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# Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals

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# ***Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals***

BETH VAN SCHAACK\*

*One of the most fundamental defenses to a criminal prosecution is that of nullum crimen sine lege, nulla poena sine lege (“no crime without law, no punishment without law”) (NCSL). Notwithstanding that respect for NCSL is a hallmark of modern national legal systems and a recurrent refrain in the omnibus human rights instruments, international criminal law (ICL) fails to fully implement this principle. The absence of a rigorous manifestation of NCSL within ICL can be traced to the dawn of the field with the innovations employed by the architects of the Nuremberg and Tokyo Tribunals. In the face of NCSL defenses, the judges of the Nuremberg Tribunal, in reasoning that was later echoed by their brethren on the Tokyo Tribunal, rejected the defenses through a complex interplay of arguments about immorality, illegality, and criminality.*

*These core arguments have been adapted to the modern ICL jurisprudence. Where states failed to enact comprehensive ICL in the postwar period, ICL judges have engaged in a full-scale—if unacknowledged—refashioning of ICL through jurisprudence addressed to their own jurisdiction, the elements of international crimes, and applicable forms of responsibility. Along the way, courts have updated and expanded historical treaties and customary rules, upset arrangements carefully negotiated between states, rejected political compromises made by states during multilateral drafting conferences, and added content to vaguely worded provisions that were conceived more as retrospective condemnations of past horrors than as detailed codes for prospective penal enforcement. A taxonomy of these analytical claims reveals the varied ways that today’s ICL defendants have been made subject to new or expanded criminal law rules.*

*Collectively, these cases have the potential to raise acute concerns about whether the rights of defendants are adequately protected in ICL. This, in turn, raises important questions about the legitimacy of ICL as a field of criminal law. This Article argues that the methodology developed by the European Court of Human Rights to enforce the articulation of the NCSL principle in its*

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*constitutive document (the European Convention for the Protection of Human Rights and Fundamental Freedoms) suggests that the NCSL jurisprudence has not compromised the fundamental fairness of ICL. Rather, even where new standards have been applied to past conduct, these cases have not infringed the higher-order principles underlying the NCSL prohibition. Today's defendants were on sufficient notice of the foreseeability of ICL jurisprudential innovations in light of extant domestic penal law, universal moral values expressed in international human rights law, developments in international humanitarian law and the circumstances in which it has been invoked, and other dramatic changes to the international order and to international law brought about in the postwar period. As a prescriptive contribution, this Article argues that any lingering concerns about the rights of the defendants can and should be mitigated by sentencing practices—to a certain extent already in place and employed by the ad hoc criminal tribunals—that are closely tethered to extant domestic sentencing rules governing analogous domestic crimes.*

*Although focused on the NCSL jurisprudence, this Article also presents a model of ICL formation and evolution that finds resonance in the origins and gradual demise of the common law crime in the United States and elsewhere. Common law crimes provided much of the substantive content for the nascent Anglo-American criminal justice system until they were gradually supplanted by legislative efforts. So too in ICL; common law international crimes have been crucial to building the infrastructure of a truly international criminal justice system. As in the domestic historical narrative, international crimes are increasingly finding expression in more positivistic sources of law, thus obviating the need for, and diminishing the discretion of, international judges to make law in the face of gaps or deficiencies. Collectively, the NCSL cases thus provide insight into the dynamics of ICL argumentation, the interpretive attitudes of ICL judges, and an emerging philosophy of the nature of ICL.*

#### TABLE OF CONTENTS

INTRODUCTION .....	121
I. THE ORIGINS OF THE <i>NULLUM CRIMEN SINE LEGE</i> JURISPRUDENCE ...	125
II. <i>NULLUM CRIMEN SINE LEGE</i> IN INTERNATIONAL CRIMINAL LAW .....	133
A. THE SHIFTING STATUS OF <i>NULLUM CRIMEN SINE LEGE</i> IN INTERNATIONAL CRIMINAL LAW .....	134
B. THE OBJECT AND PURPOSE OF INTERNATIONAL CRIMINAL LAW ....	141
C. ILLEGALITY = CRIMINALITY .....	149
D. ACTS <i>MALUM IN SE</i> .....	155
E. NOTICE ANYWHERE IS NOTICE EVERYWHERE .....	158

1. Treaties .....	159
2. Customary International Law .....	161
3. General Principles of Law .....	166
4. Judicial Opinions .....	169
5. The Teachings of the Most Highly Qualified Publicists ..	171
III. <i>NULLUM CRIMEN SINE LEGE</i> AS AN INTERNATIONAL HUMAN RIGHT ...	172
CONCLUSION .....	189

### INTRODUCTION

One of the most fundamental defenses to a criminal prosecution is that of *nullum crimen sine lege, nulla poena sine lege* (“no crime without law, no punishment without law”). In its simplest translation, this Latin maxim asserts the *ex post facto* prohibition: that conduct must be criminalized and penalties fixed in advance of any criminal prosecution.<sup>1</sup> More broadly, the maxim is also invoked in connection with corollary legislative and interpretive principles<sup>2</sup> compelling criminal statutes to be drafted with precision (the principle of specificity), to be strictly construed without extension by analogy, and to have ambiguities resolved in favor of the accused (the principle of lenity or *in dubio pro reo*). Together, these precepts undergird the principle of legality and serve several purposes: ensuring that individuals are capable of obtaining notice of prescribed conduct so they can rationally adjust their behavior to avoid sanction; protecting the citizenry from arbitrary or oppressive state action in the face of ambiguities or gaps in the law; and effectuating the expressive purposes of the law by clearly articulating conduct that is collectively condemned. The principle of *nullum crimen sine lege* (NCSL) writ large thus embodies “an

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1. German jurist Anselm Feuerbach is credited with coining the maxim. See PAUL JOHANN ANSELM RITTER VON FEUERBACH, *LEHRBUCH DES GEMEINEN IN DEUTSCHLAND GÜLTIGEN PEINLICHEN RECHTS* (1801). The concept, however, is far older than the maxim. Extant in ancient Roman and Greek law, NCSL is a fundamental component of such seminal works of legal philosophy as St. Thomas Aquinas’s *Summa Theologica*. The *nullum crimen sine lege* principle experienced a resurgence in the Enlightenment period, when the prevailing political ideology was one of reaction against oppressive government and judicial arbitrariness. For a comprehensive treatment of the principle and its history, see MACHTELD BOOT, *GENOCIDE, CRIMES AGAINST HUMANITY, WAR CRIMES: NULLUM CRIMEN SINE LEGE AND THE SUBJECT MATTER JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT* 83–85 (2002); Jerome Hall, *Nulla Poena Sine Lege*, 47 *YALE L.J.* 165, 165–70 (1937); and Aly Mokhtar, *Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects*, 26 *STATUTE L. REV.* 41, 41–47 (2005).

2. See, e.g., *Prosecutor v. Galić*, Case No. IT-98-29-T, Judgment and Opinion, para. 93 (Dec. 5, 2003) (noting that *nullum crimen sine lege* encompasses principles of specificity and strict construction); *Veeber v. Estonia* (No. 2), App. No. 45771/99, paras. 30–31 (Eur. Ct. H.R. Jan. 21, 2003), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=9&portal=hbkm&action=html&highlight=estonia&sessionid=8778689&skin=hudoc-en> (same).

essential element of the rule of law”<sup>3</sup> by speaking to the very legitimacy of a legal rule, providing a check on the power of all branches of government over individuals, and policing the separation of powers by ensuring legislative primacy in substantive rulemaking. Indeed, Alexander Hamilton recognized violations of the principle as “the favorite and most formidable instruments of tyranny.”<sup>4</sup>

The principle of NCSL has constitutional significance in many national systems.<sup>5</sup> In American law, for example, the ex post facto clauses of the U.S. Constitution constrain the legislative branches of the federal and state governments from enacting retroactive legislation.<sup>6</sup> The Framers had particular historical tyrannies in mind in constitutionalizing the twin prohibitions against ex post facto laws and bills of attainder.<sup>7</sup> At the time of the U.S. founding, the courts were perceived as less of a threat to the values underlying NCSL, because the “opportunity for discrimination is more limited than the legislature’s, in that [courts] can only act in construing existing law in actual litigation.”<sup>8</sup> Instead, American law addresses adjudicative retroactivity primarily through the “fair warning requirement” found implicit in the Due Process Clauses.<sup>9</sup> Within international law, the principle of NCSL is embodied in all of the omnibus human rights instruments.<sup>10</sup> These human rights treaty provisions are directed to all branches of the governments of states parties, although in practice, they are most often invoked in reaction to judicial action enforcing ex post legislation or reinterpreting existing rules. In contradistinction, the principle is not featured in

3. Jorgić v. Germany, App. No. 74613/01, para. 10 (Eur. Ct. H.R. July 12, 2007), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=74613/01&sessionid=8779548&skin=hudoc-en>; see HERBERT PACKER, THE LIMITS OF CRIMINAL SANCTION 79–80 (1968) (describing NCSL as “the first principle” of the criminal law).

4. THE FEDERALIST NO. 84, at 511–12 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

5. For a comparative study of NCSL in domestic law, see BOOT, *supra* note 1, at 81–126 and KENNETH S. GALLANT, THE PRINCIPLE OF LEGALITY IN INTERNATIONAL AND COMPARATIVE CRIMINAL LAW (forthcoming Nov. 2008) (unpublished manuscript, on file with author).

6. U.S. CONST. art. I, § 9, cl. 3 (“No Bill of Attainder or ex post facto Law shall be passed.”); *id.* § 10, cl. 1 (“No State shall . . . pass any Bill of Attainder, ex post facto Law . . .”). The ex post facto clauses include a constellation of prohibitions against legislative acts that: (1) make criminal an innocent action done before the passing of the law; (2) aggravate a crime; (3) inflict a greater punishment than the law stated at the time the crime was committed; or (4) alter the legal rules of evidence to allow for less, or different, testimony than the law required at the time of the commission of the offence to convict the offender. *Calder v. Bull*, 3 U.S. 386, 390 (1798).

7. Trevor W. Morrison, *Fair Warning and the Retroactive Judicial Expansion of Federal Criminal Statutes*, 74 S. CAL. L. REV. 455, 462 (2001) (noting Framers’ concerns with Great Britain’s passage of ex post facto laws and bills of attainder to attack unpopular groups and individuals).

8. *James v. United States*, 366 U.S. 213, 247 n.3 (1961). Indeed, the ex post facto clauses do not speak to the judicial power at all. *See Ross v. Oregon*, 227 U.S. 150, 162 (1913) (“[T]he provision is directed against legislative, but not judicial, acts.”). The U.S. Supreme Court has resisted the extension of the ex post facto clauses to courts. *See Rogers v. Tennessee*, 532 U.S. 451, 467 (2001) (upholding a court’s action as the “routine exercise of common law decisionmaking in which the court brought the law into conformity with reason and common sense”).

9. U.S. CONST. amends. V, XIV, § 1; *see United States v. Lanier*, 520 U.S. 259, 265 (1997).

10. *See, e.g.*, Universal Declaration of Human Rights, G.A. Res. 217A, at art. 11(2), U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR]; *see also infra* Part I.

the statutes governing the modern international criminal law tribunals, with the exception of the Rome Statute establishing the International Criminal Court (ICC).

Notwithstanding that respect for NCSL is a hallmark of modern national legal systems and a recurrent refrain in human rights instruments, international criminal law (ICL) fails to fully implement this supposed tool against tyranny. The absence of a rigorous manifestation of NCSL within ICL can be traced to the dawn of the field. In the post-World War II (WWII) period, the victorious Allies essentially held German and Japanese sovereignty “in trust” as postwar occupiers.<sup>11</sup> In the exercise of their legislative authority, the Allies renounced suggestions from within that the Axis leaders be summarily executed. Instead, they established international criminal tribunals to prosecute German and Japanese defendants—“one of the most significant tributes that power has ever paid to reason.”<sup>12</sup> The Charters governing these Tribunals were the source of new rules of international law that were immediately,<sup>13</sup> and then intermittently thereafter,<sup>14</sup> impugned for their retroactive application. As those historic proceedings drew to a close, the international community of states initiated a number of drafting exercises to codify the Nuremberg principles. Many of these efforts, however, were either indelibly compromised by polarized negotiations or abandoned during the Cold War period. Those projects that were finalized were generally never fully implemented within domestic legal systems.

Where the international community of states—still the primary source of legislative authority in international law—failed to enact comprehensive ICL either internationally or domestically, judicial institutions have undertaken the responsibility of developing the law and, in so doing, raised the most acute concerns about compliance with the precepts of NCSL. In the post-Cold War renaissance of ICL, international and domestic criminal courts have stepped in to develop and modernize the law born of the WWII era. In this process, courts are actively engaged in applying new ICL norms to past conduct. This is not the demure application of a judicial gloss to established doctrine. Rather, these tribunals are engaging in a full-scale refashioning of ICL through jurisprudence addressed to their own jurisdiction, the elements of international crimes, and applicable forms of responsibility. Along the way, courts are updating and expanding historical treaties and customary prohibitions, upsetting arrangements carefully negotiated between states, rejecting political compromises made

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11. George A. Finch, *The Nuremberg Trial and International Law*, 41 AM. J. INT'L L. 20, 22 (1947).

12. Robert H. Jackson, OPENING STATEMENT FOR THE UNITED STATES OF AMERICA, ON THE SUBJECT OF INTERNATIONAL MILITARY TRIBUNAL NO. I (Nov. 21, 1945), reprinted in 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 98, 99.

13. See, e.g., Finch, *supra* note 11, at 28. But see Lord Wright, *War Crimes Under International Law*, 62 L.Q. REV. 40 (1946) (arguing in favor of the legality of the proceedings).

14. See, e.g., Christian Tomuschat, *The Legacy of Nuremberg*, 4 J. INT'L CRIM. JUST. 830, 832–34 (2006) (recounting criticism).

by states during multilateral drafting conferences, and adding content to vaguely worded provisions that were conceived more as retrospective condemnations of past horrors than as detailed codes for prospective penal enforcement. All told, in the wake of cataclysmic events, judges have expanded the reach of ICL, even at the expense of fealty to treaty drafters' original intentions and in the absence of positive law that might ensure formal advance notice of proscribed conduct. As a result, the invocation of NCSL has been practically ubiquitous in the ICL context as criminal defendants attempt to stem this jurisprudential tide. And yet, the defense has proven to be a rather porous barrier to prosecution. Given that the principle of NCSL is an integral part of the human rights canon, this adjudicative trend raises acute concerns about whether the rights of defendants are adequately protected in ICL. This, in turn, raises important questions about the legitimacy of ICL as a field of criminal law.

This Article addresses these issues in three Parts. Part I starts with the reasoning of the Nuremberg and Tokyo Tribunals—the Aristotelian “prime movers” in the field of ICL. Part II then updates these arguments with reference to exemplary cases in the modern jurisprudence. Building off the historical materials, this Part develops a taxonomy of recurring lines of reasoning and methodological choices employed by modern ICL tribunals in the face of NCSL defenses. In these cases, some tribunals accept the applicability of the principle of NCSL and purport to rule in compliance with it; others deny its applicability under the particular circumstances presented. In all these cases, defendants are made subject to new or expanded criminal law rules.

Part III evaluates these judicial decisions collectively against the rights of criminal defendants as set out in the web of human rights treaties articulating the NCSL principle. This Part contains the Article's normative claim: the expansive interpretive approach undertaken by modern ICL judges has not compromised the fundamental fairness of modern ICL proceedings. Rather, even where new standards have been applied to past conduct, ICL judges have not infringed the higher-order principles underlying the NCSL prohibition. Today's defendants were on sufficient notice of the foreseeability of ICL jurisprudential innovations in light of extant domestic penal law, universal moral values expressed in international human rights law, developments in international humanitarian law and the circumstances in which this law has been invoked, and other dramatic changes to the international order and to international law brought about in the postwar period. As a prescriptive contribution, this Part argues that any lingering concerns about the rights of the defendants can and should be mitigated by sentencing practices—to a certain extent already in place and employed by the ad hoc criminal tribunals—that are closely tethered to extant domestic sentencing rules governing analogous domestic crimes.

Although focused on NCSL jurisprudence, this Article also presents a model of ICL formation and evolution that finds resonance in the origins and gradual

demise of the common law crime.<sup>15</sup> Common law crimes provided much of the substantive content for the nascent Anglo-American criminal justice system until they were gradually supplanted by legislative efforts.<sup>16</sup> So too in ICL; common law international crimes—as developed and elaborated upon in the cases discussed herein—have been crucial to preparing the way for a truly international criminal justice system. As in the domestic historical narrative, international crimes are increasingly finding expression in more positivistic sources of law, thus obviating the need for, and diminishing the discretion of, international judges to make law in the face of gaps or deficiencies. Collectively, the NCSL cases teach volumes about the dynamics of ICL argumentation, the interpretive attitudes of its judges (even those trained in the Civilist-Germanic tradition), and an emerging philosophical perspective on the nature of international criminal law. In particular, this Article reveals that when ICL judges find themselves at the “point of intersection between law and morals,”<sup>17</sup> they lean decidedly toward the latter.

#### I. THE ORIGINS OF THE *NULLUM CRIMEN SINE LEGE* JURISPRUDENCE

The principle of NCSL entered the field of ICL on uncertain footing and was immediately distinguished. In the post-WWII period, NCSL was at the heart of the defendants’ challenge to the legality of the near-identical Charters governing the international military tribunals at Nuremberg and Tokyo. The victorious Allies could have easily relied solely on the well-established constellation of war crimes prohibitions to prosecute the WWII defendants. Instead, they opted to innovate and assert jurisdiction over two additional crimes, not theretofore codified: crimes against the peace (the crime of aggression in today’s lexicon) and crimes against humanity. War crimes, while deserving of opprobrium, did not fully capture the Nazi atrocities, which radiated outward in acts of aggression and penetrated inward as persecutory pogroms against compatriots.

First in the dock, the Nuremberg defendants attacked the novel crimes against

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15. The *Justice Case*, brought immediately following the Nuremberg proceedings against Nazi jurists held responsible for implementing the Nazi “racial purity” program through the implementation of eugenic laws, also invoked this comparison between ICL and the common law when the tribunal stated:

International law is not the product of statute. Its content is not static. The absence from the world of any governmental body authorized to enact substantive rules of international law has not prevented the progressive development of that law. After the manner of the English common law it has grown to meet the exigencies of changing conditions.

*United States v. Altstötter*, reprinted in 3 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNAL UNDER CONTROL COUNCIL LAW NO. 10, at 954, 966 (1951) [hereinafter *Justice Case*].

16. Common law crimes emerged in the United Kingdom through the mid-seventeenth century. At this time, legislatures met infrequently and judges regularly confronted harmful conduct without proscriptive statutes. WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* 103 (1986).

17. ALEXANDER PASSARIN D’ENTRÈVES, *NATURAL LAW* 116 (2d ed. 1952).



the peace charge most vociferously,<sup>18</sup> arguing—accurately—“that no sovereign power has made aggressive war a crime at the time that the alleged criminal acts were committed, that no statute had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders.”<sup>19</sup> In its final judgment, the Nuremberg Tribunal initially dodged the defense, reasoning simply that the law of the Charter—as the manifestation of the sovereign legislative power of the victorious Allies—was “decisive” and “binding upon the Tribunal.”<sup>20</sup> Notwithstanding the undeniable novelty of two out of the three crimes prosecuted at Nuremberg, the Tribunal declared that the Charter was “the expression of international law existing at the time of [the Charter’s] creation.”<sup>21</sup> Thus, when considering the crimes against the peace charge, the Tribunal asserted that it was not “strictly necessary to consider whether and to what extent aggressive war was a crime before the execution of the London Agreement.”<sup>22</sup>

Notwithstanding this available “out,” the Tribunal did address the defense on the merits, albeit technically in *obiter dicta*, “in view of the great importance of the questions of law involved.”<sup>23</sup> In so doing, the Tribunal ultimately neutralized the defense through a trilogy of analytical claims. The first move qualified the very application of the maxim, which the Tribunal argued is “not a limitation on sovereignty, but is in general a principle of justice.”<sup>24</sup> Identifying NCSL as a principle of justice implied that the Allied states could override the principle in the collective exercise of their executive, legislative, and judicial powers in German territory.<sup>25</sup>

Second, the Tribunal concluded that because the conduct was unquestionably wrong, it was also unlawful under international law. The Tribunal pointed to extant treaties, including the Kellogg-Briand Pact<sup>26</sup> and various bilateral treaties

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18. Interestingly, the defendants’ motion did not address the novelty of the crimes against humanity charge at all. See Motion Adopted by All Defense Counsel on 19 November 1945, in 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 168–70 (1947).

19. Judgment, 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 462 (1948) [hereinafter Nuremberg Judgment].

20. *Id.* at 461.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 462.

25. The French translation of the judgment disarms the defense even more, stating “*nullum crimen sine lege* ne limite pas la souveraineté des États; elle ne formule qu’une règle généralement suivie”—that is, NCSL “is not a limitation on the sovereignty of states; it only expresses a generally followed rule.” There are other translation discrepancies in the versions of this passage of the opinion. See Susan Lamb, *Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law* in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 733, 737 n.13 (Antonio Cassese et al. eds., 2002).

26. General Treaty for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 L.N.T.S. 57 [hereinafter Kellogg-Briand Pact].

of neutrality and non-aggression, to reason that general international law prohibited the charged acts of aggression. From here, the Tribunal took its third leap by equating illegality with criminality. It reasoned that the Pact, with its "solemn renunciation of war as an instrument of national policy[,] necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing."<sup>27</sup> In so arguing, the Tribunal transformed a treaty devoted to the regulation of state conduct (providing as a sanction that the state in question would "be denied the benefits furnished by"<sup>28</sup> the Pact and thus render itself vulnerable to reprisals and claims for reparations) into one regulating individual conduct by providing penal sanctions.<sup>29</sup> The treaty's renunciation of war *ipso facto* rendered war unlawful under general international law, and the illegality of war under general international law *ipso facto* rendered the pursuit of war a crime under international law.<sup>30</sup> In this way, the launching of aggressive war in Europe became an international crime over and above a breach of an obligation of a contractual nature. The Tribunal concluded: "On this view of the case alone, it would appear that the maxim [NCSL] has no application to the present facts."<sup>31</sup>

To support this conflation of illegality and criminality, the Tribunal invoked the long history of war crimes prosecutions for acts now prohibited by the 1907 Hague Conventions,<sup>32</sup> such as the mistreatment of prisoners of war and the use

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27. Nuremberg Judgment, *supra* note 19, at 463.

28. Kellogg-Briand Pact, *supra* note 26, at pmb1.

29. Telford Taylor, a key member of the U.S. prosecutorial team, anticipated this correlation in an early memorandum on trial strategy in which he wrote:

Only the most incorrigible legalists can pretend to be shocked by the conclusion that the perpetrator of an aggressive war acts at peril of being punished for his perpetration, even if no tribunal has ever previously decided that perpetration of an aggressive war is a crime. And, in any event, the *ex post facto* question is rendered much easier by the fact of treaty violation . . . a man who violates a treaty must act at peril of being punished by the offending party's employing self-help.

TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 51 (1992).

30. The Tribunal contended that criminal prosecutions were justified because the defendants could not have reasonably thought their conduct was lawful and it would be unjust to exonerate responsible individuals. It argued:

To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances, the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.

Nuremberg Judgment, *supra* note 19, at 462. Tribunals established pursuant to Control Council Law No. 10 in the allied zones of occupation echoed this certainty: "There is no doubt of the criminality of the acts with which the defendants are charged. They are based on violations of International Law well recognized and existing at the time of their commission." *The German High Command Trial*, in 12 *LAW REPORTS OF THE TRIALS OF WAR CRIMINALS* 62 (1949).

31. Nuremberg Judgment, *supra* note 19, at 462.

32. The 1899 Hague Conventions, signed but never ratified, addressed themselves to the Pacific Settlement of International Disputes (Hague I), the Laws and Customs of War on Land (Hague II),

of poisonous weapons, notwithstanding that those Conventions are silent as to individual criminal responsibility for breaches.<sup>33</sup> The Tribunal noted that:

Many of these prohibitions have been enforced long before the date of the Convention; but since 1907 they have certainly been crimes, punishable as offenses against the laws of war; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders. For many years past, however, military tribunals have tried and punished individuals guilty of violating the rules of land warfare laid down by this Convention.<sup>34</sup>

Accordingly, the Tribunal reasoned that if the Hague Conventions could give rise to penal consequences, so too could the Kellogg-Briand Pact. Relatedly, the Tribunal argued, if war crimes—as part of the *jus in bello*—existed without express conventional authorization, then, *a fortiori*, there must also be *jus ad bellum*: “those who wage aggressive war are doing that which is equally illegal, and of much greater moment than a breach of one of the rules of the Hague Convention.”<sup>35</sup> With this series of logical leaps, the defendants’ primary defense was rejected, and the Tribunal rendered judgment on all counts in the indictment.

Given the novelty at the time of the application of individual criminal responsibility to any violations of international law, the presumed link between

Maritime Warfare (Hague III), the Launching of Projectiles and Explosives from Balloons (Hague IV, 1), Asphyxiating Gases (Hague IV, 2), and Expanding Bullets (Hague IV, 3). In 1906, delegates reconvened in The Hague to draft additional treaties, which have superseded their predecessors and expanded consideration to the Opening of Hostilities (Hague III), the Rights and Duties of Neutral Powers and Persons in Case of War on Land (Hague V), the Status of Enemy Merchant Ships at the Outbreak of Hostilities (Hague VI), the Laying of Submarine Automatic Contact Mines (Hague VIII), Bombardment by Naval Forces in Time of War (Hague IX), and the Discharge of Projectiles and Explosives from Balloons (Hague XIV). The most important treaty to emerge from this latter Conference was undoubtedly the fourth “Respecting the Laws and Customs of War on Land.” Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 2 (limiting the means and methods of warfare) [hereinafter 1907 Hague (IV) Convention].

33. Nuremberg Judgment, *supra* note 19, at 463. Article 3 of the 1907 Hague (IV) Convention provides that a belligerent in violation of the treaty “shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.” The treaties do not contemplate penal sanctions. 1907 Hague (IV) Convention, *supra* note 32, at art. 3.

34. Nuremberg Judgment, *supra* note 19, at 463. For support, the Tribunal cited the now infamous *Quirin* case before the U.S. Supreme Court for the proposition that “[f]rom the very beginning of its history this Court has applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as enemy individuals.” *Ex parte Quirin*, 317 U.S. 1, 27–28 (1942); see Nuremberg Judgment, *supra* note 19, at 465.

