REVIEW ESSAYS

New Frontiers: The Expansion of International Criminal Law†

MICHAEL E. TIGAR‡

Professor Bassiouni's *International Criminal Law* is the successor to *A Treatise on International Criminal Law,* published in 1973 by Professors Bassiouni and Ved Nanda. The earlier treatise proved extremely valuable to those of us with a scholarly and practical interest in international criminal law and enforcement. It was almost the only resource available in English and was always the first place one looked to begin research.

The present three-volume set is a worthy successor and supplement and has brought together the work of forty authors from fourteen countries in articles that cover almost all aspects of this field. In addition, a number of appendices reproduce the texts of basic documents that a researcher or practitioner might have trouble locating in all but the best-equipped law library.

The field of international criminal law has attracted the interest of ever-larger numbers of lawyers since World War II. The reasons are not hard to find; in the past forty years, public international law has found a new basis, its scope has expanded to recognize new bearers of rights, and international bodies have come to play a larger role in its development.

The first of these reasons for the expansion of international criminal law, its newly found basis, evolved in the wake of World War II. Because states created after the war have been unwilling to accept a set of rules largely inherited from big power principles of coexistence, transnational criminal law has evolved and expanded.

The next reason for this expansion, the greater number of groups seen as possessing rights, grew out of the historical view that the sole subjects of international law were states. Almost without exception, an individual's rights under international law depended solely upon the state's willingness to assert them; violation of a personal right was typically thought of as an affront to the sovereign, not the individual. The human rights movement of the past forty years has affirmed, repeatedly and increasingly effectively, that

† The full title of the reviewed text is INTERNATIONAL CRIMINAL LAW (M. Bassiouni, ed. 1986).

‡ B.A. 1962, J.D. 1966, University of California (Berkeley). Thomas Watt Gregory Professor of Law, University of Texas School of Law.

individuals are bearers of international rights. In turn, this development has led to the expansion of categories of international crime. Formerly, the archetypical international crime was an individual or sovereign taking up sword and thereby giving offense to another sovereign. But as individuals become bearers of rights, they can become victims of international crimes—even crimes committed by the sovereign in whose territory they dwell and whose subjects they are.

The third and final reason for the expansion of international criminal law is the ever-larger role that international bodies have assumed in defining generally accepted principles of international law. To the traditional institutions, one must add the General Assembly of the United Nations, the regional courts of human rights, and a number of international bodies that operate in affiliation with the United Nations.

One must not, however, imagine that these volumes take the reader to the pinnacle of theory and stop there. Although there are many articles on frontier theoretical questions confronting the international and multinational systems of criminal justice, the lawyer with immediate workaday problems will also find these books useful. They answer basic and commonly encountered questions about such topics as extradition and the permissible territorial reach of a given sovereign's criminal law.

Volume I, entitled "Crimes," is in two parts. The first contains several articles and documents on the framework of international criminal law, with special emphasis upon international human rights law, and crimes against the peace or against state security. The second part deals with individual international crimes and is divided into chapters on "Crimes Against the Peace," "Armed Conflict and War Crimes," " Crimes Against Fundamental Human Rights," "Crimes of Terror Violence," and "Crimes Against Social Interests." The first three of these groups obviously address the international legal principles that developed in large measure from the Nuremberg judgments. These principles are important in the municipal context as well. Many states have incorporated specific penal sanctions against such conduct into their national codes. Moreover, such articles as "The Crime of Torture" and "The Crime of Human Experimentation" address conduct that takes place within the boundaries of a single state, even without the sovereign's approval. Some of the articles, such as "The Crime of Apartheid," treat conduct of particular, identifiable sovereigns within their own territory.

It is difficult at times to sort out the different senses in which these articles use the word "crime." The general articles in Part I of Volume I help to define the context, but the problem persists. Two hundred years ago, the list of international crimes was relatively short. Piracy was perhaps the archetypical offense. Under the laws of any civilized state, a pirate was subject to prosecution wherever he might be apprehended and held. This was either as a result of codification, or by direct application of customary international law—a kind of international common law crime.

Two related events have shattered this simple mold. First, nations are increasingly responding to pressure from international and multinational organizations to create crimes addressed to international and multinational conduct. For example, the American statutes on air piracy and assaults against internationally protected persons are the direct result of international accords to which the United States is a party. Despite their origins in international agreement, these crimes fit the traditional mold: each sovereign creates and enforces a norm according to its own views of the proper territorial reach of its penal law. A second development, commented on in several chapters of Volume I, is the effort to create a consensus that certain conduct is so odious that it violates the law of nations. This view holds that a state should not only punish such violations when they occur within its territory or are committed by its nationals, but that states should assert their powers to condemn such conduct without reservation and punish violators wherever they may be found.

