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

Beth Van Schaack, Santa Clara University
ABSTRACT

One 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. 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 Allied representatives drafting the Charters could have easily relied solely on the well-established constellation of war crimes 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. The judges of the Nuremberg Tribunal, in reasoning that was to be later echoed by their brethren on the Tokyo Tribunal, rejected the defense with 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.” This implied that the Allied states could override the principle in the exercise of their collective executive, legislative, or judicial powers in the German territory. Second, having identified NCSL as a principle of justice, the Tribunal concluded that prosecution was justified, because the defendants could not have reasonably thought their conduct was lawful and it would be unjust to exonerate malefactors. Third, the Tribunal ruled that the Charter was an “expression of international law existing at the time of its creation,” and so defendants received adequate fair warning that they might be prosecuted for their actions.

These core arguments have been adapted to the modern ICL jurisprudence. Where states have failed to enact comprehensive ICL, judicial institutions 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 prohibitions, 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. By reviewing these cases, it is possible to construct a taxonomy of analytical claims made by tribunals adjudicating international criminal law to evade or neutralize the defense of
NCSL. These arguments turn on a complex interplay of immorality, illegality, and criminality and depend in large part on the multiplicitous sources of international law.

Collectively, these cases—in which defendants have been made subject to new or expanded criminal law rules—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. Nonetheless, this Article argues that the methodology developed by the European Court of Human Rights to enforce the articulation of the NCSL principle in its 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 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 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 also provide insight into the dynamics of ICL argumentation, the interpretive attitudes of ICL judges, and even an emerging philosophy of the nature of ICL as a body of law.
**CRIMEN SINE LEGE: JUDICIAL LAWMAKING AT THE INTERSECTION OF LAW AND MORALS**

**BETH VAN SCHAACK**

**TABLE OF CONTENTS**

I. **INTRODUCTION** .......................................................................................................................... 3

II. **THE ORIGINS OF THE NULLUM CRIMEN SINE LEGE JURISPRUDENCE** .......................... 7

III. **NULLUM CRIMEN SINE LEGE IN ICL** .................................................................................. 15

   A. **THE SHIFTING STATUS OF NCSL IN ICL** ........................................................................... 15
   B. **THE OBJECT & PURPOSE OF ICL** ....................................................................................... 22
   C. **ILLEGALITY = CRIMINALITY** ............................................................................................. 29
   D. **ACTS MALUM IN SE** ............................................................................................................... 34
   E. **NOTICE ANYWHERE IS NOTICE EVERYWHERE** ............................................................... 36
      1. **TREATIES** ............................................................................................................................. 37
      2. **CUSTOMARY INTERNATIONAL LAW** ................................................................................ 39
      3. **GENERAL PRINCIPLES OF LAW** ..................................................................................... 43
      4. **JUDICIAL OPINIONS** ........................................................................................................ 48
      5. **THE TEACHINGS OF THE MOST HIGHLY QUALIFIED PUBLICISTS** ............................ 49

IV. **NCSL AS AN INTERNATIONAL HUMAN RIGHT** ................................................................. 50

V. **CONCLUSION** ....................................................................................................................... 64

I. **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”). This Latin maxim asserts the *ex post facto* prohibition: that conduct must be criminalized and penalties fixed in advance of any criminal prosecution. The maxim is

---

* Assistant Professor of Law, Santa Clara University School of Law; J.D. Yale Law School, 1997; B.A. Stanford University, 1987. This article greatly benefited from comments from the faculty of Santa Clara University School of Law, in particular Art Gemmel, Paul Goda S.J., Bradley Joodeph, Jean Love, and Bob Peterson. I am also indebted to Margaret McAuliffe DeGuzman, Kenneth Gallant, Ryan Goodman, Linda Keller, Susan Lamb, Jaya Ramji-Nogales, Gabor Rona, and Ron Slye, and grateful for the support of the School of Law Faculty Scholarship Support Fund. Leslie Frost and Jeffrey Larson provided excellent research assistance. The central idea in the Article grew out of my casebook with Ron Slye published by Foundation Press: *INTERNATIONAL CRIMINAL LAW & ITS ENFORCEMENT* (2007).

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 Jerome Hall, *Nulla Poena Sine Lege*, 47 Yale L. J. 165 (1937); Machteld Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* 83 et seq. (2002); Aly Mokhtar, *Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects*, 26 Statute L. Rev. 41 (2005).
often invoked in connection with corollary legislative and interpretive principles \(^2\) 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 two key purposes: ensuring that individuals are capable of obtaining notice of prescribed conduct so they can rationally adjust their behavior to avoid sanction and protecting the citizenry from arbitrary state action in the face of ambiguities or gaps in the law. The principle of *nullum crimen sine lege* (NCSL) writ large thus embodies “an essential element of the rule of law,” \(^3\) 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. Indeed, Alexander Hamilton recognized violations of the principle as “the favorite and most formidable instruments of tyranny.” \(^4\)

The principle of NCSL has constitutional significance in many national systems. \(^5\) In United States 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. \(^6\) The framers had particular historical tyrannies in mind in constitutionalizing the twin prohibitions against *ex post facto* laws and bills of attainder. \(^7\) 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.” \(^8\) Instead, United States law addresses adjudicative retroactivity primarily through the “fair warning requirement” found implicit in the Due Process clauses. \(^9\)

---


\(^6\) U.S. Conст. art. I, § 9, cl. 3 (“No bill of attainder or *ex post facto* Law shall be passed.”) & U.S. Conст. art. I, § 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; and (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. (2 Dall.) 286, 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. *Ross v. Oregon*, 227 U.S. 150, 162 (1913) (“the 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, 466-67 (2001) (upholding a court’s action as the “routine exercise of common law decision-making in which the court brought the law into conformity with reason and common sense.”).

Within international law, the principle of NCSL is embodied in all of the omnibus human rights instruments. These provisions are directed to all branches of the governments of state parties, although in practice, they are most often invoked in reaction to judicial action. In contradistinction, the principle is not featured in the statutes governing the modern international criminal law tribunals, with the exception of the Rome Statute establishing the International Criminal Court.

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 period, the victorious Allies essentially held German and Japanese sovereignty “in trust” as postwar occupiers. 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.”10 The Charters governing these Tribunals were the source of new rules of international law that were immediately,11 and then intermittently thereafter,12 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 states—still the primary source of legislative authority in international law—have failed to enact comprehensive ICL, it is judicial institutions that 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 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 is 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 two parts. Part II starts where the Nuremberg and Tokyo Tribunals—the Aristotelian “prime movers” in the field of ICL—left off by developing a taxonomy of recurring lines of reasoning and methodological choices employed by modern ICL tribunals in the face of NCSL defenses with reference to exemplary cases. 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. In all these cases, defendants are made subject to new or expanded criminal law rules.

Part III then 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. Part III 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, 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 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 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

---

13 The *Justice Case*, brought 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 Altsötter et al., III TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNAL UNDER CONTROL COUNCIL LAW NO 10, 954, 966 [hereinafter “Justice Case”].*
justice system until they were gradually supplanted by legislative efforts.\textsuperscript{14} So too in ICL; common law international crimes—as developed and elaborated upon in the cases discussed herein—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 also teach volumes about the dynamics of ICL argumentation, the interpretive attitudes of its judges (even those trained in the Civilist-Germanic tradition), and even an emerging philosophical perspective on the nature of law. In particular, this Article reveals that when ICL judges find themselves at the “point of intersection between law and morals,”\textsuperscript{15} they lean decidedly toward the latter.

\section{The Origins of the \textit{Nullum Crimen Sine Lege} Jurisprudence}

The principle NCSL entered the ICL field 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 Allied representatives drafting the Charters 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 the peace charge most vociferously,\textsuperscript{16} 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.”\textsuperscript{17} 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.”\textsuperscript{18} 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

\textsuperscript{14} Common law crimes emerged in the United Kingdom through the mid-17\textsuperscript{th} century when legislatures met infrequently and judges regularly confronted harmful conduct without proscriptive statutes. \textsc{LaFave \\ \\ & Scott, Substantive Criminal Law} 103 (West 1986).

\textsuperscript{15} \textsc{Alexander Passarini d’Entrèves, Natural Law} 116 (2d ed. 1952).

\textsuperscript{16} Interestingly, defendants’ motion did not address the novelty of the crimes against humanity charge at all. \textit{See} Motion Adopted by all Defense Counsel on 19 November 1945, \textit{in} \textsc{Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg}, 14 November 1945-1 October 1946 at 168-70 (1947).

\textsuperscript{17} Judgment, \textit{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”].

\textsuperscript{18} Nuremberg Judgment at 461.
time of its creation.” 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.”

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.” 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.” This implied that the Allied states could override the principle in the exercise of their collective executive, legislative, or judicial powers in the German territory.

Second, having identified NCSL as a principle of justice, the Tribunal concluded that prosecution was justified, because the defendants could not have reasonably thought their conduct was lawful and it would be unjust to exonerate responsible individuals. It reasoned:

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.

By this reasoning, because extant treaties, including the Kellogg-Briand Pact and various bilateral treaties of neutrality and non-aggression, prohibited the acts of aggression undertaken by Germany, defendants’ conduct was unquestionably wrongful and thus punishable.

19 Id.
20 Id.
21 Id.
22 Id. at 462.
23 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 generalment suivie”—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 733, 737 n.13, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (Cassese et al. eds. 2002).
24 Nuremberg Judgment 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, XII LAW REPORTS OF THE TRIALS OF WAR CRIMINALS at 62 (1949).
26 Telford Taylor, a key member of the prosecutorial team, anticipated this potential argument in an early memorandum on trial strategy:
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.”27 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”28 the Pact and thus render itself vulnerable to reprisals and claims for reparations) into one regulating individual conduct by providing penal sanctions. 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. 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.”29 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,30 such as the mistreatment of POWs and the use of poisonous weapons, notwithstanding that those Conventions are silent as to individual criminal responsibility for breaches.31 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 no where designates such practices as criminal, nor is any sentence prescribed, nor

---

27 Nuremberg Judgment, supra note ___, at 463.
28 Kellogg-Briand Pact, supra note ___, at Pmbld.
29 Nuremberg Judgment, supra note ___, at 462.
30 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), 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). Delegates reconvened in The Hague in 1906 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”].
31 Nuremberg Judgment, supra note ___, 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.
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.32

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.”33 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 illegality and criminality was tenuous. In fact, the inclusion of crimes against the peace was hotly contested during the Tribunal’s 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.34 The French delegate, Professor André Falco, harkened back to the decision following World War I—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.35 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-World War I period in connection with the massacres and deportations committed by the Ottoman Empire of its Armenian subjects, among other atrocities of that war.36 Two decades before the establishment of the

---

32 Nuremberg Judgment, supra note ___, 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 (1942). See Nuremberg Judgment, note ___, at 465.

