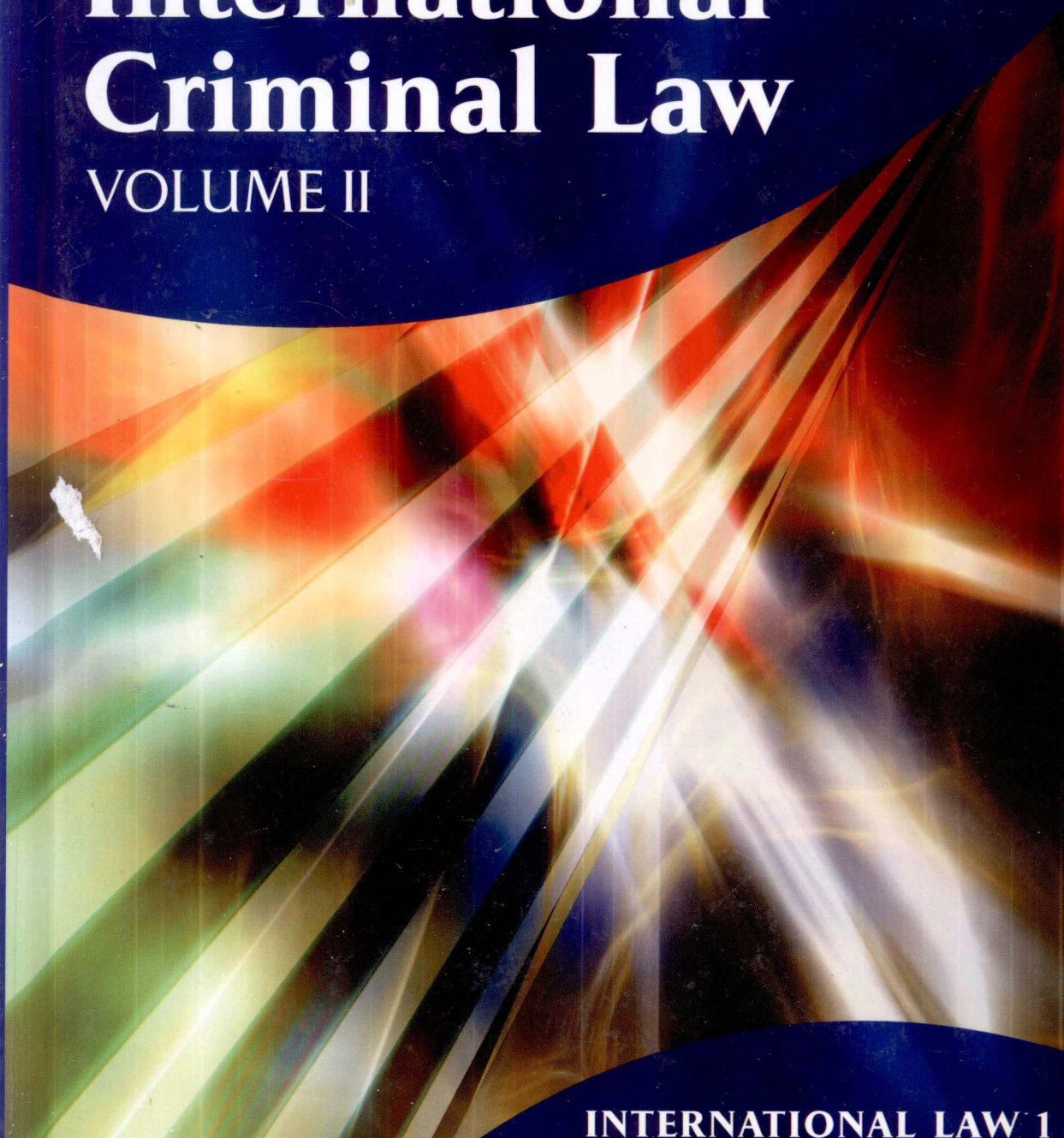
Edited by
William A. Schabas

International Criminal Law

VOLUME II



INTERNATIONAL LAW 1

International Criminal Law
Volume II

Edited by

William A. Schabas

Professor of International Law, Middlesex University, London
Emeritus Professor of Human Rights Law
National University of Ireland Galway
Chairman, Irish Centre for Human Rights

