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AN ARGUMENT FOR STRICT LEGALITY IN INTERNATIONAL CRIMINAL LAW

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ABSTRACT

In the past twenty years, judges sitting in international criminal law (ICL) trials have employed a flexible, natural law influenced version of legality. However, recent events suggest that there are both opportunities and threats in the ICL system that would best be served by a strict version of legality. More than ever, ICL must be seen as legitimate and impartial, and strict legality can help achieve this. The four prongs of legality promoted here are 1) nullum crimen sine lege, 2) lex praevia, 3) lex certa, and 4) lex stricta. This article maintains that judges should apply all four prongs when ascertaining ICL rules and their content. Additionally, it concludes by arguing for a codified international criminal code that includes sentencing guidelines, thereby creating a fifth prong of lex scripta.

A strict legality approach could help to depoliticise ICL and ICL trials. And, strict legality better serves ICL's goals of ending impunity and fostering peace. Further, legality is a fundamental human right from which derogation is not permitted, and protection of this right would be better achieved via a written international criminal code. Strict legality is not a perfect principle, and those that promote its significance are aware of its flaws. Despite these failings, this article contends that strict legality offers the most just, most effective, most coherent, most persuasive, most legitimate, and even the most moral approach to ICL.

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I. Introduction

In the past twenty years, judges sitting in international criminal law (ICL) trials have employed a flexible, natural law influenced version of legality.[1] However, recent events suggest that there are both opportunities and threats in the ICL system that would best be served by a strict version of legality. The International Criminal Court (ICC) appears to be going through both an expansion and a contraction, creating the need to revisit the content and application of the principle. On the one hand, given that on December 14, 2017, the 16th Assembly of States Parties to the Rome Statute reached a consensus to activate the ICC's jurisdiction over the crime of aggression from July 17, 2018,[2] the ICC's jurisdiction, and thus its role and power, is expanding. On the other hand, Burundi's recent withdrawal from the ICC, as well as indications from other states and the African Union that more withdrawals might be on the horizon, undermines the reach of the existing ICL system.[3] More than ever, ICL must be seen as legitimate and impartial. Strict legality can help achieve this.

While "the tension between morality and legality is unlikely to ever disappear,"[4] strict legality will help ICL trials to rely on positive law. Depoliticising ICL and ICL trials remains an urgent issue. Recent

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1. *See, e.g.*, ROBERT CRYER ET AL., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 19 (2nd ed. 2010); *see also* ALEXANDER GRABERT, DYNAMIC INTERPRETATION IN INTERNATIONAL CRIMINAL LAW: STRIKING A BALANCE BETWEEN STABILITY AND CHANGE 100 (2014) (noting that ICTs treated the standards of foreseeability and accessibility as lower in ICL as compared to municipal law, often in an attempt to distinguish "acceptable" judicial clarification from retroactive crime creation); Beth Van Schaack, Crimen Sine Lege*: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119, 123 (2008) (arguing that "[n] otwithstanding 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").

2. Assembly of States Parties to the Rome Statute, *Activation of the Jurisdiction of the Court over the Crime of Aggression* (ICC-ASP/16/Res. 5) (Dec. 14, 2017).

3. *See Burundi First to Leave International Criminal Court*, AL JAZEERA (Oct. 27, 2017), http://www.aljazeera.com/news/2017/10/burundi-leave-international-criminal-court-171027080533712.html; *see also* U.N. Secretary-General, Depositary Notification: South Africa: Withdrawal of Notification of Withdrawal (Mar. 7, 2017), https://treaties.un.org/doc/Publication/CN/2017/CN.121.2017-Eng.pdf; U.N. Secretary-General, Depositary Notification: Gambia: Withdrawal of Notification of Withdrawal (Feb. 10, 2017), https://treaties.un.org/doc/Publication/CN/2017/CN.62.2017-Eng.pdf; *African Leaders Plan Mass Withdrawal from International Criminal Court*, THE GUARDIAN (Jan. 31, 2017), https://www.theguardian.com/law/2017/jan/31/african-leaders-plan-mass-withdrawal-from-international-criminal-court.

4. Dov Jacobs, *International Criminal Law, in* INTERNATIONAL LEGAL POSITIVISM IN A POST-MODERN WORLD 451, 454 (Jörg Kammerhofer & Jean D'Aspremont eds., 2014).

examples that strain the system include the politicization of the International Criminal Tribunal for the Former Yugoslavia (the ICTY) recent conviction of Ratko Mladic,[5] the in court suicide of convicted war criminal Slobadan Proljak and the Croatian government's treatment of him as an innocent martyr,[6] Burundi's aforementioned withdrawal from the ICC, and continued controversy over everything from Africa's relationship with the ICC[7] to the ethics of prosecuting someone who was abducted as a child.[8] Politicization of ICL challenges the system and its capabilities, and therefore threatens to impede its goals. Indeed, the history of ICL is the history of a system deferred due in part to power struggles. Legality operates to legitimize a criminal justice system, and this is one of several ways that strict legality can benefit ICL.

Yet, at the same time that the politicization of ICL undermines its goals, continued efforts to codify ICL indicate a climate ripe for enshrining strict legality. For example, while crimes against humanity are referred to in a number of different treaty texts and were included in the Nuremberg Charter and the International Law Commission's (ILC) Nuremberg Principles,[9] states have not yet concluded a comprehensive convention. However, in May 2013, the ILC's Planning Group for its 65th session led to the inclusion of the topic of Crimes against Humanity in the ILC's Long-term Programme of Work.[10] The complete draft with commentaries has been submitted for comments and observations and responses are due by December 1, 2018.[11] Given that a

5. *See, e.g.*, Marko Milanović, *Some Thoughts on the Mladic Judgment*, EJIL: TALK! (Nov. 27, 2017), https://www.ejiltalk.org/some-thoughts-on-the-mladic-judgment/ (calling the reactions in the Balkans "nationalist").

6. *See, e.g.*, Owen Bowcott, *Bosnian Croat War Criminal Dies after Taking Poison in UN courtroom*, THE GUARDIAN (Nov. 29, 2017), https://www.theguardian.com/law/2017/nov/29/un-war-crimes-defendant-claims-to-drink-poison-at-trial-in-hague-slobodan-praljak; *Croatian PM Plenkovic Regrets Praljak's Death in The Hague*, REUTERS (Nov. 29, 2017), https://www.reuters.com/article/us-warcrimes-bosnia-croatia/croatian-pm-plenkovic-regrets-praljaks-death-in-the-hague-idUSKBN1DT2HW.

7. *See, e.g.*, Mark Kersten, *Between Disdain and Dependency — Uganda's Controversial Place in the ICC-Africa Relationship*, JUSTICE IN CONFLICT (Mar. 29, 2017), https://justiceinconflict.org/2017/03/29/between-disdain-and-dependency-ugandas-controversial-place-in-the-icc-africa-relationship/.

8. Jason Burke, *Ex-child Soldier Dominic Ongwen Denies War Crimes at ICC Trial*, THE GUARDIAN (Dec. 6, 2016), https://www.theguardian.com/world/2016/dec/06/dominic-ongwen-the-hague-trial-war-crimes-lra-uganda.

9. *See* Roger S. Clark, *History of Efforts to Codify Crimes against Humanity, in* FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY 13 (Leila Nadya Sadat ed., 2011).

10. *See* Int'l Law Comm'n, Rep. on the Work of its Sixty-Fifth Session, U.N. Doc. A/68/10, at 165-170 (Aug. 24, 2015).

11. *See Analytical Guide to the Work of the International Law Commission – Crimes against Humanity*, INT'L LAW COMM'N (Sep. 22, 2017), http://legal.un.org/ilc/guide/7_7.shtml.

second reading of the draft by the ILC will take place during 2018, the UN General Assembly might adopt a convention in 2019 or 2020.[12]

Like the ICC's jurisdiction over aggression, these developments regarding a crimes against humanity convention are additional indicators that ICL continues to develop and mature, and that projects long stalled are finally coming to fruition. There is no reason that, given the current climate for developing ICL, similar advancements couldn't be made to develop a strict legality principle and to enshrine in it in the world's first truly universal international criminal code. The time to build on these advancements is now. This is why, while judges and academics have defended these more "relaxed" applications of legality as appropriate[13] and just,[14] this article argues for a four-pronged understanding of legality that is strict in nature, contending that the strict application of the principle of legality [legality] better serves ICL's goals of ending impunity and fostering peace.[15] It also argues that legality is a fundamental human right from which derogation is not permitted, and further that a fifth prong of lex scripta should be achieved via a written international criminal code.

Throughout, it uses the development of the crimes of rape and sexual violence through the judgments of the *ad hoc* international criminal tribunals (the ICTY and the International Criminal Tribunal for Rwanda (ICTR); collectively, the ICTs) as examples of a relaxed interpretation of legality amounting to a violation of the principle. There are several reasons for this. First, it is easier to discuss abstract theoretical concepts via concrete examples. Second, these examples also

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12. *See id.*

13. *See, e.g.*, Prosecutor v. Aleksovski, Case No. IT-95-14/1, Appeals Judgment, ¶ 173 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000) (arguing that legality does not prevent ICL judges from "interpreting and clarifying elements of a particular crime"); WILLIAM A. SCHABAS, THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE (2006) (using "interpreting and clarifying" in a way that functions as judicial crime creation and noting the relaxed legality standards applied at the ICTs).

14. For example, the trial judges in Prosecutor v. Furundžija, Case No. IT-95-17/1, Judgment, ¶183-84 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), considered that expanding the definition of rape to include forced oral penetration was the best means for protecting human dignity.

15. ICL deals with "prohibitions [of international law] addressed to individuals, violations of which are subject to penal sanction by" the international community of States. *See* CRYER, *supra* note 1, at 1. There is, however, no settled definition of what the subjects of ICL are. *Id.* at 1-16. While, for the purposes of his own book, Cryer applies the conception of ICL as crimes within the jurisdiction of an international court or tribunal, this paper generally deals with crimes created by international law, examining how these are then dealt with by the various international criminal tribunals. The goals of ICL are discussed further below.

provide evidence that the content of the principle is relevant and requires urgent review. Third, the crimes of rape and sexual violence are useful offenses through which to study legality in the international sphere because, prior to the judgments of the ICTs and despite mention in various international law treaties and judgments throughout the 19th and 20th centuries, no definition of these crimes containing clear *actus rei* and *mentes reae* existed under international law. Accordingly, both the ICTY and the ICTR acknowledged in their judgments that "no definition of rape can be found in international law,"[16] and claim to have pioneered groundbreaking international law jurisprudence on sexual violence by offering the first definitions created for ICL.[17] Over time, different chambers have taken distinct approaches to the definitions of rape and sexual violence. Catharine MacKinnon has described this diversity of definitions as a "definitional debate."[18] Other commentators have argued that the many definitions of rape and sexual violence within the judgments of the two tribunals violate the principle of legality.[19] Because of this, the treatment and development of these crimes under international law serve as helpful, practical examples for discussing the legality principle.

The four prongs of legality promoted here are: 1) *nullum crimen sine lege*, 2) *lex praevia*, 3) *lex certa*, and 4) *lex stricta*. The first two prongs are relatively uncontroversial in ICL, but the latter two as described here might be met with opposition. This article maintains that judges should apply all four prongs when ascertaining ICL rules and their content. While this paper promotes strict legality, it recognizes that this approach has shortcomings. Strict legality is not a perfect principle, and those that promote its significance are aware of its flaws.[20] Despite these failings, this article contends that strict legality offers the most

16. *Id.* ¶ 175; Prosecutor v. Akayesu, Case No. ICTR-96-4, Judgment, ¶ 596, 687 (Int'l Crim. Trib. for Rwanda Sep. 2, 1998).

17. *See Crimes of Sexual Violence*, U.N. INT'L CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, http://www.icty.org/sid/10312 (last visited Jan. 17, 2019).

18. Catherine A. MacKinnon, *Defining Rape Internationally: A Comment on Akayesu*, 44 COLUM. J. TRANSNAT'L L. 940, 954 (2006).

19. Roelof Haveman commented that such a "highly remarkable" number of definitions of sexual violence emerged through this process that scholars have argued that these trials violated the principle of *nullum crimen sine lege*. Roelof Haveman, *Rape and Fair Trial in Supranational Criminal Law*, 9 MAAST. J. EUR. & COMP. L. 263, X (2002) [hereinafter Haveman, *Rape and Fair Trial*].

20. For example, Joshua Dressler promotes legality as "the first principle of American criminal law jurisprudence," arguing that it "applies even though its application may result in a dangerous and morally culpable person escaping punishment." UNDERSTANDING CRIMINAL LAW 41 (4th ed. 2006).

just, most effective, most coherent, most persuasive, most legitimate, [21] and even the most moral approach to ICL.

Chief amongst the deficiencies of strict legality is that, when strict legality is applied, in some cases judges cannot use existing criminal law to convict persons accused of committing heinous crimes. Such outcomes draw criticism: opponents of strict legality feel it is unjust, immoral, dangerous, and wrong to let people accused of rape and murder go free based on the "technical" or "procedural'" issue of legality.[22] They argue that the real injustice is to rely on strict maxims if doing so results in impunity.[23] Further, they assert that strict legality does not fit the context of ICL, which addresses creative evils with which state-based international law might not be able to keep up.[24] Additional concerns might be that the principle of legality promoted here could prove unworkable in a common law system. However, ICL is not a common law system, and *lex scripta*—a written code—could go a long way towards addressing any such concerns.

Moreover, some might wish to oppose the principle as promoted here on the basis that it conflicts with previous and/or existing legal practice. For example, jurisprudence from the European Court of Human Rights (ECtHR) promotes a more flexible version of legality. A prominent example that parallels the ICT cases examined in this article is *S.W. v. United Kingdom/C.R. v United Kingdom*, in which ECtHR judges held that the abolition of marital immunity as a shield against a rape charge by UK judges did not violate the legality principle enshrined in Article 7 the European Convention on Human Rights or the

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21. In this paper, the term "legitimacy" is used in the basic Weberian sense that legality "derives from voluntary agreement of the interested parties" and/or "is imposed by an authority which is held to be legitimate and therefore meets with compliance." *See* MAX WEBER, ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY 36 (Guenther Roth and Claus Wittich eds. 1978). In Amy Nivette's shorthand, this is the "link between state power and citizens." *Legitimacy and Crime: Theorizing the Role of the State in Cross-national Criminological Theory* 18 THEORETICAL CRIMINOLOGY 93, 94 (2014).

22. *See, e.g.*, Van Schaack, *supra* note 1, at 140; Kirsten Campbell, *To Render Justice: Models of "Justice" in the International Criminal Tribunal for the Former Yugoslavia* (April 4, 2005), http://escholarship.org/uc/item/8260s3n7 (part of the "Papers presented at the UC Berkeley Center for the Study of Law and Society Bag Lunch Speaker Series"); *see also* GABRIEL HALLEVY, A MODERN TREATISE ON THE PRINCIPLE OF LEGALITY IN CRIMINAL LAW 50 (2010).

23. *See, e.g.*, Van Schaack, *supra* note 1, at 141; Hans Kelsen, *Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?*, 1 INT'L L. QUARTERLY 153 (1947) (arguing that punishing the wrongdoers of WWII "is more important than to comply with the rather relative rule against *ex post facto* laws.").

24. Alain Pellet, *Applicable Law, in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 1051, 1059 (Antonio Cassese et al. eds., 2002).

defendant's rights under this article.[25] Admitting that this case reversed extant English law,[26] the judges invoked reasoning similar to that of the ICTY *Furundžija* trial judges, employing "respect for human dignity and human freedom" as a justification for the expansion.[27] However, this article critiques such an approach as incompatible with the both the goals and requirements of criminal law. On top of this, this article argues that strict legality works to ensure human rights. Further, this article is not so much concerned with what has happened or is happening, but rather looks back to previous cases in order to build arguments regarding both what should happen (normatively) and what could happen (pragmatically).