35. Nuremberg Judgment, *supra* note 19, at 463; see also *id.* at 186 (finding a war of aggression to be “the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole”). This concept finds expression in Justice Jackson’s observation that war is “the crime that comprehends all lesser crimes.” Robert H. Jackson, Report to the President (June 6, 1945), reprinted in INTERNATIONAL CONFERENCE ON MILITARY TRIALS REPORT OF ROBERT H. JACKSON TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS: LONDON, 1945 (U.S. Gov’t Printing Office 1949), available at <http://www.yale.edu/lawweb/avalon/imt/jackson/jack08.htm> [hereinafter Jackson Report].

immorality, illegality, and criminality was tenuous. In fact, the inclusion of crimes against the peace in the Charters was hotly contested during the Tribunals' creation. During the negotiations over the crimes to be charged and their definition, the Soviet and French delegations resisted the inclusion of crimes against the peace in the Charter of the future tribunal.<sup>36</sup> The French delegate, Professor André Falco, harkened back to the decision following World War I (WWI)—driven largely by a prior American delegation—to reject the idea of a crime of aggression. Given this precedent, Falco worried that its inclusion now would constitute *ex post facto* legislation.<sup>37</sup> Eventually, these differences in opinion were overcome—primarily due to the tenacity of Justice Robert H. Jackson of the U.S. delegation—and the American position and formulation of the crime prevailed in the Nuremberg Charter and was reproduced in the Tokyo Charter.

Although the offense of crimes against humanity was almost equally as novel as that of crimes against the peace, it provoked less consternation among the defendants and less overt angst within the Tribunal. The cognizability of such crimes had been contemplated, but rejected, in the post-WWI period in connection with the Ottoman Empire's massacres and deportations of its Armenian subjects, among other atrocities of that war.<sup>38</sup> Two decades before the establishment of the Nuremberg Tribunal, the American delegation to the conference designing the post-WWI prosecutorial strategy argued that crimes against humanity were nonjusticiable, regardless of how iniquitous the acts were. In written comments, the delegation reasoned:

The laws and customs of war are a standard certain, to be found in books of authority and in the practice of nations. The laws and principles of humanity vary with the individual, which, if for no other reason, should exclude them from consideration in a court of justice, especially one charged with the administration of criminal law.<sup>39</sup>

This position prevailed, and the final document—which was never fully implemented—did not advocate prosecutions for crimes against humanity.

It was thus left to the drafters of the Nuremberg Charter to establish crimes against humanity in positive law. The Nuremberg Tribunal, perhaps recognizing

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36. TAYLOR, *supra* note 29, at 65–66.

37. *Id.* at 66.

38. In 1915, the Allied governments of France, Great Britain, and Russia issued a joint declaration to the Ottoman Empire denouncing the massacres of Armenians as “crimes against humanity and civilization for which all the members of the Turkish Government will be held responsible together with its agents implicated in the massacres.” Egon Schwelb, *Crimes Against Humanity*, 23 BRIT. Y.B. INT’L L. 178, 181 (1946) (quoting Armenian Memorandum Presented by the Greek Delegation to the Commission of Fifteen on March 14, 1919).

39. Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Comm’n on Responsibilities (Apr. 4, 1919), Annex II, *reprinted in Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties: Report Presented to the Preliminary Peace Conference (Mar. 29, 1919)*, 14 AM. J. INT’L L. 95, 134 (1920).

that the legality of the charge was suspect, interpreted its Charter restrictively to require that crimes against humanity be charged only in connection with one of the other crimes within the Tribunal's jurisdiction—that is, crimes against the peace or war crimes. Specifically, the Tribunal held:

To constitute Crimes against Humanity, the acts relied on before the outbreak of the war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were Crimes against Humanity within the meaning of the Charter, but from the beginning of the war in 1939, War Crimes were committed on a vast scale, which were also Crimes against Humanity; and insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute War Crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted Crimes against Humanity.<sup>40</sup>

In this way, the Tribunal disregarded language in the Charter definition that crimes against humanity could be committed “before or during the war”<sup>41</sup> and essentially conflated the war crimes and crimes against humanity counts and allegations. Unlike its lengthy exegesis with respect to the legality of crimes against the peace, the Tribunal did not otherwise justify the crimes against humanity charge.<sup>42</sup> Thus, just as it announced an expansive crime of aggression, the Tribunal significantly limited the reach of crimes against humanity. Because both charges implicated the NCSL principle in almost equal measure, the Nuremberg Tribunal's disparate approach can perhaps best be explained as an attempt to limit the incursion on state sovereignty occasioned by crimes against humanity, which establish the international criminality of peacetime acts against compatriots.<sup>43</sup>

The Tokyo Charter, the product of a special proclamation issued by the Supreme Allied Commander of the Far East—U.S. General Douglas MacArthur—assigned virtually the same subject matter jurisdiction to the Tokyo Tribunal.<sup>44</sup> Not surprisingly, the Japanese defendants asserted arguments in

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40. Nuremberg Judgment, *supra* note 19, at 249.

41. For a fuller discussion of the origins, impact, and demise of the “war nexus” requirement for crimes against humanity, see generally Beth Van Schaack, *The Definition of Crimes Against Humanity: Resolving the Incoherence*, 37 COLUM. J. TRANSNAT'L L. 787 (1999).

42. The American judge at Nuremberg, Judge Biddle, later justified the limited approach to crimes against humanity as being “highly desirable” in light of the then-prevailing “stage of the development of international law.” Francis Biddle, *The Nurnberg Trial*, 33 VA. L. REV. 679, 695 (1947).

43. See Van Schaack, *supra* note 41, at 846–47 (noting that the notion of crimes against humanity made inroads into traditional *domains réservés* of states).

44. *United States v. Araki et al.*, Judgment and Annexes, in 20 THE TOKYO MAJOR WAR CRIMES TRIAL 48,436 (R. John Pritchard & Sonia Magbanua Zaide eds., 1981).

preliminary proceedings similar to those raised by their brethren at Nuremberg. With respect to the crimes against the peace charge, they too argued that war as an act of state was not illegal under international law and thus not subject to penal condemnation.<sup>45</sup> At the time, the motion was dismissed,<sup>46</sup> but the defendants had to await the final judgment for the Tribunal's reasons. It was no doubt hardly worth the wait as the Tribunal laconically adopted the reasoning of the Nuremberg Tribunal:

In view of the fact that in all material respects the Charters of this Tribunal and the Nuremberg Tribunal are identical, this Tribunal prefers to express its unqualified adherence to the relevant opinions of the Nuremberg Tribunal rather than by reasoning the matters anew in somewhat different language to open the door to controversy by way of conflicting interpretations of the two statements of opinions.<sup>47</sup>

In his separate opinion in the Tokyo proceedings, Justice Röling of the Netherlands concluded that aggressive war was not a crime prior to the enactment of the two Charters. Nonetheless, he dismissed the *ex post facto* argument by reasoning that the victorious allies were entitled to disregard the NCSL principle as a matter of policy:

If the principle of "nullum crimen sine praevia lege" ["no crime without previously declared law"] were a principle of *justice*, . . . the Tribunal would be bound to exclude for that very reason every crime created in the Charter *ex post facto*, it being the first duty of the Tribunal to mete out justice. However, this maxim is not a principle of justice but a rule of policy, valid only if expressly adopted, so as to protect citizens against arbitrariness of courts . . . as well as the arbitrariness of legislators . . . . [T]he prohibition of *ex post facto* law is an expression of political wisdom, not necessarily applicable in present international relations. This maxim of liberty may, if circumstances necessitate it, be disregarded even by powers victorious in a war fought for freedom.<sup>48</sup>

In Röling's estimation, the victorious states had a right—if not a duty—to neutralize threats to international peace and to ensure the non-repetition of conduct that disrupted the newly established order.<sup>49</sup> Indeed, according to Röling, the Allies could have responded with raw power rather than law to achieve this aim. "That the judicial way is chosen . . . is a novelty which cannot be regarded as a violation of international law in that it affords the vanquished

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45. *Id.* at 48,436–436a.

46. *Id.* at 48,437.

47. *Id.* at 48,439.

48. *United States v. Araki et al.*, Separate Opinion of Judge Röling, in 21 THE TOKYO MAJOR WAR CRIMES TRIAL 44–45A (R. John Pritchard & Sonia Magbanua Zaide eds., 1981).

49. *Id.* at 46.

more guarantees than mere political action could do."<sup>50</sup> In Judge Röling's mind, the imperatives of necessity and security overrode any resistance exerted by the NCSL principle.

Justice Pal of India, in his famously sprawling dissent, declared that the Tokyo Tribunal was free, indeed obligated, to disregard the provisions of the Charter if they diverged from pre-existing international law. Otherwise, he reasoned, the Tribunal would be "a mere tool for the manifestation of power":<sup>51</sup>

The so-called trial held according to the definition of crime *now* given by the victors obliterates the centuries of civilization which stretch between us and the summary slaying of the defeated in a war. A trial with law thus proscribed will only be a sham employment of legal process for the satisfaction of a thirst for revenge. It does not correspond to any idea of justice.<sup>52</sup>

In Justice Pal's estimation, a victor nation's legislating new law for the vanquished was not only contrary to the rule against the retroactivity of law, but also a usurpation of power.

Justice Pal also took issue with the majority's resort to customary international law to compensate for the lack of more comprehensive treaty law. In particular, he noted that much state conduct went against the rule articulated by the majority, and that "[c]ustomary law does not develop only by pronouncements."<sup>53</sup> He concluded, accordingly, that "[w]hen the conduct of the nations is taken into account the law will perhaps be found to be that only a lost war is a crime."<sup>54</sup> To the extent that any custom may have been developing, he argued, it was directed at sovereign states and not individuals.<sup>55</sup> Justice Pal questioned the wisdom of a system of individual responsibility that applied only to the vanquished, arguing that such censure could not promote genuine deterrence:<sup>56</sup> "[f]ear of being punished by the future possible victor for violating a rule which that victor may be pleased then to formulate would hardly elicit any appreciation of the values behind that norm."<sup>57</sup>

In this way, the postwar tribunals approached the principle of NCSL somewhat inconsistently and with caution.<sup>58</sup> Although the judges did not dismiss the

50. *Id.* at 47.

51. *United States v. Araki et al.*, Dissenting Opinion of Justice Pal, in 21 *THE TOKYO MAJOR WAR CRIMES TRIAL* 36-37 (R. John Pritchard & Sonia Magbanua Zaide eds., 1981).

52. *Id.* at 37.

53. *Id.* at 123-26; *see also id.* at 152 ("War itself, as before remained outside the province of law, its conduct only having been brought under legal regulations. No customary law developed so as to make any war a crime.").

54. *Id.* at 128.

55. *Id.* at 180.

56. *Id.* at 214.

57. *Id.* at 215.

58. Military tribunals proceeding on the basis of Control Council Law No. 10 (CCL 10), which was enacted to provide a uniform basis for the trial of lesser defendants in occupation courts, generally adopted the same reasoning employed by the two international tribunals when confronted with claims

defense summarily, they did significantly limit its impact vis-à-vis the crimes against the peace charge. At the same time, their reasoning with respect to crimes against humanity—and in particular their truncation of the concept—suggests that the principle was not entirely absent from their deliberations. This may be due to the fact that crimes against the peace had some grounding in extant treaties. Furthermore, crimes against humanity are more revolutionary in that they embody the beginnings of a universal moral code addressing the way in which states may treat their citizens and thus intrude more acutely into prerogatives of state sovereignty recognized since the Peace of Westphalia. The limitations on the definition of crimes against humanity adopted by the Nuremberg Tribunal ensured that its jurisprudence enabled such intrusions only in connection with the commission of aggressive war or war crimes. As discussed in the next Part, in many ways, the two Tribunals set the terms for future adjudications of NCSL before modern ICL tribunals. Today's tribunals adjudicating ICL borrow heavily from the Nuremberg precedent and reasoning in ruling on the applicability and impact of the principle of NCSL in proceedings before them.

## II. NULLUM CRIMEN SINE LEGE IN INTERNATIONAL CRIMINAL LAW

Fast forward to the 1990s and the establishment of the two ad hoc international criminal tribunals and subsequent hybrid tribunals. Proving the old adage that “there is nothing new under the sun,”<sup>59</sup> tribunals adjudicating ICL today borrow heavily from the Nuremberg reasoning. In ruling on the applicability and impact of the principle of NCSL in proceedings before them, modern tribunals invoke a complex interplay among immorality, illegality, and criminality. The principle is invoked in varied circumstances. In some cases, defendants have sought to impugn what they consider to be new definitions of crimes and forms of participation set forth in the tribunals' constitutive statutes. In other proceedings, defendants have contested expansive applications of dated law to address modern atrocities. The tribunals have employed multiple responses to reject the applicability of NCSL and its constitutive principles. Some tribunals purport to be acting in actual or substantial compliance with the dictates of the NCSL principle. Other opinions imply that NCSL is inapplicable or inapposite.

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that CCL 10 constituted *ex post facto* legislation. *United States v. Ohlendorf et al.*, 4 TRIAL OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL No. 10, at 458–59 (1951) (“Control Council Law No. 10 is but the codification and systematization of already existing legal principles, rules, and customs . . . . Certainly no one can claim with the slightest pretense at reasoning that there is any taint of *ex post factoism* in the law of murder.”). Likewise, in the *Justice Case*, the court noted: “The *ex post facto* rule cannot apply in the international field as it does under constitutional mandate in the domestic field.” *Justice Case*, *supra* note 15, at 974–75. NCSL was unsuccessfully raised as a defense in several subsequent domestic proceedings beyond the immediate postwar period (most notably in the *Eichmann* case), but the Nuremberg reasoning was largely followed and “no new arguments were adduced.” Lamb, *supra* note 25, at 739; see *Att’y Gen. of Isr. v. Eichmann*, reprinted in 36 I.L.R. 5 (Jm. 1961), *aff’d*, 36 I.L.R. 277 (S. Ct. 1962) (Isr.).

59. *Ecclesiastes* 1:9.



In many of the cases, the opinions interweave multiple lines of reasoning that reinforce and complement each other.<sup>60</sup> The rest of this Part constructs a taxonomy of these analytical claims. The next Part discusses their legitimacy vis-à-vis international human rights law addressed to the rights of defendants.

A. THE SHIFTING STATUS OF *NULLUM CRIMEN SIN LEGE* IN INTERNATIONAL CRIMINAL LAW

A recurring argument in the face of the defense of NCSL is that the principle of NCSL simply does not apply in ICL with the same force and effect as it does in the domestic penal order. This approach arose initially in defenses of the legality of the Nuremberg and Tokyo proceedings and their postwar progeny.<sup>61</sup> Judge Cassese, himself an international law judge, has opined that in the post-war period, “[t]he strict legal prohibition of *ex post facto* law had not yet found expression in international law.”<sup>62</sup> Even now, fifty years later, one Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) reasoned that “[i]t is not certain to what extent [the principle of legality and its components] have been admitted as part of international legal practice, separate and apart from the existence of the national legal system.”<sup>63</sup> It is argued that because the different states of the world approach the NCSL principle somewhat differently, no consistent formulation of the principle has emerged that would be applicable to international courts as a general principle

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60. See, e.g., Prosecutor v. Milutinović, Šainović & Ojdanić, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction: Joint Criminal Enterprise, paras. 37–42 (May 21, 2003) (relying on the existence of a customary rule, an equivalent rule under national law, and the inherently atrocious behavior of the accused to reject his NCSL defense).

61. Many of the post-WWII occupation courts echoed this reasoning. In the *Justice Case*, for example, the court noted:

The *ex post facto* rule cannot apply in the international field as it does under constitutional mandate in the domestic field . . . . International law is not the product of statute for the simple reason that there is yet no world authority empowered to enact statutes of universal application. International law is the product of multipartite treaties, conventions, judicial decisions and customs which have received international acceptance or acquiescence. It would be sheer absurdity to suggest that the *ex post facto* rule, as known to constitutional states, could be applied to a treaty, a custom, or a common law decision of an international tribunal, or to the international acquiescence which follows the events. To have attempted to apply the *ex post facto* principle to judicial decisions of common international law would have been to strangle that law at birth.

*Justice Case*, *supra* note 15, at 974–75.

62. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 72 (2003); see also Hans Kelsen, *Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?*, 1 INT’L L.Q. 153, 164 (1947) (“[T]his rule [against *ex post facto* legislation] is not valid at all within international law, and is valid within national law only with important exceptions.”).

63. Prosecutor v. Delalić, Mucić, Delić & Landžo, Case No. IT-96-21-T, Judgment, para. 403 (Nov. 16, 1998). This reasoning was echoed in *Prosecutor v. Karemera, Ngirumpatse, Nzirorera & Rwamakuba*, Case No. ICTR-98-44-T, Decision on Defense’s Preliminary Motions Challenging Jurisdiction: Joint Criminal Enterprise, para. 43 (May 11, 2004) (“The Chamber holds that, given the specificity of international criminal law, the principle of legality does not apply to international criminal law to the same extent as it applies in certain national legal systems.”).

of law. This, in turn, permits international tribunals to temper the application of NCSL in their proceedings, in contradistinction to domestic courts that may be constrained by the dictates of their own particular constitutional or statutory schemes.<sup>64</sup>

Courts have also reasoned that to the extent that it exists in ICL, NCSL does not apply to full effect. This is due, in part, to the perceived “different methods of criminalisation of conduct in national and international criminal justice systems.”<sup>65</sup> In its discussion on the construction of its Statute, the ICTY elaborated:

Whereas the criminalisation process in a national criminal justice system depends upon legislation which dictates the time when conduct is prohibited and the content of such prohibition, the international criminal justice system attains the same objective through treaties or conventions, or after a customary practice of the unilateral enforcement of a prohibition by States. It could be postulated, therefore, that the principles of legality in international criminal law are different from their related national legal systems with respect to their application and standards.<sup>66</sup>

Whereas the legislature defines the crime and prescribes the corresponding punishment in domestic law, in ICL, states and nongovernmental bodies draft treaties that embody core international prohibitions. The crimes themselves are rarely drafted in terms of the basic elements of criminal law, such as mens rea, actus reus, attendant circumstances, and so forth.<sup>67</sup> This is due, in part, to the fact that much treaty drafting has been done by diplomats (rather than specialists in comparative criminal law) lacking technical-drafting skills who are working in the context of political, and often politicized, multilateral negotiations.

Moreover, many ICL treaty provisions merely sketch out the broad contours of legal prohibitions, as it was not necessarily envisioned that such provisions would be applied directly as rules of decision in criminal prosecutions. Instead, it was largely expected that states would incorporate the treaties’ general prohibitions into their domestic penal codes and then apply these, presumably more precise, criminal definitions in domestic proceedings upon gaining custody of an accused. Even where states parties have codified treaty crimes, their legislatures have at times simply incorporated ICL by reference,<sup>68</sup> especially

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64. See Alicia Gil Gil, *The Flaws of the Scilingo Judgment*, 3 J. INT’L CRIM. JUST. 1082, 1087 (2005) (noting that international courts can do things that domestic courts cannot).

65. *Delalić*, Case No. IT-96-21-T, Judgment, para. 403.

66. *Id.* paras. 404–05.

67. See, e.g., *Prosecutor v. Galić*, Case No. IT-98-29-T, Judgment and Opinion, para. 133 (Dec. 5, 2003) (ascertaining the elements of the crime of terror against the civilian population, which is prohibited—but not defined—by the Additional Protocols to the Geneva Conventions).

68. See, e.g., 18 U.S.C. § 2441(c) (1996) (providing for jurisdiction over “war crimes” as defined by enumerated treaties); see also Jordan J. Paust, *It’s No Defense: Nullum Crimen Sine Lege, International Crime and the Gingerbread Man*, 60 ALB. L. REV. 657, 672–78 (1997) (citing referential statutes).

prior to the establishment of the ICC, at which time many states updated their penal codes. The establishment of the modern international criminal tribunals—and the vitalization of the principle of universal jurisdiction—have, for the first time, enabled the more direct applicability of all of these provisions in actual prosecutions.

In addition, the terminology in many international treaties is open-textured, such as with respect to provisions prescribing the war crimes of “willfully causing great suffering,” committing “inhumane and degrading treatment or punishment,” or causing the destruction of property “not justified by military necessity.” This is at times by design, as drafters indicated that it would be impossible to envision every type of conduct that deserved censure.<sup>69</sup> In other circumstances, these pockets of vagueness reflect the concerted ambiguity that results from difficult interstate negotiations in which states have been known to jealously guard the prerogatives of state sovereignty. It is thus left to the courts to add content to these provisions through reference to potentially divergent state conduct and often empty or self-serving rhetoric. This is the case even though domestic principles of statutory construction would often counsel against courts filling deliberate omissions in legislation,<sup>70</sup> and canonical international law principles of treaty construction would compel adoption of an interpretation that is most deferential to state sovereignty.<sup>71</sup> As a result of these factors in ICL formation, modern criminal tribunals must interpret treaties and statutes—some relatively ancient—that were drafted without the precision we now expect from modern penal codes. Although the ICC Statute, with its Elements of Crimes,<sup>72</sup>

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69. With respect to the Geneva Conventions, the Commentary notes that “[h]owever great the care taken in drawing up a list of all the various forms of infliction, it would never be possible to catch up with the imagination of future torturers who wished to satisfy their bestial instincts; and the more specific and complete a list tries to be, the more restrictive it becomes.” 3 INT’L COMM. OF RED CROSS, COMMENTARY: GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 39 (J. Pictet ed. 1958); see also *Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A) para. 49 (1979) (noting that “whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague . . .”).

70. *Prosecutor v. Delalić, Mucić, Delić & Landžo*, Case No. IT-96-21-T, Judgment, para. 412 (Nov. 16, 1998) (“It has always been the practice of courts not to fill omissions in legislation when this can be said to have been deliberate. It would seem, however, that where the omission was accidental, it is usual to supply the missing words to give the legislation the meaning intended.”).

71. See 1 OPPENHEIM’S INTERNATIONAL LAW 1278–79 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) (discussing the canon of *in dubio mitius*, which dictates that where treaty terms are ambiguous, an interpretation should be chosen that is least onerous to the party assuming the obligation or that interferes least with state sovereignty).

72. Preparatory Commission for the International Criminal Court, *Addendum: Finalized Draft Text of the Elements of Crimes*, U.N. Doc. PCNICC/2000/INF/3/Add.2 (Nov. 2, 2000), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N00/724/27/PDF/N0072427.pdf?OpenElement> [hereinafter *Elements of Crimes*]. During the Rome Conference, several delegations, led by the United States, insisted that further elaboration of crimes beyond the statutory definitions was necessary and that formal Elements of Crimes should be incorporated directly or by reference into the Statute. The United States argued for the following statutory language: “Definitional elements for these crimes, contained in annex XXX [placeholder in original], shall be an integral part of this Statute, and shall be applied by

better approximates this level of precision, key terms remain undefined even in that treaty. The persistent systematic indeterminacy of areas of ICL invites more active judicial interpretation of the scope of international crimes as judges add necessary content to avoid situations of *non liquet* that would inevitably exonerate a malefactor—an unsavory outcome where atrocities are at issue.<sup>73</sup>

Complicating efforts to create a holistic corpus of law is the fact that the international system lacks a standing world legislature that can fill interstices and lacuna, modernize ancient prohibitions, or fix faulty formulations. In the domestic arena, there is the expectation that the legislature will rectify problems in the law if they are revealed through the exoneration of individuals who have committed bad acts. The only way treaties can be amended is through the sporadic and sluggish multilateral treaty drafting process. Indeed, states are loath to renegotiate existing treaties, not only because of the transaction costs inherent to such an endeavor, but also because of the confusion wrought in trying to keep track of which states have ratified which version of which treaty. As Professor Eskridge has observed with respect to domestic statutes, it is most appropriate for courts to adapt old norms with little chance of legislative

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the Court in conjunction with the general provisions of criminal law, in its determination.” Rome Conference, June 15–17, 1998, *Conference Document*, A/CONF.183/C.1/L.8 (June 19, 1998). Other delegations resisted, arguing that “the current definition of crimes in the Draft Statute generally meets the requirements of the principle of *nullum crimen sine lege*. There is no need at this stage for any further elaboration on the material and mental elements of the crimes.” Definition of Crimes, ICJ Brief No. 1, to UN Diplomatic Conference (June 1988). Adopted as a compromise measure and part of a “package deal” in the waning days of the Rome Conference, Article 9 reads, “Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7 and 8. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.” Rome Statute of the International Criminal Court art. 9, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 [hereinafter ICC Statute]. *But see id.* at art. 21 (placing Elements of Crime in the first tier of sources of law). Articles 9 and 21 can be reconciled by reading them in tandem: the Court “shall apply” the Elements *for the purpose of* “assist[ing] the Court . . . .” See Margaret McAuliffe deGuzman, *Article 21: Applicable Law*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 701, 705 (Otto Triffterer ed., 2d ed. 2008) (forthcoming) (draft, on file with author).

73. There is no express void for vagueness doctrine in international law that would allow an international tribunal to strike part of its subject matter jurisdiction for vagueness. See *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (stating that the void for vagueness doctrine bars the enforcement of “a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application . . . .”). *But see* *Prosecutor v. Stakić*, Case No. IT-97-24-T, Judgment, para. 724 (July 31, 2003) (striking “other inhumane acts” count for vagueness). One commentator has surmised that this absence is a feature of the disempowerment of international judges:

The absence of any remedy for vagueness is presumably the result of both the general trend toward limiting rather than expanding the power of the judges *vis-à-vis* States Parties, and the feeling that States Parties as legislators could be trusted to delineate clearly the crimes which might ultimately be charged against their own agents.

Bruce Broomhall, *Article 22: Nullum Crimen Sine Lege*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 447, 452–53 (Otto Triffterer ed., 1999). Ironically, the ICL cases presented herein suggest that, by contrast, international judges feel quite empowered to prescribe conduct in the face of ambiguities in the law.

revision.<sup>74</sup>

Most importantly, perfect positivism is impossible where customary international law (CIL)—the practice of states bolstered by a sense of legal duty—remains an integral source of ICL. The CIL of international criminal law must often be gleaned from various forms of state practice, including the ratification of ICL treaties, the domestication of treaty norms, and the implementation and enforcement of those norms through prosecutions before domestic courts. A customary legal system does not lend itself to a robust NCSL principle.

Given this intermittent, decentralized, and curtailed process of law formation, tribunals adjudicating ICL have lower expectations about the definitional precision of international crimes,<sup>75</sup> reasoning that ICL cannot be expected to adhere to the standards of specificity demanded from national criminal law. This is particularly apparent in a line of cases raising the NCSL defense in the face of vaguely worded international crimes. In the *Čelebići* case before the ICTY, defendants moved for the dismissal of the counts that alleged the commission of “wilfully causing great suffering or serious injury to body or health,” “inhuman treatment,” and “cruel treatment.” Defendants argued that dismissal was warranted because these provisions contravened the principle of specificity and thus could not serve as the basis of a criminal prosecution.<sup>76</sup> In rejecting the defense and convicting the defendants, an ICTY Trial Chamber added content to its Statute by relying on the Geneva Convention Commentaries, the discussions within human rights institutions concerning analogous provisions in human rights treaties addressed to states parties and giving rise to state responsibility in their breach, and the overarching principles animating international humanitarian law (IHL). The Tribunal noted that these IHL prohibitions were deliberately open-textured in order to reach a variety of conditions and conduct.<sup>77</sup>

The ICTY employed similar reasoning with respect to the residual category of crimes against humanity in Article 5(i)—other inhumane acts.<sup>78</sup> In the *Kupreškić* case, the Trial Chamber acknowledged that it could be argued that the

74. See William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1554–55 (1987); see also Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 VAND. L. REV. 1 (2006) (applying Eskridge’s theory to international humanitarian law).

