel, City of New York, trace the development of international criminal law, specifically, the "process that has taken place for several hundred years and has resulted in the creation of international criminal jurisdiction over piracy offenses, war crimes and crimes against humanity, genocide, and a host of lesser international offenses provided for by treaty and convention."[8] In addition, they argue that "the emergence of intenational standards of human rights, on both world and regional levels, and of general or special application, has added to the growing body of international conduct norms which, because they require enforcement, qualify as substantive I.C.L."[9] They conclude that, in spite of this considerable body of substantive international criminal law, enforcement techniques are so underdeveloped as to give rise to a "crisis," and reluctantly "acknowledge that for the foreseeable future, reliance will have to be placed on the traditionally less criminal and much more civil and urban, though also more subtle, appeal to the sense of injustice of all mankind, the pride of nations, and the competition for prestige and honor."[10]

5. In this connection it should be noted that the Nuremberg Trials found only individuals and not the state of Germany guilty of the crime against peace.

6. Preface, Vol. II, at ix.

7. Vol. I, at 5.

8. Vol. I, at 7.

9. *Id.*

10. Vol. I, at 22.

Fritz Munch, Professor of International Law, University of Bonn, contends in an essay on "State Responsibility in International Criminal Law"[11] that, under the *lex lata*, only individuals, and not states, may be held criminally responsible and subject to criminal penalties for international crimes. He suggests that state responsibility for international crimes in a sense analogous to municipal penal law would be possible as a jurisprudential matter but would require a fundamental change in the negative attitudes presently prevailing in the world community. His conclusion thus, in effect, confirms that expressed twenty-five years earlier by Schwarzenberger.[12] On the other hand, in a note following the Munch essay, the editors point out that the International Law Commission, in its study of state responsibility, purposely does not draw a distinction between a tort and a crime on the assumption that "a wrongful act subjects a state to responsibility under international law regardless of the focus or label attached to reparations."[13]

After the expositions on doctrine and theory, the focus turns to specific aspects of international criminal law under the following broad headings: (1) crimes against peace, i.e., aggression, indirect aggression and national and collective self-defense; (2) the regulation of armed conflict; (3) common crimes against mankind, i.e., air and sea piracy and other forms of terrorism, slavery, genocide, racial discrimination and the international narcotics trade; (4) the prosecution of international crime and the creation of an international criminal court; and (5) the enforcement machinery of international criminal law, i.e., police cooperation with respect to international crimes and the possible role of an international criminal police and of United Nations peacekeeping forces as a world police force. With respect to aggression, editor Bassiouni contributes a helpful history of efforts by the world community to define this elusive and emotionally laden concept and an equally useful summary of proposals on defining aggression before the United Nations as of June 1971.[14] He notes that these efforts have been "marked with few successes," but suggests that they have at a minimum helped to clarify the issues and have thereby made a significant contribution to the maintenance of minimal world order.

It is generally agreed that the use of force in self-defense does not constitute aggression, but the world community has been no more successful in reaching agreement on a precise definition of self-defense than it has on a definition of aggression. Yoram Dinstein,

11. Vol. I, at 143.
12. Schwarzenberger, *supra* note 1.
13. Vol. I, at 154.
14. Vol. I, at 159.

Professor of International Law, University of Tel Aviv, contributes a well thought out essay[15] which surveys various views on the content of the self-defense concept and perceptively analyses the components of the problem. Parenthetically, it may be noted that Dinstein's paper is refreshingly free of Middle East polemics. His only oblique reference to the Middle East is his disparaging comments on what he sees as the failure of the United Nations Security Council to perform its function under the Charter of evaluating the conduct of a state which purports to justify its use of force on the ground of self-defense.[16]

As to the regulation of armed conflict, editor Nanda briefly sketches some of "the enormity and complexity of imposing effective legal limits on the military uses of the Oceans."[17] He is of the opinion that the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Seabed Thereof[18] "suffers from several imperfections and inadequacies," but is also "future-oriented, providing a desirable first step for further negotiation of other multilateral agreements toward the peaceful uses of the seabed."[19] The peaceful use of the seabed has been one of the many issues under consideration in the preliminary meetings of the law of the sea conference. Some commentators, however, believe that it is an issue which has been shamefully neglected.[20] Professor Nanda's observations would seem most apposite to this concern.