Section II of this article defines the principle of legality, examining its history in ICL and locating it as both a general principle and a rule of customary international law (CIL). Following this, Section III offers a definition of strict legality for ICL, elaborating upon the four prongs endorsed here. The purposes of legality, such as protecting against abuse of power, ensuring the legitimacy of governance, and promoting human rights, are discussed in Section IV. Section V proposes that legality should be viewed as a human rights principle in its own right. Arguments against strict legality are considered and rebutted in Section VI. Finally, Section VII concludes with recommendations for how to achieve the strict legality principle promoted here.

II. Defining The Principle of Legality

The concept of legality in ICL is fluid and evolving. There is no agreed upon definition or fixed standard. Legality in the international sphere is derived from that of municipal systems,[28] as legality is a general principle of law common to almost all legal systems.[29] The drafting history of the Rome Statute characterizes legality as "fundamental to any criminal legal system," notes the link between this general principle and domestic systems, and acknowledges the need to articulate legality clearly in the statute.[30]

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25. SW v. United Kingdom, (No. 335-B) Eur. Ct. H.R. (ser. A) (1995); CR v. United Kingdom, (No. 335-C) Eur. Ct. H.R. (ser. A) (1995).

26. SW, *supra* note 25, ¶¶ 22-23, 35.

27. *Id.* ¶ 42.

28. Machteld Boot, Genocide, Crimes Against Humanity, War Crimes: *Nullum Crimen Sine Lege* and the Subject Matter Jurisdiction of the International Criminal Court 18 (2002).

29. M. Cherif Bassiouni, International Criminal Law 98 (3d ed. 2008).

30. *See* Jun Yoshida (Rapporteur), Rep. of the Preparatory Comm'n on the Establishment of an Int'l Criminal Court, U.N. Doc. A/AC.249/CRP.1/Rev.1 (Apr. 11, 1996).

The principle of legality rests on ancient bedrock: evidence suggests that it dates back at least as far as 440 AD.[31] At the same time, because of the diversity presented in how domestic systems address legality[32] and the relative newness of ICL,[33] there is no one understanding of what it means to uphold or violate the principle under ICL.[34] Roughly 120 mostly civil law countries subscribe to a version of legality similar to the one promoted here.[35] Other, mostly common law countries employ a more flexible principle that allows judges to balance legality against other interests.[36] However, even countries that allow this balancing usually[37] prohibit retroactive judicial crime creation,[38] articulating the limits of judicial interpretation in criminal law. Multiple material sources of international law articulate the principle of legality. As of 2008, M. Cherif Bassiouni had located 281 international treaties that mention this principle in some way.[39] Nevertheless, most international treaties lack specificity as to the content and application of legality.[40] Bassiouni posits two possible reasons for the lack of specificity evidenced in them: 1) the expectation that ICL is to be embodied in national legislation, meaning that "ICL norms need only be declarative" because national legislation will supply the specificity required; and 2) "the lack of technical expertise of the diplomats" who draft ICL instruments.[41] He characterizes the first reason as both an unrealized expectation and an incorrect understanding of ICL's applicability to individuals.[42] As to the second reason, it is a barrier to precise drafting that can be corrected

31. For a review of the history of the principle of legality in the ancient world, see JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 165-67 (2nd ed. 1947).

32. BOOT, *supra* note 28, at 81.

33. CRYER, *supra* note 1, at 1.

34. BASSIOUNI, *supra* note 29, at 98.

35. *Id.*

36. *Id.*; KENNETH S. GALLANT, THE PRINCIPLE OF LEGALITY IN INTERNATIONAL AND COMPARATIVE CRIMINAL LAW 13 (2009).

37. A notable exception might be modern Germany, in which courts sometimes use the so-called "Radbruch formula," choosing to protect society against harm rather than the individual against a violation of legality. ANTONIO CASSESE & PAOLA GAETA, CASSESE'S INTERNATIONAL CRIMINAL LAW 22 (3d ed. 2013).

38. GALLANT, *supra* note 36, at 13 ("In such states, it is particularly important that legality limits the unforeseeable retroactive expansion of criminal liability by judicial decision, as well as prohibits retroactive crime creation and statutory penalty increases."). Gallant also argues that case law on the European Convention on Human Rights and U.S. constitutional law confirm this prohibition in common law countries. *Id.*

39. BASSIOUNI, *supra* note 29, at 95.

40. *Id.*

41. *Id.*

42. *Id.*

going forward. Indeed, the Rome Statute has carefully and clearly articulated its legality principle.[43]

It is highly likely that legality is also a [CIL] principle[44] and that it binds international as well as domestic tribunals.[45] It has been present in ICL trials at least since the WWII Tribunals, which chose a substantive justice interpretation of the principle favoring punishment for serious harm in the absence of positive law.[46] Since then, this approach "was gradually replaced by that of strict legality."[47] "[L]egal proscriptions established in ICL must satisfy the requirements of the principles of legality,"[48] and thus it follows that any court applying these ICL proscriptions must also comply with legality. The Universal Declaration of Human Rights (UDHR) refers to both domestic and international law when articulating the principle,[49] as does the International Covenant on Civil and Political Rights (ICCPR)[50] and the European Convention on Human Rights (ECHR).[51] The principle exists in the common criminal law system of the European Union.[52] The United Nations established the ICTY as bound by the principle,[53] and the ICTs have acknowledged that they are bound by it numerous times.[54] The Rome

43. Rome Statute of the International Criminal Court art. 22, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter "Rome Statute"].

44. *See, e.g.*, *Rule 101. The Principle of Legality*, INT'L COMM. OF THE RED CROSS, https://ihl-databases.icrc.org/customary-ihl/eng/print/v1_rul_rule101; GALLANT, *supra* note 38, at 352-54 (arguing that legality is a customary principle of international humanitarian law); *see also* Section V *infra* at 23, which builds the argument that legality is not only a customary international human rights principle, but that the sources of this principle imply it is meant to be applied in both domestic and international spheres.

45. GALLANT, *supra* note 33, at 355 ("[L]egality applies as a matter of international human rights law in both national and international tribunals, whether national or international crimes are charged."). He states that the "stronger versions" of legality such as the one promoted in these chapters "have not become customary international law binding states and/or international organizations outside the treaty context."

46. CASSESE & GAETA, *supra* note 37, at 24-26.

47. *Id.* at 26.

48. BASSIOUNI, *supra* note 29, at 33.

49. G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 11(2) (Dec. 10, 1948) [hereinafter UDHR].

50. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 and arts. 15(1), 15(2), 1057 U.N.T.S. 407, Mar. 23, 1976 [hereinafter ICCPR].

51. Convention for the Protection of Human Rights and Fundamental Freedoms arts. 8(1), 8(2), Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

52. CHRISTINA PERISTERIDOU, THE PRINCIPLE OF LEGALITY IN EUROPEAN CRIMINAL LAW (2015).

53. *See* U.N. Secretary-General, *Rep. of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶ 29, 34, U.N. Doc. S/25704 (May 3, 1993) [hereinafter Report of the Secretary General].

54. GALLANT, *supra* note 36, at 303.

Statute was drafted with a strict legality provision,[55] reflecting contemporary state practice and *opinio juris* that this principle binds ICL tribunals.[56]

III. The Definition of Legality Promoted in This Article

While the principle of legality is enshrined in CIL, no one definition of legality for the purposes of ICL prevails. Because no definitive understanding of legality exists in international law, this paper proposes a definition that it argues best serves the aims of ICL and best upholds international human rights law. This paper proposes that legality in international criminal law consists of four components: A) *nullum crimen sine lege*, denoting that a crime must have been articulated in law to be a crime; B) *lex praevia*, resulting in the prohibition of *ex post facto* laws and ensuring the foreseeability of prosecution for articulated crimes; C) *lex certa*, guaranteeing the certainty of the elements of the crime; specificity, and D) *lex stricta*, guiding the judge to strict interpretation, a prohibition on interpreting by analogy, and the principle of *in dubio pro reo*.[57] These four components are widely accepted. However, the interpretation of their meaning as promoted in this article might strike some as iconoclast or contrary to practice. Each prong will be discussed in detail in this article, and the "four pronged legality test" will be referred to throughout this article as the lens through which to assess compliance with the principle.[58] A fifth element, *lex scripta*, requiring written criminal codes, is both ideal and achievable, and something that the States, tribunals, and individuals crafting ICL should strive towards through progressive codification. The conclusion of this article presents a brief proposal for an universal international criminal code.

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55. Rome Statute art. 22.

56. One hundred sixty-three states participated in the final drafting of the Rome Statute. *See* United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc A/CONF.183/13, at 5-41 (2002), http://legal.un.org/icc/rome/proceedings/E/Rome%20Proceedings_v2_e.pdf. One hundred twenty of these States adopted it on 17 July 1998. *See Home: About*, INT'L CRIMINAL COURT, https://www.icc-cpi.int/about.

57. *See generally* Roelof Haveman, *The Principle of Legality, in* SUPERNATIONAL CRIMINAL LAW: A SYSTEM SUI GENERIS 39, 40 (Roelof Haveman et al. eds., 2003) [hereinafter Haveman, *The Principle of Legality*].

58. Claus Kreß presents a very similar version of legality in his entry *Nulla Poena Nullum Crimen Sine Lege, in* THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2010). In *General Principles of Criminal Law in the Rome Statute*, 10 CRIM. L. FORUM 1, 4 (1999), Kai Ambos also characterizes legality in the Rome Statute in a way similar to the position in this article, saying it comprises "*lege scripta*, *praevia*, *certa* and *stricta*," the key distinction being *lege scripta* as a necessity for the Rome Statute rather than an urgently needed feature or ICL generally.

This articulation of legality is at once substantive and procedural.[59] It addresses the element of crimes; the basis for criminal procedures such as arrest, investigation, detention, and prosecution; and concepts such as fair trial rights that join procedural process and substantive rights.

A. *Nullum Crimen Sine Lege*

The maxim *nullum crimen sine lege* can be translated literally as no crime without law, or more fluently as "nothing is a crime except as provided by law."[60] Because "the act must have been criminal at the time committed,"[61] locating an act as proscribed by law does not suffice as the basis for criminal liability; a mere prohibition must not be transmuted into criminalization. Rather, legality requires that "the actor is able to recognise the criminality of the act."[62] *Nullum crimen* is the core of legality.[63] While the maxim often reads *nullum crimen, nulla poena sine lege*—no crime without law, and no punishment without law—this paper is not concerned with penalties or sentencing but with law creation. Therefore, this article will not engage *nulla poena*. The three other aspects of legality promoted here—*lex praevia*, *lex certa*, and *lex stricta*—flow from *nullum crimen* and formulate more specific aspects of it.

B. *Lex Praevia*

Lex praevia means that the crime the accused is charged with must have been defined as a crime prior to the commission of the act that forms the basis of the charge.[64] It provides the temporal aspect of legality. *Nullum crimen* alone does not specify the temporal relationship between the law criminalizing the act and the commission of the act for which a person is on trial. *Lex praevia* adds this further clarification, resulting in a prohibition of retroactive law.[65] Jurists have argued that this prohibition was not part of international law at the time of the

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59. GALLANT, *supra* note 33, at 312, writes that the ICTs have addressed legality as both a jurisdictional and a substantive issue (citing Prosecutor v. Šainović, Case No. IT-05-87, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction: Joint Criminal Enterprise, ¶ 10 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006)); *see also* Kreß, *supra* note 58, ¶ 1, writing that legality addresses both criminalised conduct and the sanctions for it.

60. GALLANT, *supra* note 36, at 12.

61. *Id.* at 135.

62. *Id.* at 132.

63. BASSIOUNI, *supra* note 29, at 89.

64. AARON X. FELLMETH & MAURICE HORWITZ, GUIDE TO LATIN IN INTERNATIONAL LAW (2009).

65. *See e.g.*, Kreß, *supra* note 58, ¶ 22 ("The legality principle finds expression in international conventions through the prohibition of retroactive criminal laws.").

World War II tribunals.[66] Gallant calls this prohibition the "most important constituent," of legality in criminal law;[67] Heller and Dubber contend that in some jurisdictions the prohibition on retroactive law is given more weight than any other aspect of legality.[68] While it is possible to find exceptions to the prohibition on retroactive law, these are anomalies, best characterized as "the use of the coercive legal apparatus in times of crises" as opposed to evidence against the predominance of the prohibition.[69] Importantly, this wording is not meant to denote a justifiable legal response to crisis in which retroactive law serves a beneficial purpose. Instead, the crises are crises of law, and the retroactive application of penal law is a part of this breakdown.

Hallevy has identified four relevant temporal points related to legality. The four points are:

(1) The time of the criminal event
(2) The time of the judicial event
(3) The time of the enactment of the criminal norm
(4) The time of validation of the criminal norm.[70]

The distinction between enactment and validation refers to the fact that a criminal norm is not valid until it is published widely in order to achieve notice, and also that enactment might not coincide with entry into force.[71] Having divided the temporal nature of criminal law into four distinct elements, Hallevy describes six possible arrangements of these four moments in time.[72] Only one of these scenarios complies with the above general rule, and the other five violate it in some way. This article argues that one of these scenarios describes the creation of the crimes of rape and sexual violence under international law. Hallevy calls this the "sixth possible relation between the relevant points in time," a scenario in which "the criminal event takes place first, followed by the judicial decision, the enactment of the procedural criminal norm, and its validation."[73]

66. BASSIOUNI, *supra* note 29; Kelsen, *supra* note 23, at 164.

67. GALLANT, *supra* note 36, at 8.

68. THE HANDBOOK OF COMPARATIVE CRIMINAL LAW 17 (Kevin Heller & Markus Dubber eds., 2010).

69. HALL, *supra* note 31, at 170.

70. HALLEVY, *supra* note 22, at 51-52.

71. *Id.* at 52-53.

72. *Id.* at 61-78.

73. *Id.* at 77.

In this scenario, "the substantive criminal norm is not applicable to a criminal event that has taken place before its validation has been completed."[74] Therefore, the judgment in this timeline should acquit for any charges against the act. Hallevy's formulation assumes that judges and judgments are not sources of international criminal law.[75] Given that Article 38 of the Statute of the ICJ lists judgments as a subsidiary means for identifying the rules of international law, rather than as a source of international law, this seems an accurate restatement of public international law's (PIL) sources doctrine.[76] Using Hallevy's formulation, the ICTs should not have created the crimes of rape and sexual violence.

The effects of *lex praevia* include advance notice and foreseeability, two features that in turn serve to uphold the rule of law and fairness.[77] *Lex praevia* also allows a defendant to properly prepare her defense by knowing the details of the crime she is charged with prior to trial. In contrast, the variety of definitions proffered in ICT cases addressing rape, and the fact that these definitions were issued in final judgments as opposed to before trial, undermined fair trial rights.[78]

C. *Lex Certa*

Lex certa, translated as legal certainty, provides that a crime is articulated with sufficiently precise wording so that the criminalized conduct is clear.[79] It has also been translated as "settled law,"[80] demonstrating how *lex praevia* and *lex certa* work together to achieve temporal clarity and precise content. In general, criminal law should be "settling, dispositive, and purposive," rather than leaving open questions; this is necessary for law to function as a system of planning and authority capable of guiding action and achieving goals.[81] In criminal law, the need for certainty is amplified, due to the threat of deprivation of liberty and the role of criminal law in preventing actions considered dangerous and harmful.

74. *Id.*

75. *Id.* at 44.

76. JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 57-58 (8th ed. 2012); *see also* MALCOLM SHAW, INTERNATIONAL LAW 37-38 (5th ed. 2003).

77. GALLANT, *supra* note 33, at 15-17.

78. Haveman, *Rape and Fair Trial*, *supra* note 19, at 264.

79. *See, e.g.*, Michael Faure et al., *The Regulator's Dilemma: Caught between the Need for Flexibility and the Demands of Foreseeability—Reassessing the Lex Certa Principle*, 24 ALBANY L. J. SCI. & TECH. 283 (2014).