75. Prosecutor v. Milutinović, Šainović & Ojdanić, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction: Joint Criminal Enterprise, paras. 37–38 (May 21, 2003) (setting forth the requirements of NCSL, but noting that courts must “tak[e] into account the specificity of international law” in considering the principle’s application).

76. Prosecutor v. Delalić, Mucić, Delić & Landžo, Case No. IT-96-21-T, Judgment, paras. 503, 515 (Nov. 16, 1998).

77. *Id.* para. 532.

78. See Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, art. 5(i), Annex, U.N. Doc. S/RES/827 (May 23, 1993) [hereinafter ICTY Statute]. During the drafting of the ICC Statute, some delegates raised concern about the inclusion of this crime on the ground that it “would not provide the clarity and precision required by the principle of legality, would not provide the necessary certainty concerning crimes that would be subject to international prosecution and adjudication, would not sufficiently guarantee the rights of the accused and would place an onerous burden on the Court to develop the law.” Erkin Gadirov, *Article 9: Elements of Crimes*, in COMMENTARY ON THE

term “lacks precision and is too general to provide a safe yardstick for the work of the Tribunal and, hence, that it is contrary to the principle of the ‘specificity’ of criminal law.”<sup>79</sup> Yet, the Tribunal determined that the term was “deliberately designed as a residual category, as it was felt undesirable for this category to be exhaustively enumerated. An exhaustive categorization would merely create opportunities for evasion of the letter of the prohibition.”<sup>80</sup> The Trial Chamber suggested that tribunals should look to international human rights law to “identify a set of basic rights appertaining to human beings, the infringement of which may amount, depending on the accompanying circumstances, to a crime against humanity.”<sup>81</sup>

In the *Stakić* case, another Trial Chamber disagreed with the *Kupreškić* residual approach and dismissed charges under Article 5(i) based upon allegations of the forcible domestic transfer of persons. The Trial Chamber reasoned that “the crime of ‘other inhumane acts’ subsumes a potentially broad range of criminal behaviour and may well be considered to lack sufficient clarity, precision and definiteness[. This] might violate the fundamental criminal law principle *nullum crimen sine lege certa*.”<sup>82</sup> On appeal, neither party raised the legality of “other inhumane acts.” Nonetheless, the ICTY Appeals Chamber addressed it *proprio motu*. The Appeals Chamber ruled that the crime against humanity of “other inhumane acts” did not violate NCSL, as it formed part of customary international law and served as a residual category for unenumerated crimes.<sup>83</sup>

A notable exception to this trend in decision with respect to open-textured

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ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 289, 294 (Otto Triffterer ed., 1999) (internal quotation marks omitted).

79. Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment, para. 563 (Jan. 14, 2000); see also Prosecutor v. Blagojević, Case No. IT-02-60-T, Judgment, para. 625 (Jan. 17, 2005) (noting that “the principle of legality requires that a trier of fact exercise great caution in finding that an alleged act, not regulated elsewhere in Article 5 of the Statute, forms part of this crime [of “other inhumane acts”]: norms of criminal law must always provide individuals with sufficient notice of what is criminal behaviour and what is not”).

80. *Kupreškić*, Case No. IT-95-16-T, Judgment, para. 563.

81. *Id.* para. 566.

82. Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, para. 719 (July 31, 2003) (internal quotation marks omitted). The Trial Chamber went on to rule that the crime against humanity of deportation covered the alleged inhumane acts, which involved the forced movement of persons across a de facto, as opposed to a strictly international, boundary. *Id.* para. 723. This ruling was novel in its own right, as deportation historically referred to the forcible transfer of a person across an international border. The drafters of the ICC Statute dropped this distinction; Article 7(1)(d) prohibits “deportation or forcible transfer,” and the Elements of Crimes makes no mention of the necessity of traversing such a boundary. *Elements of Crimes*, *supra* note 72.

83. Prosecutor v. Stakić, Case No. IT-97-24-A, Judgment, paras. 314–15 (Mar. 22, 2006). The Appeals Chamber did, however, scale back the Trial Chamber’s ruling that deportation (as a crime against humanity) could also be charged for moving individuals across shifting frontlines—as opposed to de facto or de jure state boundaries—as contrary to the NCSL principle. *Id.* paras. 300–03. At the same time, the Appeals Chamber reversed the Trial Chamber’s determination that “other inhumane acts” did not encompass the internal—as opposed to international—forcible transfer of persons. *Id.* para. 317.

provisions appears in the case against Vasiljević. There, Trial Chamber II of the ICTY acquitted the defendant of the count alleging his commission of “violence to life and person” as set forth in Common Article 3 of the Geneva Conventions. The Tribunal reasoned that the offense was not defined with sufficient specificity under international law to serve as the basis for a criminal prosecution.<sup>84</sup> This assessment, the Tribunal stressed, must take into account “the specificity of international law, in particular that of customary international law.”<sup>85</sup> It would be impermissible, it noted, for a criminal conviction to be based on “a norm which an accused could not reasonably have been aware of at the time of the acts, and this norm must make it sufficiently clear what act or omission could engage his criminal responsibility.”<sup>86</sup> In so ruling, the Trial Chamber rejected the reasoning of a different Trial Chamber that had convicted a defendant of the crime, noting that the offense was defined by the “cumulation” of elements of other listed offenses, such as murder, mutilation, cruel treatment, and torture.<sup>87</sup>

Related to this consideration of the lesser application of the principle of NCSL to ICL is the characterization of NCSL within ICL as a flexible principle of justice or a policy choice that can yield to competing imperatives rather than as a rigid rule that applies in all circumstances.<sup>88</sup> Under this approach, tribunals recognize that convicting a defendant in breach of the principle of NCSL is one form of injustice. Allowing inadvertent or even deliberate “loopholes” in the law to exonerate a malefactor results in an injustice of an altogether different, perhaps more profound, kind. By subordinating the principle of NCSL to a vision of substantive justice, tribunals have determined that the former injustice is less problematic than the latter.<sup>89</sup> Thus, in explaining the outcome at Nuremberg, Judge Cassese has noted that, at the time, “the *nullum crimen sine lege* principle could be regarded as a moral maxim destined to yield to superior exigencies whenever it would have been contrary to justice not to hold persons

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84. Prosecutor v. Vasiljević, Case No. IT-98-32-T, Judgment, para. 201 (Nov. 29, 2002) (“Once it is satisfied that a certain act or set of acts is indeed criminal under customary international law, the Trial Chamber must satisfy itself that this offence with which the accused is charged was defined with sufficient clarity *under customary international law* for its general nature, its criminal character and its approximate gravity to have been sufficiently foreseeable and accessible.”).

85. *Id.*

86. *Id.* para. 193.

87. See Prosecutor v. Blaškić, Case No. 95-14-T, Judgment, para. 182 (Mar. 3, 2000).

88. See Prosecutor v. Milutinović, Šainović & Ojdanić, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction: Joint Criminal Enterprise, para. 37 (May 21, 2003).

89. See Kelsen, *supra* note 62, at 165 (“In case two postulates of justice are in conflict with each other, the higher one prevails; and to punish those who were morally responsible for the international crime of the second World War may certainly be considered as more important than to comply with the rather relative rule against *ex post facto* laws, open to so many exceptions.”). Kelsen also argued that Nazi defendants should not benefit from the protections of the principle of legality when they denied them to so many of their subjects. See Hans Kelsen, *The Rule Against Ex Post Facto Laws and the Prosecution of the Axis War Criminals*, 11 JUDGE ADVOC. J. 8, 46 (1945); see also CASSESE, *supra* note 62, at 139 (discussing the substantive justice approach).

accountable for appalling atrocities.”<sup>90</sup> Thus, courts will balance considerations of “the preservation of justice and fairness towards the accused” against the articulated needs of the international community for security, accountability, and “the preservation of world order.”<sup>91</sup> In so doing, courts construct, or acknowledge, a hierarchy of principles that elevates the latter set of concerns. Most important in this line of reasoning is the belief that building a robust system of international justice will generate a more reliable deterrent effect, contribute to the prevention of abuses in the future, and ensure a more secure public order for all.

The principle’s frequent invocation by modern international criminal tribunals thus suggests that the extreme version of the argument that NCSL does not apply in ICL is overstated. These tribunals accept the applicability of the principle to proceedings before them;<sup>92</sup> however, they have rejected, or impliedly denied, the absolute positivistic version of the principle in favor of the general applicability of the values underlying the principle. Most international courts treat NCSL as an applicable general principle of law that must be adapted to the international law context of the cases before them. Indeed, the tribunals occasionally articulate the notion that international jurisdiction is special, and that the application of NCSL is different in international courts than it is in domestic courts.<sup>93</sup>

#### B. THE OBJECT AND PURPOSE OF INTERNATIONAL CRIMINAL LAW

When considering how to prioritize potentially competing principles, the ICL tribunals will invoke the object and purpose of ICL as an interpretive tool. In *Prosecutor v. Hadžihasanović*, for example, defendants invoked the NCSL defense in an effort to thwart prosecutions based on contested forms of responsibility.<sup>94</sup> In a preliminary challenge to jurisdiction, defendants argued that IHL

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90. CASSESE, *supra* note 62, at 72.

91. *Prosecutor v. Delalić, Mucić, Delić & Landžo*, Case No. IT-96-21-T, Judgment, para. 405 (Nov. 16, 1998).

92. *See Prosecutor v. Karemera, Ndirumpatse, Nzirorera & Rwamakuba*, Case No. ICTR-98-44-T, Decision on Defense’s Preliminary Motions Challenging Jurisdiction: Joint Criminal Enterprise, para. 39 (May 11, 2004) (“The Chamber agrees with the Defence that, in deciding on the present issue, the Chamber is bound to respect the principle *nullum crimen sine lege*.”).

93. This notion of international judicial privilege is apparent elsewhere in ICL, for example in the jurisprudence on the applicability of amnesty laws and immunity doctrines before international courts. *See Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, para. 155 (Dec. 10, 1998) (noting that international crimes can be prosecuted before an international tribunal notwithstanding a domestic amnesty law that might block a domestic proceeding); *Prosecutor v. Taylor*, Case No. SCSL-2003-01-AR72(E), Decision on Immunity from Jurisdiction, paras. 51–52 (May 31, 2004) (finding that the international court was not bound by the head of state immunity doctrine applicable within domestic courts).

94. *Prosecutor v. Hadžihasanović, Alagić & Kubura*, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, para. 36 (Nov. 12, 2002). In this regard, see also the *Tadić* case, which established that the doctrine of joint criminal enterprise was a form of complicity prosecutable in light of the Tribunal’s object and purpose. *Prosecutor v. Tadić*, Case No. IT-94-1-A, Judgment, paras. 190–91 (July 15, 1999).



did not allow superiors to be prosecuted for the acts of their subordinates in non-international armed conflicts, primarily because Protocol I, applicable in international conflicts, is the first and only IHL treaty to set out the elements of the superior responsibility doctrine.<sup>95</sup> The Trial Chamber dismissed the appeal. In clarifying the meaning of the NCSL prohibition, the Trial Chamber invoked the distinction between conduct and classification. It determined that NCSL required the prior illegality of the conduct in question, but was agnostic as to how that conduct was classified under any applicable body of law. As long as it was foreseeable and accessible to a possible perpetrator that his conduct was punishable at the time of commission, the principle of NCSL was satisfied.<sup>96</sup> Thus, “[t]he emphasis on conduct, rather than on the specific description of the offence in substantive criminal law, is of primary relevance.”<sup>97</sup> The nature of the resulting penalty too was irrelevant from the perspective of the Trial Chamber: “whether the conduct may lead to criminal responsibility, disciplinary responsibility or other sanctions is not of material importance” as long as the defendant knew the conduct was condemned.<sup>98</sup>

The Trial Chamber adopted an expansive teleological approach in reaching this result that took into account the Security Council’s object and purpose in creating the ICTY, which it identified as the assurance of accountability for violations of international law committed on the territory of the former Yugoslavia, regardless of how that conflict was characterized.<sup>99</sup> It noted that the Council cited statements made by states during the drafting of the ICTY Statute evincing an expectation that the doctrine of superior responsibility would be enforced by the Tribunal without reference to the nature of the conflict, although this survey revealed that no state specifically argued for, or acknowledged, the applicability of the doctrine in non-international armed conflicts.<sup>100</sup> The Trial Chamber then went further to examine the object and purpose of IHL writ large:<sup>101</sup> the “regulat[ion of] the means and methods of warfare[, the protection of] persons not actively participating in armed conflict from harm” and the “respect for

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95. See *Hadžihasanović*, Case No. IT-01-47-PT, Interlocutory Appeal on Decision on Joint Challenge to Jurisdiction (Nov. 12, 2002) (consolidating the defendants’ arguments on the legality of the superior responsibility counts for interlocutory appeal).

96. *Hadžihasanović*, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, para. 62. In this regard, the Trial Chamber cited Article 22 of the ICC Statute, which states that “A person shall not be criminally responsible . . . unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.” *Id.* (emphasis added by Trial Chamber). The Trial Chamber also noted that the extradition law principle of double criminality is also satisfied where the conduct in question is criminal in both the sending and receiving state. *Id.*

97. *Id.* paras. 62, 165.

98. *Id.* para. 62.

99. *Id.* paras. 97–101, 112, 115–19, 172–73.

100. *Id.* paras. 105–09 (highlighting the responses of Italy, the United States, Canada, and the Netherlands).

101. *Id.* paras. 164–65 (“The International Tribunal is in a different position than States and can apply all principles of international criminal law to achieve the purposes of international humanitarian law.”).

human dignity.”<sup>102</sup> The Trial Chamber invoked the Preamble of the Second Additional Protocol to the Geneva Conventions,<sup>103</sup> which contains a variant of the Martens Clause,<sup>104</sup> as inspiration to consider the fundamental principles underlying IHL.<sup>105</sup> The Chamber noted that the doctrine of superior responsibility promotes two such principles: the existence of individual criminal responsibility for violations, even where treaties are silent on penal enforcement, and the principle of responsible command. The doctrine of superior responsibility promotes compliance with IHL by addressing those best able to ensure that subordinates in the field observe IHL rules through mandating training, disseminating rules and expectations of behavior, monitoring conduct, signaling the unacceptability of infringing conduct, investigating violations, and punishing violators.<sup>106</sup>

In an interlocutory appeal, defendants argued that the Trial Chamber had misstated and misapplied the principle of legality in several respects. First, defendants argued, the Chamber failed to comprehend that applying the dictates of NCSL to the context of superior responsibility required a showing that the superior would have known that his or her own conduct in failing to control his subordinates might be punishable, not just that the predicate conduct of the subordinates was criminal.<sup>107</sup> Second, defendants argued that the Trial Chamber failed to comprehend that the conduct of the superior must have been punishable under the law applicable to non-international armed conflict rather than that applicable to international armed conflict.<sup>108</sup> Third, defendants argued that the

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102. *Id.* para. 64; *see also* Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Judgment, para. 146 (Mar. 24, 2000) (noting that the object of the Geneva Conventions is to ensure the “protection of civilians to the maximum extent possible”).

103. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts pmbl., June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II]. Protocol II develops the law governing non-international armed conflicts.

104. The Martens Clause, which finds expression in a number of IHL treaties, states that “[u]ntil a more complete code of the laws of war is issued . . . populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.” Convention Respecting the Laws and Customs of War on Land, July 21, 1899, 32 Stat. 1803, T.S. No. 403. In most IHL treaties, some version of the Clause appears in the preamble. The First Additional Protocol to the Geneva Conventions elevates it to a substantive provision. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 1(2), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I] (“In the cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.”).

105. Prosecutor v. Hadžihasanović, Alagić & Kubura, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, para. 160 (Nov. 12, 2002).

106. *Id.* para. 16.

107. *Hadžihasanović* Appellate Brief, *supra* note 95, para. 20.

108. *Id.* (“Whether conduct is punishable must be seen in the context of this fundamental distinction between the two bodies of law. The fact that the conduct may be prohibited by the law applicable in international conflict does not *ipso facto* make the same conduct unlawful in internal conflict . . . . Given the historical distinction between the bodies of law applicable to each kind of conflict, it

Trial Chamber overstated the level of sanction necessary to put defendants on notice. The defendants contended that the applicable law must provide for individual criminal liability, rather than simply “other sanctions,” which could include civil negligence claims.<sup>109</sup> Finally, defendants claimed that the principle of responsible command does not necessarily give rise to the penal doctrine of superior responsibility. Rather, “the notion of responsible command referred to in [Protocol II] serves as a jurisdictional prerequisite for the applicability of the Protocol, namely that it will only apply to armed forces in internal conflict who are subject to responsible command, and not disorganised groups who are not commanded.”<sup>110</sup>

The defense also critiqued the Trial Chamber for its reliance on the object and purpose of IHL:

The lack of a clear basis in international law for the present prosecution cannot be side-stepped by drawing upon the object and purpose of IHL, in general, and the Statute of the ICTY . . . . The protection of humanity and preservation of world order as the overriding aims of IHL cannot serve as a basis to criminalise behaviour beyond the existing law. There would be no limits on the scope of IHL if the only guiding criterion was whether the prosecution was broadly in the interests of the spirit of IHL. Where the rights of the accused in a criminal trial are concerned, utmost respect for legality, for certainty and foreseeability of the law is required.<sup>111</sup>

In total, the defendants charged that “[t]he effect of the Trial Chamber’s definition would be to permit *ex post facto* extension of existing offences to cover facts that previously did not attract criminal liability whenever it is deemed in the interests of international humanitarian law (IHL) to do so. This results in arbitrariness.”<sup>112</sup>

In affirming, the Appeals Chamber ruled that the doctrine of superior responsibility is the most effective means of enforcing the foundational principle of responsible command, which applies to the laws of war governing all forms of armed conflict.<sup>113</sup> Because CIL “recognizes that some war crimes can be committed by a member of an organised military force in the course of an internal armed conflict[,] it therefore also recognizes that there can be command

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cannot be said that it is foreseeable that conduct is unlawful in internal conflict on the basis that it is prohibited in international conflict.”).

109. *Id.*

110. *Id.* para. 81.

111. *Id.* para. 25.

112. *Id.*

113. Prosecutor v. Hadžihasanović, Alagić & Kubura, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, paras. 16–17, 22 (July 16, 2003) (“[T]he concept of responsible command looks to the duties comprised in the idea of command, whereas that of command responsibility looks at liability flowing from breach of those duties. But . . . the elements of command responsibility are derived from the elements of responsible command.”).

responsibility in respect of such crimes.”<sup>114</sup> In considering the differential treatment of superior responsibility in Protocol I and II, the Appeals Chamber noted that “the non-reference in Protocol II to command responsibility in relation to internal armed conflicts did not necessarily affect the question whether command responsibility previously existed as part of customary international law relating to internal armed conflicts.”<sup>115</sup> In this analysis, the ICTY largely overlooked obvious reasons why states may have chosen not to apply the doctrine to non-international armed conflicts when they were drafting Protocol II. Besides the fact that states have historically been more reluctant to develop binding rules addressing internal conflicts, they may have considered the doctrine inapplicable in such conflicts where armed forces may be disorganized and spontaneous, and lines of authority may be self-proclaimed, de facto, and decentralized.<sup>116</sup> Indeed, the principle of unity of command—which states that there is only one commander at any given level of the military hierarchy with command authority over subordinates—may be undercut or entirely absent in the context of a non-international armed conflict.<sup>117</sup> Finally, the Appeals Chamber confirmed that the applicability of the superior responsibility doctrine in non-international armed conflicts was both foreseeable and accessible to defendants embattled in the former Yugoslavia:

As to foreseeability, the conduct in question is the concrete conduct of the accused; he must be able to appreciate that the conduct is criminal in the sense generally understood, without reference to any specific provision. As to accessibility, in the case of an international tribunal such as this, accessibility does not exclude reliance being placed on a law which is based on custom.<sup>118</sup>

The precise framing of the overarching object and purpose of ICL has contributed to the tribunals’ more relaxed approach to the dictates of the strict version of NCSL. A fundamental assumption underpinning the principle of legality is that it will deter crime by ensuring fair notice of proscribed conduct.<sup>119</sup> This assumes known, or knowable, law and rational actors who will structure their conduct to avoid anticipated censure. To date, the deterrence of

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114. *Id.* para. 18.

115. *Id.* para. 29.

116. See Prosecutor v. Delalić, Mucić, Delić & Landžo, Case No. IT-96-21-A, Judgment, para. 193 (Feb. 20, 2001) (noting the difficulty of determining command hierarchies in contemporary conflicts).

117. See *id.*

118. *Hadžihasanović*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, para. 34. Judge Hunt, in his separate opinion, likened the majority’s reasoning to the common law approach taken in the post-WWII period to adapt established principles to novel situations. *Hadžihasanović*, Case No. IT-01-47-AR72, Separate and Partially Dissenting Opinion of Judge David Hunt: Command Responsibility Appeal, para. 4 (July 16, 2003).

119. *Jacquins v. Commonwealth*, 63 Mass. (9 Cush.) 279, 281 (1852) (“The reason why [ex post facto] laws are so universally condemned, is that they overlook the great object of all criminal law, which is, to hold up the fear and certainty of punishment as a counteracting motive, to the minds of

individuals within their personal jurisdiction has not been a primary motivation of existing ICL tribunals. Many modern ICL tribunals—such as the International Criminal Tribunal for Rwanda (ICTR), the East Timor Special Panels, the Special Court for Sierra Leone (SCSL), and the Extraordinary Chambers in the Courts of Cambodia (ECCC)—were established (or have asserted jurisdiction) after the horrific events in question; the ICTY (for the latter part of its existence) and ICC are exceptions. Being *ex post*, these tribunals were unable to exert any meaningful deterrent effect on defendants within their personal jurisdiction and had to settle for contributing to the deterrence of future perpetrators. Even scholars devoted to the field doubt whether ICL can yet exert a meaningful deterrent effect<sup>120</sup> under contemporary circumstances where international justice remains sporadic and random.<sup>121</sup> Until legal censure is more certain, the narratives that explain why seemingly ordinary people do evil things in the context of war or state-sponsored repression—because they are beset by prejudices, intoxicated by power, manipulated by elites, terrified into submission by superior orders or threats of retaliation for their inaction, or caught up in a maelstrom of violence—likely still overwhelm any cost-benefit analysis in which individual perpetrators may engage.

While any cumulative deterrent effect in ICL remains feeble, other goals of criminal justice—retribution; the incapacitation of perpetrators; the compensation, satisfaction, and rehabilitation of victims; and the public condemnation of injurious behavior—become more salient.<sup>122</sup> These other goals still can be advanced where the strict dictates of NCSL are de-emphasized. Retribution and condemnation<sup>123</sup> in particular focus on the individual culpability of the defendant and his bad acts, as well as the harm suffered by victims. Although one may decry retribution as a primitive and unenlightened motivation for criminal law, its enduring potency cannot be denied. Anti-impunity (perhaps a kinder,

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persons tempted to crime to prevent them from committing it. But a punishment prescribed after an act is done, cannot, of course, present any such motive.”)

120. See David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 *FORDHAM INT’L L.J.* 473, 476, 483 (1999) (“Even if we assume that those committing atrocities engage in rational cost-benefit calculations (weighing the risk of prosecution against the personal and political gain of continued participation in ethnic cleansing and similar acts), most probably view the risk of prosecution as slight . . . . Even if successful, the contribution of such mass prosecutions to deterrence is uncertain at best.”). *But see* Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 *AM. J. INT’L L.* 7, 12 (2001) (“Where leaders engage in some form of rational cost-benefit calculation, the threat of punishment can increase the costs of a policy that is criminal under international law.”).

121. See Diane Marie Amann, *Group Mentality, Expressivism, and Genocide*, 2 *INT’L CRIM. L. REV.* 93, 116 (2002) (noting the “selectivity” of international prosecutions).

122. See Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 *HARV. HUM. RTS. J.* 39, 44–47 (2002) (discussing the multiple goals of criminal law).

123. See *Prosecutor v. Erdemović*, Case No. IT-96-22-T, Sentencing Judgment, para. 65 (Nov. 29, 1996) (“[T]he International Tribunal sees public reprobation and stigmatisation by the international community, which would thereby express its indignation over heinous crimes and denounce the perpetrators, as one of the essential functions of a prison sentence for a crime against humanity.”).

gentler term for retribution) is often cited as a key object and purpose of ICL.<sup>124</sup> In the face of centuries, if not millennia, of impunity for what we now consider human rights atrocities, retributive impulses may exceed concerns for the strict adherence to the legality principle, as courts are unwilling to let bad behavior continue to go unpunished.<sup>125</sup> Although the Nuremberg and Tokyo proceedings have been critiqued as one-sided victors' justice, in general, there is little tradition in ICL of over-reaching or arbitrary prosecutions. Instead, the problem historically has been the chronic under-enforcement of ICL. As a result, there is still little concern for "over-deterrence." Instead, there is a willingness to overlook legalisms that would lead to impunity in an effort to jumpstart a system of greater accountability.

The ICTY's teleological approach is doctrinally legitimate with respect to treaty interpretation, as the Vienna Convention on the Law of Treaties<sup>126</sup> provides that a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."<sup>127</sup> This teleological approach is also well established within the jurisprudence of the various human rights institutions, which quite self-consciously interpret their constitutive treaties as "living" instruments that must adapt to modern needs in order to advance fundamental human rights and sustain a protective public order applicable to all those within

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124. ICC Statute, *supra* note 72, at p.mbl. (affirming that "the most serious crimes of concern to the international community as a whole must not go unpunished").

125. This emphasis on accountability reflects the polar shift that often occurs among human rights advocates who espouse the rights of defendants in domestic criminal proceedings, but cheer for the prosecution in international ones. In both cases, advocates have aligned themselves against the source of superior power—the state in the domestic context, and the impunity-enjoying perpetrator in the international context.

126. This analysis assumes the applicability of the Vienna Convention approach to the statutes of the ad hoc tribunals, not all of which are technically treaties. Notwithstanding the different instruments creating these tribunals, the provisions governing the subject matter jurisdiction of all of the tribunals are drawn directly from ICL treaties. This provenance may indirectly justify a treaty-based approach to interpretation. In addition, the Vienna Convention regime mirrors the techniques governing the interpretation of domestic legal instruments, such as contracts, which arguably renders the Vienna Convention's interpretive rules applicable as "general principles of law." William A. Schabas, *Interpreting the Statutes of the Ad Hoc Tribunals*, in *MAN'S INHUMANITY TO MAN* 847, 852 (Lal Chand Vohrah et al. eds., 2003) (arguing that defendants are entitled to strict construction). In any case, the ad hoc tribunals regularly cite the Vienna Convention for guidance in interpreting their statutes. See, e.g., *Kanyabashi v. Prosecutor*, Case No. ICTR-96-15-A, Decision on the Defence Motion for Interlocutory Appeal on the Jurisdiction of Trial Chamber I, Joint and Separate Opinion of Judge McDonald and Judge Vohrah, para. 15 (June 3, 1999); *Prosecutor v. Tadić*, Case No. IT-94-1, Decision on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses, para. 18 (Aug. 10, 1995) ("Although the Statute of the International Tribunal is a *sui generis* legal instrument and not a treaty, in interpreting its provisions and the drafters' conception of the applicability of the jurisprudence of other courts, the rules of treaty interpretation contained in the Vienna Convention on the Law of Treaties appear relevant.").