The next part of the first volume, which deals with common crimes against mankind, contains discussions on subjects of substantial current relevance, namely air and sea piracy, treason, slavery, genocide, racial discrimination and international narcotics; all are interesting reading. In particular, it may surprise some readers to learn that, as noted in an essay by the editors,[21] in spite of substantial national and international efforts towards the suppression of slavery, a 1971 Report of the Rapporteur of Britain's Anti-Slavery Society alleges that debt bondage, serfdom, chattel slavery, servile forms of marriage and the sale of children still constitute "a recognizable element in patterns of society" in thirty-eight countries. Also, not gener-

15. Vol. I, at 273.

16. Vol. I, at 286. *Cf.* Murphy, *The Trend Towards Anarchy in the United Nations*, 54 A.B.A.J. 267 (1968).

17. Vol. I, at 343, 350.

18. T.I.A.S. No. 7337.

19. Vol. I, at 350.

20. *See, e.g.*, Auburn, *The International Seabed Area*, 20 INT'L & COMP. L.Q. 173, 189 (1971).

21. Vol. I, at 504.

ally well known, even to most international lawyers, are the legal and other problems arising out of efforts to combat traffic in narcotics. Editor Bassiouni, in an essay on "The International Narcotics Control System,"[22] admirably fills this gap in our knowledge.

The last part of the first volume deals generally with enforcement procedures in international criminal law. Several papers discuss and evaluate the Nuremberg and Tokyo trials, as well as the principles of international law and policy derived from the trials and developed by the United Nations and other international institutions. Judge J.V. Dautricourt, Professor of Law, University of Louvain, a leading proponent of an international criminal court, ably presents arguments in favor of the creation of such an institution.[23] Recently, under the auspices of the Foundation for the Establishment of an International Criminal Court, two unofficial conferences held at Windspread, Racine, Wisconsin and at Bellagio, Italy drafted a convention on international crimes and a statute for an international criminal court.[24] Since the 1953 United Nations Draft Statute,[25] however, the establishment of an international criminal court has not been pursued at the official level.[26]

Also, in the enforcement area, Jean Nepote, Secretary General of the International Criminal Police Organization (Interpol), considers the role an international police force might play in the context of an international criminal court and discusses the operations of Interpol and other forms of international police cooperation with respect to international crimes.[27] Finally, S.K. Agrawela, Professor of International Law, University of Poona, describes the functions of United Nations peacekeeping forces, and suggests that the world community should consider establishing a permanent United Nations force, whose function would be limited to peacekeeping, as opposed to en-

22. Vol. I, at 533.

23. Vol. I, at 636.

24. The drafts have been published with the assistance of the Johnson Foundation under the title: "The Establishment of an International Criminal Court, 1st and 2nd International Criminal Law Conference" (1973). Copies may be obtained from the Johnson Foundation, Racine, Wisconsin 53401.

25. Draft Statute for an International Criminal Court, Report of the 1953 Committee on International Criminal Jurisdiction, 9 U.N. GAOR, Supp. 12, U.N. Doc. A/2645 (1954).

26. By way of editorial comment in the July 1973 issue of the AMERICAN JOURNAL OF INTERNATIONAL LAW, Professor Leo Gross has called for a resumption of early United Nations efforts to draft a comprehensive convention on all forms of terrorism and to establish an international criminal court. Gross, *International Terrorism and International Criminal Jurisdiction*, 67 AM. J. INT'L L. 508 (1973). For a caveat regarding this suggestion, see Murphy, Letter to the Editor-in-Chief, 68 AM. J. INT'L L. ____ (April 1974).

27. Vol. I, at 676.

forcement actions, in order to improve the chances of obtaining a strong consensus in support of such an institution.[28]

In the second volume, which deals with questions of jurisdiction over and international cooperation with respect to international crimes, the emphasis shifts, in the words of the editors, to "the international aspects of municipal criminal law and those international law aspects which affect it."[29] S.Z. Feller, Dean and Professor of Criminal Law, the Hebrew University of Jerusalem, in a lengthy essay,[30] analyses the various situations in which states have exercised, or may exercise, jurisdiction over offenses with a foreign element, and suggests that a primary goal of international cooperation is to assure that the jurisdictional provisions of individual states municipal law are expansive enough to encompass all offenders and avoid "loopholes being left through which offenders are able to escape criminal responsibility."[31] The filling of jurisdictional gaps is also a concern of Steven Gorove, Professor of Law, University of Mississippi, who contends that states must go beyond the jurisdictional provisions of the Outer Space Treaty[32] and engage in "further national and international action involving domestic legislation and treaty law . . . to avoid lawlessness and chaotic conditions."[33]

