

**INCORPORATING TRANSNATIONAL/INTERNATIONAL LAW  
IN FIRST YEAR CRIMINAL LAW AND PROCEDURE CLASSES**

**By:**

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- I. Teaching Methodologies - Pros and Cons
  - A. Presenting material as a separate subject matter
    - 1. Emphasizes uniqueness of transnational and international issues
    - 2. Allows for exclusive focus on expanding borders & globalization
    - 3. Provides more in-depth discussion of jurisdiction issues
  - B. Integrating materials into existing subjects covered in the course (See Podgor, Henning, Taslitz, & Garcia, *Criminal Law: Concepts and Practice* (2005 Carolina Press))
    - 1. Allows for material to be covered in context
    - 2. Adds a new dimension to existing materials
    - 3. Allows for easier comparison and contrasts
- II. Criminal Law & Procedure - a few examples of incorporating transnational and international material into the course
  - A. Jurisdiction
    - 1. Statutes that are explicitly focused on international conduct (e.g., Foreign Corrupt Practices Act)
    - 2. Statutes that contain an explicit provision within the statute that allows for extraterritorial jurisdiction (e.g., Computer Fraud Statute)

3. Statutes that are silent as to extraterritorial jurisdiction - requiring court to interpret
    - a. The vast majority of criminal statutes fail to explicitly state whether the statute can/should be applied extraterritorially.
    - b. The presumption in criminal cases is against extraterritorial jurisdiction. (*United States v. Bowman*, 260 US 93 (1922)).
    - c. The reality is that courts almost always find that the U.S. has extraterritorial jurisdiction for prosecution. In discerning the intent of the legislature courts usually find for allowing an extraterritorial application.
    - d. Courts sometimes use international law principles to support an extraterritorial application. [territoriality (objective territoriality), nationality, protective principle, passive personality principle, universality].
  4. Proceeding Outside the Criminal Justice Process - enemy combatant status initially in the holding of Padilla and Hamdi
- B. Statutory Construction - Interpreting explicit terms in a statute - (*Small v. United States*, 125 S.Ct. 1752 (2005) (finding that “convicted in any court” for purposes of possession of a firearm does not include a conviction from a Japanese court)
- C. Punishment -
1. 8<sup>th</sup> Amendment - *Roper v. Simmons*, 125 S.Ct. 1183 (2005)
  2. Refusal of countries to extradite to the United States unless there is an assurance that the death penalty will not be a possible punishment- *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (Ser.A)(1989)
  3. Violations of Art. 36, Vienna Convention on Consular Relations - *Valdez v. Oklahoma*, 2002 OK CR 20 (2002); according proper “review and reconsideration”

when there is a violation - *Case Concerning Avena and Other Mexican Nationals (Mexico v. U.S.)*, 2004 I.C.J.

- D. Homicide - Considering large-scale murders as a basis for human rights violations (e.g. Art. 7, Rome Statute for the International Criminal Court - provides that a crime against humanity includes murder “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.” ( <http://www.un.org/law/icc/>)).
- E. Defenses -
  - 1. Following Orders - rejected in Art. 33 of the Rome Statute for the International Criminal Court except when there is a legal obligation to obey an order of a superior, there is no knowledge of it being unlawful, and the “order is not manifestly unlawful” (manifestly unlawful in cases of genocide and crimes against humanity)
  - 2. Insanity - Art. 31 of the Rome Statute for the International Criminal Court - “the person suffers from a mental disease of defect that destroys that person’s capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law...”
  - 3. Diminished Capacity - Ad Hoc Tribunal for the Former Yugoslavia (ICTY)- *Prosecutor v. Delalic et.al*, <http://www.un.org/icty/celebici/appeal/judgement/index.htm> (February 20, 2001) - court was faced with the issue of whether diminished capacity would constitute a defense
- F. Constitutional Issues
  - 1. Fourth Amendment - *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).
  - 2. Fifth Amendment - *United States v. Balsys*, 524 U.S. 666 (1998).
  - 3. Sixth Amendment - issues of right to compulsory process, to confront witnesses, and right to jury trial -

e.g., *United States v. Kole*, 164 F.3d 164 (3d Cir. 1998).

G. Obtaining Evidence from Abroad

1. Methods - Letters Rogatory, Mutual Legal Assistance Treaties, Executive Agreements
2. Grand Jury Subpoenas- *Marc Rich & Co. v. United States*, 707 F.2d 663 (2d Cir. 1983).

H. Obtaining Persons from Abroad

1. Extradition (Rule of Speciality & Dual Criminality Principle)
2. Luring
3. Kidnapping (*United States v. Alvarez-Machain*, 504 U.S. 655 (1992))

Basic Material -

Ellen S. Podgor, *Understanding International Criminal Law* (2004 Lexis)

Materials for Class -

See LexisNexis Webcourse - National Courses - International Criminal Law - Site has indictments (e.g. John Walker Lindh), websites for International Tribunals, materials from an array of different international organizations