127. Vienna Convention on the Law of Treaties art. 31(1), Jan. 27, 1989, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]. The Vienna Convention, while not universally subscribed to, is generally considered to have codified the customary international law of treaties and is treated as definitive by international and domestic tribunals. See *East Timor (Port. v. Austl.)*, 1995 I.C.J. 90, ¶ 214 (June 30).

signatory states.<sup>128</sup> By joining such a multilateral human rights regime, states parties submit themselves to a particular legal order and assume the obligations set forth in these treaties for the benefit of individuals within their *espace juridique* and not for the benefit of themselves or other contracting states.<sup>129</sup>

At least in the realm of IHL, a teleological approach is also permitted, if not mandated, by the Martens Clause.<sup>130</sup> The Clause suggests a reservoir of uncodified law applicable in armed conflict in the absence of complete codification.<sup>131</sup> It allows, indeed mandates, courts to go beyond the written text<sup>132</sup> and invoke not only customary international law (“the usages established between civilized nations”) but also the moral bases of humanitarian obligations—that is, “pre-judicial principles [and] the sentiments of humanity.”<sup>133</sup> As such, the Martens Clause also provides a principle of interpretation. If “faced with two interpreta-

128. See *The Effect of Reservations on the Entry into Force of the American Convention on Human Rights* (arts. 74 and 75), Advisory Opinion OC-2/82, Sept. 24, 1982, Inter-Am. C.H.R. (Ser. A) No. 2 para. 27 (1982), reprinted in 67 I.L.R. 568 (1984) (“[T]he object and purpose of the Convention is not the exchange of reciprocal rights between a limited number of States, but the protection of the human rights of all individual human beings within the Americas, irrespective of their nationality.”); see also *Ireland v. United Kingdom*, App. No. 5310/71, 2 Eur. H.R. Rep. 25 (1980), reprinted in 58 I.L.R. 188, 291 (“Unlike international treaties of the classic kind, the [European Convention for the Protection of Human Rights and Fundamental Freedoms] creates, over and above a network of mutual, bilateral undertakings, objective obligations which, in the words of the Preamble, benefit from a ‘collective enforcement.’”).

129. See Alexander Orakhelashvili, *Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights*, 14 EUR. J. INT’L L. 529, 532 (2003).

130. Justice Jackson referenced the Martens Clause in connection with the proposed crimes against humanity charge in his letter to President Truman on the status of what would become the Nuremberg trials. See Jackson Report, *supra* note 35. Tribunals in the post-WWII period also applied the Martens Clause to confirm the illegality of certain conduct absent positive law criminalization. In the *Justice Case*, for example, the Clause was invoked for the proposition that the deportation of the inhabitants of occupied territory constituted a war crime under CIL. Transcript of Prosecution’s Opening Statement, *United States v. Alstotter* (Justice Case), reprinted in 3 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG TRIBUNAL UNDER CONTROL COUNCIL LAW NO. 10, at 31, 66 (1951).

131. The full meaning and import of the Martens Clause remains in dispute. Some states argue that it simply reminds states parties that they are bound by CIL alongside their treaty obligations. Others consider it defunct given the state of codification of the law of armed conflict. Still others argue that the Clause goes further as a source of norms regulating state conduct in the absence of a treaty of CIL rule. These views came to a head in the ICJ’s Nuclear Weapons opinion. See *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 405–09 (July 8) (Shahabuddeen, J., dissenting). See generally Theodor Meron, *The Martens Clause, Principles of Humanity, and Dictates of Public Conscience*, 94 AM. J. INT’L L. 78 (2000).

132. Jared Wessel, *Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication*, 44 COLUM. J. TRANSNAT’L L. 377, 390 (2006) (“[T]he Martens Clause . . . codifies a legal view that necessitates a high level of deference to judges to engage in progressive development as they define reasonable standards in the diverse international community.”).

133. *The Attitude of States Toward the Development of Humanitarian Law*, in THE NEW HUMANITARIAN LAW OF ARMED CONFLICT: PROCEEDINGS OF THE 1976 AND 1977 CONFERENCES 221, 257 (Antonio Cassese ed., 1980) [hereinafter PROCEEDINGS] (emphasis omitted). This “language was revolutionary in its recognition that the codified laws of war were incomplete and could supplement and interact with customary laws of war.” Ariane L. DeSaussure, *The Role of the Law of Armed Conflict During the Persian Gulf War: An Overview*, 37 A.F. L. REV. 41, 45 (1994).

tions—one in keeping with the principles of humanity and moral standards, and one which is against these principles—then we should of course give priority to the former interpretation.”<sup>134</sup>

Arguably, any right to strict construction implied by the NCSL principle might override the broad interpretive approach sanctioned by the Vienna Conventions and subsequent ICL practice as a *lex specialis*. The Vienna Convention provides a generic, “off the rack” approach to treaty interpretation that does not contain special consideration for penal treaties.<sup>135</sup> Even the Martens Clause was drafted at a time when individual criminal responsibility—with its attendant concerns with the principle of legality—was not yet established as an expected response to treaty breaches. Referring to extratextual principles is more palatable with respect to holding states responsible for breaches than it is for criminally prosecuting individuals where penal sanctions are at issue. Nonetheless, these cases demonstrate that the Vienna Convention regime, coupled with the Martens Clause, has provided a methodology for tribunals to invoke the object and purpose of ICL to resolve ambiguities in, or to extend, positive law.<sup>136</sup>

### C. ILLEGALITY = CRIMINALITY

NCSL defenses have been frequently asserted in situations in which there is a norm governing state behavior that does not, on its face, govern individual behavior or render such behavior strictly criminal. Many historical ICL and IHL treaties are silent as to individual criminal responsibility precisely because they were drafted at a time when the international community only conceived of collective (state) responsibility for breaches. This meant that injured states could resort to reprisals<sup>137</sup> or seek reparations from responsible states<sup>138</sup> in the event of a breach. Nonetheless, starting with the Nuremberg Tribunal’s reason-

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134. PROCEEDINGS, *supra* note 133, at 257. In this way, the Martens Clause:

is much more than a pious declaration. It is a general clause, making the usages established among civilized nations, the laws of humanity, and the dictates of public conscience into the legal yardstick to be applied if and when the specific provisions of the [Hague] Convention and the Regulations annexed to it do not cover specific cases occurring in warfare, or concomitant to warfare.

*United States v. Krupp*, reprinted in 9 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL NO. 10, at 1327, 1341 (1950).

135. See Schabas, *supra* note 126, at 852–55 (arguing that defendants are entitled to strict construction).

136. See Prosecutor v. Erdemović, Case No. IT-96-22-A, Judgment, para. 19 (Oct. 7, 1997) (holding that notwithstanding the lack of a customary international law rule or a general principle of law, duress does not constitute a complete defense to the killing of innocents by a soldier).

137. See Prosecutor v. Kupreškić, Case No. IT-96-16-T, Judgment, para. 530 (Jan. 14, 2000) (discussing historical practice of reprisals).

138. See, e.g., Convention Respecting the Laws and Customs of War on Land art. 3, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 2 [hereinafter Fourth Hague Convention] (“A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.”). Nicaragua



ing with respect to the crimes against the peace charge, modern tribunals quite easily equate the historical international condemnation of a practice with its criminalization.<sup>139</sup> As a result, treaties that were originally devoted to the regulation of state conduct have been effectively recast as treaties penalizing individual conduct.

This equation of illegality with criminality is especially apparent in the war crimes jurisprudence, given that many IHL treaties do not contain penal provisions. Indeed, by design, none of the treaties or treaty provisions addressing civil wars and other non-international armed conflicts sets forth a penal regime or a schedule of war crimes along the lines of the grave breaches provisions in the 1949 Geneva Conventions, which govern international armed conflicts. And yet, the modern tribunals have made quick work of dismantling distinctions between the norms applicable in international and non-international armed conflicts that were so carefully crafted by states during the IHL treaty-drafting process. As a result, much of the conduct prohibited or criminalized by treaties governing international armed conflicts now constitutes actionable war crimes even if committed in non-international armed conflicts.

The inaugural example of this reasoning is found in the proceedings involving the first defendant to be prosecuted before a modern international tribunal. In the preliminary proceedings contesting the legality of the charges against him, Dusko Tadić argued that the conflict in the former Yugoslavia was an internal—rather than an international—war. He contended that neither the 1949 Geneva Conventions nor the Fourth Hague Convention regulated non-international armed conflicts, with the exception of Common Article 3 to the Geneva Conventions, which does not mention criminal responsibility. For support, Tadić invoked the U.N. Secretary-General's admonition that the Tribunal could apply only those rules of humanitarian law that were "beyond doubt" part of customary law.<sup>140</sup> His argument was aimed at the dismissal of the charges brought under Article 2 of the ICTY Statute, which reproduces the list of grave breaches recognized by the Geneva Conventions, and Article 3, which reproduces text from the Fourth Hague Convention.

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sought such reparations before the ICJ in connection with the United States' support of the Contras. *See generally* Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

139. Prosecutor v. Delalić, Mucić, Delić & Landžo, Case No. IT-96-21-A, Judgment, para. 162 (Feb. 20, 2001) ("a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches"). *But see* Prosecutor v. Vasiljević, Case No. IT-98-32-T, Judgment, paras. 196, 199 (Nov. 29, 2002) ("[U]nder no circumstances may the court create new criminal offences after the act charged against an accused . . . by criminalising an act which had not until the present time been regarded as criminal . . . For criminal liability to attach, it is not sufficient . . . merely to establish that the act in question was *illegal* under international law, in the sense of being liable to engage the responsibility of a state which breaches that prohibition, nor is it enough to establish that the act in question was a crime under the domestic law of the person who committed the act." (emphasis in original)).

140. The Secretary-General, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808, para. 34, *delivered to the Security Council*, U.N. Doc. S/25704 (May 3, 1993) [hereinafter ICTY Secretary-General's Report].

The Appeals Chamber ruled that Article 3 of the ICTY Statute (allowing for jurisdiction over the “laws or customs of war”) applied to both international and non-international armed conflicts.<sup>141</sup> In so ruling, the Appeals Chamber looked to the Security Council’s object and purpose in promulgating the ICTY Statute, which was to bring “to justice persons responsible for serious violations of international humanitarian law in the former Yugoslavia, thereby deterring future violations and contributing to the re-establishment of peace and security in the region.”<sup>142</sup> The Appeals Chamber noted that in Security Council deliberations, delegates never characterized the conflict in the former Yugoslavia as either international or non-international; rather, they focused on condemning particular conduct of the belligerents.<sup>143</sup> The Appeals Chamber concluded that to rule that both war crimes provisions (Articles 2 and 3) applied only in a time of international armed conflict—thus authorizing “the International Tribunal to prosecute and punish certain conduct in an international armed conflict, while turning a blind eye to the very same conduct in an internal armed conflict”<sup>144</sup>—would discount the Security Council’s apparent indifference to the nature of the conflict and defeat the goal of punishing condemned acts committed therein.<sup>145</sup>

The Appeals Chamber ruled that, while there had been no “full and mechanical transplant”<sup>146</sup> of rules governing international armed conflict to the body of law governing non-international armed conflict, Article 3 contemplated a corpus of law applicable to non-international armed conflict that was geared toward protecting civilians and those *hors de combat* (“out of the fight”) and regulating the means and methods of warfare. It then interpreted Article 3 to cover serious infringements of IHL beyond those outlined in Article 2 of the Statute, such as: (1) breaches of the 1907 Hague Conventions; (2) breaches of other provisions of the 1949 Geneva Conventions not treated therein as grave breaches, including violations of Common Article 3; (3) breaches of uncodified customary humanitarian law; and (4) breaches of humanitarian law treaties in force between the warring parties.<sup>147</sup>

To guide future inquiries, the Appeals Chamber identified four factors that must be satisfied in order for an offense to be cognizable under the catch-all

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141. Prosecutor v. Tadić, Case No. IT-94-1-AR92, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 77 (Oct. 2, 1995).

142. *Id.* para. 72.

143. *Id.* para. 74.

144. *Id.* para. 78.

145. The Appeals Chamber reversed the Trial Chamber on the applicability of the Geneva Conventions’ grave breaches provisions to non-international armed conflicts. In a separate opinion, Judge Abi-Saab argued that the Tribunal should have affirmed the Trial Chamber’s Article 2 ruling in order to rationalize the laws of war and rectify an “artificial” division of labor between the ICTY statutory provisions that does not reflect the modern trend toward considering war crimes committed in internal armed conflicts to be “grave breaches.” *Tadić*, Case No. IT-94-1-AR72, Separate Opinion of Judge Abi-Saab on the Defence Motion for Interlocutory Appeal on Jurisdiction, pt. IV (Oct. 2, 1995).

146. *Tadić*, Case No. IT-94-1-AR92, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 126.

147. *Id.* para. 89.

Article 3 in the context of a non-international armed conflict: (1) the act must infringe a rule of IHL; (2) the rule must be customary in nature or, if contained in a treaty, the treaty must be applicable; (3) the violation must be “serious,” which is to say the rule must protect “important values” and “the breach must involve grave consequences for the victim”; and (4) the violation must entail, under customary or conventional law, individual criminal responsibility.<sup>148</sup> With respect to the applicability of individual criminal responsibility, point (4) above, the Appeals Chamber noted that the Nuremberg Tribunal had concluded that individual criminal responsibility could exist in the absence of an explicit treaty provision to that effect.<sup>149</sup> The Appeals Chamber surveyed state practice—in the form of national prosecutions, military manuals, and legislation criminalizing IHL violations in internal conflict—to conclude that while Common Article 3 and Protocol II are silent as to criminal enforcement, certain breaches of the law of armed conflict committed in non-international armed conflicts nonetheless constitute international crimes as a matter of customary international law.

Further to this example, in *Prosecutor v. Karemera*, defendants argued that the ICTR lacked jurisdiction to prosecute persons for committing a crime through the extended form of joint criminal enterprise liability during an internal, as opposed to an international, armed conflict.<sup>150</sup> Citing an extension of the four-part *Tadić* test to forms of responsibility, defendants argued that the Tribunal could only prosecute individuals for a form of liability where (1) the form was provided for in the Statute, explicitly or implicitly; (2) the form existed under customary international law at the relevant time; (3) the law providing for that form of liability was sufficiently accessible at the relevant time; and (4) the defendant would have been able to foresee that he could be held criminally liable for his actions if apprehended.<sup>151</sup> Defendants conceded that prior precedent had established the existence of joint criminal enterprise liability (JCE) in international armed conflicts,<sup>152</sup> but noted that all the sources

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148. *Id.* para. 94.

149. In *Akayesu*, the ICTR followed the ICTY's lead and determined that parts of Additional Protocol II (particularly Article 4(2)'s fundamental guarantees) entail individual criminal responsibility as a matter of CIL. *Prosecutor v. Akayesu*, Case No. ICTR-94-4-T, Judgment, paras. 615–17 (Dec. 6, 1999). This argument was bolstered by the observation that all the acts in question were crimes under Rwandan law and that Rwanda had ratified the treaties. *Id.* para. 617.

150. *Prosecutor v. Karemera, Ngirumpatse, Nzirorera & Rwamakuba*, Case No. ICTR-98-44-T, Decision on Defense's Preliminary Motions Challenging Jurisdiction: Joint Criminal Enterprise (May 11, 2004). In *Hadžihasanović*, the defendants made similar arguments with respect to the doctrine of superior responsibility. The ICTY Appeals Chamber rejected the challenge. *See Prosecutor v. Hadžihasanović*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility (July 16, 2003).

151. *Karemera*, Case No. ICTR-98-44-T, Decision on Defense's Preliminary Motions Challenging Jurisdiction: Joint Criminal Enterprise, para. 2; *see also Prosecutor v. Milutinović, Šainović & Ojdanić*, Case No. IT-05-87-PT, Decision on Ojdanić's Motion Challenging Jurisdiction: Indirect Co-Perpetration, para. 15 (Mar. 22, 2006); *Prosecutor v. Blagojević & Jokić*, Case No. IT-02-60-T, Judgment, para. 695 n.2145 (Jan. 17, 2005).

152. *See Prosecutor v. Tadić*, Case No. IT-94-1-AR92, Decision on the Defence Motion for Interlocutory Jurisdiction (Oct. 2, 1995). The ICTY's invocation of JCE liability in *Tadić* was an

relied upon—primarily WWII caselaw—emerged in the wake of an international armed conflict. Defendants also noted that neither Common Article 3 nor Protocol II includes provisions relating to JCE liability.<sup>153</sup>

The Trial Chamber ruled that JCE liability is well recognized as one of the forms of criminal responsibility prosecutable under Article 6(1) of the ICTR Statute and that this provision is equally applicable to all crimes within the jurisdiction of the Tribunal, whether committed in the course of international or internal armed conflicts.<sup>154</sup> Noting that IHL imposes individual criminal responsibility for violations committed in the course of internal armed conflicts, the Trial Chamber determined that there was no principled reason to exclude this form of liability in such contexts.<sup>155</sup> Indeed, the Trial Chamber noted that “[t]he gravity of the participation in a joint criminal enterprise cannot depend on the nature of the conflict,” and that this form of liability ensured “an efficient prosecution.”<sup>156</sup> In other words, “[t]he nature of the conflict is not relevant to the responsibility of the perpetrator.”<sup>157</sup> The Trial Chamber did note, however, that conflict classification remained relevant to determine chargeable crimes.<sup>158</sup>

Responding to defendants’ arguments that a prosecution under a JCE theory of liability for crimes committed in a non-international armed conflict would infringe the principle of NCSL, the Trial Chamber noted that the accused had sufficient notice that they could be held criminally liable for taking part in the commission of crimes within the jurisdiction of the ICTR Statute as part of a JCE. The Trial Chamber was satisfied that the precedents employed to establish the existence of JCE liability in international armed conflicts provided the necessary notice to defendants embattled in internal armed conflicts. It reasoned:

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innovation, as the ICTY Statute does not specifically list it as a punishable form of liability and excludes liability for conspiracy to commit the enumerated crimes. *See* Statute of the International Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827, art. 7(1), Annex, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute]. In finding JCE liability to be a form of “commission,” the ICTY relied upon the object and purpose of the Statute and the nature of international crimes, which are often “manifestations of collective criminality.” *Tadić*, Case No. IT-94-1-A, Judgment, para. 191 (July 15, 1999).

153. *Karemera*, Case No. ICTR-98-44-T, Decision on Defense’s Preliminary Motions Challenging Jurisdiction: Joint Criminal Enterprise, para. 16.

154. *Id.* para. 33. In this regard, the Trial Chamber also found the doctrine of JCE applicable to a prosecution for genocide, even though the Genocide Convention (at Article III) and the ICTR Statute (at Article 2(3)) only list five forms of punishable genocidal acts. *Id.* paras. 46–48. The Chamber determined that Article 6(1) applied to all crimes within the jurisdiction of the Tribunal and that the specific provisions on genocide provide additional grounds on which individuals may be prosecuted for genocide that are not applicable to other crimes (for example, conspiracy and incitement). *Id.* para. 47; *see also* Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment (Apr. 19, 2004).

155. *Karemera*, Case No. ICTR-98-44-T, Decision on Defense’s Preliminary Motions Challenging Jurisdiction: Joint Criminal Enterprise, para. 36 (“The Chamber does not perceive any difference between the structure of international crimes committed in the course of international armed conflicts and international crimes committed in the course of internal armed conflicts.”).

156. *Id.*

157. *Id.*

158. *Id.*

[t]here exist numerous judicial decisions, international instruments and domestic legislations which convey that the commission of crimes under the Statute through participation in a joint criminal enterprise would entail criminal responsibility. Even if the aforementioned judicial decisions refer to conflicts of an international character, any potential perpetrator was able to understand that the criminalization of acts of such gravity did not depend on the international or internal nature of the armed conflict.<sup>159</sup>

In this body of jurisprudence, the ICTY has essentially merged the law relevant to international and non-international armed conflicts and rendered conflict classification a more nuanced and ultimately less essential exercise.<sup>160</sup> Three strands of arguments underlie the tribunals' justification for these developments. One conflates illegality and criminality and postulates that a treaty's silence as to the penal consequences of a breach does not, *ipso facto*, mean treaty breaches are not crimes.<sup>161</sup> This position is articulated even where sister treaties expressly provide for criminal penalties, which might imply the opposite result. When forced to explain these treaty silences, tribunals reason that states intended to leave details of enforcement to parties and the international community rather than mandate any particular enforcement regime.<sup>162</sup> This approach disregards, however, the obvious counter-explanation that drafting states made a deliberate choice *not* to criminalize such behavior and instead adopt only state responsibility.

A second justification, perhaps more germane to the Nuremberg era, concedes the lack of express criminalization of certain acts, but argues that retroactive justice is preferable to the alternative enforcement options, which include impunity, extrajudicial forms of collective responsibility (for example, sanctions, reprisals, reparations, or territorial concessions), and summary execution. Had the WWII Allies not initiated their experiment with international justice, most of the defendants may have been summarily executed and the German

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159. *Id.* para. 44.

160. As a result of these rulings, the Office of the Prosecutor has brought most war crimes charges before the ICTY under the catch-all Article 3 rather than Article 2, which incorporates the grave breaches regime of the Geneva Conventions. A charge under Article 3 obviates the need to prove the existence of an international armed conflict in the relevant region of the former Yugoslavia, a highly complex task where international involvement by Yugoslavia (Serbia and Montenegro) and the Republic of Croatia in the newly independent Bosnia-Herzegovina was clandestine and subtle. Article 3 now essentially does all the work of Article 2 and more.

161. *See* Kanyabashi v. Prosecutor, Case No. ICTR-96-15-A, Decision on the Defence Motion for Interlocutory Appeal on the Jurisdiction of Trial Chamber I, Joint and Separate Opinion of Judge McDonald and Judge Vohrah, para. 16 (June 3, 1999).

162. *See* Prosecutor v. Delalić, Mucić, Delić & Landžo, Case No. IT-96-21-T, Judgment, para. 176 (Nov. 16, 1998) ("While 'grave breaches' *must* be prosecuted and punished by all States, 'other' breaches of the Geneva Conventions *may* be so."). This result harkens back to the ancient *Lotus* principle whereby that which is not affirmatively prohibited is permitted. *See generally* S.S. *Lotus* (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9 (Sept. 7).

people condemned and punished *en masse*.<sup>163</sup> The assignment of individual criminal responsibility before a court of law, even retroactively, is a more progressive and fair form of norm enforcement.<sup>164</sup> Courts adjudicating ICL thus reason that NCSL dilemmas must be evaluated against the available alternatives.

Third, the tribunals are quite overt about updating and modernizing old law in light of modern realities. The Appeals Chamber in *Tadić*, for example, found that national policies and the inroads made by the international human rights regime into areas traditionally shrouded by state sovereignty have “blur[red] the traditional dichotomy between international wars and civil strife.”<sup>165</sup> In addition, as most modern global conflicts are internal or internationalized in character, the distinction between the two bodies of law has seemed increasingly arbitrary and outmoded to modern tribunals.<sup>166</sup> ICL tribunals thus evince a “normative bias” visible in other forms of international legal discourse favoring “international legal completeness, predictability, coherence, and dynamism”<sup>167</sup> at the expense of strict textualism or deference to the prior intentions of states. This quest for coherence often leads to decisions that render ICL a more comprehensive and holistic body of law. In this way, tribunals utilize the existence of a norm in one context (international armed conflicts) to provide both notice and a rule of decision in another context (non-international armed conflicts). This is the case regardless of whether states may have had reasoned motives for creating distinct legal regimes between international and non-international armed conflicts. The near complete merger of the criminal law relevant to all classes of armed conflict now finds positive expression in Article 8 of the ICC Statute, indicating that this synthetic approach has been in large measure, although not entirely, ratified by the community of states.

#### D. ACTS *MALUM IN SE*

In addition to making the leap between illegality and criminality, the tribunals have also invoked the link between immorality and criminality and rejected the

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163. See Robert Gellately, *Introduction* to LEON GOLDENSOHN, *THE NUREMBERG INTERVIEWS*, at vii, vii–xiv (Robert Gellately ed., 2004) (recounting proposals by the United States, the United Kingdom and the Soviet Union to execute the Nazi defendants).

164. See Kelsen, *supra* note 62, at 165 (noting that collective sanctions are a feature of “primitive law”).

165. *Prosecutor v. Tadić*, Case No. IT-94-1-AR92, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 83 (Oct. 2, 1995).

166. *Id.* para. 97 (“Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals . . . when two sovereign States are engaged in war, and yet refrain from the same bans or providing the same protection when armed violence has erupted ‘only’ within the territory of a sovereign State?”); see also *Delalić*, Case No. IT-96-21-T, Judgment, para. 172 (“In light of the fact that the majority of the conflicts in the contemporary world are internal, to maintain a distinction between the two legal regimes and their criminal consequences in respect of similarly egregious acts because of the difference in nature of the conflicts would ignore the very purpose of the Geneva Conventions, which is to protect the dignity of the human person.”).

167. Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT’L L. 247, 258 (2004).

defense of NCSL in situations in which the conduct in question is deemed *malum in se*. Tribunals have reasoned that, when conduct shocks the conscience of the international community, no formal notice of its penal consequences is necessary to prosecute offenders. In other words, where atrocities are at issue, no innocents are ensnared when prosecutions proceed in the absence of prior positive law. As Justice Jackson argued at Nuremberg, “[t]he refuge of the defendants can be only their hope that International Law will lag so far behind the moral sense of mankind that conduct which is crime in the moral sense must be regarded as innocent in law.”<sup>168</sup> This rhetoric retains contemporary currency. As one ICTY Trial Chamber argued, “[t]he purpose of this principle [NCSL] is to prevent the prosecution and punishment of an individual for acts which he reasonably believed to be lawful at the time of their commission. It strains credibility to contend that the accused would not recognize the criminal nature of the acts alleged in the Indictment.”<sup>169</sup> The ICTY Appeals Chamber noted that,

Although the immorality or appalling character of an act is not a sufficient factor to warrant its criminalization under customary international law, it may in fact play a role in that respect, insofar as it may refute any claim by the Defence that it did not know of the criminal nature of the acts.<sup>170</sup>

By this reasoning, the NCSL principle protects only “legitimate confidence.”<sup>171</sup>

This presumption of fair notice is applied even where novel forms of liability are contested. The notion of *malum in se* is perhaps attenuated in circumstances in which a defendant may know that certain conduct being committed by the primary perpetrator is wrong (and thus inevitably criminal), but arguably does not consider his particular contribution to such conduct to be equally as iniquitous (and thus as likely to render him vulnerable to penal sanctions through principles of secondary or vicarious liability). In *Tadić*, for example, the defendant was convicted on appeal of participating in a joint criminal enterprise (JCE) to commit international crimes, even though the ICTY Statute does not

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168. ROBERT H. JACKSON, THE NÜRNBERG CASE 94 (1947).