33 Id. 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.” Report to the President by Mr. Justice Jackson, June 6, 1945, in International Conference on Military Trials Report of Robert H. Jackson to the International Conference on Military Trials, London, 1945 (1949), available at http://www.yale.edu/lawweb/avalon/imt/jackson/jack08.htm [hereinafter “Jackson Report”].

34 Taylor, supra note ___, at 65-6.

35 Taylor, supra note ___, at 66.

36 The Allied governments of France, Great Britain and Russia issued in 1915 a joint Declaration to the Ottoman Empire denouncing the massacres of Armenians as “crimes against humanity and civilization for
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.\(^ {37} \)

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, undoubtedly recognizing 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, \textit{viz.} 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.\(^ {38} \)


\(^{38}\) Nuremberg Judgment at 249.
In this way, the Tribunal disregarded language in the Charter definition that crimes against humanity could be committed “before or during the war” 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. 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 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.

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. Not surprisingly, the Japanese defendants asserted arguments in 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. At the time, the motion was dismissed, but 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.

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

40 The American judge at Nuremberg, Judge Biddle, later explained the limited approach to crimes against humanity 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).
41 Van Schaack, supra note ____, at 846-7 (noting that the notion of crimes against humanity made inroads into traditional domains réservés of states).
43 Id. at 48,439. Military tribunals proceeding on the basis of Control Council Law No. 10 (CCL 10), enacted to provide a uniform basis for the trial of lesser defendants in occupation courts, generally adopted this same reasoning when confronted with claims that CCL 10 constituted ex post facto legislation. Einsatzgruppen Case, United States v. Ohlendorf and Others, 4 TRIAL OF WAR CRIMINALS BEFORE THE NUERNBURG MILITARY TRIBUNALS UNDER CONTROL COUNCIL NO. 10 (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.”).
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 the 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.\(^{44}\)

In Röling’s estimation, the victorious states had a right—if not a duty—to neutralize threats to international peace and ensure the non-repetition of conduct that disrupted the newly established order.\(^{45}\) 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 more guarantees than mere political action could do.”\(^{46}\) In Judge Röling’s mind, the imperatives of necessity and security overrode 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.”\(^{47}\)

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.\(^{48}\)

In Justice Pal’s estimation, for a victor nation to legislate 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


\(^{45}\) *Id.* at 46.

\(^{46}\) *Id.* at 47.


\(^{48}\) *Id.* at 37.
customary law does not develop only by pronouncements." He concluded, accordingly, that "When 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." To the extent that any custom may have been developing, he argued, it was directed at sovereign states and not individuals. 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: "Fear 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."

In this way, the Nuremberg and Tokyo Tribunals approached the principle of NCSL somewhat inconsistently and with caution. Although they did not dismiss the 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 at the time. 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

---

49 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.").
50 Id. at 128.
51 Id. at 180.
52 Id. at 214.
53 Id. at 215.
54 Many of the post-WWII occupation courts echoed this reasoning. In the “Justice Case,” for example, the court noted:

The \textit{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 \textit{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 \textit{ex post facto} principle to judicial decisions of common international law would have been to strangle that law at birth.

Justice Case, \textit{supra} note \____, at 974-75. \textit{See also} The Einsatzgruppen Case, United States \textit{v.} Ohlendorf and Others, 4 TRIAL OF WAR CRIMINALS BEFORE THE NUERNBURG MILITARY TRIBUNALS UNDER CONTROL COUNCIL NO. 10 (1951) ("CCL 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 \textit{ex post factoism} in the law of murder."), NCSL was unsuccessfully raised as a defense in several subsequent domestic proceedings beyond the immediate postwar period (most notably in the \textit{Eichmann} case), but the Nuremberg reasoning was largely followed and “no new arguments were adduced.” Lamb, \textit{supra} note \____, at 739. \textit{See Attorney General of Israel \textit{v.} Eichmann}, reprinted in 36 I.L.R. 5 (Jm. 1961), aff’d, 36 I.L.R. 277 (S. Ct. 1962) (Isr.).
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.

III. *Nullum Crimen Sine Lege* in ICL

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,” 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 between immorality, illegality, and criminality as revealed in the survey of such cases that follows. In cases before these tribunals, defendants seek to impugn the definitions of crimes and forms of participation set forth in the tribunals’ constitutive statutes. In other proceedings, however, today’s tribunals are not merely ratifying retroactive legislation promulgated by states after the events in question. Rather, they are themselves expanding dated law to address modern atrocities. In many cases, tribunals purport to be acting in actual or substantial compliance with the dictates of the NCSL principle. In other cases, tribunals imply that NCSL is inapplicable or inapposite. In many of these cases, these multiple lines of reasoning are interwoven so that they reinforce and complement each other. to reject the applicability of NCSL and its constitutive principles. 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 NCSL in ICL

A recurring argument in the face of the defense of NCSL is that the principle of NCSL simply does not apply in ICL to 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. Judge Cassese, for

---

55 Ecclesiastes 1:9-14.
56 *See, e.g.*, *Prosecutor v. Milutinovic*, 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) [hereinafter “*Milutinovic: JCE*”]

57 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
example, 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.” Even now, fifty years later, one Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) reasoned “[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.” 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 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.

Courts have also reasoned that to the extent that it exists in ICL, NCSL do 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.” 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.

Whereas it is for the legislature to define the crime and prescribe its punishment in domestic law, in ICL states and non-governmental bodies draft treaties that embody core international prohibitions. The crimes themselves are rarely drafted in terms of the basic 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 ___, at 974-75.

58 Cassese, *supra* note ___, at 72; see also Hans Kelsen, *Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?*, 1 INT’L Q. 153, 164 (1947) (“this rule [against *ex post facto* legislation] is not valid at all within international law, and is valid within national law only with important exceptions.”).

59 *Prosecutor v. Delalić*, Case No. IT-96-21-T, Judgement, para. 403 (Nov. 16, 1998) [hereinafter “Delalić”]. This reasoning was echoed in *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, Decision On The Preliminary Motions By The Defence Of Joseph Nzirorera, Édouard Karemera, André Rwamakuba And Mathieu Ngirumpatse Challenging Jurisdiction In Relation To 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.”).


61 Delalić, *supra* note ___, at para. 403.

62 *Id.* at 404-05.
elements of criminal law—mens rea, actus reus, attendant circumstances, etc. 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 state parties have codified treaty crimes, their legislatures at times simply incorporated ICL by reference, especially 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. In other circumstances, these pockets of vagueness reflect the concerted ambiguity that results from difficult inter-state negotiations in which certain 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 and canonical international law principles of treaty construction would compel adoption of an interpretation that is most deferential to state sovereignty. As a result of these factors in ICL formation, modern criminal

63 See, e.g., Galić, supra note ___, at para. 133 (ascertaining the elements of the crime of terror against the civilian population as prohibited by the Additional Protocols to the Geneva Conventions).
65 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. U.K., 2 Eur. H.R. Rep. 245, Series A, Vol. 30, para. 49 (noting that “while 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.”).
66 Delalić, supra note ___, at para. 412 (“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.”).
67 See 1 OPPENHEIM’S INTERNATIONAL LAW 1278 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) (discussing canon of in dubio mitius, which dictates that where treaty terms are ambiguous, an
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, better approximates the ideal, 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.

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 interpretation should be chosen that is least onerous to the party assuming the obligation or that interferes least with state sovereignty).

68 Report of the 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 (2000), available at http://www.iccnow.org/html/u.n.html [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 U.S. argued for the following statutory language: “Definitional elements for these crimes, contained in annex XXX [placeholder], shall be an integral part of this Statute, and shall be applied by the Court in conjunction with the general provisions of criminal law, in its determination.” Conference Document, A/CONF.183/C.1/L.8 (June 19, 1988). 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). As a compromise measure, adopted as part of a “package deal” in the waning days of the Rome Conference, the language at 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.” Article 9, ICC Statute. But see Art. 21, ICC Statute (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 “assisting the Court….” See Margaret McAuliffe DeGuzman, Article 21: Applicable Law, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT ____ (Otto Triffterer, ed., 2nd ed. 2008) (forthcoming, draft on file with the author).

69 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, Judgement, at para. 724 (July 31, 2003) (striking “other inhumane acts” count). One commentator has surmised that this absence is a feature of the disempowerment of international judges: “[t]he 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.” Broomhall, supra note ___, at 452-3. 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.
Professor Eskridge has observed with respect to domestic statutes, courts are more likely to adapt old norms with little chance of legislative revision.  

Most importantly, perfect positivism is impossible where customary international law (CIL)—the practice of states bolstered by their articulations of legal duties—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 implementation and enforcement 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, 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 alleging 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. In rejecting the defense and convicting 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 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.

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

---

71 Milutinovic: JCE, supra note ___, at paras. 37-38 (setting forth requirements of NCSL, but noting that courts must “take[e] into account the specificity of international law” in considering principle’s application).  
72 Id. at para. 532.  
73 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 ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 289, 294 (Otto Triffterer ed. 1999).  
74 Prosecutor v. Kupreškić, Case No. IT-95-16, Judgement, para. 563 (Jan. 14, 2000). See also Prosecutor v. Blagojevic, Case No IT-02-60-T, Judgement, 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.”).
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.”\textsuperscript{76} 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.”\textsuperscript{77}

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.”\textsuperscript{78} On appeal, the legality of “other inhumane acts” was not the subject of either party’s appeal. Nonetheless, the ICTY Appeals Chamber addressed it\textit{ 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.\textsuperscript{79}

A notable exception to this trend in decision with respect to open-textured provisions appears in the case against Vasiljević. There, Trial Chamber II of the ICTY acquitted 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.\textsuperscript{80} This assessment, the Tribunal stressed, must take into account “the specificity of international law, in particular that of customary international law.”\textsuperscript{81} 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.