80. FELLMETH & HORWITZ, *supra* note 64, at 174.

81. SCOTT J. SHAPIRO, LEGALITY 201-02 (2011).

Sufficient clarity has been interpreted to mean "the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable."[82] This clarity allows people to foresee the criminal sanction attached to the specified conduct and to avoid criminal behavior.[83] The basic structure of a crime includes both the objective element (*actus reus*) and subjective element (*mens rea*).[84] Therefore, *lex certa* indicates that for the law to be sufficiently precise, both the criminalized act and the attendant mental state should be specified. Until the advent of the Rome Statute and its detailed Elements of Crimes,[85] the absence of prospectively specified elements of international crimes had been a major shortcoming in ICL.

Thus, *lex praevia* and *lex certa* combine to create notice, which in turn safeguards additional goods. Bassiouni articulates how legality provides notice, helping to prevent both prosecutorial and judicial overreaching and crime creation. He argues that "[t]he goals of principles of legality are to provide notice as part of general prevention, as well as notice to the accused as part of fairness.'"[86] Continuing, he elaborates that notice provides clarity, which in turn limits both prosecutorial and judicial discretion, because clarity creates boundaries for their action.[87] Absent these clear boundaries, the accused is placed in the doubly unfair position of confusion regarding what she is charged with and the threat that the imprecisely delimited crime will be extended and her punishment concomitantly expanded.[88] Legality safeguards against such outcomes.[89]

While perfect notice—the idea that all persons know and understand all laws—is a legal fiction, law makers and those with the power to punish are instructed by these two tenets to take all steps necessary to ensure maximum notice. *Lex certa* also functions to protect individual liberty not infringed by law. Packer describes the principle of specificity as:

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82. Kokkinakis v. Greece, No. 260-A, Eur. Ct. H.R. (ser. A) ¶ 52, (1993). The court declared *lex certa* as integral an element of legality as the prohibition on retroactive law creation.

83. FELLMETH & HORWITZ, *supra* note 64, at 7.

84. IRYNA MARCHUK, THE FUNDAMENTAL CONCEPT OF CRIME IN INTERNATIONAL CRIMINAL LAW: A COMPARATIVE ANALYSIS 112 (2014).

85. Rep. of the Preparatory Comm'n for the Int'l Criminal Court (Addendum), *Part II: Finalized Draft Text of the Elements of Crimes*, U.N. Doc. PCNICC/2000/1/Add.2 (2000).

86. BASSIOUNI, *supra* note 29, at 98.

87. *Id.*

88. *Id.*

89. *Id.*

> [A]n injunction to take care in the framing of criminal statutes, that no more power be given to call conduct into question as criminal, with all the destruction of human autonomy that this power necessarily imports, than is reasonably needed to deal with the conduct the lawmakers seek to prevent.[90]

Accordingly, *lex certa* circumscribes law makers' ability to cast a wide net on human behavior via criminal law and reminds drafters to craft law as precisely as possible. Critique of the ways in which ICL lacks specificity abound, focused on an absence of details and a level of vagueness that render elements of crimes unclear.[91] Despite the fact that "there is no express void for vagueness doctrine in international law"[92] a finding that *lex certa* was violated should result in acquittal for the charge based on uncertain law.[93]

Fair labelling is an attendant principle of *lex certa*. It entails that the nomenclature of a criminal offense clearly expresses the wrongdoing and stigma attached to the sanctioned conduct.[94] While a relatively new concept, fair labelling existed as a principle in municipal law for at least a decade prior to the founding of the ICTs,[95] and is widely accepted as fundamental to criminal law.[96] Fair labelling "fulfils the fundamental requirement of fairness to the offender, the victim, and the public."[97] Robinson argues that some ICTY judgments exhibit reference to upholding this principle.[98] ICT cases addressing rape seem to demonstrate a disregard for the concept, for example by expanding the definition of rape to include forced oral penetration, which had previously

90. HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 94-95 (1968).

91. LEENA GROVER, INTERPRETING CRIMES IN THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 106 (2014) ("(1) prohibited conduct is not described in detail; (2) some prohibited conduct is especially vague (e.g., 'other inhumane acts' as a crime against humanity); and (3) mental elements for crimes are not accurately defined.").

92. Van Schaack, *supra* note 1, at 137; *see also* GALLANT, *supra* note 36, at 363.

93. GALLANT, *supra* note 36, at 363 (observing that currently, how *lex certa* "is enforced [in international law] is largely left to the legal systems concerned.").

94. *See, e.g.*, Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 LEIDEN J. INT'L L. 925, 927 (2008).

95. *See, e.g.*, James Chalmers & Fiona Leverick, *Fair Labelling in Criminal Law*, 72 MODERN L. REV. 217, 218-19 (2008).

96. *See, e.g.*, ANDREW ASHWORTH & JEREMY HORDER, PRINCIPLES OF CRIMINAL LAW 77-78 (7th ed. 2013).

97. Justice T.A. Doherty, *Preface* to HILMI M. ZAWATI, FAIR LABELLING AND THE DILEMMA OF PROSECUTING GENDER-BASED CRIMES AT THE INTERNATIONAL CRIMINAL TRIBUNALS, at xii (2014).

98. Robinson, *supra* note 95, at 927 n.9.

been labelled as sexual assault in many jurisdictions.[99] Gallant has similarly observed what he calls "retroactive re-characterisation of crime,"[100] noting how the ICTs classified acts as crimes through judicial argument that such acts were "criminal in the sense generally understood."[101] Such practices violate *lex certa* and fair labelling. When adhered to, fair labelling functions to effectively communicate and thus deter, and to limit judicial discretion regarding what constitutes a criminal act.[102] Fair labelling helps deter by ensuring "that the censure that attaches to the conviction and the punitive response that follows is proportionate to the wrong done."[103] Proportionality enhances procedural legitimacy, which in turn augments deterrence. Arguments allowing judges to develop crimes as long as the essence of a previously articulated crime is respected violate the fair labelling principle.

D. *Lex Stricta*

The maxim *lex stricta* instructs the judge to use strict interpretation, which can have several meanings. One meaning is that reasoning by analogy is prohibited and another is that, when in doubt, things must be construed in the accused's favour (*in dubio pro reo.*) The Rome Statute links both of these aspects of *lex stricta*, suggesting a related meaning and usage.[104] *In dubio pro reo* can refer to judicial interpretation of trial evidence,[105] as opposed to interpretation of law. However, the ICTs have applied *in dubio pro reo* beyond assessment of evidence, resulting in a broader meaning.[106] Thus, *in dubio pro reo* can also function as a general safeguard against judicial crime creation. The doubt

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99. *See* Prosecutor v. Furundžija, Case No. IT-95-17/1, Judgment, ¶¶ 179-82 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

100. GALLANT, *supra* note 36, at 320-24.

101. *Id.* at 322 (citing Prosecutor v. Hadzihasanovic, Case No. IT-01-47, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ¶ 34 (Int'l Crim. Trib. for the Former Yugoslavia Jul. 16, 2003)).

102. *See, e.g.*, Findlay Stark, *It's Only Words: On Meaning and Mens Rea*, 72 CAMBRIDGE L. J. 155 (2013).

103. ANDREW ASHWORTH & LUCIA ZEDNER, PREVENTIVE JUSTICE 179 (2014).

104. Rome Statute art. 22(2).

105. *See, e.g.*, WAR CRIMES JUSTICE PROJECT, MANUAL ON INTERNATIONAL CRIMINAL DEFENSE: ADC-ICTY DEVELOPED PRACTICES, ¶¶ 30-34, at 15 (2011).

106. *See, e.g.*, Prosecutor v. Tadić, Case No. IT-94-1, Sentencing Judgment, ¶ 31 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 11, 1999) (holding that *in dubio pro reo* necessitates that where the record was unclear as to which of two charges Tadic was to be held criminally liable for, the court must choose the lesser charge); Prosecutor v. Galić, Case No. IT-98-29, Appeals Judgment, ¶ 74 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2006) (considering *in dubio pro reo* to address the specificity of the charges so that "that the accused has to be properly

to which it refers might include doubt regarding the temporal element or content of a crime. This meaning fits with the principle's origins in English law, in which medieval judges developed a rule of mitigating interpretation in order to turn the tide of capital punishment.[107] This origin demonstrates the protective function of the principle, and the role of the judge in protecting defendants against excessive punishment.

In contrast, failure to adhere to *lex stricta*'s prohibition against reasoning by analogy can result in judicial crime creation. A strict prohibition on reasoning by analogy is favored by civil law jurists.[108] However, common law jurists are more likely to refer to the principle as "strict construction" without reference to a prohibition on reasoning by analogy.[109] Strict construction is a judicially created canon of interpretation designed to protect the defendant from overreaching punishment by the State.[110] American law includes the right to fair notice and a prohibition on judge made crime in the canon of strict construction.[111] Nevertheless, this canon is silent on reasoning by analogy.

There are several ways in which legality functions as a rule of judicial interpretation, and *lex stricta* in particular is a key constraint: "the basic rule of interpretation embodying the principle of legality is the prohibition or limitation on the use of analogy in judicial interpretation."[112] The line between acceptable judicial interpretation and reasoning by analogy in a way that amounts to "judicial legislation" can be very thin, presenting problems of accurate categorization.[113] One way to distinguish between acceptable application of a rule and prohibited reasoning by analogy is the degree of difference or similarity between the acts in question.[114] However, this approach still leaves substantial discretion in the hands of the judge. A strict prohibition on reasoning by analogy discourages judicial overreaching because it takes away one avenue

informed of the nature and cause of the charges against him so that he can properly prepare his defence.").

107. *See* HALLEVY, *supra* note 22, at 160-61.

108. *See, e.g.*, BOOT, *supra* note 28, at 94, 100-02; Haveman, *The Principle of Legality*, *supra* note 57, 46-48.

109. HALL, *supra* note 31, at 165.

110. HALLEVY, *supra* note 22, at 160-161.

111. *Id.* at 161.

112. M. Cherif Bassiouni, *Principles of Legality in International and Comparative Criminal Law, in* BASSIOUNI, *supra* note 29, at 73.

113. HALL, *supra* note 31, at 173; BOOT, *supra* note 28, at 108-09; BASSIOUNI, *supra* note 29, at 98 n.81 ("The doctrine and jurisprudence of many such legal systems [that prohibit resort to analogy] reveals that what is called interpretation is in some cases slightly less than analogy.").

114. HALL, *supra* note 31, at 173.

through which judges could enlarge the scope of a previously defined crime. The prohibition on reasoning by analogy also encourages the promulgation of clear and prospective criminal law. This embargo is particularly necessary given that, even in jurisdictions that prohibit reasoning by analogy, it remains difficult to entirely prevent such expansions from occurring.[115] Even in systems with the most defined principles of *lex stricta*, the ultimate decision between what is permissible and impermissible interpretation is in the hands of the judge. Thus, setting the bar high by entirely prohibiting analogy creates the best conditions for achieving this goal and the purposes it serves, articulated in the next section.

IV. The Purposes of Legality

Legality serves several purposes. Some of these functions have been articulated in the preceding section's explication of legality's core tenets, such as prior notice as to what constitutes criminal behavior. Additionally, legality secures higher order goods of the utmost importance, such as rule of law and other aspects of good governance.[116] This section addresses how legality ensures (A) the purposes of criminalization and (B) creates legitimacy of governance.[117] Determining the legitimacy of criminal sanction depends upon understanding the purpose of criminal law, therefore these purposes are discussed first.[118]

A. *Legality's Role in Ensuring the Purposes of Criminalization*

Legality is designed to serve as a constant force within criminal law. Its purposes do not change across criminal law scenarios. These purposes include giving prior and clear warning regarding behaviour that society both condemns and punishes, thereby potentially allowing individuals to avoid both the behavior and attendant consequences.

115. *See* BOOT, *supra* note 25, 100-09 for a review of German criminal law doctrines.

116. Jeremy Waldron describes the rule of law as "one of the most important political ideals of our time." *The Concept and the Rule of Law*, 43 GEO. L. REV. 1, 3 (2008). This assessment is based on the other goods it secures and the harms it protects against.

117. Van Schaack similarly emphasizes the governance purposes and the criminal law purposes of legality. Van Schaack, *supra* note 1, at 121.

118. Gallant has outlined similar purposes, namely "[1] [T]he protection of individual human rights... [;] [2] legitimacy of governance...[;] [3] [protection of] the structure of democratic governance by assigning law-making authority to the correct organ of government...[;] [and] [4] the promotion of the purposes of criminalization." *See* GALLANT, *supra* note 36, at 19-20; *see also* Kreb, *supra* note 58, ¶ 4 (categorizing the four theoretical foundations of legality as 1) the guarantee of individual liberties against state arbitrariness; 2) the need for fairness in criminal law; 3) democracy and separation of powers; and 4) the purposes of criminal law).

Legality is thus an essential ingredient in crime prevention. Key goods such as deterrence, rule of law, and fairness depend on legality. To support this claim, it is first necessary to establish (1) the purposes of criminal law generally; (2) the purposes of ICL specifically; and (3) legality's role in supporting these purposes.

1. The Aims of Criminal Law

Criminal law is a tool for social control.[119] Lawmakers label conduct criminal because they consider these acts egregiously harmful and significantly dangerous for society.[120] These harms are deemed to threaten "all members of the polity."[121] Correspondingly, crimes merit public censure and the threat of prison.[122] While "[v]iews vary as to the precise list of purposes of the criminal law"[123] broadly speaking, criminal law exists to prevent and punish serious harm. More specifically, societies use criminal law for (at least) the following five reasons:

> (a) to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests;
> (b) to subject to public control persons whose conduct indicates that they are disposed to commit crimes;
> (c) to safeguard conduct that is without fault from condemnation as criminal;
> to give warning of the nature of conduct declared to be an offence;
> (d) to differentiate on reasonable grounds between serious and minor offences.[124]

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119. HEATHER KEATING ET AL., CLARKSON & KEATING'S CRIMINAL LAW: TEXT AND MATERIALS 1-2 (8th ed. 2014).

120. "Crime is crime because it consists in wrongdoing which directly and in serious degree threatens the security or well-being of society, and because it is not safe to leave it redressable only by compensation of the party injured." Carleton Kemp Allen, *The Nature of a Crime*, 13 J. COMP. LEGISLATION & INT'L L. 1, 11 (1931).

121. *See* R.A. DUFF, ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW 123 (2007).

122. *Id.*; *see also* MICHAEL ALLEN, TEXTBOOK ON CRIMINAL LAW 4 (13th ed. 2015).

123. RICHARD CARD & JILL MOLLOY, CARD, CROSS & JONES CRIMINAL LAW 3 (20th ed. 2012). *See, e.g.*, DUFF, *supra* note 121, at 139 (stating that there are "a diversity of reasons for criminalization, matching the diversity of kinds of wrong which can legitimately be the criminal law's business.").

124. MODEL PENAL CODE § 1.02(1) (AM. LAW. INST., Proposed Official Draft 1962).

Substantive criminal law thus reflects what society deems most harmful at any given moment.[125] Trifling matters fall outside its scope. Rather, "[t]he wrongdoing which the criminal law seeks to punish is that which threatens the fundamental values upon which a society is founded."[126] Punishing wrongdoers via criminal law "operates then as a form of social control both punishing the offender and reasserting the mores of that society."[127] Various theories justify this imposition, such as deterrence, retribution, or expression.[128] All of these theories hinge on the gravity of the act deemed criminal, and each of these justifications communicates society's core values. Criminal law seeks to achieve a peaceful equilibrium when a crime has thrown things off balance. It is only by concerning itself with the most serious threats to society can criminal law justify the deprivation of liberty and the negative impact of being labelled a criminal. Because criminal sanction is the most coercive operation available, criminal law correspondingly demarcates the limits of this power and the scope of its operation.[129]

2. The Purposes of International Criminal Law

ICL bears a strong resemblance to its municipal counterpart. The general aim of preventing, punishing, and denouncing severe harms remains the same, although the gravity threshold is higher under international law, which does not concern itself with the majority of domestic crimes, focusing instead on "mass criminality"[130] or aggravated crimes such as war crimes.[131] This is true as a statement both with respect to the field of ICL and to the rules and practice that apply to

125. Allen, *supra* note 120, at 4.

126. *Id.*

127. *Id.*

128. MARK DRUMBL, ATROCITY, PUNISHMENT AND INTERNATIONAL LAW 60-63 (2007) (analyzing the invocation of these justifications at the ad hoc tribunals); GROVER, *supra* note 91 (listing such ad hoc tribunal cases); BASSIOUNI, *supra* note 91, at 681, 689 (2003) (noting a tendency for *ad hoc* tribunals to emphasize retribution over other justifications).