169. *Delalić*, Case No. IT-96-21-T, Judgment, para. 313 (allowing the prosecution of violations in the face of defense arguments that such offenses do not give rise to individual criminal responsibility). The ICTY Appeals Chamber ruled that, “[i]t is universally acknowledged that the acts enumerated in common Article 3 are wrongful and shock the conscience of civilized people” and thus were “criminal according to the general principles of law recognized by the community of nations” within the meaning of the International Covenant on Civil and Political Rights (ICCPR). *Delalić*, Case No. IT-96-21-A, Judgment, para. 173 (Feb. 20, 2001); see also *Prosecutor v. Milutinović, Šainović & Ojdanić*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction: Joint Criminal Enterprise, para. 42 (May 21, 2003) (noting that “due to the lack of any written norms or standards, war crimes courts have often relied upon the atrocious nature of the crimes charged to conclude that the perpetrator of such an act must have known that he was committing a crime”).

170. *Milutinović*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction: Joint Criminal Enterprise, para. 42.

171. Tomuschat, *supra* note 14, at 835.

include JCE liability as a form of responsibility, and the indictment did not allege such a theory.<sup>172</sup> In noting that international crimes are often the result of “manifestations of collective criminality,” the Appeals Chamber concluded that “the moral gravity of such participation is often no less—or indeed no different—from that of those actually carrying out the acts in question.”<sup>173</sup>

These statements, which elide the morally wrong and the legally criminal, invoke the natural law tradition found in all international law. This tradition is particularly cogent in ICL, which has as its origins the belief that the law must conform to a universal transnational morality and conception of justice.<sup>174</sup> Many ICL cases proceed as though a transcendent law exists that has yet to be reduced to positive law but that can be discovered and invoked in criminal proceedings. Because such moral rules are considered universally and intrinsically knowable, the prior articulation of the consequences of engaging in contrary conduct is deemed unnecessary. Courts adjudicating serious violations of ICL thus envision themselves as operating in a realm of greater moral certainty that, it is argued, justifies a less strict application of NCSL.<sup>175</sup>

It is perhaps not surprising that jurists would “turn to ethics”<sup>176</sup> in the face of atrocities, when a desire to ensure the confluence of law and morality is likely to be at its strongest.<sup>177</sup> Historically, international law development has been at its most active in reaction to a breakdown in international order. As Lord Wright noted when considering the immediate post-WWII period, “[t]he period of [international law] growth generally coincides with the period of world upheavals. The pressure of necessity stimulates the impact of natural law and of moral ideas and converts them into rules of law deliberately and overtly recognized by the consensus of civilized mankind.”<sup>178</sup> In this way, tribunals appear compelled to respond to “innovations in cruelty” where positive law is silent.<sup>179</sup> Indeed, it is precisely because classical international law was premised on state consent to self-regulation that it is so susceptible to equal and opposite natural law impulses.

172. Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, paras. 172–75 (July 15, 1999).

173. *Id.* para. 191.

174. Stefan Glaser, *La Méthode d'Interpretation en Droit International Pénal*, 9 RIVISTA ITALIANA DI DIRITTO E PROCEDURA PENALE 757, 762–64 (1966).

175. See, e.g., Prosecutor v. Erdemović, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, para. 75 (Oct. 7, 1997) (“The purview of the International Tribunal relates to war crimes and crimes against humanity committed in armed conflicts of extreme violence with egregious dimensions. We are not concerned with the actions of domestic terrorists, gang-leaders and kidnapers. We are concerned that, in relation to the most heinous crimes known to humankind, the principles of law to which we give credence have the appropriate normative effect upon soldiers bearing weapons of destruction and upon the commanders who control them in armed conflict situations.”).

176. See Martti Koskeniemi, “*The Lady Doth Protest Too Much*”: *Kosovo, and the Turn to Ethics in International Law*, 65 MOD. L. REV. 159 (2002).

177. Wright, *supra* note 13, at 40 (arguing that all of law must reflect “the instincts of justice and humanity which are the common heritage of” humankind).

178. *Id.* at 51.

179. GARY J. BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 25 (2001).



This reasoning is most palatable when applied to mass atrocities and heinous conduct that, for whatever reason, falls outside of positive law. Tribunals limited to adjudicating only the most “serious” of ICL violations<sup>180</sup> can perhaps more easily execute this leap from *contra bonos mores* to prosecutable crime. This move is increasingly difficult with respect to acts that are more morally neutral or contested. In *Prosecutor v. Norman*, for example, the defendant was prosecuted for the enlistment and use of child soldiers in combat.<sup>181</sup> Putting forcible conscription to the side, even the enlistment and use of child soldiers, while anathema to Western sensibilities that exalt the inviolability of childhood, is not necessarily universally condemned as intrinsically wrong or immoral. Indeed, the number of child soldiers in Africa could suggest the existence of a regional custom with respect to the practice.<sup>182</sup> The unfortunate ubiquity of the practice of using child soldiers is reflected in the fact that some older human rights treaties plead for the progressive elimination of the practice rather than unequivocally compel desistance.<sup>183</sup>

#### E. NOTICE ANYWHERE IS NOTICE EVERYWHERE

In considering NCSL defenses, jurists often make use of the multiplicity of sources of international law set forth in Article 38 of the Statute of the International Court of Justice (ICJ)—multilateral treaties, international custom, “the general principles of law recognized by civilized nations,” and (as subsidiary means) judicial decisions and the writings of publicists—to either identify an applicable rule of decision or otherwise conclude that the defendant was effectively and sufficiently “on notice” that his conduct was unlawful.<sup>184</sup> These disparate sources of law may articulate different standards with respect to the

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180. The statutes of the ad hoc tribunals contain language limiting their jurisdiction to “serious violations of international humanitarian law.” See ICTY Statute, *supra* note 152, at art. 1; Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, art. 1, Annex, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute]. The ICC Statute ups the ante to “the most serious crimes of international concern.” ICC Statute, *supra* note 72, at art. 1. The Extraordinary Chambers in the Courts of Cambodia are to prosecute “senior leaders” of the Khmer Rouge and those “most responsible” for international crimes. Law on the Establishment of the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed During the Period of Democratic Kampuchea art. 2, Oct. 27, 2004, NS/RKM/1004/006 [hereinafter ECCC Statute]. Likewise, the Special Court for Sierra Leone is prosecuting “persons who bear the greatest responsibility for serious violations” of IHL. Statute of the Special Court for Sierra Leone art. 1(1), Jan. 16, 2002, 2178 U.N.T.S. 138, available at <http://www.sc-sl.org/scsl-statute.html> [hereinafter SCSL Statute].

181. *Prosecutor v. Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction, paras. 2–7 (May 31, 2004).

182. See *Asylum Case (Colom. v. Peru)*, 1950 I.C.J. Rep. 266, 276–77 (recognizing the possibility of regional custom).

183. See, e.g., Convention on the Rights of the Child art. 38, Nov. 20, 1989, 1577 U.N.T.S. 3. A 2000 Optional Protocol raises the age of conscription to eighteen and obliges states parties to take “all feasible measures” to refrain from using children in direct hostilities. See Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 54/263, art. 1, U.N. Doc. A/RES/54/263, entered into force Feb. 12, 2002.

184. Statute of the International Court of Justice art. 38(1)(a)–(d), June 26, 1945, 59 Stat. 1031, pt. 2, 1055, 1060 [hereinafter ICJ Statute].

same subject matter, and international law has only rudimentary rules for reconciling competing sources of authority.<sup>185</sup> According to the ICL “rule of recognition”<sup>186</sup> adopted by the ICL tribunals, so long as some source of law provides either a rule of decision or sufficient notice of prohibited conduct (and these two inquiries are often intertwined), the principle of NCSL is satisfied.

### 1. Treaties

International tribunals will look to the relevant state’s treaty obligations to determine whether defendants were bound by a particular rule at the time of the acts charged or otherwise on notice of prohibited conduct for the purposes of resolving NCSL defenses. In *Galić*, for example, the defendant was charged with inflicting terror on the civilian population under Article 3 of the ICTY Statute<sup>187</sup> in violation of Article 51(2) of Additional Protocol I<sup>188</sup> and Article 13(2) of Additional Protocol II.<sup>189</sup> Neither of these provisions contemplates individual criminal liability or defines “inflicting terror” as a criminal offense. *Sua sponte*, the Trial Chamber invoked the four-part test developed in *Tadić* and determined that the offense was within the subject matter jurisdiction of the Tribunal.<sup>190</sup> In applying the second *Tadić* condition (that the rule be applicable to the events in question), the Trial Chamber determined that the defendant was bound by the rule as a function of the former Yugoslavia’s treaty obligations.<sup>191</sup> In particular, in a May 22, 1992 agreement, the parties specifically agreed to bring into force several provisions of Additional Protocol I and committed themselves to refrain from attacking the civilian population irrespective of whether the conflict in Bosnia constituted an international armed conflict within the meaning of that treaty.<sup>192</sup>

With respect to the fourth *Tadić* condition requiring the criminality of the rule

185. See *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 95 (June 27) (noting that the treaty norms do not necessarily supersede CIL).

186. See H.L.A. HART, *THE CONCEPT OF LAW* 94 (2d ed. 1994) (explaining the concept of a rule of recognition that “specif[ies] some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts”); Lorenzo Gradoni, *Nullum Crimen Sine Consuetudine: A Few Observations on How the International Criminal Tribunal for the Former Yugoslavia Has Been Identifying Custom* (unpublished manuscript, on file with the author), available at <http://www.esil-sedi.eu/english/pdf/Gradoni.PDF>.

187. *Prosecutor v. Galić*, Case No. IT-98-29-T, Judgment and Opinion, para. 64 (Dec. 5, 2003).

188. Protocol I, *supra* note 104, at art. 51(2) (“The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.”).

189. Protocol II, *supra* note 103, at art. 13(2) (same language as Article 51(2) of Protocol I).

190. *Galić*, Case No. IT-98-29-T, Judgment and Opinion, paras. 94–129.

191. *Id.* para. 25; see also *Prosecutor v. Kordić*, Case No. IT-95-14/2-A, Judgment, paras. 41–46 (Dec. 17, 2004) (noting that NCSL is satisfied where a state is already bound to a treaty containing the applicable prohibition, regardless of whether the treaty or the rule constitutes customary international law, and distinguishing prior cases that may have implied that the crime had to be part of customary international law).

192. *Galić*, Case No. IT-98-29-T, Judgment and Opinion, para. 24; see also *Prosecutor v. Delalić, Mucić, Delić & Landžo*, Case No. IT-96-21-A, Judgment, para. 44 (Feb. 20, 2001) (noting that the May

in question, the Trial Chamber determined that the charged conduct also constituted a grave breach of Additional Protocol I, specifically the crime of “[m]aking the civilian population or individual civilians the object of attack,”<sup>193</sup> even though this was not the precise crime charged. Accordingly, it determined that the basic conduct of attacking civilians was criminalized regardless of whether the additional element of the specific intent to terrorize the victims was present.<sup>194</sup> In determining the existence of this IHL crime, the Trial Chamber declined to confirm its customary status, determining that it was unnecessary to do so because the rule applied via treaty law.<sup>195</sup>

On appeal, Galić argued that treaty law alone, without grounding in customary international law, was insufficient to give the Tribunal jurisdiction over the offense of the “international crime of terror.”<sup>196</sup> The Appeals Chamber noted that the Tribunal has endeavored to confirm the customary status of relevant norms in keeping with the Secretary General’s command that the ICTY assert jurisdiction only over those crimes that are “beyond doubt” part of customary law.<sup>197</sup> This, it noted, was especially true where the operative treaty does not specifically criminalize conduct or provide precise elements of crimes. Under such circumstances, the Tribunal has looked to customary law to establish individual criminal responsibility and the constitutive elements.<sup>198</sup> The majority of the Appeals Chamber then confirmed the Trial Chamber’s reasoning regarding the legality of the crime of inflicting terror on the civilian population, citing a number of national laws penalizing conduct analogous to the charged crime, including legislation from the former Yugoslavia.<sup>199</sup> It noted that the applicable treaty provisions charged did not articulate any new legal obligations but rather codified “in a unified manner” the foundational IHL principles of distinction and protection.<sup>200</sup>

In dissent, Judge Schomburg of Germany argued that spreading terror among the civilian population was prohibited by IHL, but was not a crime for which

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22 Agreement rendered some of the norms derived from the law governing international armed conflicts applicable in the war in the former Yugoslavia regardless of conflict classification).

193. Protocol I, *supra* note 104, at art. 85(3)(a).

194. *Galić*, Case No. IT-98-29-T, Judgment and Opinion, para. 127.

195. *Id.* paras. 97, 138.

196. *Prosecutor v. Galić*, Case No. IT-98-29-A, Judgment, para. 79 (Nov. 30, 2006) (internal quotation marks omitted).

197. *Galić*, Case No. IT-98-29-A, Judgment, para. 94–96; *see also* *Prosecutor v. Milutinović, Šainović & Ojdanić*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction: Joint Criminal Enterprise, para. 10 (May 21, 2003) (“[T]here is no reference in the report of the Secretary-General limiting the jurisdiction *rationae personae* of the International Tribunal to forms of liability provided by customary law. However, the principle of legality demands that the Tribunal shall apply the law which was binding upon individuals at the time of the acts charged. And, just as is the case in respect of the Tribunal’s jurisdiction *ratione materiae*, that body of law must be reflected in [CIL].”).

198. *Galić*, Case No. IT-98-29-A, Judgment, para. 83.

199. *Id.* paras. 94–96.

200. *Id.* para. 87.

defendant could be prosecuted or convicted.<sup>201</sup> He considered state practice criminalizing the conduct to be insufficient to conclude that the fourth *Tadić* element was satisfied.<sup>202</sup> He also critiqued the majority's failure to consider whether a prosecutable crime existed in both international and internal armed conflicts.<sup>203</sup> In conclusion, he raised the specter of politicization and warned that:

[i]t would be detrimental not only to the Tribunal but also to the future development of international criminal law and international criminal jurisdiction if our jurisprudence gave the appearance of inventing crimes—thus highly politicizing its function—where the conduct in question was not without any doubt penalized at the time when it took place.<sup>204</sup>

In lieu of a conviction under Count 1, Judge Schomburg would have convicted him under the counts concerning attacks on civilians for the same underlying conduct, treating the terrorization of the civilian population as an aggravating circumstance at sentencing.<sup>205</sup>

## 2. Customary International Law

Beyond treaty law, courts adjudicating ICL more frequently resort to customary international law (CIL) when an otherwise applicable treaty is silent, ambiguous, or constrained in its articulation of a legal principle.<sup>206</sup> Indeed, courts will even resort to CIL when there is an extant treaty on a subject,<sup>207</sup> although it is difficult to identify relevant state practice outside of the treaty where the treaty is well subscribed to by states.<sup>208</sup> Where CIL satisfies the

201. *Galić*, Case No. IT-98-29-A, Separate and Partially Dissenting Opinion of Judge Schomburg, paras. 7–8 (Nov. 30, 2006).

202. *Id.* paras. 10–15, 20.

203. *Id.* para. 16.

204. *Id.* para. 21.

205. *Id.* para. 22.

206. The Nuremberg Tribunal signaled the importance of CIL when it noted that

[t]he law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced in military courts. This law is not static, but by continual adaptation follows the needs of a changing world. Indeed, in many cases treaties do no more than express and define for more accurate reference the principle of law already existing.

Nuremberg Judgment, *supra* note 19, at 464. Historically, adjudications of the law of war in the United States provide additional examples of this approach. *See, e.g.*, 11 Op. Att'y Gen. 297, 299 (1865) (stating that the laws of war may be prosecuted even though they have not been defined by any act of Congress).

207. Prosecutor v. Delalić, Mucić, Delić & Landžo, Case No. IT-96-21-T, Judgment, paras. 302–03 (Nov. 16, 1998) (“The evidence of the existence of such customary law . . . may . . . be extremely difficult to ascertain, particularly where there exists a prior multilateral treaty which has been adopted by the vast majority of States . . . . Despite these difficulties, international tribunals do, on occasion, find that custom exists alongside conventional law, both having the same substantive content.”).

208. *See* R.R. Baxter, *Treaties and Custom*, in 129 RECUEIL DES COURS 64 (1971) (identifying the paradox of finding CIL when a well-subscribed treaty occupies the field).

principle of legality, NCSL is effectively reformulated as *nullum crimen sine jure*, where *jure* includes other than positively enacted law.<sup>209</sup>

A compelling example of this reasoning is found in a case emerging from the Special Court for Sierra Leone.<sup>210</sup> The defendant in question was Sam Hinga Norman, the now-deceased former leader of the Civil Defence Forces (CDF), a pro-government militia group. The Indictment against Norman and others accused the defendants of systematically utilizing boys in armed combat, a defining feature of the decade-long Sierra Leonean civil war in which more than 10,000 children served as soldiers in the country's three major armed forces. Article 4 of the Statute of the Special Court contains a catch-all provision permitting the prosecution for: "(c) Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities."<sup>211</sup> Norman moved to dismiss the count for lack of jurisdiction on the basis of NCSL.

The defendant did not contest that IHL prohibited the recruitment of children under the age of 15 years at the time he acted. He did, however, argue that such acts were not criminal under IHL. In support, he noted that at the time of the challenged acts: none of the major treaties addressing the recruitment of child soldiers provided for criminal penalties; no states criminalized the conduct in their national law or had prosecuted individuals for the offense; and Sierra Leonean law was silent as to the age of recruitment. He argued that it was not until the 2002 entry-into-force of the ICC Statute, which includes at Article 8(2)(b)(xxvi) the war crime of enlisting or recruiting child soldiers or using them in combat, that the offense became a rule recognized by customary international law outside of the ICC context.

While noting its "duty" to respect NCSL,<sup>212</sup> the majority pointed to certain legal instruments and developments that predated the establishment of the Special Court's Statute and that, in its estimation, revealed a customary rule in existence prior to the relevant time period. Conceding that the crime first entered the positive law in 1998 with the promulgation of the ICC Statute, the Special Court nonetheless pointed to state proposals and early drafts of the Statute as evidence of the emergence of a customary norm.<sup>213</sup> Though declining to identify exactly when such a norm "crystallized," which it asserted was frequently impossible to do with respect to the development of CIL, the Special Court stated that it could identify a period of time when the international

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209. M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* 144 (2d ed. 1999) (suggesting that the principle of legality in ICL should be reformulated as noted given that it does not rely exclusively on written law (*lege*) but also encompasses unwritten customary rules (*jure*)).

210. See *Prosecutor v. Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (May 31, 2004).

211. SCSL Statute, *supra* note 180, at art. 4(c).

212. *Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction, para. 25.

213. *Id.* para. 33.

community turned its attention to the problem of child soldiers that predated both the promulgation of the Special Court's Statute and the defendant's conduct.<sup>214</sup> This norm, the majority reasoned, then took six years to find positive expression in the ICC Statute as punishable behavior.

Judge Robertson, of the United Kingdom, lodged a cogent dissent, insisting that a criminal tribunal had to ensure not only that conduct was prohibited when committed by states, but also that states had intended the conduct to entail individual penal consequences.<sup>215</sup> He reasoned that the latter step had not yet occurred with respect to the recruitment and enlistment of children in armed conflict until, at the very earliest, the opening of the ICC Statute for signature in 1998, but—in any case—by the time the ICC Statute entered into force in 2002. Judge Robertson took issue with the majority for conflating bad acts with criminal conduct and argued that “it is precisely when the acts are abhorrent and deeply shocking that the principle of legality must be most stringently applied, to ensure that the defendant is not convicted out of disgust rather than evidence, or of a non-existent crime.”<sup>216</sup> Given that Sierra Leonean law did not prohibit child recruitment, he argued that there was no way for the embattled defendants to reasonably ascertain, even through competent legal advice, that they were committing a crime when they enlisted and recruited child soldiers.<sup>217</sup> He concluded that however “inconvenient” the result, NCSL compelled the dismissal of the challenged charge.<sup>218</sup>

This reasoning finds echoes in the recent *Scilingo* case<sup>219</sup> before Spain's *Audiencia Nacional*, a national court of first instance with special jurisdiction over international crimes. Adolfo Scilingo was prosecuted for his complicity in crimes committed during the reign of the Argentine military *junta*. Although the investigating judge had charged him with terrorism, torture, and genocide—three crimes that had long existed in the Spanish *Código Penal* (Penal Code) and were subject to universal jurisdiction<sup>220</sup>—the *Audiencia* convicted him of crimes against humanity,<sup>221</sup> which had only been codified in Spanish law in 2004,<sup>222</sup> well after the acts of which Scilingo was accused had been committed. The *Audiencia* rejected the defendant's argument that the prosecution was *ex post facto*, reasoning that crimes against humanity were prohibited by customary international law at the time of the events in question. The court ruled that

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214. *Id.* para. 50.

215. *Norman*, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction, Dissenting Opinion of Justice Robertson, para. 2 (May 31, 2004).

216. *Id.* para. 12; *see also id.* para. 13 (noting that the fact that the accused's conduct would “shock or even appall decent people is not enough to make it unlawful in the absence of a prohibition”).

217. *Id.* para. 31.

218. *Id.* para. 12. The surviving defendants were convicted of the offense. *Prosecutor v. Fofana*, Case No. SCSL-04-14-T, Judgment (Aug. 2, 2007).

219. SAN, Apr. 19, 2005 (R.J., No. 16/2005).

220. Art. 23.4 L.O.P.J.

221. SAN, Apr. 19, 2005 (R.J., No. 16/2005, 1.A., Fundamentos de Derecho, paras. 6–7).

222. Art. 607 C.P.

the *jus cogens* and *erga omnes* nature of the customary international law prohibition against crimes against humanity was implicitly incorporated into, and thus directly applicable in, the Spanish domestic legal system.<sup>223</sup> In so ruling, the *Audiencia* determined that it would make allowance for the unique characteristics of international law and for the crucial role that custom plays in the ICL legal system. This is notwithstanding the fact that the definition of crimes against humanity was in flux at the time the defendant acted, implicating the principle of specificity. The *Audiencia* also cited analogous provisions in Argentine domestic law, which it ruled were sufficient to put the defendant on notice of potential penalties for his conduct.<sup>224</sup> Nonetheless, it sentenced Scilingo pursuant to Article 607bis of the Spanish Code and not the provisions of domestic law. This ruling is significant because the Spanish Constitution specifically incorporates the principle of legality in several places.<sup>225</sup>

On appeal, the *Tribunal Supremo* (Supreme Court) upheld the conviction, but rejected the *Audiencia*'s reasoning.<sup>226</sup> It ruled that although the defendant did commit crimes against humanity as they are defined under international law by contributing to a state-sponsored policy to eradicate subversion,<sup>227</sup> CIL is not directly applicable within the Spanish system and thus could not create a "complete criminal offense" that was prosecutable in the Spanish courts.<sup>228</sup> Instead, the Supreme Court ruled that it would substitute a conviction for the well-established domestic crimes of murder and illegal detention.<sup>229</sup> That Spanish law did not provide universal jurisdiction over such municipal crimes was of no moment because they also constituted crimes against humanity subject to universal jurisdiction by virtue of the fact that they were closely related to (if not lesser-included offenses of) the crimes of genocide and war crimes over which universal jurisdiction existed as a matter of statutory law and CIL.<sup>230</sup> Thus, although crimes against humanity did not provide the appropriate substantive charge against the defendant, the fact that the acts in question nonetheless constituted crimes against humanity gave the Spanish courts universal jurisdiction over them.<sup>231</sup> The Supreme Court concluded that the universal jurisdiction

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223. SAN, Apr. 19, 2005 (R.J., No. 16/2005, 1.B., Fundamentos de Derecho, para. 1).

224. See generally Giulia Pinzauti, *An Instance of Reasonable Universality: The Scilingo Case*, 3 J. INT'L CRIM. JUST. 1092 (2005); Christian Tomuschat, *Issues of Universal Jurisdiction in the Scilingo Case*, 3 J. INT'L CRIM. JUST. 1074 (2005).

225. See Art. 25 C.E. ("No one may be sentenced or fined for actions or omissions that at the time of occurrence were not a crime, misdemeanor or administrative offence pursuant to valid legislation in effect at that time."); Art. 9.3 (guaranteeing the principle of legality); see also Art. 2 C.P. ("A crime or misdemeanor shall not be punished with a penalty not included in the law prior to the perpetration thereof.").

226. STS, Nov. 8, 2007 (R.J., No. 789/2007).

227. *Id.* paras. 70–75.

228. *Id.* para. 64.

229. *Id.* paras. 69–71.

230. *Id.* para. 71.

231. This disaggregative reasoning finds analogy in *Bivens*—a U.S. Supreme Court case—and Alien Tort Statute (ATS) litigation, in which the Constitution and international law, respectively, provide the

law was merely a procedural law whose extension by analogy did not implicate the principle of specificity.<sup>232</sup> The Supreme Court then sentenced Scilingo based upon the Spanish penal code, which was more lenient than the Argentine code, because the former provided maximum penalties for the crimes in question.<sup>233</sup>

In looking to CIL to “fill gaps” in positive law,<sup>234</sup> courts are not rigorous about applying the traditional CIL formula, which requires a showing of state practice coupled with *opinio juris sive necessitatis*. Rather, courts are often willing to overlook or discount contrary state practice and prioritize articulations of *opinio juris*<sup>235</sup> found in the pronouncements of states and other institutions, including nongovernmental or intergovernmental organizations.<sup>236</sup> Under this contemporary approach, contrary state practice may be considered a breach of a rule rather than evidence of the absence or desuetude of a rule. Jurists may also “double count” discursive practices as both *usus* and *opinio juris*.<sup>237</sup> It is of course uncontroversial that the substance of CIL is inherently evolutionary,<sup>238</sup> being premised on the actions of states and their conceptions and articulations of legal obligation. The current practice of international decision-making bodies suggests that the very concept of CIL is undergoing a transformation in light of the proliferation of multilateral international institutions, providing dispersed fora for parliamentary diplomacy and discursive practices.<sup>239</sup> Although this

rule of decision, and the right of action is a creature of federal common law. *See* *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971); *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (explaining the ATS’s operation).

232. STS, Nov. 8, 2007 (R.J., No. 789/2007, paras. 70–71).

233. *Id.* para. 74. Given the NCSL provision in the Spanish Constitution, this judgment will inevitably be appealed to the *Tribunal Constitucional* (Constitutional Court). *See generally* Gil Gil, *supra* note 64; Pinzauti, *supra* note 224; Tomuschat, *supra* note 224.