\textsuperscript{76} Kupreškić, supra note ___, at para. 563.
\textsuperscript{77} Id. at para. 566.
\textsuperscript{78} Prosecutor v. Stakić, Case No. IT-97-24-T, Judgement, at para. 719 (July 31, 2003). 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\textit{ de facto}, as opposed to a strictly international, boundary. Id. at 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 make no mention of the necessity of traversing such a boundary. Elements of Crimes,\textit{ supra} note ___, at 118.
\textsuperscript{79} Prosecutor v. Stakić, Case No. IT-97-24-A, Judgement, paras. 314-15 (Mar. 22, 2006). The Appeals Chamber also reversed the Trial Chamber’s determination that “other inhumane acts” did not encompass the internal—as opposed to international—forcible transfer of persons. At the same time, the Trial Chamber’s expansion of the enumerated crime of deportation to cover such transfers was also upheld on appeal. Id. at para. 300-03. The Appeals Chamber did, however, scale back the Trial Chamber’s ruling that deportation could also be charged for moving individuals across shifting frontlines—as opposed to\textit{ de facto} boundaries—as contrary to the NCSL principle. Id.
\textsuperscript{80} Vasiljević,\textit{ supra} note ___, at para. 201 (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 \textit{under customary international law} for its general nature, its criminal character and its approximate gravity to have been sufficiently foreseeable and accessible.

\textsuperscript{81} Id.
of the acts, and this norm must make it sufficiently clear what act or omission could engage his criminal responsibility." In so ruling, it 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.

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. 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. Thus, in explaining the outcome at Nuremberg, one commentator—himself an international criminal law judge—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 accountable for appalling atrocities." Thus, courts will balance considerations of "the preservation of justice and fairness toward the accused" against the articulated needs of the international community for security, accountability, and "the preservation of world order." 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 now overstated. These tribunals accept the applicability of the principle to proceedings before them; however, they have rejected, or impliedly denied, the absolute positivistic version in 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

82 Id. at para. 193.
84 See supra notes ___; see also Milutinovic: JCE, supra note __, at para 37.
85 Kelsen, supra note __, 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 THE JUDGE ADVOCATE J. 8, 46 (1945). See also ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 139 (2003) (discussing substantive justice approach).
86 Cassese, supra note __, at 72.
87 Delalić, supra note __, at para. 405.
88 See Karemera, supra note __, at 39 ("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.").
that the application of NCSL is different in international courts than it is in domestic courts.89

B. THE OBJECT & PURPOSE OF ICL

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,90 for example, defendants invoked the NCSL defense beyond the realm of substantive law in an effort to thwart prosecutions based on contested forms of responsibility. In a preliminary challenge to jurisdiction, defendants argued that IHL did not allow superiors to be prosecuted for the acts of their subordinates in internal 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.91 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. So 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.92 Thus, “[t]he emphasis on conduct, rather than on the specific description of the offense in substantive law, is of primary relevance.”93 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” so long as the defendant knew the conduct was condemned.94

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: to ensure accountability for violations of international law committed on the

89 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-95-171-T, Judgement, 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-I, Decision on Immunity from Jurisdiction (May 31, 2004) (finding that international court was not bound by head of state immunity doctrine applicable within domestic courts).
90 Prosecutor v. Hadžihasanović, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, paras. 15-39 (Nov. 12, 2002) [hereinafter “Hadžihasanović Jurisdictional Challenge”]. 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. Tadić Judgement, at paras. 190-91.
91 See Prosecutor v. Hadžihasanović, Case No. IT-01-47-PT, Interlocutory Appeal on Decision on Joint Challenge to Jurisdiction (Nov. 12, 2002) (consolidating defendants’ arguments on the legality of the superior responsibility counts for interlocutory appeal) [hereinafter “Hadžihasanović Appellate Brief”].
92 Hadžihasanović Jurisdictional Challenge at 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. at 62 (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.
93 Id. at paras. 62, 165.
94 Id. at para. 62.
territory of the former Yugoslavia, regardless of how that conflict was characterized. It noted that the Council cited statements made by states during the drafting of the ICTY Statute showing 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. The Trial Chamber then went further to examine the object and purpose of IHL writ large: the “regulation of the means and methods of warfare[, the protection of] persons not actively participating in armed conflict from harm” and the “respect for human dignity.” The Trial Chamber invoked the Martens Clause, contained in the preamble of Protocol II, as inspiration to consider the fundamental principles underlying international humanitarian law. 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.

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 make clear that applying the dictates of NCSL to the context of superior responsibility required a showing not that the predicate conduct of the subordinates was criminal, but that that it would have been known to the superior that his or her own conduct in failing to control his subordinates may be punishable. 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 internal armed conflict rather than that applicable to international armed conflict. Third, defendants argued that the Trial Chamber overstated the level of sanction necessary to put defendants on

---

95 Id. at paras. 97-101, 112, 115-19, 172-73.
96 Id. at paras. 105-9.
97 Id. at 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.”).
98 Id. at para. 64. See also Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Judgement, 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”).
99 Id. at para. 160. 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.” In most IHL treaties, the Clause appears in the preamble; Protocol I elevates it to a substantive provision. Article 1(2), Protocol I.
100 Id. at para. 16.
101 Hadžihasanović Appellate Brief, supra note __, at para. 20.
102 Id. at para. 20 (“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 cannot be said that it is foreseeable that conduct is unlawful in internal conflict on the basis that it is prohibited in international conflict.”).
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. 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.”

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.

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.”

In affirming, the Appeals Chamber ruled that the doctrine of superior responsibility is the most effective means of enforcing the foundational principle of the law of responsible command, which applies to the laws of war governing all forms of armed conflict. 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 responsibility in respect of such crimes.” 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.” In this analysis, the ICTY largely overlooked obvious reasons why states may have chosen not to apply the doctrine to non-

\[\text{References}\]

103 Id.
104 Id. at para. 81.
105 Id. at para. 25.
106 Id.
107 Hadžihasanović Appeal on Command Responsibility, supra note ___, at paras. 16-17, 22 (“The … 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.”).
108 Id. at para. 18.
109 Id. at para. 29.
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. 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. Finally, the Appeals Chamber confirmed that the applicability of the superior responsibility doctrine in internal conflicts was both foreseeable and accessible to defendants embattled in the former Yugoslavia: “[a]s 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.”

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. This assumes known, or knowable, law and rational actors who will structure their conduct to avoid anticipated censure. To date, specific deterrence 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 early 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 general deterrence of future perpetrators. Even scholars devoted to the field doubt whether ICL can yet exert a meaningful deterrent effect

---


112 *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 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.”).

113 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.
under contemporary circumstances where international justice remains sporadic and random.\textsuperscript{114} In addition, 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—may belie the argument that the relevant actors are always rational and thus capable of engaging in a coherent cost-benefit analysis.

Where deterrence is de-emphasized, 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.\textsuperscript{115} These other goals can be still advanced where the strict dictates of NCSL are de-emphasized. Retribution and condemnation\textsuperscript{116} in particular focus on the individual culpability of the defendant and his bad acts, as well has the harm suffered by victims. Although one may decry retribution as a primitive and unenlightened motivation for the criminal law, its enduring potency cannot be denied. Anti-impunity (perhaps a kinder, gentler term for retribution) is often cited as a key object and purpose of ICL.\textsuperscript{117} 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.\textsuperscript{118} 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\textsuperscript{119} provides that a “treaty


\textsuperscript{116} See Prosecutor v. Erdemović, Case No. IT-96-22-T, Joint and Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 65 (Oct. 7, 1997) (“the 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.”).

\textsuperscript{117} Preamble, ICC Statute (affirming that “the most serious crimes of concern to the international community as a whole must not go unpunished”).

\textsuperscript{118} 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—in the domestic context, the state; in the international one, the impunity-enjoying perpetrator.

\textsuperscript{119} This analysis assumes the applicability of the Vienna Convention approach to the statutes of the \textit{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
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.\textsuperscript{120} 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 signatory states.\textsuperscript{121} By joining such a multilateral human rights regime, state parties submit themselves to a particular legal order and assume the obligations set forth in these treaties for the benefit of individuals within their \textit{espace juridique} and not for the benefit of themselves or other contracting states.\textsuperscript{122}

At least in the realm of IHL, a teleological approach is also permitted, if not mandated, by the Martens Clause.\textsuperscript{123} The Clause suggests a reservoir of uncodified law applicable in armed conflict in the absence of complete codification.\textsuperscript{124} It allows, indeed


\textsuperscript{121} The Effect of Reservations on the Entry Into Force of the American Convention (arts. 74 and 75), Advisory Opinion OC-2/82 of Sept. 24, 1982 (1983), reprinted in 67 ILR 568, para. 27 (1984) (“the object and purpose of the Convention is not the exchange of mutual 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.”). \textit{See also Ireland v. United Kingdom}, App. No. 5310/71, 2 Eur. H.R. Rep. 25 (1980), reprinted in 58 ILR 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.’


\textsuperscript{123} 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. Report to the President by Mr. Justice Jackson, June 6, 1945, in \textit{International Conference on Military Trials Report of Robert H. Jackson} to the International Conference on Military Trials, London, 1945 (1949), available at http://www.yale.edu/lawweb/avalon/int/jackson/jack08.htm [hereinafter “Jackson Report”]. Tribunals in the post-WWII 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. The Justice Case, \textit{supra} note \underline{\textit{\text Supra note 123}}, at 58-59.