INTERNATIONAL LAW

An Elgar Research Collection
Cheltenham, UK • Northampton, MA, USA

Published by
Edward Elgar Publishing Limited
The Lypiatts
15 Lansdown Road
Cheltenham
Glos GL50 2JA
UK

Edward Elgar Publishing, Inc.
William Pratt House
9 Dewey Court
Northampton
Massachusetts 01060
USA

A catalogue record for this book is available from the British Library

Library of Congress Control Number: 2011939341

ISBN 978 1 84844 975 6 (3 volume set)

Printed and bound by MPG Books Group, UK

Acknowledgements

The editor and publishers wish to thank the authors and the following publishers who have kindly given permission for the use of copyright material.

American Society for International Law via the Copyright Clearance Center for article: Dapo Akande (2004), 'International Law Immunities and the International Criminal Court', *American Journal of International Law*, **98** (3), July, 407–33.

Brill Academic Publishers via the Copyright Clearance Center for articles: Anja Seibert-Fohr (2003), 'The Relevance of the Rome Statute of the International Criminal Court for Amnesties and Truth Commissions', *Max Planck Yearbook of United Nations Law*, **7**, 553–90; Megan Fairlie (2004), 'The Marriage of Common and Continental Law at the ICTY and its Progeny, Due Process Deficit', *International Criminal Law Review*, **4**, 243–319; Mohamed Elewa Badar (2006), 'Drawing the Boundaries of *Mens Rea* in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia', *International Criminal Law Review*, **6** (3), 313–48.

California Law Review, Inc. for article: Allison Marston Danner and Jenny S. Martinez (2006), 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law', *California Law Review*, **93** (1), January, 75–169.

Cambridge University Press for articles: Jeremy Sarkin (2001), 'The Tension Between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of the *Gacaca* Courts in Dealing with the Genocide', *Journal of African Law*, **45** (2), 143–72; Alexander Zahar (2001), 'Command Responsibility of Civilian Superiors for Genocide', *Leiden Journal of International Law*, **14**, 591–616.

International Review of the Red Cross for articles: Charles Garraway (1999), 'Superior Orders and the International Criminal Court: Justice Delivered or Justice Denied', *International Review of the Red Cross*, **81** (836), December, 785–94; Wibke Kristin Timmermann (2006), 'Incitement in International Criminal Law', *International Review of the Red Cross*, **88** (864), December, 823–52.

Mirjan Damaška for her own article: (2001), 'The Shadow Side of Command Responsibility', *American Journal of Comparative Law*, **49** (3), Summer, 455–96.

Louise Mallinder for her own article: (2010), 'Beyond the Courts? The Complex Relationship of Trials and Amnesties', 1–23, reset.

Johns Hopkins University Press for article: William A. Schabas (2003), 'The Relationship Between Truth Commissions and International Courts: The Case of Sierra Leone', *Human Rights Quarterly*, **25** (4), November, 1035–66.

Oxford University Press for article: Theodor Meron (2004), 'Procedural Evolution in the ICTY', *Journal of International Criminal Justice*, **2** (2), 520–25.

Beth van Schaack for her own article: (2008), '*Crimen Sine Lege*: Judicial Lawmaking at the Intersection of Law and Morals', *Georgetown Law Journal*, **97**, 119–92.

Springer Science and Business Media for articles: Gideon Boas (2001), 'Creating Laws of Evidence for International Criminal Law: The ICTY and the Principle of Flexibility', *Criminal Law Forum*, **12** (1), 41–90; Roger S. Clark (2002), 'The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences', *Criminal Law Forum*, **12** (3), 291–334.

University of Pennsylvania Law Review for article: Nancy Amoury Combs (2002), 'Copping a Plea to Genocide: The Plea Bargaining of International Crimes', *University of Pennsylvania Law Review*, **151** (1), November, 1–157.