The first type of new international crime, multinational crime, raises little controversy because its creation and enforcement are ultimately a matter of municipal concern. One might ask whether violations of the law of nations, the second type of new international crime, has any business being considered in a treatise on criminal law.

The answer, for me, is yes. The denunciation of terrorism, apartheid, genocide, torture, and kindred practices as a matter of international law is a means of asserting the existence, and defining the content, of norms that do not depend upon acceptance by a particular sovereign or government. These norms can be defined and elaborated just like any other norm of international law.

Expressing these norms is not merely an exercise in propaganda, although it may at times be precisely that. It is a means of stating principles that may command assent under the municipal law of individual states, and lead to creation and enforcement of norms by the criminal law systems of individual states. Eventually, for instance, one may see the creation of international tribunals possessing criminal jurisdiction. I should add that I find the propaganda effect of defining and denouncing this sort of behavior not at all unsettling. It is a proper purpose of criminal law to express by means of norms a legitimate community concern about conduct the community finds odious.

The editor expresses a "humanist" hope that international norms of criminal law will do some good in these difficult times. Few would disagree. More specifically, norms about state sponsored terrorism, war crimes, and crimes against the peace permit one to assess the conduct of sovereigns with some degree of objectivity. One can, for example, arraign American policy towards Nicaragua. The United States claims that it systematically opposes state sponsored terrorism and supports the rule of law in the international community. Yet it mines the harbors of a nation—Nicaragua—with which we are at peace, abets the contras in attacks on civilian installations and

targets, and condones practices by the contras that violate clearly established international norms.

The example I have chosen illustrates, however, that the prospect of broad international agreement on norms affecting foreign and military policy is dim. So long as states have fundamentally different social systems, the same schism that has characterized the debate over the specific content of international human rights will prevent consensus. In that debate, the capitalist countries place emphasis upon political rights, and the socialist countries upon social rights. The specific formulation of "rights" advocated by each group proceeds directly from the legal ideology of their respective social systems. By the same token, big powers are unlikely to agree that their geopolitical posturing can be characterized as criminal, or metropolitan countries are unlikely to regard the impoverishment of the Third World as other than neutral operation of the market.

But enough of theory. There is practical wisdom in these pages. The Chapters in Volume I treat current international and multinational criminal enforcement in the narcotics, intellectual property, and environmental protection fields. Although I recognize the limits of space in an effort of this kind, Volume I would have benefited from elimination of some appendices and inclusion of more information on current criminal law problems. For example, the editor might have devoted more space to discussing measures against assaults on internationally protected persons. The recent Letelier litigation, involving the assassination by Chilean secret police of a prominent critic of the Pinochet regime, comes immediately to mind. Those of us who have participated in that litigation, and who continue to pursue it, have had some role in defining the meaning of internationally protected person, and in securing recognition that such doctrines as "act of state" are not a shield for state sponsored terrorism.

Moreover, the authors might profitably have broadened their concern beyond the relatively narrow range of "internationally protected persons," which includes mainly diplomats and foreign official guests. There is a genuine need for international norms that would protect all refugees, and not only internationally protected persons, from assault. Various treaties, provisions of municipal law, and rules of customary international law are designed to recognize the special status of those fleeing armed conflict or political persecution. The work of the United States Senate committee chaired by Frank Church showed that a number of foreign secret police agencies are permitted to operate in the United States, and that these agencies have not limited themselves to surveillance of refugees. An instance of these operations can be found in the Letelier litigation, as well.

In addition, the hostile attitude of some countries towards refugees—and I mean to include American policy—has been the subject of legitimate criticism from the United Nations High Commissioner. It is urgent for all international actors to develop and enforce international norms relating to state behavior towards those fleeing persecution.

While the topics chosen by the editor for discussion certainly merit attention, he would have made the book even more useful to practicing lawyers by including chapters on the international financial markets and the related topic of international fiscal crimes. There was a time when the near-universal refusal of countries to enforce one another's fiscal laws, and the relative impregnability of bank secrecy laws, left little for international criminal lawyers to do in these fields. The play was in the hands of the planners, and once the funds disappeared behind the walls of a friendly tax haven, only the taxpayers or a plea-bargaining tattletale would bring the criminal practitioner into the matter.