129. Allen, *supra* note 120, at 1-2.

130. *See* CRYER, *supra* note 1, at 22.

131. An exception to the idea of this gravity threshold might be specific war crimes. For example, in most circumstances "destroying or seizing the property of an adversary," as stipulated in article 8(e)(xii) of the Rome Statute, will not be considered as egregious as most crimes perpetrated against other human beings directly. Indeed, the ICC has expressed the view that "even if inherently grave, crimes against property are generally of lesser gravity than crimes against persons." Prosecutor v. Al Mahdi, Case No. ICC-01/12-01/15, Judgment and Sentence, ¶ 77 (Int'l Crim. Court Sep. 27, 2016). Arguably it was the particular nature of the property destroyed in that case – World Heritage-listed religious sites – that founded the grave nature of the crime, rather than the destruction itself.

the various international criminal tribunals, although the manifestations of and bases for these may be distinct. Thus, deGuzman describes the "gravity of international crimes" as "the primary conceptual foundation of international law's authority to administer criminal justice."[132] Indeed, ICL effectively developed as a reaction to crimes considered across the globe to be egregious, the gravity of which "was invoked as the primary justification for establishing the tribunals."[133]

However, the concept of gravity for the purposes of ICL generally is ill-defined.[134] Further, it is only ever a subject of interpretation within particular instances of adjudication, defined by the rules of the particular forum. For example, the ICTY and the ICTR Statutes, Arts 1, articulate that the Tribunals' competence regards "serious violations of international humanitarian law."[135] The Rome Statute preamble states that it is concerned with "the most serious crimes of concern to the international community as a whole," and states "that such grave crimes threaten the peace, security and well-being of the world."[136]

Cryer identifies the core aims of ICL as retribution, deterrence, incapacitation, rehabilitation, and education.[137] He also names "broader goals" in addition to the core purposes, such as justice for victims, recording history, and post-conflict reconciliation,[138] to which Cassese adds capacity building in domestic justice systems.[139] The focus of this paper is the "core aims." ICL may be "broader" in what it can contribute to peace and justice, and to society at large. However, legality is a principle to be applied by courts sitting in international criminal trials. For the present moment, international criminal tribunals impose a gravity threshold on crimes within their jurisdiction.[140] Furthermore, even

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132. Margaret M. deGuzman, *How Serious are International Crimes? The Gravity Problem in International Criminal Law*, 51 COLUM. J. TRANSNAT'L L. 18, 20 (2012).

133. *Id.* at 21.

134. *Id.*

135. Rome Statute, Preamble.

136. Rome Statute, Preamble.

137. CRYER, *supra* note 1, at 18-23; *see also* Robert Cryer, *Witness Tampering and International Criminal Tribunals*, 27 LEIDEN J. INT'L L. 191, 191 n.1 (2014).

138. CRYER, *supra* note 1, at 23-26.

139. Antonio Cassese, *Reflections on International Criminal Justice*, 61 MODERN L. REV. 1, 6-7 (1998).

140. *See* Rome Statute, pmbl., art. 17(1)(d); Statute of the International Criminal Tribunal for the Former Yugoslavia art. 1, May 25, 1993, S.C. Res. 827 (May 25, 1993) [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda art. 1, Nov. 6, 1994, S.C. Res. 955 (Nov. 6, 1994) [hereinafter ICTR Statute]. However, as deGuzman, *supra* note 132 observes, gravity tends in practice to be used not as a limiting factor on admissibility but as a means of extending jurisdiction.

tribunals concerned with knowledge and capacity transfer to domestic governments[141] and reparations for victims[142] seem to have retained the punishment of serious crimes as their primary purpose. Thus, the argument presented here favoring strict legality is premised on the role of courts in punishing such crimes.

The multitude and magnitude of ICL's goals open it to criticism.[143] Mirjan Damaška argues that what he deems an "overabundance"' of goals creates tensions between them,[144] and that these frictions are exacerbated by the absence of a rank order of goals.[145] This is nothing new to criminal law—clashes between goals, such as retribution versus rehabilitation, or defendant's rights versus victim's interests—abound in the municipal sphere, and no criminal justice system can claim complete coherence. Yet some of the tensions seem unique to ICL; for example, the strain caused by the requirement of individual liability and the goal of achieving a collective historical record,[146] characterized by Koskenniemi as a dangerous oscillation between individual liability and show trials.[147] Damaška opines that a greater sense of cohesion could be gained by focusing on the goal of accountability for egregious human rights abuses[148] and further by creating a hierarchy of goals.[149] He places accountability through education at the top of the pyramid.[150] Arguing that deterrence is unlikely,[151] he envisions a norm-creation role for ICL.[152] Crucially, the power of international criminal tribunals to spread ideas in a persuasive way depends on their

141. *See* Statute of the Special Court for Sierra Leone, 16 January 2002, 2178 U.N.T.S. 138 (entered into force 12 April 2002).

142. *See* Rome Statute, art. 75.

143. *See, e.g.*, Mirjan Damaška, *What is the Point of International Criminal Justice?*, 83 CHI.-KENT L. REV. 329, 331 (2008) (criticizing the scope of ICL's professed aims).

144. *Id.* at 331-35.

145. *Id.* at 339-40.

146. *Id.* at 332-33.

147. Martti Koskenniemi, *Between Impunity and Show Trials*, 6 MAX PLANCK Y.B. U.N. L. 1, 2-3 (2002).

148. Damaška, *supra* note 143, at 330-31.

149. *Id.* at 334-37.

150. *Id.* at 345. *Cf.* Koskenniemi, *supra* note 147 (strongly implying that the truth telling and thus educative function of ICL is a near impossibility, given the nature of law, politics, history, and truth).

151. Damaška, *supra* note 143, at 344-45. *Cf.* Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?* 95 AM. J. INT'L L. 7, 12 (2001).

152. Damaška, *supra* note 143 at 345-47.

legitimacy.[153] This paper argues that their legitimacy depends in part on their adherence to legality.

3. Legality's Role in Supporting the Purposes of International Criminal Law

The purposes of legality are closely linked to certain purposes of ICL. Both international and municipal criminal law are understood as "the pursuit of social ends through the exercise of legitimate power."[154] Although such aims may be diverse, legality helps ICL achieve its goals of preventing, punishing, and denouncing crimes in the unique context of international politics, where leaders are often on trial and suffering spreads through countries and regions. It helps justify ICL's application of force against people themselves condemned for using force. Adhering to the principle of legality is one of the indicators that criminal law is indeed a legitimate use of, rather than an abuse of, power. This indicator of legitimacy depends upon the process: "how problem-solvers in fact (as a psychological process) arrive at their solutions is less important than whether they are able to justify those solutions by reference to legal rules."[155]

Because legality requires criminal law to be prospectively predetermined and verifiable, it provides a coherent and corresponding means of justifying criminal sanctions. The purpose of legality stays the same regardless of the particular criminal law scenario: by prior and clear warning, all individuals are on notice that society condemns, and will endeavour to punish, the criminalized act. Without prior warning there can be no influence on future behavior (deterrence);[156] without clarity and notice there can be no societal condemnation (expression); and

153. *Id.* at 345.

154. Oscar Schachter, *International Law in Theory and Practice*, 178 RECUEIL DES COURS - ACADÉMIE DE DROIT INTERNATIONAL DE LA HAYE 24 (1982) (defining law and contextualizing it as "an aspect of the broader political process").

155. MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 10 (1989).

156. *Cf.* LESLIE P. FRANCIS & JOHN G. FRANCIS, *International Criminal Courts, the Rule of Law, and the Prevention of Harm: Building Justice in Times of Injustice, in* INTERNATIONAL CRIMINAL LAW AND PHILOSOPHY, 58, 66-67 (Larry May & Zachary Hoskins eds., 2010) (arguing that robust and rigid "due process guarantees" can "dilute" deterrence by, for example, requiring witnesses when they are rare in mass killings and mass rapes, or when they may be killed to prevent such testimony). It is also important to separate evidentiary and investigative standards from judicial implementation of legality. Such material due process constraints do not apply to legality, which relies only on good faith determinations of pre-existing criminal law and not on witnesses.

without clear prior warning, punishment is no longer justified as deserved (retribution), but becomes pure and random violence.

B. *Legitimacy of Governance*

Legality is a tool for ensuring good governance and the legitimacy of governance. One way legality secures this is by enhancing the rule of law.[157] A natural corollary to criminal law's constraints upon individuals is its constraints upon government. In domestic law, "rule of law" often means "imposing law on government."[158] The international sphere lacks a central government upon which international law can impose itself. This decentralization means that multiple international institutions and actors are bound by legality, including international criminal tribunals.[159] Legality also functions as a boundary on judicial power relative to other branches of government.[160] Correspondingly, international criminal courts are bound by legality. If they were not, they would be mouthpieces for judges or anyone that controls them rather than fair arbiters of law and justice. Ensuring that judges adhere to, rather than expand, criminal law is particularly important for the criminal trials of leaders who abused power or ignored international law.

One effect of legality is the limitation upon tribunals' abilities to circumscribe and punish conduct.[161] This in turn preserves freedom for individuals and society at large, because legality marks the boundary between permitted and prohibited behavior.[162] This concept is sometimes represented in the maxim, "everything not prohibited by law is permitted."[163] For any society organized around the principle that individuals are free to choose their actions, this dividing line is an essential guide. *Lex praevia* and *lex certa* function to help individuals consciously avoid criminal conduct. By providing previous notice, individuals are

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157. *See* BASSIOUNI, *supra* note 29, at 74. Koskenniemi characterizes ICL's project as applying domestic categories and concepts, including the idea that no one is above the law, to a formerly unregulated sphere of international politics. Koskenniemi, *supra* note 147, at 2.

158. HALL, *supra* note 31, at 168.

159. Like states, international organizations are subjects of international law. *See* CRAWFORD, *supra* note 76, at 175-77.

160. *See* Gallant, *supra* note 36, at 19-20; Kreß *supra* note 58, ¶ 1-4; David Dyzenhaus & Renato Cristi, *Legality & Legitimacy: Carl Schmitt, Hans Kelsen & Hermann Heller in Weimar*, 68 U. TORONTO Q. 514-16; John Calvin Jeffries, *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV.189 (1985).

161. GROVER, *supra* note 91, at 104 (citing ASHWORTH & HORDER, *supra* note 96, at 70).

162. MODEL PENAL CODE, *supra* note 124.

163. Comm'n on Human Rights Drafting Committee, Draft Outline of an Int'l Bill of Human Rights (Jul. 1, 1947) U.N. Doc. E/CN.4/21, Annex A, art. 25.

given the option of abstaining from criminal behaviour and, in order for individuals to understand the behaviour they are meant to avoid, the law must be clear. While this explanation excludes considerations of structure, outside influence, and individual deficiencies, it remains an essential framework for a criminal justice system predicated upon autonomy and choice. In contrast, "[i]n a context that lacks a clear borderline, there is no meaning to free choice."[164] Accordingly, the criminal justice system must be limited in order to protect this freedom.[165] Legality's role in preserving freedom stems from free choice's role as the "supra-principle of criminal law theory."[166] This principle demands that "no criminal liability can be imposed on an individual unless the individual has chosen to commit a criminal offense."[167] Were a justice system to ignore this tenet, it would abuse its own power, thus curtailing individual freedom without justification.[168]

ICL must be legitimate, legal, and robust if it is to counter the cruelties to which it directs its attention. David Luban writes that "[t]ribunals bootstrap themselves into legitimacy by the quality of justice they deliver; their rightness depends on their fairness."[169] Because ICL directs itself to the "abuses of power by tyrannical ruler and ruling-regime elites,"[170] it should be impervious to the criticisms applicable to the domestic despot. To be impervious, it must "deliver champagne-quality due process and fair, humane punishments."[171] The principle of legality demarcates liberal and illiberal approaches to governance and justice, distinguishing tyrants and authoritarianism from systems espousing democracy and the rule of law. The international principle of legality is based on that found in liberal domestic governments,[172] and manifests an interesting interplay between the domestic and the

164. HALLEVY, *supra* note 22, at 5.

165. *See* Haveman, *Rape and Fair Trial*, *supra* note 19, at 265-66.

166. HALLEVY, *supra* note 22, at 3.

167. *Id.* This supra-principle is based on the idea that "[t]he individual autonomy of the human being is the social concept behind the supra-principle." *Id.* In other words, the state and its criminal law apparatus may only interfere with individual autonomy on a limited and defined basis. For more on free choice, see RONALD DWORKIN, DISTINGUISHING POLICIES, PRINCIPLES, AND RULES, TAKING RIGHTS SERIOUSLY 180 (1978); JOSEPH RAZ, THE MORALITY OF FREEDOM 425 (1986).

168. CASSESE & GAETA, *supra* note 37, at 37.

169. David Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law* 13 (Jan. 7, 2008), http://scholarship.law.georgetown.edu/fwps_papers/67.

170. M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY: HISTORICAL EVOLUTION AND CONTEMPORARY APPLICATION 51 (2011).

171. Luban, *supra* note 169, at 14.

172. This mirrors political theory that states replicate their domestic values in international affairs. *See, e.g.*, GARY J. BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES

international. For example, Germany has both "the oldest and most consistent tradition of recognizing and applying the principles of legality"[173] and, under the Nazi regime, amongst the most egregious and famous instances of abandoning the principle and inverting it for harm.[174] The transgression of legality allowed the horrors of the Holocaust, which were addressed at the first modern ICL trials. Thus, the international principle of legality not only derives from domestic iterations based at least in part on the project of liberal states to promote their particular concept of justice in the international sphere, but can also operate to hold domestic transgressions of legality to account through the trials of the leaders that have violated this principle and abused their power. Therefore, legality in international law must be held as a fixed principle in order to fulfil liberal norms of governance that stand in contrast to authoritarianism and totalitarianism that bend this principle to the will of individuals.[175]

Legality, then, is the dividing line between "liberal justice" and arbitrary power.[176] Adherence to it is thus essential to maintaining a liberal and just international criminal legal system. Legality sets "the parameters within which the coercive State apparatus operates," creating limits to arrest, police searches, charges, trials, and convictions.[177] These constraints are achieved by clearly and prospectively defining "what acts, omissions, or states of affairs amount to crimes" and, based on these

TRIBUNALS 16-18 (2000) (explaining international justice as project of liberal states exporting their versions of rule of law).

173. BASSIOUNI, *supra* note 29, at 79.

174. Descriptions of how this occurred may be found in the transcript of the "*Justice Trial*," involving the prosecution of prosecutors, judges, and officials of the Nazi Ministry of Justice before the Nuremberg Military Tribunal in 1949. *See* 3 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1949), https://www.loc.gov/rr/frd/Military_Law/pdf/NT_war-criminals_Vol-III.pdf.

175. *See also* BASS, *supra* note 172, at 35 ("[T]he pursuit of war criminals can only be explained with reference to domestic political norms in liberal states. Authoritarian and totalitarian powers may seek to punish defeated foes, or they may choose to do business with them. When they have chosen punishment, they did not use legal methods; rather, they took arbitrary steps like shooting their enemies, or at best putting on an obviously rigged show trial.").

176. GALLANT, *supra* note 33, at 21 ("Legality also protects the individual against the arbitrary power of the political, the prosecutorial, or the judicial departments to punish through the substantive creation of new crimes."). The notion that legality can protect against arbitrary power is at least several centuries old. BOOT, *supra* note 28, at 83 (tracing the origins of *nullum crimen* and noting Montesquieu's promotion of the concept in his DE L'ESPRIT DES LOIS (1748) as a "reaction to the absolute rule and arbitrary exercise of sovereign power.").