\textsuperscript{124} The full meaning and import of the Martens Clause remains in dispute. Some states argue that it simply reminds State Parties that they are bound by CIL alongside their treaty obligations. Others consider it
mandates, courts to go beyond the written text and invoke not only CIL (“the usages established between civilized nations”) but also the moral bases of humanitarian obligations, i.e., “pre-juridical principles [and] the sentiments of humanity.” As such, the Martens Clause also provides a principle of interpretation. If “faced with two interpretations—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.”

Arguably, any right to strict construction implied by the NCSL principle could 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. 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 extra-textual 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, have provided a methodology for tribunals to invoke the object and purpose of ICL to resolve ambiguities in positive law. In effect, ambiguities are most often resolved in favor of a more expansive reach for ICL and greater accountability, often to the detriment of the accused.


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) (“the 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.”). 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).

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.

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 or seek reparations from responsible states in the event of a breach. Nonetheless, starting with the Nuremberg Tribunal’s reasoning with respect to the crimes against the peace charge, modern tribunals quite easily equate the international condemnation of a practice with its criminalization. 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 in the way that the 1949 Geneva Conventions do for 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 a civil—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

---

131 See, e.g., Article 3, Convention Respecting the Laws and Customs of War on Land, 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 sought such reparations before the ICJ in connection with the United States’ support of the Contras. See Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27) (Merits) [hereinafter “Nicaragua”].
132 Delalić Appeals Judgement, supra note ___ at para. 162 (“a finding of individual criminal responsibility is not barred by the absence of treaty provision on punishment of breaches”). But see Prosecutor v. Vasiljević, Case No. IT-98-32-T, Judgement, paras. 196, 199 (Nov. 29, 2002) (“under 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.”).
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.\footnote{Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993) [hereinafter “ICTY Secretary-General’s Report”].}

The Appeals Chamber ruled that Article 3 of the ICTY Statute applied to international and non-international armed conflicts.\footnote{Prosecutor v. Tadić, Case No. IT-94-1-AR92, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995) [hereinafter “Tadić Decision on Jurisdiction”].} In so ruling, the Appeals Chamber looked to the Security Council’s object and purpose in promulgating the ICTY Statute, \textit{viz.} 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.”\footnote{\textit{Id.} at para. 72.} 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.\footnote{\textit{Id.} at para. 74.} The Appeals Chamber concluded that to rule that both war crimes provisions 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,”\footnote{\textit{Id.} at para. 78.} would discount the Security Council’s apparent indifference to the nature of the conflict and defeat the goal of punishing condemned acts committed therein.\footnote{\textit{The Appeals Chamber reversed the Trial Chamber on the applicability of the Geneva Conventions’ grave breaches provisions to non-international armed conflicts. Judge Abi-Saab in a separate opinion 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.” \textit{Prosecutor v. Tadić}, Case No. IT-94-1-AR72, Separate Opinion of Judge Abi-Saab on the Defence Motion for Interlocutory Appeal on Jurisdiction, p. 5 (Oct. 3, 1995).}}

The Appeals Chamber ruled that while there had been no “full and mechanical transplant”\footnote{\textit{Tadić Decision on Jurisdiction, supra note }, at para. 126.} of rules governing international armed conflict to the body of law governing non-international armed conflict, there was a corpus of law applicable to non-international armed conflict geared toward protecting civilians and those \textit{hors de combat} and regulating the means and methods of warfare that was contemplated by Article 3. 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.\footnote{\textit{Id.} at para. 89.}

To guide future inquiries, the Appeals Chamber identified four factors that must be satisfied in order for an offense to be cognizable under Article 3 in the context of a non-international armed conflict: (a) the act must infringe a rule of IHL; (b) the rule must
be customary in nature or, if contained in a treaty, the treaty must be applicable; (c) 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. With respect to the applicability of individual criminal responsibility, point (d) 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. 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. 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. Defendants conceded that prior precedent had established the existence of joint criminal enterprise liability (JCE) in international armed conflicts, but noted that all the sources relied upon—primarily WWII caselaw—emerged in the wake of an international armed conflict. Defendants also noted that

141 Id. at para. 94.
142 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, Judgement, 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. at 617.
143 Karemera, supra note ___.
144 In Hadžihasanović, defendants made similar arguments with respect to the doctrine of superior responsibility, arguing that only Additional Protocol I applicable in international armed conflicts set forth the doctrine. 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) [hereinafter “Hadžihasanović Appeal on Command Responsibility”].
145 Karemera, supra note ___, at para. 2; see also Prosecutor v. Blagojevic and Jokic, Case No. IT-02-60-T, Judgement, para. 695 n.2145 (Jan. 17, 2005); Prosecutor v. Milutinovic et al., Case No. IT-05-87-PT, Decision on Ojdanić’s Motion Challenging Jurisdiction: Indirect Co-Perpetration, para. 15 (Mar. 22, 2006).
146 See Tadić Appeals Judgement, supra note ___. The ICTY’s invocation of JCE liability in Tadić was an 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 ICTY Statute, Article 7(1). 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.” Id. at para. 191.
neither common Article 3 nor Additional Protocol II\textsuperscript{147} includes provisions relating to JCE liability.\textsuperscript{148}

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.\textsuperscript{149} 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.\textsuperscript{150} 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.”\textsuperscript{151} In other words, “[t]he nature of the conflict is not relevant to the responsibility of the perpetrator,” although the Trial Chamber did note that conflict classification remained relevant to determine chargeable crimes.\textsuperscript{152}

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:

\begin{quote}
there 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.\textsuperscript{153}
\end{quote}

\begin{footnotes}
\item[147] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (June 8, 1977) [hereinafter “Protocol II”].
\item[148] Karemera, supra note ___, at para. 16.
\item[149] Id. at 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. at 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 (e.g., conspiracy and incitement). Id. at para. 47. See also Prosecutor v. Krstić, Case No. IT-98-33-A, Judgement (April 19, 2004).
\item[150] Id. at 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.”).
\item[151] Id.
\item[152] Id.
\item[153] Id. at para. 44.
\end{footnotes}
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. 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. This position is articulated even where sister treaties expressly provide for criminal penalties such that a strict application of the a contrario principle would dictate 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. 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 (e.g., sanctions, reprisals, reparations, or territorial concessions), and summary execution. Had the WWII Allies not initiated their experiment with international justice, most of the defendants would have been summarily executed and the German people condemned and punished en masse. The assignment of individual criminal responsibility before a court of law, even retroactively, is a more progressive and fair form of norm enforcement. Courts adjudicating ICL thus reason that NCSL dilemmas must be evaluated against the available alternatives.

Third, the tribunals are quite self-conscious 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[ed] the traditional dichotomy between international and wars and civil strife.” In addition, as most modern global conflicts are internal or quasi-internal in character, the distinction between the two bodies of law has seemed increasingly arbitrary and outmoded to modern tribunals. ICL tribunals thus evince a “normative bias” visible in other forms of

---

154 As a result of these ruling, 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 obviated 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.

155 See Kanyabashi, Joint & Separate Opinion, para. 16 (“To interpret silence as a prohibition would frustrate the object and purpose of the Statute.”).

156 Delalić, supra note ___, at para. 308 (“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. S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 9 (Sept. 7, 1927).

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

158 Tadić Decision on Jurisdiction, supra note ___, at para. 83.

159 Id. at 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
international legal discourse favoring “international legal completeness, predictability, coherence, and dynamism” 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 expansive 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 defense of NCSL in situations in which the conduct in question is deemed *malum in se*. Tribunals have reasoned that no formal notice of the penal consequences of conduct that shocks the conscience of the international community is unnecessary. 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.” 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.” The ICTY/R Appeals Chamber noted that

---

bans or providing the same protection when armed violence has erupted ‘only’ within the territory of a sovereign State?”). *See also Delalić Appeals Judgement, supra note __*, at 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.”).  


162 Delalić, *supra* note __*, at 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 Appeals Judgement, *supra* note __*, at para. 173. *See also Milutinovic: JCE, supra note __*, at para. 42 (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.”).
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.  

By this reasoning, the NCSL principle protects only “legitimate confidence.”

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 is wrong and inevitably criminal, but arguably not know that his particular involvement in, or contribution to, such conduct would also render him vulnerable to penal sanctions. 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 include JCE liability as a form of responsibility, and the indictment did not allege such a theory. 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.”

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. Many ICL cases proceed as though a higher 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.

It is perhaps not surprising that jurists would “turn to ethics” in the face of atrocities, when a desire to ensure the confluence of law and morality is likely to be at its strongest. Historically, international law development has been at its most active in

---

163 Milutinovic, supra note ___, at para. 42.
164 Tomuschat, supra note ___, at 835.
165 *Tadić* Appeals Judgement, supra note ___, at paras. 172-75.
166 Id. at para. 191.
168 See *Prosecutor v. Erdemović*, Case No, IT-96-22-T, Sentencing Judgement, para. 75 (Nov. 29, 1996) (noting that “[t]he 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 kidnappers. 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.”).
169 See Martti Koskenniemi, “The Lady Doth Protest Too Much”: Kosovo, and the Turn to Ethics in International Law, 65 Mod. L. Rev. 159 (2002).
170 Lord Wright, *War Crimes Under International Law*, 62 L. Q. Rev. 40 (1946) (arguing that all of law must reflect “the instincts of justice and humanity which are the common heritage of” humankind).
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.”

In this way, tribunals appear compelled to respond to “innovations in atrocity” where positive la w is silent.

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.

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 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. 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.

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.

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 conclude that the defendant was effectively and sufficiently “on notice” that his conduct was unlawful.