234. Tribunals will rely on CIL to establish the existence of forms of responsibility as well as substantive offenses. *See, e.g.*, *Prosecutor v. Milutinović, Šainović & Ojdanić*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction: Joint Criminal Enterprise, para. 41 (May 21, 2003) (finding that the rules of customary law were sufficient to support a prosecution under the joint-criminal-enterprise theory of liability).

235. This is the case in other areas of public international law reasoning as well. *See* Theodor Meron, *The Continuing Role of Custom in the Formation of International Humanitarian Law*, 90 AM. J. INT’L L. 238, 239 (1996) (noting that *opinio juris* weighs more heavily in IHL than state practice, which frequently contravenes articulated norms).

236. Gradoni, *supra* note 186, at 4–5 (explaining ICTY’s methodology for identifying custom and noting reliance on the work of the International Law Commission and the drafting history of the ICC Statute).

237. One study notes that the ICTY has considered the following as evidence of state practice: signatures to, ratifications of, and accessions to treaties; resolutions adopted by institutional organizations; decisions of domestic tribunals; internal legislation and policy statements (for example, military manuals); acquiescence in other state practice; and unilateral action that may not have been projected onto the international plane. *Id.* at 8. The frequency of citation suggests that the Tribunal is most influenced by the practices of the United States, Western Europe, and Russia. *Id.* at 13 fig.7.

238. *See, e.g.*, *The Paquete Habana*, 175 U.S. 677, 686 (1900) (tracing the historical development of a rule of customary international law).

239. *See* Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUSTL. Y.B. INT’L L. 82, 89 (1992) (critiquing the tendency to view CIL as formed “through proclamation, exhortation, repetition, incantation, lament”).



untethering of *opinio juris* from state practice is part of much public international law reasoning, it is particularly common in ICL, where the disjunction between the two elements can be so wide.<sup>240</sup> In ICL, states are known to espouse lofty rhetoric in self-serving dialogue just as violations continue in clandestine cells back home.

The “ostensible contradiction” between the principle of legality and a customary form of law is troubling.<sup>241</sup> Allowing unwritten ICL norms to provide fair warning to a defendant of an operative rule of decision and the penal standards by which he will be judged implicates two aspects of the NCSL principle: the defendant’s knowledge of the existence of the prohibition and its precise content (the requirement of specificity). The former is more easily satisfied in light of the web of human rights treaties articulating unequivocal prohibitions, but not necessarily setting forth precise elements of crimes. It is more difficult to accept that the precise elements of crimes can be gleaned from the (at times) divergent conduct of the multiplicity of states coupled with their subjective psychological attitudes toward a particular practice.<sup>242</sup> In this regard, it is more reasonable to charge states rather than individuals with the duty of tracking CIL because states are more used to operating on the international plane and have access to the dispersed practices of states. Nonetheless, where a customary norm finds parallel expression in some other source of law—such as extant domestic law of the nationality or territorial state or even general principles of law within the community of states—the ICL tribunals have relied upon CIL to defeat arguments that the NCSL principle is being infringed.

### 3. General Principles of Law

In addition to CIL, courts will also canvass domestic law to identify applicable general principles of law.<sup>243</sup> While drafting the ICC Statute, some mem-

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240. One commentator has characterized this as a sliding-scale methodology: “[T]he more destabilizing or morally distasteful the activity . . . the more readily international decision makers will substitute one element [of CIL] for the other, provided that the asserted restrictive rule seems reasonable.” Frederick L. Kirgis, Jr., *Custom on a Sliding Scale*, 81 AM. J. INT’L L. 146, 149 (1987).

241. Gradoni, *supra* note 186, at 1; *see also* BOOT, *supra* note 1, at 20 (“[J]urists practicing criminal law tend to become somewhat nervous when reference is made to ‘customary international law’ as a basis for individual criminal responsibility . . .”); Lamb, *supra* note 25, at 743 (“[T]he *nullum crime* principle, which relies on expressed prohibitions and is based explicitly upon the value of legal certainty, sits uneasily with the very nature of customary international law, which is unwritten and frequently difficult to define with precision.”).

242. *See* M. CHERIF BASSIUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 225 (2003) (noting the two dimensions of NCSL).

243. *See* Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgment, paras. 34–42 (July 29, 2004) (canvassing national law to determine the mental element of ordering offenses). The general-principles-of-law inquiry allows for the “distillation” of a general principle without a “comprehensive survey” but requires more than the consideration of one national legal system. *See* Milutinović, Šainović & Ojdanić, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction: Joint Criminal Enterprise, para. 41 (May 21, 2003) (observing that “although domestic law (in particular the law of the country of the accused) may provide some notice to the effect that a given act is regarded as criminal under international law, it may not necessarily provide sufficient notice of that fact”). Although

bers of the International Law Commission determined that general principles of law were not precise enough to serve as the direct basis of penal responsibility.<sup>244</sup> Nonetheless, tribunals have treated such principles as sufficiently robust to provide notice to the defendant of a novel construction of ICL.<sup>245</sup> For example, in *Furundžija*, the Trial Chamber resorted to general principles of law by seeking “principles of criminal law common to the major legal systems of the world” to determine that forcible oral intercourse could be charged as rape and hence as a war crime.<sup>246</sup> While some IHL treaties prohibit rape, none concretely defines the crime.<sup>247</sup> From its survey of national legislation, the Chamber discerned a trend toward “broadening the definition of rape so that it now embraces acts that were previously classified as comparatively less serious offences, that is sexual or indecent assault.”<sup>248</sup> At the same time, the Chamber noted that many states, including the defendant’s own, would treat such acts as the lesser crime of assault.<sup>249</sup>

The Trial Chamber ultimately determined that the rape charge was justified by reference to the object and purpose of the relevant law, which it identified as follows:

The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender . . . This principle is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well being of a person.<sup>250</sup>

In so ruling, the Trial Chamber invoked the object and purpose of IHL to justify the expansion of the international prohibition beyond what the operative domestic law would have provided. Drafters of the ICC’s Elements of Crimes have

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this is the dominant view of the directionality of general principles of law, an alternative view suggests that general principles of law can also emerge from international sources and then trickle down to the domestic context. See Simma & Alston, *supra* note 239, at 102.

244. See *BOOT*, *supra* note 1, at 330.

245. See *Prosecutor v. Tadić*, Case No. IT-94-1-AR92, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 135 (Oct. 2, 1995) (noting that “substantive justice and equity” confirmed that the defendants could be prosecuted for violations of treaties that did not include penal provisions in light of the fact that the national law of the former Yugoslavia had incorporated such breaches into domestic law, so “[n]ationals of the former Yugoslavia . . . were therefore aware, or should have been aware, that they were amenable to the jurisdiction of their national criminal courts in cases of violation of international humanitarian law”). The appellate ruling did not alter the accused’s sentence because the war crimes counts were cumulative charges, and so the sentences would run concurrently. *Tadić*, Case No. IT-94-1-Tbis-R117, Sentencing Judgment, para. 32 (Nov. 11, 1999).

246. *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, para. 177 (Dec. 10, 1998).

247. See, e.g., Convention Relative to the Protection of Civilian Persons in Time of War art. 67, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter *Fourth Geneva Convention*].

248. *Furundžija*, Case No. IT-95-17/1-T, Judgment, para. 179.

249. *Id.* para. 182.

250. *Id.* para. 183.

since codified this result.<sup>251</sup>

Separate and apart from identifying any particular “general principle[] of law recognized by civilized nations,” tribunals will even cite particular domestic law as a source of advance notice that certain conduct is prohibited.<sup>252</sup> While some international crimes are *sui generis*, many others have analogs in the crimes found in the majority of domestic penal codes. For example, an act of murder becomes a crime against humanity when it is committed in the context of a widespread and systematic attack against a civilian population with knowledge of that attack.<sup>253</sup> Thus, the definitions of these domestic analogs differ only in that they lack the *chapeau* elements that internationalize such crimes and render them prosecutable before an international tribunal.<sup>254</sup> Tribunals have reasoned that the prohibition in domestic law of the predicate act provides sufficient notice of the wrongfulness and criminality of the underlying conduct, even when the act is prosecuted under an unprecedented international law analog that requires a showing of additional elements, such as the existence of an armed conflict or discriminatory intent.<sup>255</sup> By this reasoning, the novelty of these additional elements is not enough to infringe the NCSL principle. This willingness to rely on notice of the illegality of the underlying *conduct* in question is apparent in the *Hadžihasanović* decision, wherein the Trial Chamber emphasizes that NCSL relates to “the factual criminality of particular conduct” not necessarily its particular characterization under ICL.<sup>256</sup> In *Kupreškić*, the domestic law analog is even considered technically more akin to a lesser-included offense of the international offense to be prosecuted.<sup>257</sup>

Under this approach, the *chapeau* elements are treated more as jurisdictional or aggravating elements, rendering what would otherwise be established domestic crimes prosecutable before an international tribunal. Where this line of

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251. *Elements of Crimes*, *supra* note 72, at art.7(1)(g)-1 (defining rape to include oral intercourse).

252. See, e.g., Prosecutor v. Milutinović, Šainović & Ojdanić, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction: Joint Criminal Enterprise, paras. 40–41 (May 21, 2003) (noting that national law—particularly from the accused’s home state—can provide notice of prohibited conduct or forms of responsibility, and finding that Yugoslavian law allowed for prosecutions based on a joint-criminal-enterprise theory of responsibility).

253. See ICC Statute, *supra* note 72, at art. 7. Indeed, one commentator has noted that ICL merely “introduce[d] a new nomenclature for long recognized offences.” L.C. Green, *The Maxim Nullum Crimen Sine Lege and the Eichmann Trial*, 38 BRIT. Y.B. INT’L L. 457, 461 (1962).

254. As Justice Jackson argued in his letter to President Truman outlining his plan for the Nuremberg prosecutions, “We propose to punish acts which have been regarded as criminal since the time of Cain and have been so written in every civilized code.” Jackson Report, *supra* note 35, at pt. III.

255. Prosecutor v. Delalić, Mucić, Delić & Landžo, Case No. IT-96-21-T, Judgment, para. 312 (Nov. 16, 1998). In *Delalić*, the Trial Chamber responded to the defendants’ NCSL argument by pointing out that the criminal code of the former Yugoslavia, adopted by the newly independent Bosnia-Herzegovina, criminalized all of the acts prohibited by Common Article 3.

256. Prosecutor v. Hadžihasanović, Case No. IT-01-47-PT, Interlocutory Appeal on Decision on Joint Challenge to Jurisdiction, para. 62 (Nov. 12, 2002).

257. See Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment, paras. 681–87 (Jan. 14, 2000) (applying the common law concept of lesser-included offenses to international crimes). In the civil law tradition, the more specific offense consumes the more general one. *Id.* para. 688.

argument is accepted, defendants are left to argue only that they could not have reasonably foreseen being prosecuted before an *international* tribunal, as opposed to a domestic one, for the acts in question. Retroactive exercises of jurisdiction, that is, jurisdiction before courts that did not exist prior to the defendants' actions or jurisdiction before courts that would not have had jurisdiction prior to the defendants' actions, are of such a substantially different nature as to be largely outside the domain of NCSL.<sup>258</sup> Indeed, in a rejection of classical legal positivism that postulates rule and sanction as inextricably linked, it was argued at Nuremberg that the relevant international law was in existence even absent a forum for its enforcement. Thus, the British Chief Prosecutor argued that the "only innovation" that the Charter introduced was the creation of "machinery, long overdue, to carry out the existing law."<sup>259</sup> As many of the cases suggest, the characterization of the crime prosecuted as an international crime is of no moment when a defendant had notice that the underlying conduct was proscribed by domestic law.<sup>260</sup>

#### 4. Judicial Opinions

Judicial opinions—from international or domestic courts—may also provide notice to defendants of prohibited acts. Since the establishment of the Interna-

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258. *Cook v. United States*, 138 U.S. 157, 183 (1891) (noting that "an *ex post facto* law . . . does not involve, in any of its definitions, a change of the place of trial of an alleged offence after its commission") (internal quotations and citations omitted); see also *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582–83 (1985) (allowing for the extradition of the defendant to Israel, which did not exist at the time of the alleged crimes, for ICL crimes); *Caso Scilingo*, STS, Nov. 8, 2007 (R.J., No. 789/2007, para. 63) (noting that there is no NCSL problem where the Security Council created the ICTY and ICTR after many of the crimes to be adjudicated were committed).

259. 19 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 464 (1948); see also *id.* at 463 ("[T]he existence of law has never been dependent on the existence of a correlated sanction external to the law itself."); Stanley L. Paulson, *Classical Legal Positivism at Nuremberg*, 4 PHIL. & PUB. AFF. 132, 151–55 (1975).

260. This interplay between international crimes and their domestic analogs finds parallels in the way in which international tribunals manage complementarity, *ne bis in idem* (double jeopardy), and requests for deferral or referral to domestic courts. For example, the ICC's complementarity regime functions similarly to the NCSL jurisprudence. The principle of complementarity bars the ICC from asserting jurisdiction where a competent domestic court is prosecuting an individual, even if the conduct had been charged as a domestic rather than an international crime. A case is thus inadmissible if "the person concerned has already been tried *for conduct* which is the subject of the complaint" before the ICC. ICC Statute, *supra* note 72, at art. 17(1)(c) (emphasis added). This formulation suggests that where the underlying conduct is subject to domestic prosecution, the principle of complementarity bars the prosecution before the ICC. The ICC Statute's *ne bis in idem* provisions operate somewhat differently. Domestic courts are free of any double jeopardy obligations where an individual has been tried for an international crime before the ICC and is subsequently prosecuted for an *ordinary crime* in a domestic court. See *id.* at art. 20(2) ("No person shall be tried by another court for [an ICC crime] for which that person has already been convicted or acquitted by the Court."). In other words, if a person has been tried for the crime against humanity of torture before the ICC, a domestic court could also prosecute that individual for battery. Immi Tallgren, *Article 20: Ne bis in idem*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 419, 428 (Otto Triffterer ed., 1999) (arguing that domestic courts may re-prosecute the same defendant for a domestic crime without running afoul of the ICC Statute's double jeopardy provisions).

tional Criminal Tribunal for the Former Yugoslavia (ICTY), the first modern ad hoc tribunal, international and hybrid fora have proliferated. In addition, national courts are increasingly adjudicating international crimes according to principles of extraterritorial or extraordinary jurisdiction. The adjudication of ICL is thus decentralized, and the field lacks a final arbiter exercising global appellate jurisdiction to harmonize and rationalize divergent trends in the law.

Traditionally, judicial opinions have not been a primary source of international law. As a doctrinal matter, the ICJ Statute's sources framework relegates judicial opinions to a "subsidiary means for the determination of rules of law."<sup>261</sup> In addition, the various international criminal tribunals are not, strictly speaking, bound by the precedent generated by sister courts.<sup>262</sup> Nonetheless, the elements of Article 38 of the ICJ Statute have been somewhat reordered in ICL, with judicial decisions assuming a more exalted place in the sources pantheon. Indeed, Article 21(2) of the ICC Statute elevates that court's own judicial decisions in the hierarchy of sources of law, allowing—although still not mandating—the Court to refer to "the principles and rules of law interpreted in its previous decisions."<sup>263</sup> This marks a divergence in doctrine vis-à-vis general public international law adjudication, which eschews stare decisis.<sup>264</sup>

Notwithstanding these formalities, it cannot be gainsaid that these courts rely heavily on each other's jurisprudence in resolving all manner of questions presented to them.<sup>265</sup> To be sure, this inquiry often gets filtered through the middleman of CIL,<sup>266</sup> where judicial decisions are deemed to reflect CIL. This cumulative practice arguably reveals the development of a weak form of stare decisis in ICL that operates across adjudicative institutions. This trend is likely to continue as the ICC becomes more active. Notwithstanding the promise of Article 10 of the ICC Statute—which indicates that the substantive definitions (and indeed all of Part 2) "shall [not] be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute"—it is inevitable that the jurisprudence of the ICC will generate a powerful precedential pull on future tribunals that will impact the field in profound ways.

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261. ICJ Statute, *supra* note 184, at art. 38(1)(d).

262. The ICTY and ICTR share an Appeals Chamber, which has harmonized the jurisprudence emanating from those tribunals to a certain extent. *See* Prosecutor v. Kupreškić, Case No. IT-95-16-T, Judgment, paras. 537–42 (Jan. 14, 2000) (discussing operation of stare decisis in the ICTY/R system). Another partial exception is the Statute of the Special Court for Sierra Leone, which provides at Article 20(3) that "[t]he judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda." SCSL Statute, *supra* note 180, at art. 20(3).

263. ICC Statute, *supra* note 72, at art. 21(2).

264. *See* ICJ Statute, *supra* note 184, at art. 59.

265. *See, e.g.,* Kupreškić, Case No. IT-95-16-T, Judgment, para. 541 ("[J]udicial decisions may prove to be of invaluable importance for the determination of existing law.").

266. *See, e.g.,* Prosecutor v. Rwamakuba, Case No. ICTR-98-44-AR72.4, Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, para. 14 (Oct. 22, 2004) (noting the ICTY/R Appeals Chamber's reliance on judicial decisions for evidence of CIL).

These cases suggest that the growing ICL jurisprudence can provide adequate notice of applicable standards to potential defendants, even if such defendants would never fall within the personal jurisdiction of the court of origin of the rule in question. Judicial opinions—especially those responding to situations of mass atrocity and emanating from international or quasi-international tribunals—work as a form of notice in ICL because they are symbolically important as juristic condemnations of unacceptable behavior.<sup>267</sup> Being based on the tradition of reasoned decision, such decisions are able to articulate norms more precisely than other sources of international law, such as resolutions emanating from the General Assembly or other political bodies.

##### 5. The Teachings of the Most Highly Qualified Publicists

At least one court has determined that even academic scholarship can provide a kind of notice to defendants. The case against Nikola Jorgić in Germany marked one of the first universal jurisdiction cases to be brought and the first German prosecution for genocide since ratification of the Genocide Convention in 1954.<sup>268</sup> The crime of genocide is defined in Article 220a of the German Criminal Code in a fashion identical to the Genocide Convention's definition. Nonetheless, the German Constitutional Court interpreted this definition to reach acts that might be considered "cultural genocide," a phenomenon that was specifically excluded from the Genocide Convention. The court reasoned that the intent to destroy the group "includes the annihilation of a group as a social unit with its special qualities, uniqueness and its feeling of togetherness, not exclusively their physical-biological annihilation."<sup>269</sup> Citing a General Assembly resolution equating ethnic cleansing in the former Yugoslavia with genocide, the German court held that prohibited acts could include destroying or looting houses or buildings of importance to the group, or the expulsion of members of the group. The court reasoned that the prohibition against genocide protects legal interests that "lie[] beyond the individual, namely the social existence of a group."<sup>270</sup> This, it noted, "has a broader meaning than physical-biological annihilation."<sup>271</sup> The court concluded that this interpretation was "within the margins of the possible interpretation of the international law elements of the crime of genocide."<sup>272</sup> This was true, it reasoned, because German scholars had advocated for this interpretation of the treaty.<sup>273</sup> Jorgić

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267. See Amann, *supra* note 121, at 118 (noting the importance of having respected voices of authority express moral condemnation).

268. See BVerfG, Dec. 12, 2000, docket number 2 BvR 1290/99, available at [http://www.bverfg.de/entscheidungen/rk20001212\\_2bvr129099en.html](http://www.bverfg.de/entscheidungen/rk20001212_2bvr129099en.html).

269. *Id.* para. 2.

270. *Id.* para. 2(a).

271. *Id.*

272. *Id.* para. 2(d).

273. See Jorgić v. Germany, App. No. 74613/01, paras. 27, 36, 47 (Eur. Ct. H.R. July 12, 2007), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=74613/01&sessionid=8779548&skin=hudoc-en>.

was convicted of genocide and sentenced to life imprisonment.

Collectively, these cases reveal that tribunals, when considering whether the core purpose of the NCSL principle is satisfied, are indifferent about the precise origins of the necessary notice. This notice can come from a treaty obligation (either by virtue of a multilateral treaty or a more local treaty obligation), CIL, domestic law, or other indicia of the state of international law or the direction in which it is moving. As long as notice of a rule or standard is available to the defendant from some source, and not even necessarily one directly binding on the defendant at the time he acted, the tribunals have found no breach of the NCSL principle. Mirroring the fiction of notice employed in the domestic context where the law has become increasingly inaccessible to ordinary people, the international criminal law tribunals similarly assume defendants' ability to undertake virtually global legal research to determine the scope and content of ICL. Courts reason that as long as the defendant could reasonably ascertain in advance that the particular conduct or form of participation is prohibited, particularly with the help of competent counsel, the NCSL principle is satisfied. This is especially true with respect to individuals to whom ICL is directly addressed—soldiers and statesmen.<sup>274</sup>

### III. *NULLUM CRIMEN SINE LEGE* AS AN INTERNATIONAL HUMAN RIGHT

As the study of cases presented above reveals, NCSL is a frequent defense in ICL in the face of novel substantive charges and forms of responsibility or expansive interpretations of established doctrines. Through the use of a series of interpretive devices, analytical claims, and methodological choices, ICL tribunals have allowed defendants to be prosecuted for offenses, or under forms of responsibility, that were not part of positive law at the time the defendants acted. This is more than a modest process of "interpretation and clarification,"<sup>275</sup> but is in fact a more dramatic, if unacknowledged, form of judicial lawmaking.<sup>276</sup> The apparent willingness by courts to overlook the imperatives of NCSL in the ICL context raises a number of legitimacy concerns, including questions of whether international tribunals are upsetting the "constitutional" allocation of authority between states and supranational courts in the interna-

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274. Wright, *supra* note 13, at 44 ("The actual law with its specified offences and penalties may not be familiar to a cheesemonger in the City of London, but must be taken to be known to all those who have to act in the matter to which it relates, for instance, to statesmen, to military, naval and air officers and even to soldiers in the lower ranks.").

275. Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Judgment, paras. 126–27 (Mar. 24, 2000) (stating that NCSL "does not prevent a court, either at the national or international level, from determining an issue through a process of interpretation and clarification as to the elements of a particular crime . . .").

276. See Wessel, *supra* note 132, at 386 (noting the distinction between "judicial gap-filling," which occurs when courts resolve disputes by policy-making in situations in which legislatures have failed to fully codify a particular rule, and "judicial activism," which occurs when courts refuse "to implement the announced public policy decisions of otherwise authoritative institutions").

tional system<sup>277</sup> by departing from, expanding upon, or outright rejecting rules carefully negotiated by states during multilateral treaty drafting processes.<sup>278</sup> Despite the separation-of-powers component to NCSL, however, this principle is primarily aimed at protecting criminal defendants, not state sovereignty. The ICL cases discussed above are thus open to the criticism that courts are trampling on the rights of criminal defendants in their rush to advance the ICL system. In light of the centrality of procedural protections in international human rights law, this Article focuses primarily upon these concerns, rather than those regarding sovereignty, in evaluating the NCSL jurisprudence.

Notwithstanding that this process of judicial lawmaking in ICL often seems to contravene a strict application of the principle of NCSL, the ICL jurisprudence is consistent with the purposes underlying the principle, the precise formulations of the NCSL principle in omnibus human rights instruments, and the concomitant interpretations emerging from authoritative institutions charged with enforcing human rights protections. The European Court of Human Rights in particular has established a two-part methodology for determining when a domestic prosecution runs afoul of the NCSL provision set forth in that Court's constitutive treaty. This methodology does not demand strict legality; rather, domestic courts are to ensure that the crime prosecuted is in keeping with the essence of existing crimes and that any innovation would have been foreseeable to the defendant under the circumstances. The ICL tribunals' approach to the defense of NCSL is largely consistent with this methodology.

The right to be prosecuted only for conduct that was criminalized *ex ante* is enshrined in a number of human rights declarations and treaties, in part as a reaction to the excesses of jurists working under National Socialism.<sup>279</sup> The

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277. In domestic law, NCSL is, among other things, "a direct consequence of the theory of the separation of powers" and a reflection of a rational system for organizing state authority. Boor, *supra* note 1, at 83. The separation-of-powers implications of disregarding the NCSL principle are somewhat mitigated in the international system in which the familiar triad of government branches is not reproduced *mutatis mutandis*. Accordingly, NCSL does not protect an analogous legislative authority; rather, it protects the right of states to make rules that govern their relations with each other, with the individuals within their jurisdiction, and between such individuals. Courts adjudicating ICL appear to feel less compelled to respect the outcomes of these processes than they might the products of a democratically elected legislature.

278. The cases addressed above may suggest that courts are exceeding their delegated authority and dramatically refashioning the rules that states created for themselves. And yet, it has been argued that a "residual lawmaking capacity of [international] judges may well be part of the intended design of" some treaty regimes. See Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT'L L. 631, 641 (2005); see also Eyal Benvenisti, *Customary International Law as a Judicial Tool for Promoting Efficiency*, in THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION 85 (Eyal Benvenisti & Moshe Hirsh eds., 2004) (arguing for the efficiency of judicial lawmaking where collective action problems among states prevent the emergence of necessary rules). For an application of this theory to the IHL context, see generally Danner, *supra* note 74.

279. See, e.g., UDHR, *supra* note 10, at art. 11(2); European Convention for the Protection of Human Rights and Fundamental Freedoms art. 7, opened for signature Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECPHRFF]; International Covenant on Civil and Political Rights art. 15, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; American Convention on Human Rights art. 9, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter American Convention]; African Charter on Human



principle is formulated in many relevant texts to make important allowances for international law norms.<sup>280</sup> Unlike the U.S. formulation of the ex post facto prohibition, these human rights formulations are addressed to all organs of government and not just state legislatures, although there may be no “victim” with standing before any supervisory body until ex post facto legislation is applied by the corresponding judicial branch.

NCSL entered international human rights law in the Universal Declaration of Human Rights (UDHR), which states at Article 11(2) that “[n]o one shall be held guilty of any penal offense on account of any act or omission which did not constitute a penal offense, under national or international law, at the time it was committed.”<sup>281</sup> Drafters included the term “international law” to invoke Article 38 of the ICJ Statute, although a handful of states unsuccessfully argued that the Declaration should refer only to positive law and not customary law.<sup>282</sup> The International Covenant on Civil and Political Rights (ICCPR) builds on this prohibition with the *nulla poena sine lege* admonition that “[n]or shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offense was committed. If, subsequent to the commission of the offense, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.”<sup>283</sup> This provision in the ICCPR somewhat redundantly (in light of Article 15(1)) goes on to emphasize that the principle is satisfied where the act is criminalized at the international level even as a general principle of law: “Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”<sup>284</sup> According to one international judge, this implies

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and Peoples’ Rights art. 7, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 [hereinafter African Charter].

280. *Touvier v. France*, App. No. 29420/95, 88-B Eur. Comm’n H.R. Dec. & Rep. 148, 161 (1997) (noting that Article 7(2) of the European Convention on Human Rights and Fundamental Freedoms was not meant “to affect laws which, in the wholly exceptional circumstances at the end of the Second World War, were passed in order to punish war crimes, treason and collaboration with the enemy[.]” and finding no violation where applicant was prosecuted for crimes against humanity).

