

Table of Contents

Preface to the 2 nd edition	V
Glossary	XV
Bibliography	XXI
A. Introduction	1
§ 1 Criminal Law in an International Context	1
§ 2 Terminology of “International Criminal Law”	2
I. Introduction	2
II. International Criminal Law (<i>stricto sensu</i>): Criminal Law under Public International Law	2
III. Supranational (especially European) Criminal Law	3
IV. Criminal Jurisdiction and Rules Determining the Exercise of Jurisdiction	3
V. Mutual Legal Assistance	4
B. Criminal Jurisdiction and the Territorial Scope of Criminal Law	7
§ 3 The Application of National Criminal Law to Cases with International Elements	7
I. The Competence of National Criminal Courts	7
II. Applicable (Substantive) Criminal Law	8
III. The Danger of Double Jeopardy and Conflicts of Jurisdiction	10
IV. The Relation between the Territorial Scope of Criminal Laws and their Material Scope of Protection	12
§ 4 The Principles of Criminal Jurisdiction and their Implementation in National Legal Orders	14
I. The Competence to Establish Criminal Jurisdiction	14
II. The Principles of Criminal Jurisdiction	15
1. Overview of the Principles Recognised by International Law	15
2. Territorial Principle	16
a) General Considerations	16
b) In Particular: Cybercrime	18
c) Flag Principle	19
d) Implementation of the Territorial Principle in Various National Legal Systems	20
3. Nationality Principle	22
a) General Considerations	22
b) Implementation of the Nationality Principle in Various National Legal Orders	23
4. The Protective Principles	28
a) Protective Principle (<i>stricto sensu</i>)	28
b) Passive Personality Principle/Individual Protective Principle	31
5. The Universality Principle	34
a) General Considerations	34
b) Implementation of the Universality Principle in Various National Legal Orders	35
6. Representation Principle	40
a) General Considerations	40
b) Application in Various National Legal Orders	41
7. Principle of Distribution of Competences	43
8. Principle of Protection of European Union Interests	43
C. European Criminal Law	45
§ 5 Basic Principles of European Criminal Law	45
I. Defining European Criminal Law	45
II. The European Influence on Criminal Law	46
1. Primary Law’s Influence on Criminal Law: a Historical Overview	46
2. European Law-Making versus Harmonisation of Laws	48
III. European Criminal Law and the Protection of Fundamental Rights	50
1. Existing EU Fundamental Rights	50
2. The ECJ’s Fundamental Rights Examination	51
3. The Scope of EU Fundamental Rights	53
a) Application of EU Fundamental Rights to EU Institutions, especially to the EU Legislator	53

Table of Contents

b) Applicability to the Institutions of the Member States that “implement” Union Law .	54
4. Collision of Fundamental Rights Standards of Union and National Law	55
§ 6 Supranational Criminal Law	59
I. Existing Sanctions at Union Level	59
1. The Different Types of European Sanctions	59
a) Fines	59
b) Other Financial Sanctions	60
c) Other Detriments	60
2. Classification as Criminal Law in a Broader Sense	60
II. European Criminal Law	61
1. Terminology	61
2. First Instances of a European Criminal Law <i>de lege lata</i> ?	62
3. European Competence Provisions for Adopting Criminal Law	64
III. Projects Concerning European Criminal Law	69
1. Corpus Juris of Criminal Provisions for the Protection of the Financial Interests of the European Communities (Corpus Juris 2000)	69
2. Commission Green Paper on Criminal-Law Protection of the Financial Interests of the Community and the Establishment of a European Prosecutor	70
§ 7 The Influence of European Law on Domestic Substantive Criminal Law	72
I. General Issues	73
1. Criminal Law under the Influence of European Union Law	73
2. Particularities of Criminal Law	75
II. Primary Law as a Restriction on National Criminal Law	77
1. European Law Serving as Upper Limit for National Criminal Law	77
a) Elements of a Criminal Offence Conflicting with European Law	78
b) Legal Consequences Conflicting with European Law	79
aa) Severity of Penalty	80
bb) Type of Sanction	81
2. Minimum Requirements for Criminal Law Set by European Law	82
III. Restrictions on National Criminal Law Resulting from Secondary Law – in Particular Directives (art. 83 TFEU)	84
1. Overview	84
2. Combating Crime with a Cross-Border Dimension (art. 83 (1) TFEU)	84
a) Amendments in Primary Law Concerning the Former Third Pillar	84
b) Legal Acts Adopted Prior to the Entry into Force of the Treaty of Lisbon	85
c) Prerequisites of art. 83 (1) TFEU	86
3. Annex Competence (art. 83 (2) TFEU)	88
a) “Annex Character” of the Competence Provision	88
b) Legal Situation Prior to the Entry into Force of the Treaty of Lisbon	89
c) The Prerequisites of art. 83 (2) TFEU	90
4. Competence for Minimum Harmonisation	90
5. The “Emergency Brake” (art. 83 (3) TFEU)	92
a) General Idea and Procedure	92
b) Fundamental Aspects of the Criminal Justice System	93
6. Other Approximation Competences	94
a) Competence Provisions	94
b) Does the “Emergency Brake” Apply?	95
7. Excursus: A Concept for a European Criminal Policy	96
a) Background	96
b) The Specific Principles for a European Criminal Policy	97
IV. References to European Law in Domestic Criminal Law Provisions	98
1. Introduction	98
a) Rules in Directives	98
b) Rules in Regulations	99
2. Problems Arising from the Use of Blanket Criminal Laws Referring to EU Regulations	99
a) Effect of Blanket References and Issues Concerning their Interpretation	99
b) Blanket Laws and the <i>lex certa</i> Requirement	101
aa) General Requirements	101
bb) References to European Law	102
cc) Cross-References in National Statutory Instruments	104
dd) Gaps in Criminal Liability and the Principle of <i>lex mitior</i>	105