171 Id. at 51.
173 The statutes of the ad hoc tribunals contain language limiting their jurisdiction to “serious violations of international humanitarian law.” See Article 1, ICTY Statute and Article 1, ICTR Statute. The ICC Statute ups the ante to “the most serious crimes of international concern.” Article 1, ICC Statute. 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, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006) [hereinafter “ECCC Statute”]. Likewise, the Sierra Leone Special Court is prosecuting “persons who bear the greatest responsibility for serious violations” of IHL. SCSL Statute, supra note ____.
175 See Asylum Case (Colom. v. Peru), 1950 I.C.J. Rep. 266 (recognizing the possibility of regional custom).
These disparate sources of law may articulate different standards with respect to the same subject matter, and international law has only rudimentary rules for reconciling competing sources of authority.177 According to the ICL “rule of recognition”178 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 Statute179 in violation of Article 51(2) of Additional Protocol I180 and Article 13 of Additional Protocol II.181 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.182 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. 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.183

With respect to the fourth *Tadić* condition requiring the criminality of the rule in question, the Trial Chamber determined that the conduct charged also constituted a grave breach of Additional Protocol I, specifically the crime of “making the civilian population or individual civilians the object of attack,”184 even though this was not the precise crime charged. Accordingly, it determined that the basic conduct of attacking civilians was

---

177 See *Nicaragua*, 1986 I.C.J. at 95 (noting that CIL may supersede treaty norms).
178 H.L.A. HART, *THE CONCEPT OF LAW* 92 (2d ed. 1994) (explaining the concept of a rule of recognition that “specifies 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.”). See 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.
179 *Galić*, supra note ____, at para. 64.
180 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (June 8, 1977) (Protocol I) (“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.”).
182 *Galić*, supra note ____, at paras. 94-129.
183 See also Delalić Appeals Judgement, *supra* note ____, at para. 44 (noting that the May 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).
184 Article 85(3)(a), Protocol I.
criminalized regardless of whether the additional element of the specific intent to terrorize the victims was present.\textsuperscript{185} In determining the existence of this rule of IHL, the Trial Chamber declined to confirm its customary status, determining that it was unnecessary to do so because the rule applied via treaty law.\textsuperscript{186}

On appeal, Galić argued that treaty law alone, without grounding in CIL, was insufficient to give jurisdiction to the Tribunal over the offense of “the international crime of terror.”\textsuperscript{187} The Appeals Chamber noted that that the Tribunal has endeavored to confirm the CIL 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.\textsuperscript{188} 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 CIL to establish individual criminal responsibility and the constitutive elements.\textsuperscript{189} The majority of the Appeals Chamber then confirmed the reasoning of the Trial Chamber on 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.\textsuperscript{190} It noted that the 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.\textsuperscript{191}

In dissent, Judge Schomburg of Germany argued that the prohibition against spreading terror among the civilian population was prohibited by IHL, but was not a crime for which defendant could be prosecuted or convicted.\textsuperscript{192} He considered state practice criminalizing the conduct to be insufficient to conclude that the fourth Tadić element was satisfied.\textsuperscript{193} He also critiqued the majority’s failure to consider whether a prosecutable crime existed in both international and internal armed conflicts.\textsuperscript{194} In conclusion, he raised the specter of politicization and warned that

\begin{quote}
It 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
\end{quote}

\begin{itemize}
\item \textsuperscript{185} \textit{Id.} at para. 127.
\item \textsuperscript{186} \textit{Id.} at paras. 97, 138.
\item \textsuperscript{187} \textit{Prosecutor v. Galić,} Case No. IT-98-29-A, Judgement, para. 79 (Nov. 30, 2006).
\item \textsuperscript{188} \textit{See also Milutinovic:} JCE, \textit{supra} note ___, at para. 10 (“there 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 jurisdictional rationae materiae, that body of law must be reflected in [CIL]”).
\item \textsuperscript{189} Galić, \textit{supra} note ___, at para. 83.
\item \textsuperscript{190} \textit{Id.} at paras. 94-96.
\item \textsuperscript{191} \textit{Id.} at para. 87.
\item \textsuperscript{192} \textit{Prosecutor v. Galić,} Case No. IT-98-29-A, Judgement, paras. 7-8 (Nov. 30, 2006) (Separate and Partially Dissenting Opinion, Schomburg, J.)
\item \textsuperscript{193} \textit{Id.} at paras. 10-15, 20.
\item \textsuperscript{194} \textit{Id.} at para. 16.
\end{itemize}
question was not without any doubt penalized at the time when it took place.\textsuperscript{195}

In lieu of a conviction under Count 1, Judge Schomburg would have acquitted the defendant and 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.\textsuperscript{196}

2. \textbf{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.\textsuperscript{197} Indeed, courts will even resort to CIL when there is an extant treaty on a subject,\textsuperscript{198} although it is difficult to identify relevant state practice outside of the treaty where the treaty is well subscribed to by states.\textsuperscript{199} Where CIL satisfies the principle of legality, NCSL is effectively reformulated as \textit{nullum crimen sine jure}, where \textit{jure} includes other than positively enacted law.\textsuperscript{200}

A compelling example of this reasoning is found in a case emerging from the Special Court for Sierra Leone.\textsuperscript{201} 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 “(d) Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate

\begin{itemize}
  \item \textsuperscript{195} Id. at para. 21.
  \item \textsuperscript{196} Id. at para. 1, 22.
  \item \textsuperscript{197} 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, \textit{supra} note \textsuperscript{198} at 464. Historically, adjudications of the law of war in the United States provide additional examples of this approach. \textit{See, e.g.}, 11 Op. Atty 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).
  \item \textsuperscript{198} \textit{Delalić}, \textit{supra} note \textsuperscript{197}, at para. 302-03 (“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.”).
  \item \textsuperscript{199} \textit{See} R.R. Baxter, \textit{Treaties and Custom}, 129 RECUEIL DES COURS 64 (1970) (identifying the paradox of finding CIL where a well-subscribed treaty occupies the field).
  \item \textsuperscript{200} M. Chérif Bassiouni, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 144 (2d ed. 1999) (advocating that the principle of legality in ICL should be reformulated as noted given that it does not rely exclusively on written law (\textit{lege}) but also encompasses unwritten customary rules (\textit{jure})).
  \item \textsuperscript{201} \textit{Norman}, \textit{supra} note \textsuperscript{198}. 
\end{itemize}
actively in hostilities.”

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, 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. While 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 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. 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. 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.” Given that Sierra Leonean law did not prohibit child recruitment, he argued that there was no way for the embattled defendants to reasonably

203 Norman, supra note ___, at para. 25.
204 Id. at para. 33.
205 Id. at para. 50.
207 Id. at para. 12. See also id. at para. 3 (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.”).
ascertain, even through competent legal advice, that they were committing a crime when they enlisted and recruited child soldiers. He concluded that however “inconvenient” the result, NCSL compelled the dismissal of the challenged charge.

This reasoning finds echoes in the recent Scilingo case before the Spanish 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 and were subject to universal jurisdiction—the Audiencia convicted him of crimes against humanity, which had only been codified in Spanish law in 2004, well after the acts of which Scilingo was accused had been committed. The Audiencia rejected 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 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. In so ruling, the Audiencia determined that it would make allowance for the unique characteristics of international law and of the crucial role 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, potentially running afoul of 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. 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.

On Appeal, the Tribunal Supremo (Supreme Court) upheld the conviction, but rejected the Audiencia’s reasoning. It ruled that although the defendant did commit crimes against humanity as they are defined under international law by contributing to

---

208 Id. at para. 17.
209 Id. at para. 12. The surviving defendants were convicted of the offense. Prosecutor v. Fofana, Judgement, Case No. SCSL-04-14-T (2 Aug. 2007).
212 Id. at 1.A., Fundamentos de Derecho, ¶¶ 6-7.
213 C.P. Article 607bis (Spain).
216 See La Constitucion Española [C.E.] art. 25 (“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 C.P. Art. 2 (“A crime or misdemeanor shall not be punished with a penalty not included in the law prior to the perpetration thereof.”).
217 Case Scilingo, STS No. 789/2007 (Nov. 8, 2007) (Sp.).
state-sponsored policy to eradicate subversion, 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. Instead, the Supreme Court ruled that it would substitute a conviction for the well-established domestic crimes of murder and illegal detention. 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 practically lesser include offenses of) the crimes of genocide and war crimes over which universal jurisdiction existed as a matter of statutory law and CIL. 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. The Supreme Court concluded that the universal jurisdiction law was merely a procedural law whose extension by analogy did not implicate the principle of specificity. 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.

In looking to CIL to “fill gaps” in positive law, 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 found in the pronouncements of states and other institutions, including non-governmental or intergovernmental organizations. 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. It is of course uncontroversial that the substance of CIL is inherently

---

218 Id. at 70-73.
219 Id. at 64.
220 Id. at 69-71.
221 Id. at 71.
222 Id. at 70-71.
223 Id. at 74. Given NCSL provision in the Spanish Constitution, this judgment will inevitably appealed to the Tribunal Constitucional (the Constitutional Court). See generally Tomuschat, supra note ____; Gil Gil, supra note ____; Giulia Pinzauti, An Instance of Reasonable Universality: The Scilingo Case, 3 J. INT’L CRIM. J. 1092 (2005).
224 Tribunals will rely on CIL to establish the existence of forms of responsibility as well as substantive offenses. See, e.g., Milutinovic, supra note ___, at para. 41 (finding that the rules of customary law were sufficient to support a prosecution under the joint criminal enterprise theory of liability).
225 This is the case in other areas of public international law reasoning as well. Theodore 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 may contravene articulated norms).
226 Gradoni, supra note ___, at 4 (compiling 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).
227 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 (e.g., military manuals); acquiescence in other state practice; and unilateral action that may not have been projected on to the international plane. Id. at 8.
evolutionary, 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. Although this 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. In ICL, states are known to espouse lofty rhetoric in self-serving dialog 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. Allowing unwritten ICL norms to provide fair warning to a defendant of the penal standards to which he will be judged and a rule of decision 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. In this regard, it is more reasonable to charge states rather than individuals with the duty of tracking CIL, since states are more used to operating on the international plane. 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

The frequency of citation suggests that the Tribunal is most influenced by the practice of the United States, Western Europe and Russia. Id. at para. 13.