177. Allen, *supra* note 120, at 1.

definitions, outlining "all the other powers, procedures, and sanctions of the criminal justice system."[178]

If the purpose of ICL were solely to punish, this objective could perhaps be reached more efficiently and effectively if the victors were to skip trials and instead torture or kill those whom they accused. The history of war crimes tribunals shows that the "victors were not just trying to dispose of enemies. . .Victorious liberals saw their foes as war criminals deserving of just punishment."[179] The key distinction is between law as objective and politics as subjective, and criminal law is justified when it provides solutions to societal ills in an objective manner.[180] Legality is one standard by which to judge whether or not the ICTs have achieved this outcome.

V. Legality As A Fundamental Human Rights Principle

Legality is not only a principle of criminal law, it is also a fundamental human rights principle and likely a *jus cogens* principle.[181] The reason for this is fourfold. First, various human rights instruments articulate a legality principle, clarifying its place in human rights law, including its non-derogability. Second, legality functions to protect a variety of human rights, ranging from fair trial rights to the right not to be arbitrarily deprived of life. Third, legality is itself a human right: it articulates a bundle of substantive rights protecting personal freedom and autonomy. Fourth, the reason it is useful and indeed necessary to classify legality as a *jus cogens* principle is that no valid legal system can exist without it.

A. *Legality in Human Rights Instruments*

Several international and regional human rights treaties articulate the principle of legality. The UDHR—considered CIL *en bloc*[182]—enshrined legality in Article 11(2), which reads:

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178. *Id.*

179. Bass, *supra* note 172, at 12. Studying the trials of "Leipzig, Constantinople, Nuremberg, Tokyo, The Hague, and Arusha," Bass argues that war crimes tribunals defy realist and neorealist views that they are "epiphenomenal. . . veils over state power." *Id.* at 11.

180. *See* Koskenniemi, *supra* note 147, at 9-11, regarding "the law's identity *vis-à-vis* politics" as relying on its objectivity and problem-solving capabilities.

181. *See, e.g.*, Gallant, *supra* note 33, at 399-402; Theodor Meron, War Crimes Law Comes of Age 244 (1999).

182. Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 Aust. Y.B. Int'l L. 82, 90 (1989).

> No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal 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 penal offence was committed.

The first part of the article expresses a prohibition on retroactive law. By specifying that previously established law must articulate an offence as criminal before a person can be criminally sanctioned, this article prohibits judicial interpretation that transmutes a non-criminal offence into a criminal one. Thus, extending existing crimes to include acts previously afforded lower penalties is a violation of legality.

The ICCPR,[183] the ECHR,[184] the IACHR,[185] and the ACHPR[186] all contain articles articulating legality. Additionally, the first three conventions affirm the non-derogability of the principle of legality.[187] The Human Rights Committee of the ICCPR has declared that—even in times of emergency—criminal law must be "limited to clear and precise provisions in the law that was in place and applicable at the time the act or omission took place."[188] Article 15 of the ICCPR is very similar to Article 11(2) of the UDHR, with the noted addition of specifying that legality applies in both national and international law. Articles 4(1) and 4(2) of the ICCPR, Articles 15(1) and 15(2) of the ECHR, and Articles 27(1) and 27(2) of the IACHR prohibit derogation from the legality principle even in times of public emergency that threaten the life of the nation. The implications of this for judges sitting in ICL trials is that they cannot derogate from this principle.

183. ICCPR, *supra* note 50, art. 15.

184. ECHR, *supra* note 51, art. 7.

185. Organization of American States, American Convention on Human Rights art. 9, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter IACHR].

186. Organisation of African Unity, African Charter on Human and Peoples' Rights art. 7(2), June 27, 1981, 1520 U.N.T.S. 217 [hereinafter "ACHPR"].

187. ICCPR, *supra* note 50, arts. 4(1), 4(2); ECHR, *supra* note 51, art. 15(1); IACHR, *supra* note 185, art. 27(1).

188. Human Rights Committee, General Comment No. 29: Art. 4: Derogations during a State of Emergency, at ¶ 7, CCPR/C/21/Rev.1/Add.11 (Aug, 31, 2001).

B. *Legality Protects Various Human Rights*

Legality functions to protect a number of human rights. This principle protects the right to life;[189] the right to liberty;[190] and the right to fair trial.[191] By creating limits on the application of criminal law, legality safeguards against arbitrary application of criminal law resulting in deprivation of life either through life imprisonment or the death penalty. Legality ensures limits on arbitrary application of criminal law in several ways: 1) prior and precise creation of criminal law by bona fide actors; 2) publication and communication of the tenets of the law; and 3) strict interpretation of criminal law during arrest, detention, trial, and sentencing. Similarly, legality protects against the deprivation of liberty. Legality additionally safeguards liberty by drawing the dividing line between criminalized acts and acts all peoples are free to engage in without threat of penal sanction. In this way, legality protects liberty both when a person is on trial, and when a person is living her daily life.

Legality protects fair trial rights in a number of ways. *Nullum crimen* and *lex praevia* allow defendants to locate the legal provisions via which they are charged with criminal acts. *Lex certa* allows defendants to understand the specific aspects of the charges against them, and to prepare a defense that responds directly to relevant elements. *Lex stricta* governs arrest, detention, prosecution, and trial proceedings by ensuring that the law is interpreted narrowly and thus does not catch acts that do not meet a narrow interpretation of crimes articulated in law. It also ensures that in the judgment and sentencing phases of trial, judges do not expand the law beyond its construction at the time of the act(s) for which the defendant(s) are accused, and that, if there is doubt as to the meaning of the law, the interpretation most favourable to the defendant is chosen.

VI. Addressing Arguments Against Strict Legality in International Criminal Law

It would be unwise to make a case for strict legality in ICL without considering, and then rebutting, arguments that tribunals and scholars have made against it. This section considers and then critiques (A) the ideas that domestic law and/or IHL prohibitions provided notice for

189. UDHR, *supra* note 49, art. 3; ICCPR, *supra* note 50, art.6; ECHR, *supra* note 51, art. 2; IACHR, *supra* note 185, art. 4; ACHPR, *supra*, note 186, art. 4.

190. UDHR, *supra* note 49, art. 3; ICCPR, *supra* note 50, art.9; ECHR, *supra* note 51, art. 5; IACHR, *supra* note 185, art. 7; ACHPR, *supra* note 186, art. 6.

191. UDHR, *supra* note 49, arts. 7-11; ICCPR, *supra* note 50, art. 14; ECHR, *supra* note 51, art. 6; IACHR, *supra* note 185, art. 8; ACHPR, *supra* note 186, art. 7.

the purposes of legality in international law; (B) arguments that the structural shortcomings of ICL should result in a weaker legality principle; and (C) the notion that violations of legality can be mitigated through sentencing.

A. *Notice Was Satisfied by Domestic Law, IHL, or Both*

ICT judges and commentators have at times justified judicial crime creation in ICL via the argument that extant law provided notice of the illegality of such actions for the purposes of international law. One strand of this argument states that domestic law provided notice, another that IHL did. The underlying rationale is that notice for the purposes of international law is satisfied when the accused knew the act was either criminalized *or* prohibited under *some* law, whether the law of her/his country and/or the location in which the acts took place or the laws and customs of war. These are tempting arguments that nevertheless suffer several deficiencies. This section considers each of these arguments in turn. First, it considers whether legality's requirement for prior notice was satisfied via domestic law, IHL, or both. It contends that (a) domestic law is not necessarily a source of international law; that it (b) fails to serve as a source for rape and sexual violence as international crimes, and that (c) historical State practice regarding extradition underscores that crimes do not simply jump jurisdictions. Second, it addresses in more detail some of the reasons that IHL prohibitions on rape and sexual violence did not satisfy legality for the purposes of ICL, such as the distinction between prohibition and criminalization. Third, it takes on the argument that rape and sexual violence are acts *mala in se*, and that legality is satisfied for all *mala in se* crimes. Fourth, it responds to arguments that legality should be more flexible in the international as opposed to the domestic sphere, and addresses some suggested alternatives to legality in ICL. Like any area of law, there are numerous arguments to marshal in favor of one standard as opposed to another. The purpose of this section is to select the most compelling arguments against strict legality in ICL and to review them thoroughly and systematically. Each of these arguments against strict legality in ICL is taken seriously. In the end, however, this paper concludes that the arguments for strict legality outweigh the arguments against it.

1. Domestic Crimes Do Not Satisfy Notice for International Criminal Law

There are several reasons why the existence of similar domestic crimes does not satisfy notice for the purposes of ICL. The first (a) is

that domestic law is not necessarily a source of international law and should be treated cautiously for these purposes. Second, (b) even if domestic law could possibly be a source of international law via general principles, the examples of the crimes of rape and sexual violence demonstrate that a diversity of domestic crime definitions will render this challenging or in some cases impossible. Third, (c) historical State practice regarding extradition underscores that crimes do not simply jump jurisdictions.

a. Domestic Law is Not Necessarily a Source of International Law

At times the ICTs employed domestic law in an attempt to satisfy legality. For example, the *Čelebići* trial judgment stated that the accused were on notice via the criminal codes of the Socialist Federal Republic of Yugoslavia.[192] Considering the relationship between legality and notice, the *Čelebići* Trial Chamber judges wrote that:

> The purpose of this principle 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.[193]

Thus, the *Čelebići* judgment proposed that it would be fictitious for the accused to claim that they did not know their acts were criminal at the time they committed them. However, domestic notice from a former country is insufficient for notice under international law. Domestic law is not necessarily a source of international law. Municipal law, whether court cases, legislation, or executive acts, can serve as a material source of customary international law,[194] but importantly, not any domestic law will do; it must refer to international law.[195] Early ICL was

192. Prosecutor v. Delalić, Case No. IT-96-21-T, Judgement, ¶ 312 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998).

193. *Id.* at ¶ 313.

194. *See* Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, 2012 I.C.J. Rep. 99, ¶ 55 (Feb. 3, 2012), https://www.icj-cij.org/files/case-related/143/143-20120203-JUD-01-00-EN.pdf; Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, 2002 I.C.J. Rep. 3, ¶ 58 (Feb. 14, 2002), https://www.icj-cij.org/files/case-related/121/121-20020214-JUD-01-00-EN.pdf.

195. *See, e.g.*, Certain German Interests in Polish Upper Silesia (Germany v. Poland), 1926 P.C.I.J. (ser. A) No.7, ¶ 52 (May 25) (characterizing national judicial acts as "facts which express the will and constitute the activities of States"); S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, ¶¶ 23, 26 (Sept. 7) (examining national legislation and decisions of national higher courts as

comprised primarily of international treaties instructing States Parties to enact domestic legislation and engage in domestic prosecutions where relevant. Examples include treaties addressing slavery,[196] narco-trafficking,[197] terrorism,[198] and apartheid.[199] In such instances, it was international law that served as a source of domestic law, and not the other way around. Historically, there has been no evidence that domestic criminal law provided notice for ICL purposes.

b. Domestic Law Does Not Provide Notice of Rape via General Principles

The *Čelebići* Trial Judgment argued that the criminalization of rape is embodied in "general principles of law," in the sense of Article 15(2) to the ICCPR, thereby providing notice.[200] While domestic law may prove a source of international law via general principles, it fails to do so for rape and sexual violence. Both the diversity of domestic law regarding rape and the lack of precision provided by general principles as a

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evidence of a rule of customary international law); *see also* Prosecutor v. Furundžija, Case No. IT-95-17/1, Judgment, ¶196 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), (holding that "the law applied was domestic, thus rendering the pronouncements of the British courts less helpful in establishing rules of international law on the issue"); Streletz, Kessler & Krenz v. Germany, 2001-II Eur. Ct. H.R. 230 (finding international criminal liability and no legality violation via international law obligations); Kolk and Kislyiy v. Estonia, Eur. Ct. H.R. App. Nos. 23052/04 and 24018/04, Decision on Admissibility (Jan. 17, 2006) (citing international law obligations as the basis for dismissing a legality violation claim). This is not to say that domestic law as such cannot contribute to the *formation* of CIL, but in the search for material evidence that a rule of CIL exists, the domestic law in question must refer to international law.

196. Slavery, Servitude, Forced Labour and Similar Institutions and Practices Convention (Slavery Convention), Sept. 25, 1926, 212 U.N.T.S. 17 (*entered into force* July 7, 1955); Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 266 U.N.T.S. 3 (*entered into force* April 30, 1957).

197. *See* Single Convention on Narcotic Drugs, Mar. 30, 1961, 520 U.N.T.S. 151 (entered into force Dec. 13, 1964), *amended by* G.A. Res. 3444(XXX), 1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961, Dec. 9, 1975, https://www.refworld.org/docid/3b00f1c118.html; Convention on Psychotropic Substances, Feb. 21, 1971, 1019 U.N.T.S. 175 (entered into force Aug. 16, 1976); United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Dec. 20, 1988, 28 ILM 493 (1989) (entered into force Nov. 11, 1990).

198. *See* Convention on Offences and Certain other Acts Committed on Board Aircraft, Dec. 14, 1963, 924 U.N.T.S. 177 (entered into force Dec. 4, 1969); Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 106 U.N.T.S. 1973 (entered into force Oct. 14, 1971); Convention for the Suppression of Unlawful Acts against the Safety of Civilian Aviation, Sep. 23, 1971, 178 U.N.T.S. 1975 (entered into force Jan. 26, 1973); Protocol for the Suppression of Unlawful Acts of Violence at Airports Service International Civil Aviation, Feb. 24, 1988, 474 U.N.T.S. 1990, (entered into force Aug. 6, 1989).

199. *See* International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 243 (entered into force July 18, 1976).

200. Delalić, *supra* note 192, ¶ 313.

source of law fail to provide adequate notice. On the first point, because no one definition is clearly and prospectively available, the foreseeability principle of legality remains unmet. The diversity amongst definitions both between and within domestic jurisdictions is so great that "no foregone conclusions" can be drawn about the definition of rape under international law by reference to these laws.[201] That both *Furundžija* and *Kunarac* undertook a similar survey of domestic laws yet reached different conclusions about what their content meant for the crimes of rape and sexual violence under international law underscores this point.

c. Domestic crimes are relevant only in the attendant domestic jurisdiction

For centuries, domestic criminal law has remained discrete, defined by sovereign jurisdiction, and therefore cannot provide notice in ICL. The absence of universal rules or agreements regarding extradition underscores that states wish to distinguish crimes within their jurisdiction from the crimes of other states.[202] The widely held extradition principles of double criminality and speciality offer evidence of state practice that crimes remain jurisdiction specific. Double criminality entails that "a person may be extradited only for conduct which is criminal in both requested and requesting jurisdictions."[203] Strict interpretation of this rule requires that the label and elements of the crime be the same.[204] This demonstrates that notice does not necessarily travel. On this basis double criminality has also been characterized as an application of *nullum crimen sine lege*.[205] Speciality is the principle that, following extradition, a person may be tried "only for the criminal conduct for which his surrender has been made," unless the requested State gives permission for more.[206] By prospectively limiting the requesting

201. The Hon. David Hunt AO QC, *Foreword to* INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS XI, xi-xii (Guénaël Mettraux ed., 2005). Similarly, "[t]he same difficulties have arisen in relations to a range of other crimes within the jurisdiction of the two tribunals, such as the crimes of enslavement or terror, which were devoid of any clear definition as an international *crime* until they first came to be considered by the Yugoslav Tribunal." *Id.* at xii.

202. Extradition law remains primarily organized via bilateral treaties and conventions on specific crimes. *See, e.g.*, Zdzislaw Galicki (Special Rapporteur on the Obligation to Extradite or Prosecute (*Aut Dedere Aut Judicare*)) *Prelim. Rep. on the Obligation to Extradite or Prosecute (Aut Dedere Aut Judicare)* ¶ 35, U.N. Doc. A/CN.4/571 (2006) (identifying these two sources as the primary legal basis for extradition).