281. UDHR, *supra* note 10, at art. 11(2); *see also* ICCPR, *supra* note 279, at art. 15(1) (containing an analogous formulation); African Charter, *supra* note 279, at art. 7(2) (same). The African Charter, however, does not contain a clause referencing international law as a source of law: “No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed.” African Charter, *supra* note 279, at art. 7(1).

282. The French translations of these provisions generally employ the word “*droit*” rather than “*loi*,” implying that more than written law is at issue. Boor, *supra* note 1, at 146–47.

283. ICCPR, *supra* note 279, at art. 15(1). A similar formulation is found at Article 9 of the American Convention of Human Rights although reference is made to “under the applicable law” rather than to national and international law. American Convention, *supra* note 279, at art. 9. This provision was meant to cover both international and domestic law. Boor, *supra* note 1, at 173; *see also* Protocol II, *supra* note 103, at art. 6(2)(c) (requiring prior criminalization “under the law”).

284. ICCPR, *supra* note 279, at art. 15(2). The latter provision has been interpreted to allow for resort to general principles of law within the meaning of the ICJ Statute where no applicable treaty or custom can be identified. *See* DAVID J. HARRIS ET AL., LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 282 (1995) (“If there is no treaty binding upon the parties to a dispute and if no rule of

that the provision is satisfied as long as the conduct was considered “fundamentally criminal” by the community of nations.<sup>285</sup> Virtually identical language appears in Article 7 of the European Convention on Human Rights and Fundamental Freedoms.<sup>286</sup> In many of these treaties, the NCSL provisions are non-derogable, even in times of national emergency.<sup>287</sup>

All human rights formulations of the NCSL principle invite courts to consider the existence of legal prohibitions in both national and international law in determining whether a prosecution adheres to the principle of legality. The references to international law in many of these instruments were included precisely to address the NCSL issues raised by the Nuremberg and Tokyo proceedings and to ensure that either domestic law or the various sources of international law could provide the necessary notice to defendants.<sup>288</sup> These treaties can thus be read to provide multilateral validation of the Nuremberg approach to NCSL.<sup>289</sup> In addition, these references establish the precedence of international law over domestic law and are meant to ensure that individuals

customary international law based on state practice applies, recourse may be had to ‘general principles of law recognized by civilized nations,’ i.e., by the state members of the international community, to fill the gap.”). Cassese suggests that this reference should have been to CIL and not to general principles of law. CASSESE, *supra* note 62, at 149 n.27.

285. Mohamed Shahabuddeen, *Does the Principle of Legality Stand in the Way of Progressive Development of Law?*, 2 J. INT’L CRIM. JUST. 1007, 1011 (2004).

286. European Convention on Human Rights and Fundamental Freedoms art. 7, Nov. 4, 1950, 213 U.N.T.S. 222.

287. *See, e.g.*, ICCPR, *supra* note 279, at art. 4(2). IHL contains its own articulations of the NCSL principle in the penal provisions of several treaties. For example, the Third Geneva Convention (protecting prisoners of war (POWs)) at Article 99 states that POWs may not be tried or sentenced for acts “not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed.” Convention Relative to the Treatment of Prisoners of War art. 99, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; *see also* Fourth Geneva Convention, *supra* note 247, at art. 67. Protocol I considers this prohibition to be a “fundamental guarantee” in Article 75(4)(c), and Article 6(2)(c) of Protocol II applies the same principle to individuals involved in non-international armed conflicts. Protocol I, *supra* note 104, at art. 75(4)(c); Protocol II, *supra* note 103, at art. 6(2)(c).

288. *See* P. VAN DIJK & G.J.H. VAN HOOF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 436 (1998); MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS, CCPR COMMENTARY 281 (2005); N. ROBINSON, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ITS ORIGINS, SIGNIFICANCE, APPLICATION AND INTERPRETATION 116 (1958) (noting that Article 11(2) of the UDHR was meant to signal the legality of the post-WWII proceedings); *see also* Prosecutor v. Delalić, Mucić, Delić & Landžo, Case No. IT-96-21-T, Judgment, para. 313 (Nov. 16, 1998).

289. Likewise, in 1946, the U.N. General Assembly adopted Resolution 95(I) affirming the principles of international law recognized in the Nuremberg Charter and Judgment without, however, identifying those principles specifically. Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal, G.A. Res. 95 (I), at 1144, U.N. GAOR, 1st Sess., pt. 2, U.N. Doc. A/236 (Dec. 11, 1946); *see also* *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*, [1950] 2 Y.B. Int’l L. Comm’n pt. III, paras. 95–127, U.N. Doc. No. A/1316 (A/5/12) [hereinafter *Principles of International Law*], available at [http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7\\_1\\_1950.pdf](http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/7_1_1950.pdf). Principle II states: “The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.” *Principles of International Law, supra*, para. 99.

cannot escape liability under international law by pleading that their actions were lawful under national law.<sup>290</sup>

The majority of these human rights and IHL provisions are addressed directly to the states that have duly ratified the treaties in which they are found.<sup>291</sup> As such, they do not directly implicate international legislative or judicial institutions. The UDHR, by contrast, proclaims the NCSL principle as a universal right and a “common standard of achievement” for all peoples, all nations, and “every organ of society.”<sup>292</sup> In any case, the principles contained in the treaty provisions arguably apply to international institutions such as ad hoc ICL tribunals as well. Such provisions may apply: as a matter of customary law, as general principles of law, or because such institutions are created via multilateral action whereby formative and member states bring their treaty obligations with them when they launch and associate with such bodies.

One formulation of NCSL specifically directed to an international penal institution is found in the ICC Statute.<sup>293</sup> That treaty codifies several strands of the principle of legality.<sup>294</sup> Article 22(1) dictates that “[a] person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.”<sup>295</sup> Article 24(2) provides that “[i]n the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.”<sup>296</sup> Likewise, the principle of strict construction and the rule of lenity are specifically mandated at Article 22(2), which states: “The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.”<sup>297</sup> The next section cautions that “[t]his article shall not affect the

290. See Vienna Convention, *supra* note 127, at art. 27 (“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”).

291. Prosecutor v. Tadić, Case No. IT-94-1-AR92, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 42 (Oct. 2, 1995) (noting that provisions in human rights treaties are addressed to national legal systems, not international courts, but conceding that some such provisions may be binding as general principles of law).

292. UDHR, *supra* note 10, at pmb1.

293. Early drafts of what became the ICC Statute included the NCSL principle. The 1966 version of the Draft Code of Crimes against the Peace and Security of Mankind contains a formulation that references internal law but not international law: “Nothing in this article precludes the trial of anyone for an act which, at the time when it was committed, was criminal in accordance with internal law or national law.” 1 Y.B. Int’l L. Comm’n 33, U.N. Doc. A/CN.4/L.522/1996.

294. See also ICC Statute, *supra* note 72, at art. 8(2)(b) (allowing for the prosecution of war crimes “within the established framework of international law”); *Elements of Crimes*, *supra* note 72, at art. 7(1) (“[C]rimes against humanity . . . are among the most serious crimes of concern to the international community as a whole, warrant and entail individual criminal responsibility, and require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world.”).

295. ICC Statute, *supra* note 72, at art. 22(1).

296. *Id.* at art. 24(2).

297. *Id.* at art. 22(2).

characterization of any conduct as criminal under international law independently of this Statute.”<sup>298</sup> As the jurisdiction of the Court is expressly proscriptive,<sup>299</sup> these provisions will likely be most relevant where amendments to the Statute are made, such as with the anticipated addition of the crime of aggression,<sup>300</sup> or the less likely addition of the crimes of terrorism or drug trafficking, as is recommended in Resolution E to the Final Act of the Statute.<sup>301</sup> These provisions will also undoubtedly be invoked where the Court interprets crimes or defenses in novel or expansive ways to the perceived detriment of a defendant. Collectively, these provisions also make clear that as long as conduct is criminalized by the ICC Statute, it is of no moment that the relevant domestic law does not recognize analogous municipal crimes.<sup>302</sup> In this respect, at least, the ICC exercises primacy over the domestic legal order.<sup>303</sup>

Although the full scope of the ICC’s NCSL provisions remains untested, the human rights institutions have had occasion to consider the application of the human rights versions of the NCSL principle to domestic penal proceedings in states subject to their jurisdiction. The European Court of Human Rights (European Court), in particular, has developed a methodology for adjudicating NCSL challenges to domestic prosecutions under Article 7 of its constitutive

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298. This provision embodies the idea that the relatively static Statute may not reflect existing CIL and should not “chill” the continuing process of CIL development. Per Saland, *International Criminal Law Principles*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 195* (Roy S. Lee ed., 1999); see also ICC Statute, *supra* note 72, at art. 10 (“Nothing in this Part [concerning crimes, jurisdiction, and admissibility] shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.”).

299. ICC Statute, *supra* note 72, at art. 24 (“No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.”).

300. *Id.* at art. 5(2).

301. Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Annex I, Res. E, U.N. Doc. A/Conf.183/10 (July 17, 1998).

302. Collectively, these provisions have their roots in predecessors to the ICC Statute that contemplated that the court would have jurisdiction by reference over “core” international crimes of genocide, crimes against humanity, and war crimes as defined by customary international law along with certain enumerated “treaty crimes” derived from discrete multilateral treaties. As originally envisioned, the ICC’s constitutive statute was to be primarily procedural in nature, incorporating general international law and treaty crimes by reference. Early on, delegates expressed concern that CIL would not define the relevant crimes as clearly as would be necessary to provide adequate notice to an accused. In addition, with respect to treaty crimes, they anticipated that it would be necessary to confirm that the treaty was in force with respect to the relevant states in order for a prosecution to proceed. These concerns led states to set out definitions of crimes in the Statute rather than refer to crimes by reference. The treaty crimes eventually either fell out of the Statute, as was the case with terrorism *stricto sensu* and drug trafficking, or were incorporated into the core crimes, as was the case with respect to crimes against internationally protected persons (which are enumerated as war crimes at Article 8(2)(b)(iii)) and apartheid (which is listed as a crime against humanity at Article 7(1)(j)). These developments, coupled with the court’s jurisdiction becoming strictly prospective with respect to the crimes defined within the Statute, meant that the NCSL provisions lost much of their relevance. See Raul C. Pangalangan, *Article 24: Non-Retroactivity Ratione Personae*, in *COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 467, 467–70 (Otto Triffterer ed., 1999).

303. This would have to be the case; otherwise, states would simply legislate impunity. In fact, the opposite has occurred whereby ICC ratification has spurred a global codification effort as states bring their domestic legal orders into line with the subject matter jurisdiction and infrastructure of the ICC.

document, the European Convention on Human Rights and Fundamental Freedoms (ECHR),<sup>304</sup> that involves several interrelated inquiries of relevance to ICL.<sup>305</sup> In particular, the European Court will find no violation of Article 7 where a prosecution leaves the basic ingredients of a criminal offense unchanged, but modifies or abandons non-core elements—such as attendant or circumstantial elements.<sup>306</sup> Under such circumstances, the European Court has reasoned that the challenged decision has not created a new offense or changed the basic ingredients of an old offense, but rather has permissibly applied an established offense to a new situation or context, or changed the jurisdiction in which such a crime may be adjudicated.<sup>307</sup>

The European Court will also canvas the applicable domestic legal order to consider whether developments in the law rendered the challenged interpretation foreseeable to defendants. This invites reference to non-positive law, as the European Court has interpreted the term “law” in the ECHR to refer to both written and unwritten law.<sup>308</sup> More broadly, the European Court will also look to changes in society that might render an old rule offensive, anachronistic, or presently unworkable. This is true even when the defendant could not have

304. This provision states:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilised nations.

ECPHRFF, *supra* note 279, at art. 7.

305. This methodology can be traced, to a certain extent, to the seminal cases of *S.W.* and *C.R. v. United Kingdom*, in which two men argued that they could not be prosecuted for raping their wives in light of common law marital immunities. The British House of Lords had ruled that the defense was no longer available in light of changing social, economic, and cultural mores. Considering several trends in decision in the British courts establishing important exceptions to immunity alongside ongoing legislative efforts to abolish it, the European Commission on Human Rights held that:

there was a basis on which it could be anticipated [by the applicants] that the courts could hold that the notional consent of the wife was no longer implied. In particular, given the recognition by contemporary society of women's equality of status with men in marriage and outside it and of their autonomy over their own bodies, . . . this adaptation in the application of the offence of rape was reasonably foreseeable to an applicant with appropriate legal advice.

*C.R. v. United Kingdom*, App. No. 20190/92, 21 Eur. H.R. Rep. 363, para. 60 (1995).

The European Court affirmed, reasoning that “Article 7 . . . cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.” *C.R. v. United Kingdom*, 335-C Eur. Ct. H.R. (ser. A) para. 36 (1995).

306. *X Ltd. & Y v. United Kingdom*, App. No. 8710/79, 28 Eur. Comm'n H.R. Dec. & Rep. 77, 81 (1982) (holding that Article 7 dictates that constitutive elements of an offense (blasphemous libel) cannot be changed by the courts *ex post*, although they may be clarified or adapted to new circumstances).

307. *C.R. v. United Kingdom*, 335-C Eur. Ct. H.R. (ser. A) para. 41 (1995).

308. *C.R. v. United Kingdom*, App. No. 20190/92, 21 Eur. H.R. Rep. 363, para. 33 (1995).

known precisely when the critical societal changes took effect.<sup>309</sup> Where there is considerable uncertainty or movement in the law, the European Commission has determined that the populace is essentially on notice that the law is in flux and could be interpreted adversely to future defendants.<sup>310</sup> Contrary judicial opinions or legislative debate can indicate such instability in the law.<sup>311</sup>

Likewise, the European Court has ruled that a change in the law may be foreseeable even if an individual has to seek appropriate legal advice to determine the consequences of her actions. The European Court has noted that this is especially true with respect to persons carrying on a professional activity who<sup>312</sup> “can on this account be expected to take special care in assessing the risk that such activity entails.”<sup>313</sup> Individuals in the military are subjected to such heightened duties in U.S. law. The U.S. Supreme Court has indicated that “for the reasons which differentiate military society from civilian society, . . . Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which the former shall be governed than it is when prescribing rules for the latter.”<sup>314</sup>

In terms of determining the accessibility of the relevant rule, the European Court will look to international law to determine if defendants were on notice that their conduct was unlawful and potentially sanctionable, as is permitted by Article 7(2). In the East German Border Guards case,<sup>315</sup> for example, the applicants acknowledged that the border policy for which they were convicted contravened the German Democratic Republic’s (GDR) international human rights treaty obligations, but argued that the relevant human rights treaties created only state responsibility, not individual criminal responsibility.<sup>316</sup> The European Court ruled that while the GDR could be held responsible for its treaty violations, individual criminal responsibility for such breaches was also foreseeable in light of a domestic code provision that “explicitly provided, and moreover from as long ago as 1968, that individual criminal responsibility was

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309. *C.R. v. United Kingdom*, 335-C Eur. Ct. H.R. (ser. A) paras. 37, 41 (1995).

310. *C.R. v. United Kingdom*, App. No. 20190/92, 21 Eur. H.R. Rep. 363, para. 41 (1995).

311. *See id.* para. 59.

312. *Cantoni v. France*, 1996-V Eur. Ct. H.R. para. 35 (finding that although the statute in question was drafted in general terms, the defendant could have foreseen potential liability with the advice of counsel).

313. *Id.*

314. *Parker v. Levy*, 417 U.S. 733, 756 (1974) (upholding a military prohibition against “conduct unbecoming an officer and a gentleman” as not unconstitutionally vague).

315. In this case, the applicants were involved at various levels of command in the establishment and implementation of a system for preventing individuals from crossing the Berlin Wall that involved the use of anti-personnel mines, automatic fire apparatuses, and a shoot-to-kill policy and that led to the death or injury of many individuals attempting to cross the border into West Germany. After reunification, the German courts convicted the applicants of various forms of homicide, notwithstanding the defendants’ arguments that their actions were sanctioned by extant law allowing for the use of firearms to prevent the commission of a “serious crime” (that is, fleeing the GDR) and by an official policy of using deadly force to police the border. *Streletz, Kessler & Krenz v. Germany*, 2001-II Eur. Ct. H.R. 230.

316. *Id.* para. 47.

to be borne by those who violated the GDR's international obligations or human rights and fundamental freedoms."<sup>317</sup> Thus, criminal prosecution for these acts was foreseeable, even absent the unique and probably unforeseeable circumstances of a change in regime and German reunification.<sup>318</sup> Indeed, the European Court also ratified a related case in which a lowly border guard was charged with knowing that the conduct in question infringed fundamental human rights.<sup>319</sup> A concurring opinion in the *Streletz* case argued that it was necessary to find that international law made the conduct in question a penal offense and concluded that the acts for which the applicants had been convicted constituted crimes against humanity under general principles of CIL.<sup>320</sup> With this additional step in the reasoning, the concurring judge found no breach.

Likewise, in *Kolk & Kislyiy v. Estonia*, the applicants had been convicted of crimes against humanity (specifically the crime of deportation) for acts alleged to have been committed in 1949 under an Estonian penal code provision enacted in 1994.<sup>321</sup> Noting that the Estonian Constitution recognizes international law as "an inseparable part of the Estonian legal system," the domestic courts had ruled that international law criminalized crimes against humanity by 1949, as reflected in the Nuremberg Statute and the General Assembly's affirmation of the Nuremberg Principles in 1946 by Resolution 95(I).<sup>322</sup> The domestic courts so ruled notwithstanding that the Estonian Constitution also included an unequivocal version of the NCSL provision<sup>323</sup> and that the acts in question would not have satisfied the "war nexus" requirement originally included within the definition of crimes against humanity.<sup>324</sup> In rejecting the applicant's Article 7 challenge, the European Court noted that even if the acts in question might have been lawful according to Soviet law (which was in force in Estonia at the time), they constituted crimes against humanity under international law at the time of their commission, especially given that the Soviet Union was a founding member of the Nuremberg Charter.<sup>325</sup>

The European Court has also noted that there are times when criminal rules must be drafted in general terms or when there may be a "penumbra of doubt"

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317. *Id.* para. 104. Indeed, the Court noted that the applicants could not rely on the existence of a policy that contravened international law and "objective justice." *Id.* paras. 47, 87.

318. *Id.* para. 84.

319. *K.-H. W. v. Germany*, App. No. 37201/97, paras. 14, 17 (Eur. Ct. H.R. Mar. 22, 2001), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=GERMANY&sessionId=10570468&skin=hudoc-en>.

320. *Streletz*, 2001-II Eur. Ct. H.R. 230 (Loucaides, J., concurring).

321. *Kolk & Kislyiy v. Estonia*, App. Nos. 23052/04 & 24018/04 (Eur. Ct. H.R. Jan. 17, 2006), available at <http://www.derechos.org/nizkor/impu/kolk.html>.

322. *Id.* § A.

323. See *id.* (citing Article 23(1) of the Estonian Constitution, which states that "[n]o one shall be convicted of an act which did not constitute a criminal offence under the law in force at the time the act was committed").

324. *Id.* For a discussion of the "war nexus" requirement, see *supra* note 41 and accompanying text.

325. See also *Papon v. France* (No. 2), 2001-XII Eur. Ct. H.R. 235; *Touvier v. France*, App. No. 29420/95, 88-B Eur. Comm'n H.R. Dec. & Rep. 148, 161 (1997).

at the fringes of a penal definition.<sup>326</sup> Such statutes do not necessarily offend the principle of specificity inherent in Article 7 as long as the statute “is sufficiently clear in the large majority of cases.”<sup>327</sup> Finally, where conduct is *malum in se* as opposed to *malum prohibitum*, such as the “essentially debasing” rape in question in *C.R.*, the European Court will determine that the applicant could not have reasonably believed that his conduct was lawful.<sup>328</sup> The European Court considers that extending liability in such situations is in keeping with the fundamental objectives of the ECHR—respect for human dignity and human rights.<sup>329</sup> All told, where judicial developments are consistent with the “essence” of an offence and could have been reasonably foreseen by the applicant, the prosecution is not “arbitrary”—the specific evil that Article 7 is designed to protect against.<sup>330</sup>

In 2007, the European Court interpreted Article 7 in the context of ICL with respect to the domestic genocide prosecution of Nikola Jorgić in Germany.<sup>331</sup> After exhausting his domestic remedies, Jorgić challenged his prosecution and conviction before the European Court, claiming that his prosecution violated several provisions of the European Convention: his right to a fair trial before a tribunal “established by law” (Article 6(1)), his right to liberty and security (Article 5(1)), and his right to be free from *ex post facto* prosecution (Article 7). With regard to the *ex post facto* claim, Jorgić argued that the German courts had expansively construed the genocide prohibition beyond the contours of positive law. In particular, Jorgić took issue with the German Constitutional Court’s reasoning that the intent to destroy the group included the intent to destroy the group as a social unit, short of its physical or biological destruction.

The European Court ruled that the German courts’ interpretation was both in keeping with the “essence of the offense”<sup>332</sup> and could reasonably have been foreseen at the material time by the applicant with the assistance of counsel.<sup>333</sup> Because this was the first prosecution under the German law, the European Court looked to other authorities to conclude that the defendant could not reasonably rely upon the more narrow interpretation of German law for which he was advocating.<sup>334</sup> For one, the European Court determined that several aspects of the *actus reus* of genocide do not require the physical or biological

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326. *Cantoni v. France*, 1996-V Eur. Ct. H.R. para. 32; *see also Kokkinakis v. Greece*, App. No. 14307/88, para. 40 (Eur. Ct. H.R. May 25, 1993), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Greece%20%7C%20Kokkinakis&sessionId=10572462&skin=hudoc-en>.

327. *Cantoni*, 1996-V Eur. Ct. H.R. para. 32.

328. *C.R. v. United Kingdom*, 335-C Eur. Ct. H.R. (ser. A) para. 42 (1995).

329. *Id.*

330. *Id.* para. 32.

331. *See supra* notes 268–73 and accompanying text.

332. *Jorgić v. Germany*, App. No. 74613/01, paras. 103–08 (Eur. Ct. H.R. July 12, 2007), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=74613/01&sessionId=8779548&skin=hudoc-en>.

333. *Id.* para. 113.

334. *Id.* paras. 109–10.



destruction of the group, so the German court's interpretation found support in the text of the law.<sup>335</sup> In addition, the European Court determined that Jorgić could have foreseen the more expansive interpretation of the provision in light of the work of several German scholars advancing such an interpretation and a degree of uncertainty in the law on this point.<sup>336</sup> The fact that the ICTY took a narrower approach to cultural genocide in the *Krstić* case<sup>337</sup> was of no moment, because that case post-dated defendant's conviction and could not contribute to his reasonable expectations at the time he acted.<sup>338</sup> Thus, the European Court determined that the German courts enjoyed a margin of appreciation under the Convention to adopt the interpretation of the genocide prohibition that they saw fit without running afoul of Article 7.<sup>339</sup>

The *Jorgić* case, emanating as it does from an authoritative institution charged with interpreting human rights protections, provides a useful framework for evaluating the legal innovations advanced by the ICL tribunals discussed above.<sup>340</sup> As a threshold matter, a distinction can be made within the modern cases between proceedings before the ICTY, ICTR, and SCSL, on the one hand, and "historical justice" cases before domestic courts or the ECCC, on the other. For the most part, the former's jurisprudence is on firmer footing, as some of the relevant developments in the law had been in full swing by the time the defendants acted and these tribunals began operating. Indeed, the ICTY Statute was promulgated in the midst of the war in the former Yugoslavia, arguably providing unimpeachable notice to defendants acting after the Tribunal's establishment and early expansive rulings. With historical justice cases arising out of the Cold War era, when relevant developments in international law were only just in motion at the time the defendants acted, the NCSL challenge may be more acute.

The most important ICL innovations include the establishment of a comprehensive penal regime for all armed conflicts, the knitting together of different strands of ICL (especially IHL *stricto sensu* and the "human rights crimes" of genocide and crimes against humanity), the application of all forms of criminal responsibility to all substantive crimes, an expansive approach to adding content to residual or nebulous clauses and heretofore unconstrued enumerated crimes,

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335. *Id.* paras. 104–05.

336. *Id.* paras. 47, 111.

337. Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, para. 25 (Aug. 2, 2001) (rejecting cognizability of cultural genocide).

338. Jorgić v. Germany, App. No. 74613/01, para. 112 (Eur. Ct. H.R. July 12, 2007), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=74613/01&sessionid=8779548&skin=hudoc-en>.

339. *Id.* para. 114.

340. It should be noted that the ECHR cases hinge to a certain degree on the recognition by the European Court of a margin of appreciation for states codifying international crimes and interpreting domestic or international law. The European Court's role is "confined to ascertaining whether the effects of such an interpretation are compatible with the Convention." Kolk & Kislyiy v. Estonia, App. Nos. 23052/04 & 24018/04, § C (Eur. Ct. H.R. Jan. 17, 2006), available at <http://www.derechos.org/nizkor/impu/kolk.html>.

and the de-emphasis of precision in the circumstantial elements of crimes. From this baseline, it is possible to determine to what extent more particular innovations discussed above in Part III could have been foreseen by today's defendants such that they could have ascertained how to avoid prosecution and to what extent the new tribunals have remained faithful to the essence of offenses established during the postwar period and in subsequent treaty-drafting exercises.

Key developments prior to the establishment of the two ad hoc criminal tribunals put defendants on fair notice of the possibility of criminal liability for abusive practices and expansive forms of liability committed within a range of circumstances. Foremost among these developments was the introduction and near-universal acceptance of international human rights concepts in the global consciousness of the post-WWII period.<sup>341</sup> The identification of these norms as *jus cogens* and/or *erga omnes* obligations speaks to their potency and the fact that they reflect values deemed essential to the peaceful coexistence of humankind. Most of the key human rights treaties were in place prior to the establishment of the first ad hoc tribunals and the events that gave rise to the historical justice cases.<sup>342</sup> Although addressed primarily to state actors and collective (state) responsibility, these human rights treaties signaled that certain conduct was internationally and universally proscribed.<sup>343</sup> These treaties proscribe a range of undesirable conduct, the most egregious segment of which involves violations of individuals' rights to physical integrity and security and constitutes the modern international crimes. Accordingly, where there is a lack of total certainty at the edges of a particular criminal prohibition, the prior existence of a corresponding human rights prohibition provides fair warning of potential penal liability. Moreover, by expressly regulating conduct within the borders of a single state, these international human rights treaties have indelibly adjusted state and individual expectations about the level of protection afforded by state sovereignty against international scrutiny of internal affairs. In this regard, the ICTY has specifically noted that a "[s]tate-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach."<sup>344</sup>

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341. Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: Reconciliation*, 95 AM. J. INT'L L. 757, 778 (2001) (identifying "commonly held subjective values about right and wrong that have been adopted by a representative majority of states in treaties and declarations").