Yale Law Journal Company, Inc. for article: Diane F. Orentlicher (1991), 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime', *Yale Law Journal*, **100** (8), June, 2537–615.

Every effort has been made to trace all the copyright holders but if any have been inadvertently overlooked the publishers will be pleased to make the necessary arrangement at the first opportunity.

In addition the publishers wish to thank the Library of Indiana University at Bloomington, USA and the Library at the University of Warwick, UK for their assistance in obtaining these articles.

Contents

Part I
General Principles, Procedure and Evidence

[1]

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

BETH VAN SCHAACK*

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

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

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

* Assistant Professor of Law, Santa Clara University School of Law; Yale Law School, J.D. 1997; Stanford University, B.A. 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 Joondeph, Jean Love, and Bob Peterson. I am also indebted to Margaret M. 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. Many thanks also go to the editors of *The Georgetown Law Journal* for their excellent contributions. The central idea in the Article grew out of my casebook with Ron Slye published by Foundation Press: INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT (2007).

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

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

TABLE OF CONTENTS

INTRODUCTION

One of the most fundamental defenses to a criminal prosecution is that of *nullum crimen sine lege, nulla poena sine lege* ("no crime without law, no punishment without law"). In its simplest translation, this Latin maxim asserts the ex post facto prohibition: that conduct must be criminalized and penalties fixed in advance of any criminal prosecution.[1] More broadly, the maxim is also 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 several purposes: ensuring that individuals are capable of obtaining notice of prescribed conduct so they can rationally adjust their behavior to avoid sanction; protecting the citizenry from arbitrary or oppressive state action in the face of ambiguities or gaps in the law; and effectuating the expressive purposes of the law by clearly articulating conduct that is collectively condemned. The principle of *nullum crimen sine lege* (NCSL) writ large thus embodies "an

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

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

essential element of the rule of law"[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 by ensuring legislative primacy in substantive rulemaking. 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 American law, for example, the ex post facto clauses of the U.S. Constitution constrain the legislative branches of the federal and state governments from enacting retroactive legislation.[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, American law addresses adjudicative retroactivity primarily through the "fair warning requirement" found implicit in the Due Process Clauses.[9] Within international law, the principle of NCSL is embodied in all of the omnibus human rights instruments.[10] These human rights treaty provisions are directed to all branches of the governments of states parties, although in practice, they are most often invoked in reaction to judicial action enforcing ex post legislation or reinterpreting existing rules. In contradistinction, the principle is not featured in

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

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

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

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

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

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

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

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

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

Notwithstanding that respect for NCSL is a hallmark of modern national legal systems and a recurrent refrain in human rights instruments, international criminal law (ICL) fails to fully implement this supposed tool against tyranny. The absence of a rigorous manifestation of NCSL within ICL can be traced to the dawn of the field. In the post-World War II (WWII) period, the victorious Allies essentially held German and Japanese sovereignty "in trust" as postwar occupiers.[11] 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."[12] The Charters governing these Tribunals were the source of new rules of international law that were immediately,[13] and then intermittently thereafter,[14] impugned for their retroactive application. As those historic proceedings drew to a close, the international community of states initiated a number of drafting exercises to codify the Nuremberg principles. Many of these efforts, however, were either indelibly compromised by polarized negotiations or abandoned during the Cold War period. Those projects that were finalized were generally never fully implemented within domestic legal systems.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

the peace charge most vociferously,[18] 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."[19] 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."[20] Notwithstanding the undeniable novelty of two out of the three crimes prosecuted at Nuremberg, the Tribunal declared that the Charter was "the expression of international law existing at the time of [the Charter's] creation."[21] 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."[22]

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."[23] 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."[24] Identifying NCSL as a principle of justice implied that the Allied states could override the principle in the collective exercise of their executive, legislative, and judicial powers in German territory.[25]

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

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

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

20. *Id.* at 461.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 462.

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

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