228 The Paquete Habana, 175 U.S. 677, 686 (1900).
230 One commentator has characterized this as a sliding scale methodology: “the 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).
231 Gradoni, supra note ___, at 1. See also Lamb, supra note ___, at 743 (“the nullum crime sine lege 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.”); BOOT, supra note ___, at 20 (“jurists practicing criminal law tend to become somewhat nervous when reference is made to ‘customary international law’ as a basis for individual criminal responsibility”).
In addition to CIL, courts will also canvass domestic law to identify applicable general principles of law. The International Law Commission determined while drafting the ICC Statute that general principles of law were not precise enough to serve as the direct basis of penal responsibility. Nonetheless, such principles have proven themselves to be sufficiently robust to provide notice to the defendant of a novel construction of ICL. 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 as a war crime. While some IHL treaties prohibit rape, none concretely defines the crime. 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.” 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.

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.

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...
Drafters of the ICC’s Elements of Crimes have since codified this result.241 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.242 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.243 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.244 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.245 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.246 This is the case even where the domestic law analog is technically more akin to a lesser-included offense of the international offense to be prosecuted.247

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

---

241 *Elements of Crimes*, *supra* note ___, at 110 (defining rape to include oral intercourse).
242 *Milutinović*, *supra* note ___ at para. 40-41 (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).
244 As Justice Jackson argued in this letter to President Truman outlining his plan for the Nuremberg prosecutions, “[w]e 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 ___.
245 *Delalić*, *supra* note ___, at para. 312. In *Delalić*, a Trial Chamber responded to 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.
246 *Hadžihasanović*, *supra* note ___, at para. 62.
247 *See* Prosecutor v. *Kupreškić*, Case No. IT-95-16-T, Judgement, 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.* at para. 688.
outside the domain of NCSL. 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.”

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. 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. 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. 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. Conversely, double jeopardy does attach within the ICC system even where a national court has prosecuted an individual for an “ordinary” crime, unless those proceedings were unfair or conducted to shield the accused. The

---

248 *Cook v. United States*, 138 U.S. 157, 183 (1891) ("noting that the *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.") (citations removed). See also *Demjanjuk v. Petrovsky*, 776 F.2d 571, 582-3 (1985) (allowing for the extradition of defendant to Israel, which did not exist at the time of the alleged crimes, for ICL crimes); *Caso Scilingo*, STS No. 789/2007 (Nov. 8, 2007) (Sp.), at 71 (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).

249 19 **TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL** 464 (1947-49). See id. at 463 ("the existence of law has never been dependent on the existence of a correlated sanction external to the law itself."). See also Stanley L. Paulson, **Classical Legal Positivism at Nuremberg**, 4 PHIL. & PUBLIC AFFAIRS 132, 151-55 (1975).

250 Article 17(1)(c), ICC Statute.

251 Article 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.”). This means that were a defendant tried for a crime against humanity before the ICC, she could assert the double jeopardy provisions within the ICC Statute to bar prosecution for a crime against humanity in a State Party’s domestic court, regardless of whether she were convicted or acquitted before the ICC. This language has also been interpreted to mean that domestic courts may re-prosecute the same defendant for a domestic crime without running afoul of the ICC Statute’s double jeopardy provisions. See Imm Tadjer, Article 20: Ne Bis In Idem, in **COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT** 419, 428 (Otto Triffterer ed. 1999). One rationale for this formula is that the ICC Statute could not limit the power of national courts to prosecute crimes that fall outside of the Statute. See John T. Holmes, The Principle of Complementarity, in **THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE** 41, 58 (Roy S. Lee, ed. 2002). In this way, *ne bis in idem* before the ICC does not directly parallel double jeopardy in many domestic systems, whereby jeopardy attaches only with respect to criminal processes within a single sovereign.

252 Article 20(3), ICC Statute (barring prosecution for conduct “also proscribed” under the ICC Statute). Note, however, that where the domestic proceedings are genuine, the principle of complementarity would...
drafters of the ICC specifically adopted this asymmetry, because they were concerned that many national systems did not recognize a distinction between “international crimes” and “ordinary” or “common crimes.”

This is true, even though general principles of double jeopardy would normally bar prosecution for lesser-included offenses. Moreover, in keeping with the leitmotif of complementarity, drafters did not want to divest jurisdiction from national systems solely because states had not fully incorporated international crimes within their domestic penal codes.

By contrast, the precise legal characterization of the crime is decisive in the ad hoc Tribunals’ rulings on concurrent jurisdiction. As a feature of their jurisdictional primacy over national courts, the ad hoc Tribunals have the power to request national courts to defer a prosecution to international jurisdiction. Inversely, the ad hoc Tribunals can also refer cases to national courts for prosecution. In both situations, the propriety of deferral or referral turns on the precise legal characterization of the underlying offense. For example, the ICTR denied a referral to a domestic forum whose operative penal code lacked the particulars of international crimes, even where the underlying conduct was considered criminal. The Trial Chamber found that without a penal provision on genocide, the requisite legal framework to properly prosecute the conduct of the accused and accord an appropriate punishment based upon the charges pending before the Tribunal did not exist. On interlocutory appeal, the Appeals Chamber noted that the prohibitions against homicide and genocide protect different values: “[t]he penalization of genocide protects specifically defined groups, whereas the penalization of

normally preclude such concurrent jurisdiction ex ante. See Article 17, supra note ___. The ICC system is in contradistinction to the parallel provisions in the ICTY/R Statutes according to which the ad hoc Tribunals can prosecute a person who has already been prosecuted for an ordinary crime before a domestic authority. See e.g., Article 9(2), ICTR Statute; Article 10(2), ICTY Statute.

Holmes, supra note __ at 57-58.

See Rule 9, ICTY Rules of Procedure and Evidence, U.N. Doc. IT/32/Rev. 38 (June 13, 2006), available at http://www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev38e.pdf [hereinafter “ICTY RPE”] (“A person who has been tried before a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal for Rwanda only if: (a) The act for which he or she was tried was characterized as an ordinary crime; or (b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.”).


Prosecutor v. Bagaragaza, Case No. ICTR-05-86-AR11bis, Decision On The Prosecution Motion For Referral To The Kingdom Of Norway (May 19, 2006). See also Prosecutor v. Jankovic, Case No. IT-96-23/2-PT, Decision on Referral of Case (July 22, 2005). The Prosecution charged Jankovic with torture and rape as both crimes against humanity and war crimes. In considering the Prosecution’s referral motion, which the defendant opposed, the Referral Bench ruled that both the criminal code of the former Yugoslavia (which was in place when the defendant acted) and the new criminal code of Bosnia-Herzegovina (which was enacted after the defendant acted) contained provisions allowing for the prosecution of war crimes. The Bosnian code also codified crimes against humanity and the doctrine of superior responsibility. Id. at paras. 28-30. The Bench ruled that referral was appropriate and that it was for the domestic courts to decide which penal code was applicable, especially in light of Article 4(a) in the Bosnian code—allowing for the prosecution “for any act or omission, which at the time when it was committed, was criminal according to the general principles of international law”—which suggested that retroactive application might be possible. Id. at para. 41. See also Prosecutor v. Stankovic, Case No. It-96-23/2-Pt, Decision On Referral Of Case Under Rule 11 Bis (Partly Confidential And Ex Parte) (17 May 2005) (same).
homicide protects individual lives.” In this way, the characterization of the defendant’s conduct in the NCSL context is less significant than it is in other situations in which rules or statutory provisions hinge upon the characterization of conduct as either a domestic or an international crime.

4. **Judicial Opinions**

Judicial opinions—from international or domestic courts—may also provide notice to defendants of prohibited acts. Since the establishment of the International 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.” In addition, the various international criminal tribunals are not, strictly speaking, bound by the precedent generated by sister courts. Nonetheless, the elements of Article 38 of the ICJ Statute have been reordered somewhat 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.” This marks a divergence in doctrine vis-à-vis general public international law adjudication, which eschews stare decisis.

Notwithstanding this formal doctrine, it cannot be gainsaid that these courts rely heavily on each other’s jurisprudence in resolving all manner of questions presented to them. To be sure, this inquiry often gets filtered through the middleman of CIL, 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

---

259 The ICTY/R 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, Judgement, 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 “The 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 ___.
260 Article 21(2), ICC Statute.
261 See Article 59, ICJ Statute.
262 See, e.g., Kupreškić, supra note ___, at para. 540 (“judicial decisions may prove to be of invaluable importance for the determination of existing law.”).
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.

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. 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.264 Unlike resolutions emanating from the General Assembly or other political bodies, judicial opinions are likely to be well publicized and, being based on the tradition of reasoned decision, are able to articulate norms more precisely than other sources of international law.

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 German 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 1954.265 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.”266 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.”267 This, it noted, “has a broader meaning than physical-biological annihilation.”268 The court concluded that this interpretation was “within the margins of the possible interpretation of the international law elements of the crime of genocide.”269 This was true, it reasoned, because German

---

264 See Amann, supra note ___, at 118 (noting the importance of having respected voices of authority express moral condemnation).
266 Jorgić, supra note ___, at para. 2.
267 Id. at para. 2(a).
268 Id.
269 Id. at para. 2(d).
scholars had advocated for this interpretation of the treaty. Jorgić 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. So 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 so 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.

IV. NCSL 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,” but is in fact a more dramatic, if unacknowledged, form of judicial lawmaking. 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 international system by departing from, expanding upon, or outright rejecting rules carefully

---

270 See Jorgić European Court Opinion, supra note ___, at paras. 27, 36, 47.
271 Wright, supra note ___, 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.”).
272 The Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Judgement, para. 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…”).
273 See Wessel, supra note ___, at 386 (noting distinction between “judicial gap-filling,” which occurs when courts resolve disputes by policy-making in situation 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.”).
274 In domestic law, NCSL is, among other things, “a direct consequence of the theory of separation of powers” and a reflection of a rational system for organizing state authority. Boot, supra note ___, 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.
negotiated by states during multilateral treaty drafting processes. Although NCSL contains a separation of powers component, it finds manifestation in international law as a principle 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 criminal procedure 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 broadly 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 approach.

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. 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 that “[n]o one shall be held guilty of

\[mutandis.\] 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.