203. ALUN JONES & ANAND DOOBAY, JONES AND DOOBAY ON EXTRADITION AND MUTUAL ASSISTANCE 35 (3d ed. 2005).

204. *See* Neil Boister, *The Trend to "Universal Extradition" over Subsidiary Universal Jurisdiction in the Suppression of Transnational Crime*, 2003 ACTA J. 287, 297 (2003).

205. *See id.* at 296-97.

state's powers, this principle offers an additional safeguard for ensuring against double criminality and thus of some aspects of legality. Additionally, there is no agreement on whether there is either a general or regional customary international law obligation to extradite or prosecute.[207] And, states dispute this obligation for even *jus cogens* crimes.[208] This further indicates that states view both the content of crimes and criminal law processes as jurisdiction-specific. In turn, this undermines the idea that notice anywhere is notice everywhere.

In contrast, universal jurisdiction—or the right of a national court to assert jurisdiction over a person whose conduct has no nexus to its national territory[209]—applies *stricto sensu* to purely international crimes.[210] Absent universal jurisdiction, domestic courts have criminal jurisdiction over a person only to the extent that a legislature has the power to criminalize the conduct in question.[211] A binary exists between a national court's jurisdiction to prescribe and jurisdiction to enforce.[212] A State's power to exercise criminal jurisdiction are inherently limited, stopping at its borders.[213] This binary offers further evidence that domestic law as such does not provide notice for ICL or ICTs, because proscriptive power is limited by a State's territorial sovereignty or the nationality of the accused. This limitation challenges the notion that notice anywhere is

206. *Id.*

207. *See, e.g.*, Int'l Law Comm'n, Final Rep. of the Working Group on the Obligation to Extradite or Prosecute (*Aut Dedere Aut Judicare*), ¶¶ 8-14, U.N. Doc. A/CN.4/L.844 (Jun. 5, 2015) [hereinafter ILC Final Report] (noting the continued disagreement on the issue and refusing to declare whether or not there exists a CIL obligation to extradite and prosecute). In 2012, the majority of ICJ judges ruled that it did not have jurisdiction to answer Belgium's claim that Senegal was violating a CIL obligation to extradite or prosecute and decided the case based on CAT instead. Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Rep. 2012, ¶¶ 53-5, 122(2) (Jul. 20).

208. ILC Final Report, *supra* note 207, ¶ 10; *see also* Miša Zgonec-Rožej & Joanne Foakes, *International Criminals: Extradite or Prosecute?* (Chatham House, Briefing Paper No. 1, 2013).

209. LUC REYDAMS, UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES 5 (2003).

210. Frederick A. Mann, *The Doctrine of Jurisdiction in International Law, in* COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 39 (1964).

211. Roger O'Keefe, *Universal Jurisdiction: Clarifying the Basic Concept*, 2 J. INT'L CRIM. JUST. 735, 737 (2004). This is only one explanation of universal jurisdiction; others suggest that universal jurisdiction is solely or additionally a species of power to enforce, rather than merely prescribe. *See, e.g.*, PRINCETON PROJECT ON UNIVERSAL JURISDICTION, PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 16 (2001); Jiewuh Song, *Pirates and Torturers: Universal Jurisdiction as Enforcement Gap-Filling*, 23 J. POL. PHIL. 471 (2015); Ilias Bantekas, *Criminal Jurisdiction of States under International Law, in* THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 22 (2011).

212. O'Keefe, *supra* note 211, at 738-39.

213. *Id.* at 741-44.

notice everywhere, by underscoring the discrete versus universal nature of domestic criminal law. Further, if a State were to impose criminal sanctions on a foreign national whose conduct occurred in a jurisdiction in which this conduct was not criminal at its commission, it would violate legality's prohibition on retroactive criminalization.[214] This is so precisely because crimes do not jump jurisdictions.

2. IHL prohibitions do not provide notice

IHL violations did not provide notice for the purposes of legality in ICL, for at least four reasons. First, (a) there is very little evidence that IHL treaties prior to the work of the ICTs concerned themselves with rape and sexual violence. Second, (b) IHL treaties mostly prohibited rather than criminalized conduct, and prohibition and criminalization should not be conflated. Third, (c) and building on the second point, IHL prohibitions are for the most part too vague to satisfy legality. Fourth, (d) IHL prohibitions and ICL crimes can articulate very different standards, undermining the idea that IHL provides notice in an ICL context.

a. Scant evidence of rape and sexual violence in IHL treaties

The ICT judgements cited IHL prohibitions regarding rape to argue that rape had been criminalized under international law prior to their temporal jurisdiction.[215] Their reliance on IHL is unsurprising given that the ICTY Statute gave it subject matter jurisdiction over grave breaches of the Geneva Conventions of 1949 (GCs);[216] violations of the laws and customs of war;[217] and genocide.[218] Similarly the ICTR Statute established the tribunal with competence over "serious violations of international humanitarian law"[219] and subject matter jurisdiction over genocide;[220] crimes against humanity;[221] and violations of Article 3 common to the GCs and of Additional Protocol II.[222] None of the specific provisions cited in these Statutes mentioned rape or sexual violence, and, prior to the ICTs, rape had been mentioned as a crime against

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214. *Id.*

215. *E.g.*, Prosecutor v. Furundžija, Case No. IT-95-17/1, Judgment, ¶¶ 163, 165, 170, 171. (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

216. *See* ICTY Statute, *supra* note 140, art. 2.

217. *See id.* art. 3.

218. *See id.* art. 4.

219. ICTR Statute, *supra* note 140, art. 1.

220. *Id.* art. 2.

221. *Id.* art. 3.

222. *Id.* art. 4.

humanity only once, in Control Council Law No. 10.[223] This is a key reason why these IHL prohibitions did not provide notice for the purposes of ICL.

b. Prohibition and criminalization should not be conflated

Additionally, the above-cited treaties were insufficient for the purposes of notice because legality underscores the distinction between an illegal and a criminalized act and requires sources that articulate individual criminal liability.[224] The grave breaches regime instructs States to criminalize acts enumerated as a grave breach,[225] but "did not provide for any international criminal liability for grave breaches."[226]

The Genocide Convention classifies genocide as a crime under international law.[227] However, none of the other above prohibitions criminalized the prohibited acts. For example, Common Article 3 states that the Parties to a conflict "shall be bound to apply" its provisions, and then that the subsequently articulated acts are "prohibited." Nothing in the Article mentions crimes or criminal sanctions. Treating a mere prohibition as the basis of a crime is a "conflation of illegality and criminality."[228] Unless explicitly stated, there is no reason that a mere prohibition in law should give rise to individual criminal liability.

223. TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10, Appendix D: Control Council Law No.10, art II(1)(c) 250 (1949).

224. ANTONIO CASSESE ET AL., INTERNATIONAL CRIMINAL LAW: CASES AND COMMENTARY 117 (2011) ("[I]nternational crimes are breaches of international rules entailing the personal criminal liability of the individuals concerned.").

225. Convention [No. 1] for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 49, 51, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter *First Geneva Convention*]; Convention [No. 2] for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea art. 50-1, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter *Second Geneva Convention*]; Convention [No. 3] Relative to the Treatment of Prisoners of War art. 129, Aug. 12, 1949, 6 UST 3316, 75 U.N.T.S. 13 [hereinafter *Third Geneva Convention*]; and Convention [No. 4] Relative to the Protection of Civilian Persons in Time of War art. 146, 148, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter *Fourth Geneva Convention*].

226. Marko D. Öberg, *The Absorption of Grave Breaches Into War Crimes Law*, 91 INT'L REV. RED CROSS 163, 165 (2009).

227. Convention on the Prevention and Punishment of the Crime of Genocide preamble, art.1, 9 Dec. 1948, 78 U.N.T.S. 277.

228. Van Schaack, *supra* note 1, at 127. Andrea Bianchi has characterized prohibitions as "primary rules of conduct" and individual criminal liability as falling into "secondary rules of responsibility." *State Responsibility and Criminal Liability of Individuals, in* THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 18 (Antonio Cassese ed., 2008). While this is a useful distinction, it does not explain how a rule of the first category would result, or should result, in penal sanctions specifically as opposed to another type of remedy.

Recent amendments to the Rome Statute support this; for example, Article 8 was modified to criminalize the use of certain weapons previously prohibited under IHL.[229] These updates underscore the distinction between a prohibition and criminalization, and demonstrate that there is no automatic mechanism for incorporating IHL prohibitions as an international crime.

There are several reasons that prohibitions and criminalization are distinct. One is that the above-cited prohibitions were originally directed at States, not individuals.[230] In contrast, only individuals can be held criminally liable.[231] This is true despite the fact that State Responsibility extends to peremptory norms,[232] including prohibitions on committing or assisting in the commission of core international crimes such as genocide. Ultimately, "state responsibility for an international crime is by its nature not criminal, but remains 'civil,'"[233] in the sense that it will never amount to criminal punishment, nor bear the label and stigma of criminality. Additionally, prohibitions and crimes are often fundamentally dissimilar. Prohibitions are general and lack the detailed content of a crime and the precision required by legality.[234] For example, Article 27(2) of the Fourth Geneva Convention states that "Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault." Nothing about the phrase "especially protected" denotes criminalization. And, this brief sentence contrasts sharply with criminal law definitions that require an *actus reus* and *mens rea*, as well as often articulating applicable defenses. Thus, although the ICTY judges searched the Geneva Conventions and related treaties for the definitions of rape, prohibitions such as those found in Common Article 3 of

229. Amendment to the Rome Statute of the International Criminal Court: Adoption of Amendment to Art. 8 (Kampala, Jun. 10, 2010), Depositary Notification C.N.533.2010. TREATIES-6 (*not yet in force*), https://treaties.un.org/doc/Publication/CN/2010/CN.533.2010-Eng.pdf.

230. Hunt, *supra* note 201, at xi.

231. *See, e.g.*, André Nollkaemper, *State Responsibility for International Crimes: A Review of Principles of Reparation, in* ESSAYS IN HONOUR OF PROFESSOR KALLIOPI KOUFA (Aristotle Constantinides & Nikos Zaikos eds., 2009); *see also* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Rep. 2007, ¶ 173 (Feb. 26) (noting that the distinction between State and individual responsibility "continues as a constant feature of international law").

232. Int'l Law Comm'n, *Responsibility of States for Internationally Wrongful Acts*, art. 26 (2001), *at* http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf.

233. Marko Milanović, *State Responsibility for Genocide*, 17 EURO. J. INT'L L. 553, 562 (2006).

234. Hunt, *supra* note 201, at xi.

the GCs failed to criminalize rape.[235] Further, the diversity of domestic criminal law definitions for rape indicate the impossibility of interpreting a mere prohibition to provide the basis of an international crime.[236] Given that there is no uniform definition of rape amongst States, locating a prohibition of rape directed towards States cannot provide a clear definition of rape under international law. Thus, notice requirements remain unsatisfied.

Additionally, the distinction between IHL prohibitions and criminalization is long standing. The grave breaches regime directed itself to States Parties, instructing them to enact domestic penal legislation and to take action to prosecute those suspected of a breach.[237] And, while the ICTR was granted subject matter jurisdiction over violations of Article 3 common to the GCs and of Additional Protocol II, Article 3 and AP II were not considered part of the GCs' penal regime.[238] Until the work of the ICTY, the orthodox view was that IHL applicable to non-international armed conflict did "not provide for international penal responsibility of persons guilty of violations."[239] Thus, until the work of the ICTs, there were clearly defined limitations to the penal effects of IHL. Because IHL's penal regime was so limited, it was inaccurate to characterize many of its provisions as providing notice for the purposes of legality.

c. IHL Prohibitions are Insufficiently Precise

The open-textured nature of IHL prohibitions is insufficiently precise for the purposes of legality under ICL.[240] As previously stated, the few times IHL treaties briefly mention rape, such as in the Fourth Geneva Convention, Art. 27, no elements are provided. Accordingly, at

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235. *Id.* at xi-xii.

236. *Id.* at xii.

237. First Geneva Convention, supra note 225, at art. 49; Second Geneva Convention, supra note 225, at art. 50; Third Geneva Convention, supra note 225, at art. 129; Fourth Geneva Convention, supra note 225, at art.146.

238. *See* SANDESH SIVAKUMARAN, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 475 (2012) ("[T]here is no indication on the face of any of these provisions that their breach constitutes a war crime.").

239. Denise Plattner, *The Penal Repression of Violations of International Humanitarian Law Applicable in Non-International Armed Conflicts*, 30 INT'L REV. RED CROSS 409, 414 (1990); Peter Rowe, *Liability for "War Crimes" during a Non-international Armed Conflict*, 34 MIL. L. & L. WAR REV. 149 (1995); Theodor Meron, *War Crimes in Yugoslavia and the Development of International Law*, 88 AM. J. INT'L L. 78, 80 (1994); Daphna Shraga & Ralph Zacklin, *The International Criminal Tribunal for the Former Yugoslavia*, 5 EURO. J. INT'L L. 360, 366 n.20 (1994).

240. HILMI M. ZAWATI, FAIR LABELLING AND THE DILEMMA OF PROSECUTING GENDER-BASED CRIMES AT THE INTERNATIONAL CRIMINAL TRIBUNALS 44 (2014).

times the ICTs have acquitted defendants on the basis of such imprecision. The *Vasiljević* trial chamber decided that "violence to life and person, prohibited under Common Article 3 of the GCs, was insufficiently precise to form the basis of a criminal conviction."[241] More often than not, however, the ICTs acknowledged this imprecision but chose to fill the gaps. For example, the *Kupreskic* trial chamber considered that "other inhuman acts" under Art. 5(i) of the ICTY Statute "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."[242] Yet, the judges decided that this prohibition was designed as a residual category, and that the chamber could 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."[243] This reasoning is insufficient, for a number of reasons.

First, as argued *supra*, human rights principles support strict legality, rather than undermine it. Second, expecting a defendant to have been on notice based on cobbling together multiple sources of international law is unrealistic and defies common sense. Third, criminal law is not designed to work this way—one body of law should not depend on seemingly random cross-references to other bodies of law for the core of its content. Fourth, the system should have cured itself by defining these crimes. As Bassiouni writes, "[G]iving substance and content to these words and identifying the legalelements which make them criminal was problematic in 1946. Not to have cured these problems 50 years later is even more troublesome."[244] He goes on to highlight the divide between the penalist and the publicist, the former supposedly favoring strict legality and the latter being comfortable with open-ended sources for international crimes: "For the publicist, the fact that these words have withstood the test of time and are reaffirmed in succeeding documents strengthens them. For the penalist, the absence of specificity is neither cured by time nor by repetition.[245]

This article argues that it possible to be both penalist and publicist, and to recognize that ICL is a unique field of PIL. Taking this position means

241. Prosecutor v. Vasiljević, Case No. IT-98-32-T, Trial Judgment, ¶ 193-204 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 2002).

242. Prosecutor v. Kupreškić, Case No. IT-95-16, Trial Judgment, ¶ 563 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000); *see also* Prosecutor v. Blagojević, Case No. IT-02-60, Trial Judgment, ¶ 625 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005).

243. Kupreškić, *supra* note 242, ¶ 566.

244. BASSIOUNI, *supra* note 29, at 95.

245. *Id.*

moving away from the IHL origins of the field, to develop a level of precision in defining crimes that satisfies ICL's core needs and promises.

d. IHL Prohibitions and ICL Crimes Can be Meaningfully Distinct

The content of IHL prohibitions and ICL crimes can be meaningfully distinct. The treatment of civilians is but one example. The *Kordić and Čerkez* trial chamber interpreted the war crime of attacks on civilian populations to require death, serious bodily injury, or equivalent harm.[246] Under IHL, however, this provision is intended to prohibit the deliberate targeting of civilians, regardless of the resultant harm.[247] Because the IHL prohibition is concerned only with preventing the attack, "irrespective of resultant harm," the IHL and ICL standards should not be equated.[248]

More recently, the ICC stated in the *Katanga* case that, under the Rome Statute, a crime occurs when an attack on civilians is launched irrespective of resulting harm.[249] Thus, for the purposes of the ICC at least, this judgment harmonizes the IHL and ICL definitions of an attack on civilians. This judgment demonstrates an evolving standard and the fact that IHL prohibitions left substantial scope for judicial interpretations. It further demonstrates that differing judicial interpretations created meaningfully distinct *actus rei.* Notably, the ICC's update does not satisfy notice under the temporal jurisdiction of the ICTs. Rather, these shifts underscore the imprecision of IHL prohibitions and the role of judicial crime creation at the ICTs.