Table of Contents

V. The Influence of European Law on the Interpretation and Application of Domestic Substantive Criminal Law	108
1. Introduction	108
2. Neutralising Effect on Domestic Law	108
a) Current Conflicts with Regard to the Elements of a Criminal Offence	109
b) Current Conflicts with Regard to Legal Consequences	111
c) Ostensible Conflicts	112
3. Interpretation in the Light of European Law	113
a) Introduction	113
b) Interpreting Criminal Law in the Light of European Law	115
c) Examples	116
aa) Protection of EU Legal Interests	116
bb) Interpretation of National Law in Conformity with Directives and Terminological Accessoriness of Individual Elements of Offences	118
cc) Crimes of Negligence	121
dd) Sentencing	122
4. Relevance of Framework Decisions for the Application of Criminal Law	122
§ 8 Criminal Law Enforcement in Europe	124
I. Institutions of Law Enforcement within the EU	125
1. Europol	125
2. Eurojust	128
3. The European Anti-Fraud Office (OLAF)	130
4. The Future European Public Prosecutor's Office	132
a) History and Basis in Primary Law	132
b) Background of the Establishment of a European Public Prosecutor's Office	132
II. The Judicial Cooperation in Criminal Matters on the Basis of the Principle of Mutual Recognition	135
1. The Principle	135
2. The Codification of the Principle of Mutual Recognition in art. 82 TFEU	139
a) Scope of Application	139
b) Distinction from Approximation Measures Pursuant to art. 82 (2) TFEU	139
3. Legislative Acts on the Basis of the Principle of Mutual Recognition	140
a) The European Arrest Warrant	140
aa) The Framework Decision	140
bb) The Implementation of the Framework Decision within the Member States	141
b) European Supervision Order	144
c) Mutual Judicial Assistance Concerning Evidence and the European Investigation Order	144
d) Assistance in Enforcement of Criminal Penalties	147
4. The Prohibition of Double Jeopardy (<i>ne bis in idem</i>)	148
a) Merely Internal Effect of <i>ne bis in idem</i> as the General Rule	148
b) Sanctions in Multiple Member States Based on the Same Facts	149
aa) Necessity for and Concept of a European <i>ne bis in idem</i> Principle	149
bb) The Relationship between art. 54 CISA and art. 50 CFR	151
c) Elements and Uniform Application of art. 54 CISA	153
aa) "Decision Finally Disposing of the Trial"	154
(1) The Requirement of Final Disposal	154
(2) The Criminal Nature of the Penalty or the Trial	156
(3) Requirements Regarding the Final Nature of the First Taken Decision	156
bb) "The Same Acts"	158
cc) Enforcement Element	159
dd) The Prohibition of Double Jeopardy as a Ground for Non-Enforcement of a European Arrest Warrant	161
III. Exchange of Information and the Principle of Availability in Particular	162
IV. Approximation of Criminal Procedural Law	164
1. Fields of Application	164
a) Mutual Admissibility of Evidence between Member States (lit. a)	164
b) The Rights of Individuals in Criminal Procedure (lit. b)	165
c) The Rights of Victims of a Crime (lit. c)	167
d) Other Specific Aspects of Criminal Procedure (lit. d)	168
2. "Emergency Brake" (art. 82 (3) TFEU)	168
V. Excursus: Manifesto on European Criminal Procedure Law	168