275 The cases addressed above may suggest that courts are exceeding their delegated authority and dramatically refashioning the rules 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. Tom Ginsburg, Bounded Discretion in International Judicial Lawmaking, 45 VA. J. INT’L L. 631, 641 (2005). For an application of this theory to the IHL context, see Danner, supra note ___. 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 law-making where collective action problems among states prevent the emergence of necessary rules).

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.” 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. 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.” Somewhat redundantly in light of Article 15(1), this provision in the ICCPR 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.” According to one international judge, this implies that the provision is satisfied so long as the conduct was considered “fundamentally criminal” by the community of nations. Virtually identical language appears in Article 7 of the contemporaneous European Convention on Human Rights and Fundamental Freedoms (ECHR). In many of these treaties, the NCSL provisions are non-derogable, even in times of national emergency.

---

277 Article 11(2), UDHR. See also Article 15(1) of the ICCPR and Article 7(2) of the African Charter on Human and Peoples’ Rights, which contain analogous formulations. The latter, 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.”

278 The French translations of these provisions generally employ the word “droit” rather than “loi,” implying that more than written law is at issue. *BOOT*, supra note ___, at 146-7.

279 Article 15(1), ICCPR. 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. This provision was meant to cover both international and domestic law. *BOOT*, supra note ___, at 173. See also Article 6(2)(c) of Protocol II to the Geneva Conventions, which requires prior criminalization “under the law.”

280 Id. at Article 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 DAVI D J. HARRI S, 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 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 states members of the international community, to fill the gap.”*). Cassese suggests that this reference should have been to CIL and not general principles of law. *Cassese*, supra note ___, at 149 n.27.


283 *See, e.g., Article 4(2), ICCPR. 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.” Geneva Convention Relative To The Treatment Of Prisoners Of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; see also Article 67, Geneva Convention Relative To The Protection Of Civilian Persons In Time Of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. 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.*
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 ensure that either domestic or the various forms of international law could provide the necessary notice to defendants. These treaties can thus be read to provide multilateral validation of the Nuremberg approach to NCSL. In addition, these references establish the precedence of international law over domestic law and were meant to ensure that individuals could not escape liability under international law by pleading that their actions were lawful under national law.

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. 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.” In any case, the principles contained in the treaty provisions arguably apply to international institutions such as ad hoc ICL tribunals as well 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 institution is found in the ICC Statute. That treaty codifies several strands of the principle of legality. Article 22(1) dictates that “[a] person shall not be criminally responsible


286 See Article 27, Vienna Convention (“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”).

287 See Tadić Decision on Jurisdiction, supra note ___, at para. 42 (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).

288 Early drafts of what became the ICC Statute included the NCSL principle. The 1966 version of the Draft Code of Crimes against he 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.” II Yearbook of the ILC (Pt. 2) at 38 (1966).

289 See also Art 8(2)(b) (allowing for the prosecution of war crimes “within the established framework of international law”); Elements of Crimes, supra note ___, at Article 7(1) (“crimes against humanity … are among the most serious crimes of concern to the international community as a whole, warrant and entail
under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.” 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.” 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.” The next section cautions that “[t]his article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.”

As the jurisdiction of the Court is expressly proscriptive, 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, 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. 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 so 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. In this respect, at least, the ICC exercises primacy over the domestic legal order.

individual criminal responsibility, and require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world.”).

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 (1999). See also Article 10, ICC Statute (“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.”).

Article 24, ICC Statute (“No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.”).

Article 5(2), ICC Statute.


Collectively, these provisions have their roots in predecessors to the ICC Statute that contemplated the future court with jurisdiction by reference over “core” international crimes of genocide, crimes against humanity, and war crimes along with certain “treaty crimes” set forth in discrete multilateral treaties. See Bruce Broomhall, Article 22: Nullum Crimen Sine Lege, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 447 (Otto Triffterer ed. 1999); Raul C. Pangalangan, Article 24: Non-Retroactivity rationae personae, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 467 (Otto Triffterer ed. 1999). 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
Although the full scope of the ICC 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 document, the European Convention on Human Rights and Fundamental Freedoms,\(^ {296}\) that involves several inter-related inquiries of relevance to ICL.\(^ {297}\) 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. 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.\(^ {298}\)

with respect to the crimes defined within the Statute, meant that the NCSL provisions lost much of their relevance.\(^ {295}\) 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.\(^ {296}\) This provision states:

1. 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.
2. 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 the general principles of law recognized by civilized nations.

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, European Commission of Human Rights, report of 27 June 1994 (application no. 20190/92) at para. 60 [hereinafter “C.R. Commission Opinion”]. 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, Eur. C. H. R., case no. 48/1994/495/577, Judgement of November 22, 1995, para. 36 [hereinafter “C.R. Court Opinion”].

C.R. Court Opinion, supra note ___, at paras. 37, 41.
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” to refer to both written and unwritten law.\textsuperscript{299} 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 known precisely when the critical societal changes took effect.\textsuperscript{300} Where there is considerable uncertainty or movement in the law, the European Court has determined that the populace is essentially on notice that the law is in flux and could be interpreted adversely to future defendants.\textsuperscript{301} Contrary judicial opinions or legislative debate can indicate such instability in the law.\textsuperscript{302}

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\textsuperscript{303} “can on this account be expected to take special care in assessing the risk that such activity entails.”\textsuperscript{304} 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.”\textsuperscript{305}

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,\textsuperscript{306} 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.\textsuperscript{307} The European Court ruled that notwithstanding that the GDR could be held responsible

\textsuperscript{299} Tolstoy Miloslavsky v. U.K., judgment of 13 July 1995, Series A no. 316-B, ¶ 37. See also Veeber, supra note ___, at para. 37 (noting that jurisprudential developments relied upon by the Government postdated defendant’s conduct and thus could not have put him on notice of the novel construction of the tax code).

\textsuperscript{300} C.R. Court Opinion, supra note ___, at para 37.

\textsuperscript{301} Id. at para 35.

\textsuperscript{302} C.R. Commission Opinion, supra note ___, at para. 59.

\textsuperscript{303} Cantoni v. France, Eur. Ct. H. R. Judgement, Nov. 15, 1996, at para. 35 (finding that although statute was drafted in general terms, defendant could have foreseen potential liability with advice of counsel).

\textsuperscript{304} Id.

\textsuperscript{305} Parker v. Levy, 417 U.S. 733, 756 (1974) (upholding military prohibition against “conduct unbecoming an officer and a gentleman” as not unconstitutionally vague).

\textsuperscript{306} 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 defendants’ arguments that their actions were sanctioned by extant law allowing for the use of firearms to prevent the commission of a “serious crime” (i.e., fleeing the GDR) and an official policy of using deadly force to police the border. Streletz, Kessler & Krenz v. Germany, Eur. C. H. R. Judgment (March 22, 2001).

\textsuperscript{307} Id. at para. 47.
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 to be borne by those who violated the GDR’s international obligations or human rights and fundamental freedoms.”

Thus, criminal prosecution for these acts was foreseeable, even absent the unique circumstances of a change in regime. Indeed, a lowly border guard was charged with knowing that the conduct in question infringed fundamental human rights. A concurring opinion 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. 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. 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 Genera Assembly’s affirmation of the Nuremberg Principles in 1946 by Resolution 95(I). The domestic courts so ruled notwithstanding that the Estonian Constitution also included an unequivocal version of the NCSL provision and that the acts in question would not have satisfied the war nexus requirement originally included within the definition of crimes against humanity. 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 Nuremburg Charter.

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” at the fringes of a penal definition. Such statutes do not necessarily offend the principle of specificity inherent in Article 7 so long as the statute “is sufficiently clear in the large majority of cases.” 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. The European Court considers that extending liability in such situations is in keeping with the

---

308 Id. at para. 104.
309 Id. at para. 84.
310 Streletz, supra note ___ (J. Loucaides, concurring).
312 Id. at § A.
313 Id. (citing Estonian Constitution, Article 23(1): “No 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.”).
314 Id.
316 Cantoni, supra note ___, at para. 32.
317 Id. at para. 28.
318 C.R. Court Opinion, supra note ___, at para 37.
fundamental objectives of the ECHR—respect for human dignity and human rights. 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.

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. 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 latter 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” and could reasonably have been foreseen at the material time by the applicant with the assistance of counsel. Because this was the first prosecution under the German law, the European Court looked to other authorities to conclude that defendant could not reasonably rely upon the more narrow interpretation of German law for which he was advocating. For one, the European Court determined that several aspects of the *actus reus* of genocide do not require the physical/biological destruction of the group, so the German court’s interpretation found support in the text of the law. 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. The fact that the ICTY took a more narrow approach to cultural genocide in the *Krstić* case 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. 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.

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. As a threshold

319 *Id.* at para 42.
320 *Id.* at para. 32.
321 See text accompanying *supra* notes ___.
322 Jorgić European Court Opinion, *supra* note ___, at paras. 103-08.
323 *Id.* at para. 113.
324 *Id.* at paras. 109-10.
325 *Id.* at paras. 47, 111.
327 *Id.* at para. 112.
328 *Id.* at para. 114.
329 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
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 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 over-arching 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 transsubstantive application of all forms of criminal responsibility, an expansive approach to adding content to residual or nebulous clauses and heretofore unconstrued enumerated crimes, and the de-emphasis on finding precision in the circumstantial elements of crimes. From this baseline, it is possible to determine to what extent the innovations discussed above 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. 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.

Key developments prior to the establishment of the two ad hoc criminal tribunals would have 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 is the introduction and near-universal acceptance of international human rights concepts in the global consciousness of the post-WWII period. 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. Although addressed primarily to state actors and collective (state) responsibility, these human rights treaties signaled that certain conduct was internationally and universally proscribed. In particular, these treaties proscribe a range of undesirable conduct, the most egregious of which involves violations of individuals’ rights to physical integrity and security and constitutes the modern 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, supra note ___ (citing cases).

Anthea Elizabeth Roberts, Traditional and Modern Approaches to Customary International Law: A 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.”).