Richard R. Baxter, Professor of Law, Harvard University, discusses problems of municipal and international law jurisdiction over individuals charged with the commission of war crimes,[34] and Otto Triffterer, Professor of Criminal Law, University of Bielefield, does the same with respect to such jurisdiction over states. With respect to the latter, Triffterer concludes that although criminal jurisdiction over states is within the discipline of public international law, punishment of states is not yet provided for in substantive public international law because of a lack of enforcing authority.[35]

The third and fourth chapters of the second volume deal with immunities and exceptions to international criminal jurisdiction, namely, diplomatic immunity and status of forces arrangements,[36] and, in an essay by Istvan Szaszy, Emeritus Professor of International Law, University of Budapest, with "Conflict-of-Laws Rules in International Criminal Law and Municipal Criminal Law in Western

28. Vol. I, at 694.
29. Preface, Vol. II, at ix.
30. Vol. II, at 5.
31. Vol. II, at 45.
32. T.I.A.S. No. 6347.
33. Vol. II, at 48, 57.
34. Vol. II, at 65.
35. Vol. II, at 86.
36. Vol. II, at 97-134.

and Socialist Countries."[37] The latter chapter is especially valuable for the comparative law dimension it brings to a subject of concern to both domestic and international lawyers.

The second volume also contains several essays on judicial assistance and cooperation in penal matters which should prove informative to the international lawyer, as well as to his domestic counterpart.[38] A case study of such cooperation among countries of common geographical, political and social backgrounds is provided by Bart B. DeSchutter, Professor of International Law, University of Brussels, in his essay on the Benelux experience.[39]

Finally, the last part of the second volume covers extradition and asylum.[40] As is characteristic of much of the second volume, this part contains an innovative comparative law dimension in editor Bassiouni's article on United States extradition law and practice,[41] and in a survey by Albert Metzger, former Chief Legal Adviser to the Government, Freetown, Sierra Leone, of West African extradition cases.[42] Both authors are critical of their countries' practices, albeit for different reasons, and suggest a more internationally oriented approach to the problem.

Perhaps it would be appropriate in conclusion to reflect for a moment on an issue touched upon briefly at the beginning of this review, namely, the existence or lack thereof of an "international criminal law." In view of the often expressed conclusion that states qua states are not subject to international criminal responsibility under the present status of the law, and in light of the large number of topics covered in these volumes which do not involve relations between or among states, the phrase "international criminal law" does seem to suffer from a certain measure of imprecision. In this connection, the concept "transnational law," one of Philip C. Jessup's many major contributions to international jurisprudence, comes to mind. Judge Jessup defined transnational law "to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included as are other rules which do not wholly fit into such standard categories."[43] Subjects often cited as an example of transnational law are the immigration and nationality laws which are rarely a matter of international law, but which clearly regulate "actions or events that

37. Vol. II, at 135.
38. Vol. II, at 171-305.
39. Vol. II, at 249.
40. Vol. II, at 309-416.
41. Vol. II, at 347.
42. Vol. II, at 375.
43. P. JESSUP, STORRS LECTURES, TRANSNATIONAL LAW 2 (1956).

transcend national frontiers." Similarly, municipal law rules concerning offenses with a foreign element seldom have international law as their source but regulate events transcending national frontiers.

A possible alternative approach to this area, then, might be to entitle it "transnational criminal law" and to regard it as a branch of "transnational law." Under this approach the many subjects included in these volumes would surely be regarded as transcending national borders, national cultures and, indeed, the parochial boundaries of academic disciplines.

In any event, we are indebted to editors Bassiouni and Nanda for their judicious selection of essays for, and their careful editing of, this multifaceted work. One may easily agree with the editors that "even if there is doubt about international criminal law, there is no doubt about international criminality."[44] Many of the writings appearing in these volumes help to deepen our understanding of the nature of international or transnational criminality and advance provocative proposals for its prevention and suppression.

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44. Preface, Vol. I, at xii.

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