Additionally, the content of the two bodies of law can be deployed in substantially different ways. The ICTY Appeals Chamber decided in its 2008 *Martić* judgment to incorporate "the definition of civilian

246. Prosecutor v. Kordic, Case No. IT-9495-14/2, Judgment, ¶ 55-68 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 17, 2004).

247. The prohibition on attacks on civilians can be found in multiple locations. *See, e.g.*, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol II) art. 13(2), June 8, 1977, 1125 U.N.T.S. 609; Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (with Protocols I, II and III) Amended Protocol II, art. 3(7), and Protocol III, art. 2(1), Oct. 10, 1980,1342 U.N.T.S. 137.

248. SIVAKUMARAN, *supra* note 238, at 338-39.

249. Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Decision on the Confirmation of Charges, ¶ 270 (Sep. 30, 2008).

contained in Article 50 of Additional Protocol I"[250] for the purposes of determining attacks on civilians. However, in the subsequent 2009 *Mrkšić and Šljivančanin* Appeals Judgment, it separated satisfying the IHL definition of civilian for the purposes of attacks on civilians from prosecuting attacks as crimes against humanity. Noting that "the civilian status of the victims, the number of civilians, and the proportion of civilians within a civilian population are factors relevant to the determination of whether" a population is civilian under Article 5 of the ICTY Statute, "there is no requirement nor is it an element of crimes against humanity that the victims of the underlying crimes be 'civilians.'"[251] In declaring that an attack on civilians could be prosecuted at the ICTY as a crime against humanity even if none of the victims meets IHL's definition of "civilian," it created further separation between IHL and ICL.

In contrast, the ICTR's definition of civilians was broader than that found in IHL. The *Akayesu* judgment stated that "members of the civilian population . . . includ[e] members of the armed forces who have laid down their arms and those persons placed *hors de combat*."[252] This definition was reinforced in the 1999 *Rutaganda* and 2000 *Musema* trial judgments.[253] Under IHL treaties such as the GCs, civilians, members of the armed forces who have laid down their arms, and *hors de combat* are treated as distinct categories and addressed in separate treaties. This is but one way that the content of IHL and ICL diverge, and one example of how it was unpredictable which way the judges at the ICTs would interpret IHL as relevant to ICL crimes. This lack of predictability undermines notice.

3. Characterizing Rape as an Act Mala in se is Insufficient for Notice

Similar to reliance on national law or IHL, some have argued that notice for rape was provided via the character of the act as *mala in se*, or, inherently wrong. *Malum in se* acts are so deemed because they are "bad in and of themselves."[254] They are distinguished from *malum prohibitum*, acts designated criminal by virtue of positive law as opposed to their inherent wrongness.[255] Hallevy writes that the distinction originated in

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250. Prosecutor v. Martić, Case No. IT-95-11, Appeals Judgment, ¶ 302 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 8, 2008).

251. Prosecutor v. Mrkšić, Case No. IT-95-13/1, Appeals Judgment, ¶ 32 (Int'l Crim. Trib. for the Former Yugoslavia May 5, 2009).

252. Prosecutor v. Akayesu, Case No. ICTR-96-4, Judgment, ¶ 582 (Sep. 2, 1998).

253. Prosecutor v. Rutaganda, Case No. ICTR-96-3, Trial Judgment (Dec. 6, 1999); Prosecutor v. Musema, Case No. ICTR-96-13, Trial Judgment (Jan. 27, 2000).

254. HALLEVY, *supra* note 22, at 23.

255. *Id.*

"medieval concepts of morality, religion, and society, as well as from the concept of natural law." [256] It was then "transferred to criminal law in the nineteenth and twentieth centuries," and modified based on the social context of the countries in which it was applied.[257] *Malum in se* crimes are thought to provide notice by their very nature: "The belief behind this distinction is that there is a basic core of offenses that are understandable to any rational human being, even if there is no specific provision that explicitly prohibits them. These offenses contain an intrinsic evil. . . ."[258] The *Šainović et al* Trial Judgment is important to the evolution of the crimes of rape and sexual violence at the ICTs. The *Šainović et al* Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction claimed that notice was provided by the inherently wrongful character of the charged acts.[259] Similarly, a *Hadzihasanovic* Decision stated that notice was satisfied because the accused "must be able to appreciate that the conduct is criminal in the sense generally understood, without reference to any specific provision."[260] Van Schaack characterizes this approach as disregarding legality when judges deem an act *malum in se*.[261] The reasoning of the *Šainović et al* Decision mirrored the definition of *mala in se* crimes provided *supra*, emphasizing that the inherent evil of the acts in question provided notice. The judges wrote that:

> Although the immorality or appalling character of an act is not a sufficient factor to warrant its criminalization under customary international law, it may in fact play a role in that respect, insofar as it may refute any claim by the Defence that it did not know of the criminal nature of the acts.[262]

This argument relies on morality as a substitute for positive criminal law. Additionally, it conflates an understanding of an act as criminal with the actual criminalization of an act; the former is a subjective

256. *Id.*

257. *Id.*

258. *Id.*

259. Prosecutor v. Šainović, Case No. IT-05-87, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction: Indirect Co-Perpetration, ¶ 42 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 22, 2006).

260. Prosecutor v. Hadzihasanovic, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ¶ 34 (Int'l Crim. Trib. for the Former Yugoslavia Jul. 16, 2003).

261. Van Schaack, *supra* note 1, at 156.

262. Šainović, ¶ 10.

understanding and as such may be a presumption or a mistake. The latter should be a fact if it is to form the basis of a conviction. This conflation is unwarranted: "[t]he moral and legal systems are two distinct checks on human behaviour."[263] A resort to morality invokes natural rather than positive law. To grossly summarize the distinctions, natural law is said to be knowable to all people via their faculty of reason.[264] It exists outside the creation of human made law.[265] In this way it parallels the idea that acts *mala in se* should be known by all to be criminal, even in the absence of positive criminal law. In contrast, a hallmark of positivism is the divorce between law and morality. [266]

The tension within ICL between positive and natural law predates the ICTs: Justice Robert Jackson argued at the Nuremberg trials that allowing war criminals to go free due to the absence of formal law "would mock the dead and make cynics of the living,"[267] while Justice Pal contended at the Tokyo Tribunal that the tribunal operated based on political ideology rather than law.[268] The interplay between legality and law creation at the ICTs has been described as a judicial balancing between positive and natural law,[269] and the tendency of the ICT judges

263. Richard L. Gray, *Eliminating the (Absurd) Distinction Between Malum In Se and Malum Prohibitum Crimes*, 73 WASH. U. L. REV. 1369, 1394 (1995).

264. *See, e.g.*, Alexander Orakhelashvili, *Natural Law and Justice, in* THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 523 (Wolfrum Rüdiger ed., 2012).

265. *Id.*

266. Defining legal positivism is challenging given the diversity of theories. However, some commonalities within the positivist school are uncontroversial, including its rejection of natural law as a source of law and a focus on the proper sources of law as fundamental in defining law as such. *See, e.g.*, Herbert L.A. Hart, *Positivism and the Separation of Law and Morals*, 74 HARV. L. REV. 593 (1958); Frauke Lachenmann, *Legal Positivism, in* 6 THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 785 (Wolfrum Rüdiger ed., 2012). Leading positivists acknowledge that judges make law. *See, e.g.*, Herbert L.A. Hart, *Formalism and Rule-Scepticism, in* THE CONCEPT OF LAW (Joseph Raz & Penelope A. Bulloch eds., 3rd ed. 2012).

267. ROBERT H. JACKSON, THE NUREMBERG CASE 8 (1947).

268. *See, e.g.*, Elizabeth S. Kopelman, *Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial*, 23 N.Y.U. J. INT'L L. & POL. 373 (1991).

269. Noora J. Arajärvi, *Between Lex Lata and Lex Ferenda? Customary International (Criminal) Law and the Principle of Legality*, 15 TILBURG L. REV.: J. INT'L & EURO. L. 163 (2011) ("Courts face constant juxtaposition between the positivist and natural law approaches. Neither end of the spectrum, however, seems to provide fully satisfactory outcomes in international criminal law, an area of public international law in which the principle of legality and moral standards often collide."). Arajärvi has also written of this relationship in regard to customary international law in particular. Noora J. Arajärvi, *Customary International Law and the Principle of Legality in International Criminal Courts*, ACADEMIA.EDU, 1 https://www.academia.edu/202248/Customary_International_Law_and_the_Principle_of_Legality_in_International_Criminal_Courts. David Kennedy has noted a similar tendency among international lawyers who seek to avoid categorization as either formalists or proponents of flexibility and the goals of the "international community." David

to cloak their resort to natural law in positivist language has not gone unnoticed.[270] The split between positivism and natural law mirrors what Koskenniemi has described as apology versus utopia, or the "attempt[] to ensure the *normativity* of the law by creating distance between it and State behaviour, will and interests. . .[and] to ensure the law's *concreteness* by distancing it from a natural morality."[271] The effort to achieve both at the same time creates an unworkable paradox: the normativity must come from something higher than the State, but the validity of international law as such continues to rely on the State as opposed to something outside of it.

A natural law-focused approach prompts the judge to fill the gap in the name of justice, incurring a trade-off between legality and a particular notion of morality.[272] Meron stated that

> [T]he tribunals have [thus] been guided, and are likely to continue to be guided, by the degree of offensiveness of certain acts to human dignity; the more heinous the act, the more the tribunal will assume that it violates not only a moral principle of humanity but also a positive norm of customary law.[273]

Meron's comments underscore that, in articulating new elements of crimes, the ICT judges were balancing different, sometimes conflicting, principles. Relying on *mala in se* as a substitute for notice requires judges to make moral decisions about the nature of crimes.[274] This will inevitably lead to situations in which notice was not provided, as judicial values are not a source of ICL.

Kennedy, *The Last Treatise: Project and Person (Reflections on Martti Koskenniemi's From Apology to Utopia)*, 7 GERMAN L. J. 987 (2006).

270. Robert Cryer, *The Philosophy of International Criminal Law, in* RESEARCH HANDBOOK ON THE THEORY AND HISTORY OF INTERNATIONAL LAW 250 (Alexander Orakhelashvili ed., 2011).

271. Koskenniemi, *supra* note 147, at 2.

272. Comparing Hart's version of positivism and Fuller's version of natural law, Noora Arajärvi writes that "[a]s a consequence of absolute fidelity to positive (and 'black-letter') law, it follows that some perpetrators can never be brought to justice. On the other side, allowing for the 'inner morality' of law to prevail over the principle of legality may lead to an abuse of law, perhaps in a form of political trials, and destruct the legal safeguards protecting individuals from arbitrary exercise of power by the courts." Arajärvi, *Customary International Law and the Principle of Legality in International Criminal Courts*, *supra* note 269, at 4.

273. Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AM. J. INT'L L. 348, 361 (1987).

274. *See* Jared Wessel, *Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing*, 44 COLUM. J. TRANSNAT'L L. 377, 385 (2006) ("In cases of ambiguity . . . judges often make interpretations with reference to their own values.").

In these situations, the judges "assume that international law is imbued with the core values of an international community."[275] Core values and a common understanding of inherent wrong are essential for declaring an act *mala in se*. Whether or not it is possible to achieve such uniformity and thus foreseeability in ICL depends on one's views of international law. However, there is a huge diversity of approaches to international law. The validity of considering the role of acts *malum in se* likewise depends on one's vision of law. For example, a contractarian view of law argues that "*[m]alum in se* conduct cannot be understood as wrong prior to the social contract, prior to or independently of the agreement to enter into mutually beneficial cooperation."[276] On this view, while acts *malum in se* "can be understood as wrong prior to their legal prohibition,"[277] they need a context of social contract.[278] Absent a social contract to act peacefully and for mutual benefit, the moral invocation not to harm has little meaning. The emphasis on the social contract strains the power of international law to punish, since the concept of the international community is ambiguous[279] and disputed.[280] However, there is at least one category of crime that might be said to represent undisputed values in the international community and that

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275. ALAN BOYLE & CHRISTINE CHINKIN, THE MAKING OF INTERNATIONAL LAW 281 (2007). An appeal to lofty principles has not escaped harsh criticism. *See, e.g.*, Kenneth Anderson, *The Rise of International Criminal Law: Intended and Unintended Consequences*, 20 EURO. J. INT'L L. 339 (2009). Anderson writes of the righteousness of such a position that:

> Justice may be a matter for the angels, above all things and looking down, but the administration of justice is an earthly mission that partakes as much of partiality as impartiality, peculiar as that must sound to international criminal lawyers and those, like the human rights organizations, who believe they have unique purchase on the categorical imperative because they incarnate Kant."

Id.

276. Susan Dimock, *Contractarian Criminal Law Theory and Mala Prohibita Offences, in* THE POLITICAL MORALITY OF THE CRIMINAL LAW 151, 151-52 (R.A. Duff et al. eds., 2014).

277. *Id.*

278. *Cf.* Martha Nussbaum, *Beyond the Social Contract: Capabilities and Global Justice*, 32 OXFORD DEV. ST. 3 (2004) (sidestepping the need for a social contract and offering a critique to contractarian theory with her capabilities approach to international law).

279. *Cf.* Dino Kritsiotis, *Imagining the International Community* 12 EURO. J. INT'L L. 961 (2002) (presenting the divergence of ideas as to what "international community" means as multiple communities and valuable inclusiveness).

280. Stephen Neff, *An International Community – Is There Any Such Thing?* LAUTERPACHT CENTRE FOR INT'L LAW (Oct. 9, 2015), http://www.lcil.cam.ac.uk/events/lcil-friday-lecture-international-community-there-any-such-thing-dr-stephen-neff; Brian Urquhart, *The International Community—Fact or Friction?* 1 MACALESTER INT'L 3 (1995) http://digitalcommons.macalester.edu/cgi/viewcontent.cgi?article=1006&context=macintl.

exists above the State and without need for a social contract. This category is *jus cogens*.

The theory and origin of the distinction between *mala in se* and *mala prohibita* seems parallel to *jus cogens* rules. The separation dates at least as early as 1400s England, when the King was said to rule by divine right and had the power to pardon people for *mala prohibita* but not *mala in se*.[281] The rationale behind this distinction was that there are some things higher even than the power of the King, and some wrongs so egregious that they could not be pardoned.[282] Similarly, in international law, *jus cogens* rules are beyond the capacity of States to modify, except by a norm of a similar character.[283] Finnis has written of *jus cogens* in international law and *mala in se* in the common law tradition as parallel.[284] ICL is concerned with only the gravest crimes. The Rome Statute mentions that the ICC has jurisdiction over "the most serious crimes of concern to the international community as a whole" four times.[285] On this basis, it could be inferred that ICL crimes are *mala in se* crimes.

However, there is no such category in international law. Schabas has used the terms *mala in se* and *mala prohibita* to denote different types of crimes in ICL, but without definitive effect.[286] His writing implies that so-called "core crimes" that "shock the conscience of humanity" might be considered *malum in se*, and that other international crimes denoted as "treaty crimes" might be deemed *malum prohibitum*.[287] Yet, several international crimes suggest a gray area between such categories.[288] Indeed, he notes that any such distinctions in ICL are muddled and lack clarity.[289] Similarly Hallevy points out that in the domestic sphere

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281. ROLLIN M. PERKINS, PERKINS ON CRIMINAL LAW 784 (2nd ed. 1969) (dating the distinction to a judicial decision from 1496). *But see* HALL, *supra* note 31, at 338 (arguing it is "an ancient and revered theory that is much older.").