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. 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.
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.” 332

These human rights instruments also reflect increased international expectations of individual accountability for international law violations333 and gave rise to the movement for redress for victims.334 These treaties obligate states to both respect and ensure the rights contained within them, which implicates both state and non-state action.335 In joining human rights treaties, states have pledged among themselves 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,336 the ICCPR,337 the American Convention,338 and the Torture Convention339 all require states to provide effective remedies within their national courts for victims of violations of fundamental rights guaranteed by those

332 Tadić Jurisdiction Decision, supra note ___, at para. 97.
335 See, e.g., Article 2(1), ICCPR.
336 Article 8, UDHR (“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.”).
337 Article 2(3), ICCPR, supra note ___.
338 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. Article 8.1, American Convention, supra note ___.
339 Article 14, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 39th Sess., Annex 39, Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984) [hereinafter “Torture Convention”]. 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 Article 16.
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.\textsuperscript{340} The rejection of domestic amnesty laws by international institutions\textsuperscript{341} and statutes of limitation for international crimes\textsuperscript{342} furthered 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 include 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.\textsuperscript{343} 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. 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 be extended to non-international armed conflicts and that a regime of penal responsibility for such conflicts was inevitable and immanent. 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.\textsuperscript{344} Many of the draft statutes generated during this period of time contemplated more expansive crimes against humanity and war crimes provisions than had been employed during the World War II period. In these negotiations, states also indicated a willingness to revisit issues that had been foreclosed in prior multilateral

\textsuperscript{340}See, e.g., Articles 5-7, Torture Convention, supra note ___ (obliging state parties to prosecute or extradite individuals accused of committing torture).


\textsuperscript{342}See, e.g., Convention on the Non-Applicability to War Crimes and Crimes Against Humanity, G.A. res. 2391 (XXIII), Annex, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218 (1968) (entered into force 11 November 1970). See also Articles 3-5, ECCC Statute (extending statute of limitations for domestic crimes and noting that international crimes have no statute of limitation); Kolk & Kislyiy, supra note ___ (noting that crimes against humanity and war crimes have no statute of limitation).

\textsuperscript{343}See Delalić, supra note ___, at para. 301 (“the 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.”)

\textsuperscript{344}Tadić Judgement, supra note ___, at 655 (citing the work of the International Law Commission as evidence of CIL).
negotiation exercises, such as a penal regime for non-international armed conflicts. 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 all 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.

These 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. Assuming that defendants are charged with ICL omniscience—to be sure just as much of a legal fiction in international law as it is in domestic law—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. 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 drafters of the ICTY Statute initiated this practice with Article 24(1) of the ICTY 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. The same approach is mandated before the Rwandan Tribunal. The base sentence is then subjected to calibration 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.

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

---

345 Furundžija, supra note ___, at para. 227 (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.”).
346 See Tomuschat, supra note ___, 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.”).
347 A strict application of nulla poena sine lege dictates a published schedule of penalties, a feature of many civil law systems.
348 Article 24(1), ICTY Statute. See also Sub-Rule 101(B)(iii) (reiterating requirement that the Trial Chamber to consider the general practice regarding prison sentences in the courts of the former Yugoslavia). The ICTY and ICTR RPE also set forth set forth some aggravating and mitigating factors that may be considered in sentencing convicted defendants.
349 Article 24, ICTR Statute.
Chamber made a distinction between the aggravated characterization of the offense and the concomitant sentence, which was to be in accordance with the sentencing practice of the former Yugoslavia.\textsuperscript{351} Thus, so 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.”\textsuperscript{352}

The particular crime classification employed may thus assert few 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. 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.\textsuperscript{353} As was seen in the \textit{Furundžija} decision, tribunals tend to deemphasize the impact of such expressive functions 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.\textsuperscript{354} Instead, the ICC Statute provision entitled “\emph{nulla poena sine lege}” provides laconically that “[a] person convicted by the Court may be punished only in accordance with this Statute.”\textsuperscript{355} This undoubtedly refers to the type of penalties allowed, including imprisonment up to 30 years or life imprisonment for extremely grave crimes, fines, forfeiture,\textsuperscript{356} and various forms of reparation and restitution.\textsuperscript{357} The specific sentencing provisions provides only that “the Court shall … take into account such

\begin{itemize}
  \item \textsuperscript{351} \textit{Furundžija}, supra note \_, at para. 184.
  \item \textsuperscript{352} \textit{Id. But see Galić, supra note \_, at para. ___} (noting that the ICTY is “not obliged to unconditionally adhere” to the practice of the former Yugoslavia in meeting out sentences because “the cases before this Tribunal differ in their magnitude and gravity from those ordinarily prosecuted under domestic criminal law in peacetime”).
  \item \textsuperscript{353} \textit{But see Prosecutor v. Erdemović}, Case No. IT-96-22-A (Oct. 7, 1997) (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); \textit{Prosecutor v. Musema}, Case No. ICTR-96-13-I, Judgement, para. 981 (Jan. 27, 2000) (“genocide constitutes the ‘crime of crimes,’ which must be taken into account when deciding the sentence.”). \textit{Compare Prosecutor v. Erdemović}, Case No. IT-96-22-A, para. 19 (Oct. 7, 1997) (Sep. and Dissenting Opinion of Judge Li) (arguing that “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”). \textit{See generally Allison Marston Danner, Constructing a Hierarchy of Crimes in International Criminal Law Sentencing}, 87 VA. L. REV. 415 (2001) (arguing that the \textit{chapeau} elements of international crimes allow for the grading of offenses for sentencing purposes).
  \item \textsuperscript{354} 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 (e.g., the territorial or nationality state) to serve as guidance. William A. Schabas, \textit{Article 23: Nulla Poena Sine Lege, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT} 463, 464-65 (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.
  \item \textsuperscript{355} ICC Statute, Art. 23.
  \item \textsuperscript{356} ICC Statute, Art. 77 (setting forth available penalties).
  \item \textsuperscript{357} ICC Statute, Art. 75 (providing for victim reparation).
\end{itemize}
factors as the gravity of the crime[,] the individual circumstances of the convicted persons”\(^{358}\) and “the evidence presented and submissions made during the trial that are relevant to the sentence.”\(^{359}\) The approach adopted was justified to enable judicial flexibility and discretion and to promote “equality of justice” so that all defendants would be subjected to uniform penalties, regardless of the place of commission or nationality of the relevant parties.\(^{360}\)

Nonetheless, the ICC would do well to consider adopting the ICTY/R approach where appropriate and apply the principle of lenity at the time of sentencing in the event that it engages 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 \textit{locus commissi delicti}, so long as such penalties are not grossly disproportionate to the offense in question, minimizes the tangible impact of retroactive adjudication, although it cannot totally mute the expressive function of any conviction.\(^{361}\) Where national systems do not include a specific schedule of penalties associated with the commission of crime, the ICC can look to analogous domestic crimes to calibrate the appropriate punishment to fit the facts and ensure that defendants are not unduly prejudiced by novel or expansive interpretations of the law.

V. 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.\(^{362}\) 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 \textit{ad hoc} and hybrid courts, international prosecutions will increasingly proceed exclusively before the ICC, as the \textit{ad hoc} Tribunals implement their Completion Strategies and the work of the Special Court for Sierra Leone winds down.\(^{363}\) The ICC is governed by a robust NCSL

\(^{358}\) ICC Statute, Art. 78(1).
\(^{359}\) ICC Statute, Art. 76(1).
\(^{361}\) Erdemović, supra note ___, at para. 85 (noting that sentencing provides a “sophisticated and flexible” tool to do justice in particular cases).
\(^{362}\) 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 sub-interpretations of the basic doctrines. \textit{Ronald Dworkin, Law’s Empire} 70 (1986).
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.\footnote{ICC Statute, 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. \textit{See} Margaret McAuliffe DeGuzman, \textit{Article 21: Applicable Law}, \textit{in} \textit{COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT} 435, 441-42 (Otto Triffterer, ed. 1999).} That said, there are “legality deficits” within the Statute, as many crimes remain vaguely or sparingly worded and key terms remain undefined.\footnote{Perceived vagueness in definition is one of the reasons articulated by the United States for opposing the Court. \textit{See} John R. Bolton, \textit{The Risks and Weaknesses of the International Criminal Court from an American Perspective}, 41 VA. J. INT’L L. 186, 189 (2000).} 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\footnote{See David Hunt, \textit{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”).} 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 terrorism\footnote{See, e.g., Vincent-Joel Proulx, \textit{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 (2004).} or corruption.\footnote{See, e.g., Sonja Starr, \textit{Extraordinary Crimes At Ordinary Times: International Justice Beyond Crisis Situations}, 101 NW. U.L. REV. 1257 (2007).}

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. 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 \textit{ad hoc} tribunals in the late 1990s. This includes 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.\footnote{The contemplated subject matter jurisdiction for the \textit{ad hoc} tribunal envisioned for Lebanon 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. \textit{See} Statute of the Special Tribunal for Lebanon, annexed to Report of the Secretary-General on the establishment of a special tribunal for Lebanon, U.N. Doc. No. S/2006/893 (Nov. 15, 2006).}

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

\footnote{\textit{See Wessel, supra note ___}, at 414 (“it is unrealistic in light of history to expect \textit{nullum crimen sine lege} to significantly restrain judicial policy-making at the ICC.”).}
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. 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 abolish altogether statutes of limitation for international crimes.\footnote{See supra note \text{___}.} Spain has been particularly active in litigating cases arising out of repressive regimes in Latin America during the Cold War and elsewhere. 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, 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.\footnote{See \text{Military Commission Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006)}.} 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. It was not to be. Impatient in the face of continued atrocities and states’ dogged unwillingness to better align law with morality and justice, 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 postwar 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\footnote{See \text{U.S. v. Hudson & Goodwin, 11 U.S. 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 \text{WAYNE LAFAVE, 1 SUBST. CRIM. L. § 2.1 (2nd Ed. 2007)}.} in the face of virtually complete codification,\footnote{John Calvin Jeffries, Jr., \text{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.”).} 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 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 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 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 through guided by the 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 Koskenniemi, the utopians emerge dominant in international criminal law.

* * *

---