Table of Contents

§ 9 The European Convention on Human Rights	170
I. Council of Europe	171
1. The International Organisation	171
2. The Council of Europe's Role in Criminal Law	172
II. The European Convention on Human Rights (ECHR)	172
1. The ECHR in Different Legal Systems	173
a) The Principle of "Minimum Standard"	173
b) Significance for Domestic Law	173
c) Significance of the Convention for EU Law	174
aa) The EU's Accession to the ECHR	174
bb) The Charter of Fundamental Rights and art. 6 (3) TEU	175
cc) The Relationship between ECtHR and ECJ	176
2. The Interpretation of the ECHR	177
3. Guarantees Relating to Criminal Law	177
a) Overview	177
aa) Subsidiary Protection through the ECtHR	177
bb) Scope of Application	178
b) Testing ECHR Rights Related to Criminal Law	179
c) Right to Life – art. 2 ECHR	180
d) Prohibition of Torture (and Degrading Punishment) – art. 3 ECHR	183
aa) Scope of Protection and Unexceptional Prohibition of Torture	183
bb) Threat of Torture	186
cc) Medical Interventions	187
dd) Deportation and Extradition	188
ee) Procedural Effects of a Violation of art. 3 ECHR	189
ff) Requirements for Assessing a Violation of art. 3 ECHR in Criminal Proceedings	190
e) Right to Liberty – art. 5 ECHR	190
f) Right to a Fair Trial – art. 6 (1) and (3) ECHR	195
aa) Scope of Protection	195
bb) The Court and the Court Proceeding	196
aa) Fair Trial	198
bb) Problem: A Fair Trial and the Use of <i>Agents Provocateurs</i>	203
cc) Fairness and "Plea Bargaining" in Criminal Proceedings	204
g) Presumption of Innocence – art. 6 (2) ECHR	204
h) No Punishment without Law – art. 7 ECHR	205
aa) Scope of Protection	205
bb) The Necessity for Clarity and Definiteness	206
cc) Prohibition of Analogies	207
dd) Prohibition of <i>ex post facto</i> Laws	207
i) Right to Respect for Private and Family Life – art. 8 ECHR	208
j) Right to Appeal in Criminal Matters – art. 2 (1) Additional Protocol No. 7	210
k) <i>Ne bis in idem</i>	210
l) Limitations on Use of Restrictions of Rights/Prevention of the Misuse of Power – art. 18 ECHR	211
4. Procedural Law and Organs of the ECHR	211
a) The ECtHR and its Role as an Organ	211
b) Individual Applications and Inter-State Cases	212
c) Judgment	213
d) Effect	213
D. International Criminal Law	215
§ 10 General Introduction to International Criminal Law	215
I. Definition of International Criminal Law	215
II. The Enforcement of International Criminal Law	217
III. International Criminal Law and the Law of State Responsibility	219
IV. Treaty Crimes	220
§ 11 History of International Criminal Law	221
I. Development until 1919	221
II. Versailles and the Leipzig War Crime Trials	222
1. The Treaty of Versailles	222
2. The Leipzig War Crime Trials	223
III. The International Military Tribunal in Nuremberg (IMT)	223

Table of Contents

1. Structure of the International Military Tribunal	224
a) Jurisdiction	224
b) Composition of the Tribunal	224
2. Procedural Law	224
3. Judgment	225
4. Criticism of the Nuremberg Trials	225
5. Summary	226
IV. The International Military Tribunal for the Far East (IMTFE)	226
V. Cold War Era	226
VI. International Criminal Tribunal for the Former Yugoslavia (ICTY)	228
1. Structure of the Tribunal	229
a) Jurisdiction	229
b) Composition of the Tribunal	229
c) Sanctions	229
2. Crimes Falling under the Material Jurisdiction of the ICTY	230
3. Legitimacy of the Tribunal	230
VII. The International Criminal Tribunal for Rwanda (ICTR)	231
VIII. Hybrid Courts	232
§ 12 The International Criminal Court (ICC)	235
I. Structure of the Rome Statute	236
II. Object and Purpose of the ICC	237
III. Jurisdiction	237
1. Jurisdiction <i>ratione personae</i>	237
2. Jurisdiction <i>ratione materiae</i>	238
3. Jurisdiction <i>ratione loci</i> “genuine link”	238
4. Jurisdiction <i>ratione temporis</i>	239
IV. Trigger Mechanisms for the Court’s Activities	239
1. State Referral	240
2. <i>Proprio motu</i> Investigations by the Prosecutor	242
3. Resolution of the UN Security Council	243
V. Principle of Complementarity	245
1. The Principle of Complementarity within the Legal System of the ICC	245
2. Broader Impact on National Criminal Systems	248
a) Direct Application of Customary International Law	249
b) Dynamic References to Customary International Law	249
c) Explicit References to the Rome Statute	250
d) The Ordinary National Crime Solution	250
e) The Specific National Crime Solution	251
3. Complementarity in Practice	252
VI. Institutional Aspects	252
1. The Judges	253
2. The Registry	253
3. The Prosecutor	253
4. Financing	254
VII. Procedure	254
1. Preliminary Investigation	254
2. Confirmation of Charges	255
3. Trial	255
4. Appeal and Revision	256
5. Victims’ Rights	256
6. Summary	258
VIII. Sanctions and Their Enforcement	258
IX. Limitation and Finality	258
X. The ICC and the World of Politics	259
§ 13 The General Part of International Criminal Law	262
I. Applicable Law	263
1. General Sources of International Law	263
2. Specific Sources of International Criminal Law	263
II. Rules of Interpretation and the Principle of <i>nullum crimen, nulla poena sine lege</i>	266
1. Interpretation of International Law in General	266
2. Interpretation of International Criminal Law	266
III. Individual Criminal Responsibility	268