Times have changed. Bilateral treaties and understandings have grown in number and have been expanded in content. Courts domestic and foreign have assaulted the citadel of secrecy. They have been willing to assert criminal jurisdiction over conduct that has an adverse effect on forum markets. Yet these volumes tell us little of that story.

True, Volume II, subtitled "Procedure," has chapters on extraterritorial enforcement and on international exchange of information. These are important parts of the great changes that have taken place in the last decade, and these chapters are worthwhile additions to the literature.

The puzzle has more pieces, however. We want to know state practice with respect to assertion of jurisdiction over conduct that arguably takes place outside state borders but has impact on the forum or some affiliating circumstance. We also want to know what information nations are customarily exchanging today in criminal matters, and by what means. Volume II serves us well in these respects. But neither of these procedural subjects is sufficiently norm-specific to tell us anything about the consensus, or lack of it, with respect to prescribing conduct related to financial markets and enterprise behavior.

More attention to fiscal crimes would also be valuable because of the recent trend towards internationalization of finance capital. In 1985, for instance, the United States became a net debtor nation for the first time since 1914—one more indication of this phenomenon. The possibility of international manipulation of financial markets grows greater every year, and the enforcement authorities of capitalist countries have expressed increasing concern on this score. The solutions have been largely unilateral and ad hoc. The subject deserves treatment in a comprehensive work on international criminal law.

Also missing from this work is any systematic treatment of antitrust norms in the international and multinational arena. Perhaps the editor

thought this specialized subject was beyond the scope of his project, and one could certainly understand such a decision ("understand" does not mean "agree"). Multinational enterprises have shown time and again their ability to engage in market control that evades the regulatory powers of national and even regional enforcement authorities. A study of this phenomenon would probably reveal that states cannot agree on norms because there are contradictions among ruling groups in advanced countries. To this must be added the very different approaches to control of anticompetitive conduct—for example, the different attitudes towards cartels in the United States and the European Economic Community.

Yet, on the whole, Volume II is first-rate. The material on territoriality will be helpful to practitioners and scholars alike, although the American Law Institute's Foreign Relations Restatement will have something to add. The sections on enforcement of judgments, transfer of prisoners, and international exchange of information are good introductions to their subjects.

The material on extradition might have included further treatment of the ways in which states have been acquiring what prosecutors call "personal jurisdiction" over defendants. Extradition law is fairly straightforward: It is governed by treaty. The accused cannot be tried for an offense other than that for which he was extradited. Political crimes are customarily excluded. Fraud by the demanding state is frowned upon, although there are American decisions declining to grant relief based upon American deceit of a foreign government in the extradition process. Notable among these is the FBI's shameful manufacture of evidence against Native American activist Leonard Peltier, for whom I was one among a number of lawyers that included John Privitera. John would have been able to add something to the discussion of extradition in these volumes.

Prosecutors and police are impatient with the delays and limitations on extradition. They have therefore resorted with increasing frequency to subterfuge. One government will ask another to deport the accused into the waiting arms of its police. However, this device requires government-to-government contact, often at high levels. It is more efficient simply to kidnap the defendant. The Israeli government has apparently resorted to this tactic to bring Mordechai Vanunu to Jerusalem to face charges of unauthorized dissemination of secret information—he blew the whistle on Israel's nuclear intentions. Recently in a federal criminal case in Austin, Texas, the defendant, who had been captured in Mexico, moved to dismiss because he was charged with an offense other than that for which he was extradited. The prosecutor responded that the defendant had not been extradited; he had been kidnapped by Drug Enforcement Administration personnel. Therefore, argued the prosecutor, no legal wrong had been committed.

These iniquities are permitted because the offense of kidnapping, or the indiscretion of evading an extradition treaty, is thought to be an affront to the sovereign of the state of refuge and not to the defendant. This theory is

unsupportable in a world that increasingly recognizes individuals as bearers of rights under international law.

I want to add that none of my comments should be taken as denying the great value of these volumes. I salute Professor Bassiouni for undertaking this task, and the authors for their contributions. To allow the reader to gauge my feeling about these volumes, I add this: I agreed to do this book review, although I have manuscripts overdue and too many projects underway, on three conditions. First, that the review be an essay, and contain no footnotes. Second, that it be brief. Third, and most important to me, that I get to keep the books. They will, I think, be a valuable reference in solving practical problems, and a starting point for academic research.