342. Important treaties embodying these values are the 1948 Genocide Convention, the 1949 Geneva Conventions, the 1966 International Covenant on Civil and Political Rights, the 1984 Torture Convention, the regional human rights conventions, and the various nondiscrimination conventions.

343. Many human rights treaties envision the state (via state actors and governmental policies) as primarily responsible for rights violations, and thus the source of recompense. See, e.g., Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 14, G.A. Res. 39/46, at 197, U.N. GAOR, 39th Sess., Annex 39, Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984) [hereinafter Torture Convention]. The most extreme human rights abuses have also been embodied in penal treaties—such as the Genocide, Geneva, and Torture Conventions—which envision both state and individual criminal responsibility.

344. Prosecutor v. Tadić, Case No. IT-94-1-AR92, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para. 97 (Oct. 2, 1995).

These human rights instruments also reflect increased international expectations of individual accountability for international law violations<sup>345</sup> and gave rise to the movement for redress for victims.<sup>346</sup> These treaties obligate states to both respect and ensure the rights contained within them, which implicates both state and non-state action.<sup>347</sup> In joining human rights treaties, states have pledged to, among other things, enact legislation, create institutions to enforce human rights norms, protect the rights of victims of human rights violations, and cooperate in the detection and prosecution of persons suspected of having committed such crimes. In keeping with these overarching duties, these treaties and declarations obligate states to provide victims with legal redress, judicial access, and an enforceable right to fair and/or adequate compensation. Specifically, a right to reparations on the part of victims of human rights violations appears in numerous multilateral instruments. For example, the Universal Declaration of Human Rights,<sup>348</sup> the ICCPR,<sup>349</sup> the American Convention,<sup>350</sup> and the Torture Convention<sup>351</sup> all require states to provide effective remedies within their national courts for victims of violations of fundamental rights guaranteed by those instruments. In addition, many of the human rights treaties allow for the exercise of universal and other forms of extraterritorial jurisdiction, signaling the importance of ensuring worldwide penal accountability for violations.<sup>352</sup>

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345. See Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, G.A. Res. 3074 (XXVIII), at 78, U.N. GAOR, 28th Sess., Supp. No. 30, at 78, U.N. Doc. A/9030 (Dec. 3, 1973); Question of the Punishment of War Criminals and of Persons Who Have Committed Crimes Against Humanity, G.A. Res. 2840 (XXVI), at 88, U.N. GAOR, 26th Sess., Supp. No. 29, U.N. Doc. A/8429 (Dec. 18, 1971) (affirming that "refusal by States to co-operate in the arrest, extradition, trial and punishment of persons guilty of war crimes and crimes against humanity is contrary to the purposes and principles of the Charter of the United Nations and to generally recognized norms of international law"); Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), at 121, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (Oct. 24, 1970).

346. See Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, at 213, U.N. GAOR, 40th Sess., 96th plen. mtg., Annex, Agenda Item 5, Supp. No. 53, U.N. Doc. A/40/53 (Nov. 29, 1985) ("Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures . . .").

347. See, e.g., ICCPR, *supra* note 279, at art. 2(1).

348. UDHR, *supra* note 10, at art. 8 ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.")

349. ICCPR, *supra* note 279, at art. 2(3).

350. The American Convention obliges signatories to ensure that every person has the right to a hearing to determine his rights and obligations of a civil nature. American Convention, *supra* note 279, at art. 8(1).

351. Torture Convention, *supra* note 343, at art. 14. These provisions apply *mutatis mutandis* to acts of cruel, inhuman, and degrading treatment or punishment that may fall short of torture: "the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment." *Id.* at art. 16.

352. See, e.g., *id.* at arts. 5-7 (obliging states parties to prosecute or extradite individuals accused of committing torture).

The rejection of domestic amnesty laws by international institutions<sup>353</sup> and statutes of limitation for international crimes<sup>354</sup> furthers this trend toward placing a high premium on accountability for rights violations.

In terms of the context in which international crimes may be committed, the Cold War spawned developments in the nature of armed conflicts that included a decline in strictly international wars, a rise of civil and other non-international wars, and the internationalization of internal conflicts through proxy warfare. This splintering of conflict classification strained the relevance and durability of negotiated distinctions within the IHL of the norms applicable to the various categories of armed conflict.<sup>355</sup> Common Article 3 and Protocol II—although silent as to penal sanctions—reflect early concern with abuses committed in non-international armed conflicts, and their negotiation histories suggest a trend in legal development toward a notion of war crimes committed outside of international armed conflicts.<sup>356</sup> In any case, the changing nature of armed conflict, coupled with the human rights regime's incursions into state sovereignty, would have given notice of the likelihood that the well-developed norms governing international armed conflicts would eventually extend to non-international armed conflicts and that a regime of penal responsibility for such conflicts was inevitable and imminent. The reinvigoration of the process toward building a permanent international criminal court resulted in negotiations that began to collapse legal distinctions between the categories of war crimes in many key areas. Collectively, these developments—coupled with the development of a human rights regime that applies in times of peace and war—forecast that conflict classification would become less relevant to assigning individual liability for abuses.

The reinvigoration of the International Law Commission's project on establishing a permanent international criminal court in the mid-1980s launched the ICL renaissance.<sup>357</sup> Many of the draft statutes generated during this period of time

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353. See *Garay Hermosilla v. Chile*, Case 10.843, Inter-Am. C.H.R., Report No. 36/96, OEA/Ser.L./V/II.95, doc. 7 rev. 156 (1997) (finding Chilean amnesty law incompatible with IACHR obligations to ensure victim redress).

354. See, e.g., Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. Res. 2391 (XXIII), at 40, Annex, 23 U.N. GAOR, Supp. No. 18, U.N. Doc. A/7218 (Nov. 26, 1968); see also ECCC Statute, *supra* note 180, at arts. 3–5 (extending the statute of limitations for domestic crimes and noting that international crimes have no statutes of limitations); *Kolk & Kislyiy v. Estonia*, App. Nos. 23052/04 & 24018/04, § C (Eur. Ct. H.R. Jan. 17, 2006), available at <http://www.derechos.org/nizkor/impu/kolk.html> (noting that crimes against humanity and war crimes have no statute of limitation).

355. See *Prosecutor v. Delalić, Mucić, Delić & Landžo*, Case No. IT-96-21-T, Judgment, para. 301 (Nov. 16, 1998) (“[T]he prevalence of armed conflicts within the confines of one State or emerging from the breakdown of previous State boundaries is apparent and absent the necessary conditions for the creation of a comprehensive new law by means of a multilateral treaty, the more fluid and adaptable concept of customary international law takes the fore.”).

356. See Deidre Willmott, *Removing the Distinction Between International and Non-International Armed Conflict in the Rome Statute of the International Criminal Court*, 5 MELB. J. INT'L L. 196, 199–204 (2004).

357. *Prosecutor v. Tadić*, Case No. IT-94-1-T, Opinion and Judgment, para. 655 (May 7, 1997) (citing the work of the International Law Commission as evidence of CIL).

contemplated more expansive crimes against humanity and war crimes provisions than had been employed during the WWII period. In these negotiations, states indicated a willingness to revisit issues that had been foreclosed in prior multilateral negotiation exercises, such as a penal regime for non-international armed conflicts.<sup>358</sup> The “re-discovery” of crimes against humanity signaled a more robust regime of ICL that would address situations of internal tyranny and state-sponsored repression. Revived formulations of the crime did not depend on the existence of a state of war (as is required for war crimes), or some protected status of the victim or heightened mens rea (as are required for genocide). As a result, the ground was laid for crimes against humanity to operate as an umbrella crime with clear analogs in established domestic crimes for which advance notice of proscription would be unequivocal.<sup>359</sup>

Although just as much of a legal fiction in international law as it is in domestic law, if not more so, individuals may be charged with ICL omniscience. The foregoing developments in domestic law, human rights, IHL, and ICL made it clear at the outset of the ICL renaissance that much of the conduct in question in the modern cases was already proscribed, even if there was no direct treaty provision on point. Accordingly, individuals have not been prosecuted or convicted of conduct that they could not reasonably have understood to be proscribed with the assistance of counsel. In most cases, with the child soldiers case as a possible exception, new constructions were not “unexpected” or “indefensible” by reference to the extant domestic and international law and basic values concerning how humans should act towards each other.

Even where modern courts have taken some liberties with the content of the applicable substantive law in betrayal of the NCSL principle, they have to a certain extent mitigated the harm to defendants by remaining more faithful to the gist of NCSL’s sentencing counterpart—*nulla poena sine lege*.<sup>360</sup> In particular, defendants before the ad hoc tribunals are generally (although not always) sentenced in keeping with the domestic law in place at the time they acted and not pursuant to any fixed schedule of penalties associated with particular international crimes. The architects of the ICTY initiated this practice with Article 24(1) of the Tribunal’s Statute, which provides that the Tribunal shall “have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia” in determining the terms of imprisonment.<sup>361</sup> The

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358. Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, para. 227 (Dec. 10, 1998) (noting that “the Rome Statute by and large may be taken as constituting an authoritative expression of the legal views of a great number of States”).

359. See Tomuschat, *supra* note 14, at 834 (noting that crimes against humanity are “an amalgamation of the core substance of criminal law to be encountered in the criminal codes of all ‘civilized’ nations”).

360. A strict application of *nulla poena sine lege* dictates a published schedule of penalties, a feature of many civil law systems.

361. ICTY Statute, *supra* note 152, at art. 24(1); see also Rules of Procedure and Evidence (RPE) of the International Criminal Tribunal for the Former Yugoslavia, rule 101(B)(iii), U.N. Doc IT/32/rev.38 (June 13, 2007) (reiterating requirement that the Trial Chamber consider the general practice regarding

same approach is mandated before the Rwanda Tribunal.<sup>362</sup> The base sentence is then subjected to adjustment in light of aggravating and mitigating factors associated with the particular circumstances of the defendant, the form or degree of involvement in the crime, and the gravity of the conduct in question.<sup>363</sup>

In *Furundžija*, for example, the Trial Chamber characterized the defendant's actions as rape, rather than as sexual assault (which is how his conduct would have been characterized by the domestic courts of the former Yugoslavia). In so ruling, the Trial Chamber made a distinction between the aggravated characterization of the offense for the purposes of charging and conviction and the concomitant sentence, which was to be in accordance with the sentencing practice of the former Yugoslavia.<sup>364</sup> Thus, as long as the sentence was in alignment with the national practice, the Tribunal found no adverse consequence of the act being characterized as rape rather than assault under ICL other than the potential heightened stigma associated with such a designation. With respect to the stigma factor, the Trial Chamber concluded that "any such concern is amply outweighed by the fundamental principle of protecting human dignity, a principle which favours broadening the definition of rape."<sup>365</sup>

The particular crime classification employed may thus assert fewer tangible impacts on a defendant where the tribunal calibrates the sentence based on the gravity of the conduct in question, or analogous sentences under domestic law, and not its precise legal categorization before the international tribunal.<sup>366</sup> This is not to say classification is without any effect; the degree of stigma associated with different international crimes varies as observers instinctively assume a hierarchy of crimes with genocide at the apex followed by crimes against humanity and war crimes, in that order.<sup>367</sup> As was seen in the *Furundžija* decision, tribunals tend to de-emphasize the impact of such expressive functions

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prison sentences in the courts of the former Yugoslavia). The ICTY and ICTR RPE also set forth some aggravating and mitigating factors that may be considered in sentencing convicted defendants.

362. ICTR Statute, *supra* note 180, at art. 23.

363. *See, e.g.*, Prosecutor v. Plavšić, Case No. IT-00-39/40-T, Sentencing Judgment, paras. 21, 25 (Feb. 27, 2003).

364. Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, para. 184 (Dec. 10, 1998).

365. *But see* Prosecutor v. Galić, Case No. IT-98-29-A, Judgment, para. 398 (Nov. 30, 2006) ("[T]he International Tribunal, while bound to take the sentencing law and practice of the former Yugoslavia into account, does not have to follow it.").

366. *See* Prosecutor v. Erdemović, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Li, para. 19 (Oct. 7, 1997) (arguing "that the gravity of a criminal act, and consequently the seriousness of its punishment, are determined by the intrinsic nature of the act itself and not by its classification under one category or another").

367. *See* Erdemović, Case No. IT-96-22-A, Judgment, paras. 26–27 (finding defendant's original guilty plea to be uninformed because defendant was unaware that crimes against humanity were a more serious offense than war crimes); Prosecutor v. Musema, Case No. ICTR-96-13-I, Judgment, para. 981 (Jan. 27, 2000) ("[G]enocide constitutes the 'crime of crimes,' which must be taken into account when deciding the sentence."). *See generally* Allison Marston Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, 87 VA. L. REV. 415 (2001) (arguing that the *chapeau* elements of international crimes allow for the grading of offenses for sentencing purposes).

of the law when considering the legality of a particular characterization.

This referential approach was not built into the ICC process, although it was considered.<sup>368</sup> Instead, the ICC Statute provision entitled “*nulla poena sine lege*” provides laconically that “[a] person convicted by the Court may be punished only in accordance with this Statute.”<sup>369</sup> This undoubtedly refers to the type of penalties allowed, including imprisonment up to thirty years or life imprisonment for extremely grave crimes, fines, forfeiture,<sup>370</sup> and various forms of reparation and restitution.<sup>371</sup> The specific sentencing provisions provide only that “the Court shall . . . take into account such factors as the gravity of the crime[,] the individual circumstances of the convicted persons”<sup>372</sup> and “the evidence presented and submissions made during the trial that are relevant to the sentence.”<sup>373</sup> Drafters adopted this approach to enable judicial flexibility and discretion and to promote “equality of justice” so that all defendants before the ICC would be subjected to uniform penalties, regardless of the place of commission or nationality of the relevant parties.<sup>374</sup>

Nonetheless, the ICC would do well to consider adopting the ICTY/R approach where appropriate and to apply the principle of lenity at the time of sentencing in the event that the judges engage in more expansive juridical interpretations that may run counter to the domestic law to which defendants would otherwise be subject. Relying upon existing penalties for the same or analogous crimes in place in the *locus commissi delicti* can minimize the tangible impact of retroactive adjudication.<sup>375</sup> This approach should give way, however, where such penalties would be grossly disproportionate to the offense in question because the local law is weak or underdeveloped. Where national systems do not include a specific schedule of penalties associated with the commission of particular crimes, the ICC can look to the sentencing practices of the triers of fact to calibrate a punishment that fits the facts and to ensure that defendants are not unduly prejudiced by novel or expansive interpretations of the law.

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368. Early in the process of drafting the ICC Statute, it was envisioned that the international court would take into account the penalties provided in applicable national law (for example, the territorial or nationality state) to serve as guidance. William A. Schabas, *Article 23: Nulla Poena Sine Lege*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 463, 464 (Otto Triffterer ed., 1999). There was even talk of drafting a more detailed schedule of penalties along the line of civil law jurisdictions, but in the end, these options were abandoned in favor of a more untethered approach. *Id.* at 465–66.

369. ICC Statute, *supra* note 72, at art. 23.

370. *Id.* at art. 77 (setting forth available penalties).

371. *Id.* at art. 75 (providing for victim reparation).

372. *Id.* at art. 78(1).

373. *Id.* at art. 76(1).

374. Rolf Einar Fife, *Article 77: Applicable Penalties*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 985, 986, 989–90 (Otto Triffterer ed., 1999).

375. Prosecutor v. Erdemović, Case No. IT-96-22-T, Joint and Separate Opinion of Judge McDonald and Judge Vohrah, para. 85 (Oct. 7, 1997) (noting that sentencing provides a “sophisticated and flexible” tool to do justice in particular cases).

## CONCLUSION

Innovative judges and expansive legal interpretations are not unique or endemic to ICL. Like all incipient areas of law, the development of ICL has proceeded asymptotically: early cases addressed vast open areas in legal doctrine. Today's cases address issues that are more nuanced, involving the resolution of more micro irregularities and the filling in of increasingly smaller gaps.<sup>376</sup> Although codification will never be complete, the rate of change is slowing significantly. As a maturing system of law, most of the next phase of the evolution of ICL will happen at the outer edges of doctrine, where the implications of new ideas are perhaps less dramatic. As a result, there will be less and less space for judges to build upon the ICL edifice.

Going forward, unless the international community creates more ad hoc and hybrid courts, international prosecutions will increasingly proceed exclusively before the ICC, as the ad hoc Tribunals implement their Completion Strategies and the work of the Special Court for Sierra Leone winds down. The ICC is governed by a robust NCSL provision that prohibits not only the retroactive application of law but also mandates strict construction in favor of the defendant. In addition, Article 21 sets forth a hierarchy of sources that may limit the Court's ability to refer to more expansive customary international law.<sup>377</sup> That said, there are "legality deficits" within the Statute, as many crimes are vaguely or sparingly worded and key terms remain undefined,<sup>378</sup> notwithstanding the Elements of Crimes.<sup>379</sup> As the ICC begins to issue substantive decisions and judgments, the new court will undoubtedly be faced with the pressure to innovate. It remains to be seen<sup>380</sup> to what extent the NCSL provisions will truly cabin the ability and proclivity of the court to adopt expansive or novel interpretations to crimes within its jurisdiction or to assert jurisdiction over crimes that states purposefully excluded from its jurisdiction, such as acts of

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376. Dworkin would employ a tree metaphor to describe this process, whereby the Nuremberg and Tokyo Tribunals provided ICL's trunk and the modern tribunals, perched on ever narrower branches, are making increasingly minor refinements and subinterpretations of the basic doctrines. RONALD DWORGIN, *LAW'S EMPIRE* 70 (1986).

377. ICC Statute, *supra* note 72, at art. 21. This Article directs the Court to apply, in the first place, the Statute, Elements of Crimes and Rules of Procedure and Evidence; in the second place, "applicable treaties and the principles and rules of international law"; and, in the third place, "general principles of law . . . derived from national law[.]" It has been presumed that "principles and rules of international law" refers to international customary law, although the formulation is ambiguous. See Margaret McAuliffe deGuzman, *Article 21: Applicable Law*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 435, 441-42 (Otto Triffterer ed., 1999).

378. Perceived vagueness in definition is one of the reasons articulated by the United States for opposing the court. See John R. Bolton, *The Risks and Weaknesses of the International Criminal Court from an American Perspective*, 41 VA. J. INT'L L. 186, 189 (2000).

379. See David Hunt, *The International Criminal Court: High Hopes, "Creative Ambiguity" and an Unfortunate Mistrust in International Judges*, 2 J. INT'L L. CRIM. JUST. 56, 60 (2004) (opining that the Elements of Crime—"an overwhelming exercise of legal positivism"—will have the effect of "stultifying further growth in the law").

380. See Wessel, *supra* note 132, at 414 ("[I]t is unrealistic in light of history to expect *nullum crimen sine lege* to significantly restrain judicial policy-making at the ICC.").



terrorism<sup>381</sup> or corruption.<sup>382</sup>

Beyond the ICC, situations remain in which innovation is possible and will be tempting. For example, the ECCC will have to determine the state of ICL in the 1975–79 period, when the Khmer Rouge were in power.<sup>383</sup> Many developments in the law of crimes against humanity and genocide most relevant to the Khmer Rouge era are the result of the work of the two ad hoc tribunals in the late 1990s. These include the almost complete convergence of the law on war crimes relevant to international and non-international armed conflicts, the official abandonment of a “war nexus” for crimes against humanity, and the adoption of the subjective approach to protected group identity and membership for the crime of genocide.<sup>384</sup>

Where the defense of NCSL will likely retain its greatest currency going forward will be in domestic proceedings, especially where courts adjudicating historical justice cases must decide what law to apply to events that antedated or were contemporaneous with the ICL renaissance. In connection with their ratification of the ICC Statute, states are increasingly incorporating international crimes into their domestic penal codes. Such crimes are often subject to universal jurisdiction, granting domestic courts an expansive extraterritorial reach. Indeed, there will undoubtedly be additional efforts to apply these new statutes to conduct that predated codification. Such retroactive justice is enabled by the trend among courts to extend, toll, or altogether abolish statutes of limitation for international crimes.<sup>385</sup> Spain has been particularly active in litigating cases arising out of the repressive regimes in Latin America during the Cold War and elsewhere. NCSL may exert greater resistance in domestic prosecutions than it does in international ones where domestic courts are bound by constitutional articulations of the principle and where courts may not be able to rely upon the varied sources of international law for applicable rules of decision.<sup>386</sup>

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381. See, e.g., Vincent-Joel Proulx, *Rethinking the Jurisdiction of the International Criminal Court in the Post-September 11th Era: Should Acts of Terrorism Qualify as Crimes Against Humanity?*, 19 AM. U. INT'L L. REV. 1009, 1022–25 (2004).

382. See, e.g., Sonja Starr, *Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations*, 101 NW. U. L. REV. 1257, 1257–58 (2007).

383. See ECCC Statute, *supra* note 180, at art. 2 (limiting the ECCC's temporal jurisdiction to crimes committed during the period of April 17, 1975 to January 6, 1979).

384. A hybrid court to consider terrorist acts in Lebanon is in the process of being established. See Detlev Mehlis, *Report of the International Independent Investigation Commission Established Pursuant to Security Council Resolution 1595, para. 5, delivered to the Security Council*, U.N. Doc. S/2005/662 (Oct. 20, 2005) (proposing the establishment of such a court). The contemplated subject matter jurisdiction includes crimes of terrorism, for which there is no omnibus international definition. The statute for that tribunal, however, defines terrorism solely in reference to Lebanese domestic law. It is unclear how influential international law will be in those proceedings. See Statute of the Special Tribunal for Lebanon, S.C. Res. 1757, art. 2, Attachment, U.N. Doc. S/RES/1757 (May 30, 2007).

385. See *supra* note 354.

386. Prosecutor v. Milutinović, Šainović & Ojdanić, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction: Joint Criminal Enterprise, para. 39, (May 21, 2003) (noting that international law is “the product of multipartite treaties, conventions, judicial decisions and

The NCSL dilemma also remains relevant for idiosyncratic or expansive interpretations of established law, along the line of the *Jorgić* case. In addition, in the United States, the military-commission scheme envisioned by the Bush Administration contemplates assertions of jurisdiction over a number of crimes,<sup>387</sup> newly designated as war crimes, that do not find expression in ICL, IHL, or domestic law, such as “material support for terrorism” or the crime of conspiracy as a substantive offense.<sup>388</sup> Still, ICL is not likely to repeat the dramatic evolution it underwent in the last two decades.

ICL began with a bang in the post-WWII period as the framers of the Nuremberg and Tokyo Tribunals created two new offenses—crimes against the peace and against humanity—to supplement established, yet ultimately deficient, war crimes prohibitions. These jurists assumed that their efforts would be made permanent through the creation of new positive law and permanent institutions. This was not to be. Impatient in the face of continued atrocities and states’ dogged unwillingness to align law with morality and justice better, and pressed with the need to take principled action, modern international judges have sacrificed the strict application of NCSL to fashion the moral universe for the future international order that was envisioned during the momentous post-war period. There is no question that the lines of reasoning employed in the cases discussed above occasionally produced substantive justice at the expense of strict legality. Yet, even if the analytical claims employed in individual cases are not always fully satisfactory or persuasive, the results obtained for the system as a whole ensure that tomorrow’s defendants cannot credibly claim they did not know that their acts of mass murder and mayhem were crimes under international law.

Just as common law crimes once flourished in England and the new American colonies, similar processes have been at work in ICL. And just as common law crimes eventually dissipated<sup>389</sup> in the face of virtually complete codification,<sup>390</sup> so too will the common law of ICL become less necessary, prevalent, and relevant. And yet, in ICL, this integration and stabilization of the law has been driven less by assertions of legislative primacy, as happened in the common law context, and more as a result of international courts aggressively

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customs which have received international acceptance or acquiescence’ rather than a set of statutes adopted by one sovereign authority, as in national systems”) (quoting the *Justice Case*, *supra* note 15).

387. See Military Commission Act of 2006, 10 U.S.C.A. § 950v(b)(25) (2006 & Supp. 2007).

388. See *United States v. Hamdan*, Ruling on Motion to Dismiss (Ex Post Facto) 5-6 (July 14, 2008) (holding that the conspiracy and material support for terrorism crimes did not violate the *ex post facto* prohibition because they were pre-existing offenses under the common law of war) (draft on file with *The Georgetown Law Journal*).

389. See *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812) (abolishing notion of federal common law crimes and declaring that all federal crimes must be proscribed by statute to be punishable). For a history of this transition, see WAYNE R. LAFAVE, 1 SUBSTANTIVE CRIMINAL LAW § 2.1 (2d ed. 2007).

390. John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 202 (1985) (noting that, in the United States, “penal legislation exists in such abundance that wholesale judicial creativity is simply unnecessary”).

flexing their jurisprudential muscles in the face of legislative debility. International judges, it turns out, are better able to represent the moral condemnation of the international community than are states engaged in multilateral negotiations with their own interests—including ensuring impunity—at heart. And so, where the law was silent, it was made to speak. These jurisprudential developments were then codified by states in the ICC Statute, which is serving as the inspiration and impetus for the domestication of ICL norms. In this global codification process, states cannot claim to start with a blank slate; rather, many of the broad contours of the law have been sketched out for them by the jurisprudence of ad hoc tribunals and their progeny. Positive law, in the form of the ICC Statute, now reflects developments in the law made at the expense of perfect legal certainty. Now that the universe of international criminal law has settled in, the need for expansive interpretation is diminishing and the full complement of the principle of legality can take root.

Since its genesis, ICL has been buffeted by powerful crosscurrents. The first is a humanitarian impulse that was stimulated in the post-WWII period and that animated the United Nations project and the human rights movement. This period, coming as it did in the wake of the unprecedented atrocities of WWII, constitutes a veritable constitutional moment<sup>391</sup> in international law. The second current is the enduring principle of state sovereignty, which renders states anxious to shield their agents and internal events from international scrutiny and censure. Perhaps more than any other area of public international law, ICL reflects the perennial struggle between the “is” and the “ought” and between positivism and normativity. In the still-primitive state of international law, where what positive law exists is often the product of self-interested negotiation and compromise and where consistent enforcement remains elusive, courts have seized the opportunity to swim in normative waters. Although international law is arguably an instrument of international relations ostensibly made by and for states, ICL has risen above its progenitors and embarked upon a path of its own, guided by judicial discourse. So far, in the struggle between apology and utopia being waged in the field of international law as first identified by Finnish scholar Martti Koskeniemi,<sup>392</sup> the utopians emerge dominant in international criminal law.

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391. Bruce Ackerman uses the term “constitutional moment” in the context of liberal revolutions. See BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* 46–54 (1992). According to Ackerman, this moment is essentially a window of opportunity for “a collective effort both to frame . . . fundamental principles and to mobilize broad popular support for . . . crucial initiatives.” *Id.* at 49.

392. MARTTI KOSKENIEMI, *BETWEEN APOLOGY AND UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (2005) (noting the tension in international law between descriptive theories that accurately convey how states behave and normative ones that hinge on principles of justice that should govern international relations).