Table of Contents

IV. The Structure of an International Criminal Law Offence	268
1. The Material Elements of International Crimes	269
2. The Mental Elements of International Crimes	270
3. Grounds for Excluding Criminal Responsibility	275
a) Self-defence	275
b) Necessity	276
c) Superior Orders	277
d) Mistake	277
e) Mental Incapacity	279
f) Immunities	279
g) Statute of Limitations	281
h) Unwritten Grounds for Excluding Criminal Responsibility	281
V. Individual Criminal Responsibility	281
1. Perpetration	282
a) Direct Perpetration	282
b) Co-Perpetration	282
c) "Joint Criminal Enterprise" as Extension of Co-Perpetration?	283
d) Indirect Perpetration	285
2. Accessoryship	286
a) Instigation	286
b) Assistance	287
c) Contribution to a Group Crime	288
VI. Superior Responsibility	289
VII. Attempt and Abandonment of the Attempt	291
VIII. Omission	292
§ 14 Special Part of International Criminal Law	293
I. Genocide	294
1. History	294
2. Protected Interests	295
3. Structure of the Crime	296
4. The Material Elements of Genocide in General	296
5. The Mental Elements of Genocide in General	298
6. Individual Genocidal Acts	299
a) Killing Members of the Group	300
b) Causing Serious Bodily or Mental Harm to Members of the Group	300
c) Deliberately Inflicting on the Group Conditions of Life Calculated to Bring about Its Physical Destruction in Whole or in Part	300
d) Imposing Measures Intended to Prevent Births within the Group	301
e) Forcibly Transferring Children of the Group to Another Group	301
II. Crimes against Humanity	302
1. History	302
2. Protected Interests	304
3. Structure of the Crime	304
4. The Chapeau Element	305
5. Mental Elements in Respect of the Chapeau	307
6. Individual Acts	307
a) Murder	307
b) Extermination	307
c) Enslavement	308
d) Deportation or Forcible Transfer of Population	308
e) Imprisonment or Other Severe Deprivation of Physical Liberty	309
f) Torture	309
g) Sexual Violence	309
h) Persecution	309
i) Enforced Disappearance of Persons	310
j) Apartheid	310
k) Other Inhumane Acts of a Similar Character	310
III. War Crimes	311
1. History	311
2. Protected Interests	313
3. Elements of the Offence	313
4. Objective Requirements of an Armed Conflict	314

Table of Contents

5. Subjective Requirement of an Armed Conflict	316
6. Categories of the Individual Acts	316
a) Material and Mental Elements	316
b) Grave Breaches of the Geneva Conventions of 12 th August 1949 in relation to an International Armed Conflict (art. 8 (2) (a) of the Rome Statute)	316
c) Other Serious Violations of the Laws and Customs Applicable in International Armed Conflict (art. 8 (2) (b) of the Rome Statute)	317
d) Serious Violations of art. 3 Common to the Four Geneva Conventions of 12 th August 1949 in an Armed Conflict not of an International Character (art. 8 (2) (c) of the Rome Statute)	318
e) Other Serious Violations of the Laws and Customs Applicable in Armed Conflicts not of an International Character (art. 8 (2) (e) of the Rome Statute)	319
IV. Aggression	319
1. The Crime of Aggression under Customary International Law	320
2. The Crime of Aggression in the Rome Statute	320
a) Elements of the Criminal Offence	322
b) Trigger Mechanism	323
c) Coming into Force	324
d) Conclusion	324
Annex: Situations and Cases at the International Criminal Court	327
Index	335