282. Gray, *supra* note 263, at 1374.

283. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331.

284. John Finnis, *Natural Law Theories*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Nov. 4, 2015) https://plato.stanford.edu/entries/natural-law-theories/ ("*Ius gentium—ius cogens—mala in se*—human rights: legal rules and rights posited because morally necessary parts of any legal system.").

285. Rome Statute, Preamble, ¶¶ 4, 9 and arts. 1, 5(1).

286. William A. Schabas, *International Crimes, in* ROUTLEDGE HANDBOOK OF INTERNATIONAL LAW 273 (David Armstrong ed., 2009).

287. *Id.* at 272-74.

288. *Id.* at 273.

289. *Id. See also* Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 CLMLR 1681 (2005). Waldron argues that prohibitions on torture must be understood as *mala in se*. *Id.* at 1693. However, he arrives at this conclusion by arguing that torture is both wrong and has been legally regulated for a long time, in order to argue against the idea that there is unregulated

many crimes, such as driving under the influence of alcohol and intoxication in a public place, have at different times been classified as *mala in se* and *mala prohibita*.[290] Notice requires more clarity and predictability than exhibited in either ICL's references to *mala in se* or the shifts in *mala in se* in the domestic context.

Rather than existing as a separate category that supersedes legality, even acts *mala in se* are subject to legality's restrictions. Legal philosopher Brand-Ballard writes that "[t]aken literally, *nullum crimen* also extends to these cases. . .[in which] actions *mala in se*. . .are not prohibited under criminal law."[291] He examines several theories of punishment, including minimalist retribution, retribution, and act-consequentialism, declaring that under all of them "*nullum crimen* forbids reaching the optimal result" of punishing the wrongdoer even when the act in question is *malum in se*.[292] He classifies this juncture as a "fork in the road"—a choice must be made as to whether to follow strict legality and possibly acquit or to modify legality based on ideas of morality. [293] Bending the criminal law to notions of morality undermines the very purpose of criminalization: not everything wrong is criminalized.[294] There are many wrongs that *ought* to be criminalized, but that does not mean they *are* or *have been* criminalized. Rather, the relationship between morality and criminalization is inconsistent: "[m]any moral behaviors may be considered offenses, and immoral behaviors be absolutely legal." [295]

Sexual violence in particular is a place where morality and notice for the purposes of legality diverge. Domestic rape laws exhibit a profound diversity in their scope and content. Hallevy writes that "definition of specific offenses is complicated to such a degree that it is not entirely understandable to a reasonable person" and cites as an example that "[r]ape of a wife was not considered rape until the end of the twentieth century, and rape was classified as a *mala in se* offense."[296] This lack of clarity is one reason why choosing strict legality over notice via *malum in se* can be characterized as the more "moral" action, particularly in "our

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space to torture, rather than by explaining what it means for a crime to be *mala in se* under ICL. *Id.* at 1693-95.

290. HALLEVY, *supra* note 22, at 24.

291. JEFFREY BRAND-BALLARD, LIMITS OF LEGALITY: THE ETHICS OF LAWLESS JUDGING 172 (2010).

292. *Id.* at 173

293. *Id.*

294. Dimock, *supra* note 276, at 165.

295. HALLEVY, *supra* note 22, at 25.

296. *Id.*

morally complex world."[297] The predictability and impartiality strict legality provides is its own form of morality and integrity. A strict positivist view of legality protects "the inner morality of law,"[298] even when such a view fails to criminalize undesirable behavior, because this position protects the rule of law.

B. *Legality in ICL Should Be Weaker Than in Domestic Spheres*

A key argument of this article is that legality in ICL should be as strong as, if not stronger than, the principle of legality in the municipal sphere. However, some argue that the nature of the international systems makes a weaker standard more appropriate for ICL. Luban opines that legality in ICL can be more relaxed than legality in municipal jurisdictions, because it is directed at regulating weak institutions rather than powerful States.[299] Yet, it is precisely because ICL institutions are weaker than States that the ICL principle of legality must be as strong or stronger than its domestic counterpart. ICL institutions need a strong legality principle to shore up legitimacy and thus the political will of the States it depends upon for enforcement. Without the strong foundation that legality provides, ICL is open to crippling criticism. In this way, strict legality acts as a shield, undergirding ICL's reach and power.

An additional argument for a weaker version of legality in ICL is the notion that the system is too frail, or too inefficient, to bear a higher standard. Van Schaack describes the international system as slow and loath to update treaties. She points out the absence of a global legislature with oversight over key legal tasks such as gap filling, modernization of out-dated law, or reworking of bad law.[300] She describes amendments to treaties as "sporadic and sluggish," presenting high transaction costs for reluctant States.[301] However, States Parties to the Rome Statute have as of 2010 approved substantial amendments,[302] including for the provision of a definition of the crime of aggression[303]

297. Nicola Lacey, *Philosophy, Political Morality, and History: Explaining the Enduring Resonance of the Hart-Fuller Debate*, 83 NYULR 1059, 1066 (2008).

298. *See generally* LON L. FULLER, THE INNER MORALITY OF LAW (1958).

299. Luban, *supra* note 169, at 19.

300. Van Schaack, *supra* note 1, at 137.

301. *Id.*

302. *See* Amendment to the Rome Statute of the International Criminal Court: Adoption of Amendment to Art.8 (Kampala, Jun. 10, 2010), Depositary Notification C.N.533.2010.TREATIES-6 (*not yet in force*), https://treaties.un.org/doc/publication/CN/2010/CN.533.2010-Eng.pdf.

303. Amendments to the Rome Statute of the International Criminal Court: Adoption of Amendment to Art.8 (Kampala, Jun. 11, 2010), Depositary Notification C.N.651.2010.TREATIES-

over which the ICC will have jurisdiction beginning January 2017 if the Assembly of the Parties approves jurisdiction.[304] These amendments demonstrate the willingness of the Rome Statute's States Parties to update the ICC's legal regime, undermining the idea that States Parties will not take action to update relevant ICL treaties. At the same time, other key treaties, such as the Genocide Convention, remain frozen in time.[305] However, if the States Parties to the Rome Statute stay active, absence of changes to other legal regimes may be irrelevant, given the ICC's jurisdiction over all core international crimes.

The above arguments to make legality weaker based on the deficiencies of ICL are paradoxical: if the system is so flawed, why should it be empowered to punish? Highlighting the deficiencies in the system hardly inspires faith in its capacity to detain, try, and imprison. Conversely, if it is a problematic system, higher standards might mitigate such flaws. In the end, the similarities between the domestic and international criminal justice systems are perhaps more important than the differences, at least for the purposes of legality. For example, Pellet's argument that international crimes are more creative and thus require a more flexible principle of legality fails to take into account that crimes in the municipal sphere are similarly limited only by "men's criminal imagination."[306] Overall, the two spheres exhibit key commonalities: enforcement powers must be held in check; judicial discretion

8 (*not yet in force*), https://asp.icc-cpi.int/iccdocs/asp_docs/RC2010/AMENDMENTS/CN.651.2010-ENG-CoA.pdf

304. On 26 June 2016, Palestine became the 30th country to ratify the amendment, making the only remaining barrier to its implementation a decision by the Rome Statute's Assembly of States Parties to exercise jurisdiction over the crime of aggression. *See* Press Release, United Nations General Assembly, State of Palestine Becomes the Thirtieth State to Ratify the Kampala Amendments on the Crime of Aggression (June 29, 2016), https://asp.icc-cpi.int/en_menus/asp/press%20releases/Pages/PR1225.aspx. Since that date, the Netherlands, Chile, Argentina and Portugal have also ratified the amendment, bringing the total as of October 20, 2017 to 34. United Nations Treaty Collection, 10. b Amendments on the crime of aggression to the Rome Statute of the International Criminal Court (May 8, 2013), https://treaties.un.org/doc/Treaties/2010/06/20100611%2005-56%20PM/CN.651.2010.pdf. The next step is for the Assembly of States Parties to consider activation of the Court's jurisdiction over the crime of aggression, which it is set to do at its next session in December 2017. *See* International Criminal Court Assembly of States Parties, Sixteenth session, Provisional Agenda (Mar. 6, 2017), U.N. Doc. ICC-ASP/16/1.

305. *See, e.g.*, William A. Schabas, writing that, despite being "much criticised for its limited scope . . . the crime of genocide has been left alone, where it occupies a special place as 'the crime of crimes'." *Introductory Note: Convention on the Prevention and Punishment of the Crime of Genocide* ¶ 19, U.N. AUDIOVISUAL LIBRARY, http://legal.un.org/avl/ha/cppcg/cppcg.html.

306. *See* Pellet, *supra* note 24, at 1059 (arguing against strict legality by claiming it weakens ICL's opportunity to respond to atrocity).

will always be faster and more flexible than amending legislation or treaties; and those who commit serious harm will sometimes outpace the law. This is why, in the end, "[d]irect enforcement systems of ICL are, for the purposes of the principles of legality, indistinguishable from national criminal justice systems, and thus there is no justification for applying a lesser standard of legality to this method of ICL enforcement method."[307]

1. Nullum Crimen Sine Iure in Place of Sine Lege

An example of the argument that legality in the international context should be "more liberal"[308]— broader, more fluid—than in domestic sphere is the proposition that, in international law, the maxim *nullum crimen sine iure* replaces *nullum crimen sine lege.*[309] It is not clear what this reformulation means: *iure* itself means law or by law.[310] This suggests that the distinction lies in the *type* of law referenced, for example as between written or unwritten law.[311] Gallant treats *sine iure* as "indicat [ing] that both written statutory law and uncodified (but binding) law, such as common law and customary international law, can be used to meet the strictures of legality."[312] He also submits that *iure* might be similar to *droit* in French, and *lege* to *lois*, with *lois* indicating statutes and *droit* capturing other types of law and/or conveying law in the broadest sense.[313]

If this reformulation is meant to clarify that the sources of ICL are often unwritten, it is simply a restatement of the sources of PIL, and thus does not seem to add anything. Perhaps it is being offered in defense of the fact that ICL has thus far failed to embody *lex scripta*, or a rejoinder to the argument that custom and general principles cannot satisfy legality. In this way it may serve as a retroactive justification of the trajectory of ICL in the 1990s. This position is falling out of fashion with the advent of the Rome Statute and its detailed list of the elements, defences, and penalties,[314] and an emphasis on

307. BASSIOUNI, *supra* note 29, at 95.

308. *See, e.g.*, Haveman, *supra* note 19, at 267 (summarizing and criticizing the "more liberal" version of this principle in ICL).

309. *See, e.g.*, BASSIOUNI, *supra* note 29, at 88; Van Schaack, *supra* note 1, at 144.

310. *Iure*, COLLINS DICTIONARY, http://www.collinsdictionary.com/dictionary/english/iure.

311. BASSIOUNI, *supra* note 29, at 88.

312. GALLANT *supra* note 36, at 14 (referencing Stefan Glaser, *La Méthode d'Interpretation en Droit International Pénal*, 9 REV. IT. DIRITTO & PROCEDURA PENALE NUOVA 757, 766 (1966)).

313. *Id.* (noting the contrast between "droit" and "lois au sens strict de ce terme" or statutes).

314. *See* Elements of Crimes, arts. 77, 78, 110, U.N. Doc. PCNICC/2000/1/ Add.2 (2000).

proactive rather than reactive ICL.[315]

On the other hand, reference to *iure* instead of *lege* may go beyond the distinction between written and unwritten law to refer to a broader, natural law justification. The rephrasing could be meant as an excuse to do away with the standards of legality practiced in the domestic sphere and give an alternative justification—just as justice defined by the judge or the tribunal or the lawyer or the diplomat—as opposed to predefined in criminal law. If this is the case, there is no explanation for this rejection and so the end result is without foundation. As Haveman writes,

> [B]y rephrasing the principle, the problem is 'defined away': by giving a new meaning to the principle, humanitarian law is less incompatible with the principle, and maybe even not incompatible at all any more. But in the meantime, the original background of the principle, the rationale behind it, has been neglected. Why would a citizen in international law be entitled to guarantee against abuse of authority by the state to a lesser extent than he is under national law? Why would it be less important under international (criminal) law to define the conduct which can make him a suspect than under national law?[316]

The questions Haveman raise cannot be answered. There is no justifiable reason to provide less protection under international law. Since individuals hold the right to legality's protections, there is also no explanation for this right disappearing in different legal fora. Rather, it is always there, wherever any human stands before a court. And, there is no ground for the claim that it is "less important" for ICL to uphold legality. ICL has many imperatives for upholding the principle. Further, every system calling itself a justice system and imposing criminal sanctions is either bound by legality, or is not a criminal justice system as such.

C. *Violations of Legality Can Be Mitigated Through Sentencing*

Some argue that violations of legality can be excused or offset at the sentencing phase. Van Schaack has suggested that "any lingering concerns about the rights of the defendants [that arise from legality issues]

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315. The establishment of the ICC as a permanent, global criminal court indicates the interest of over 120 states and the UN in taking a proactive approach to ICL, as opposed to an approach based on retrospective reaction to specific events.

316. Haveman, *supra* note 19, at 267.

can and should be mitigated by sentencing practices."[317] She states that using domestic sentencing guidelines for analogous crimes can ensure fairness.[318] However, this argument is unsatisfactory, for several reasons.

First, in ICL, the same judges violating legality are likely those imposing the sentences. Thus, there is no reason to think that they would be cognizant of nor inclined to "mitigate" a problem of their own creation, or that they would recognize this situation as problematic. Second, it is unclear what is meant by mitigating a violation of legality—does it mean reducing the sentence, or perhaps something else? Third, there are no ICL guidelines by which to decide sentencing or how to mitigate it. Neither the ICTY nor ICTR used international sentencing guidelines, but rather referred to the sentencing practice of the former Yugoslavia and Rwanda, respectively.[319] Van Schaack states that reference to domestic sentencing practice ensures fairness and "minimizes the tangible impact of retroactive adjudication."[320] This argument lacks foundation. There is no guiding principle that argues in favor of the fairness of these domestic sentencing regimes. Further, the "tangible impact" of retroactive adjudication is unclear, as is the mechanism by which sentencing minimizes these harms.

Fourth, the ICTs' sentencing practices have been heavily criticized, further calling into question the assumed fairness. Academic critique highlights such issues as a lack of positive law on the topic and inconsistency of sentencing rationales across various cases,[321] the *ad hoc* aggravating and mitigating circumstances put forth by judges in different cases—which demonstrated wide discretion and competing rationales —,[322] and perceived leniency and the absence of clear sentencing guidelines.[323] This in itself is a legality problem: *nulla poena sine lege*, no punishment without law, speaks to the need to have clear and prospective sentencing

317. Van Schaack, *supra* note 1, at 124.

318. *Id.*

319. ICTY Statute, art. 24, made reference to "the general practice regarding prison sentences in the courts of the former Yugoslavia" as the baseline for sentencing at the ICTY. ICTR Statute, art. 23, stated that the tribunal "shall have recourse to the general practice regarding prison sentences in the courts of Rwanda."

320. Van Schaack, *supra* note 1, at 188.

321. *See* Barbara Hola, *Sentencing of International Crimes at the ICTY and ICTR*, 4 AMSTERDAM L.F. 3 (2012).

322. *See* Mirko Bagaric & John Morss, *International Sentencing Law: In Search of a Justification and Coherent Framework*, 6 INT'L CRIM. L. REV. 191, 255 (2006).

323. *See* Mark B. Harmon; Fergal Gaynor, *Ordinary Sentences for Extraordinary Crimes*, 5 J. INT'L CRIM. JUST. 683 (2007).

guidelines so that punishment is protected from arbitrariness and abuse.[324] That *nulla poena* and sentencing law are underdeveloped areas of ICL makes it an unlikely space for addressing legality violations.[325] This issue is further compounded by the absence of fair labelling of sexual violence crimes within the ICT statutes.[326] Fair labelling would assist judges in determining the relative gravity of offenses and thus the proportional sentences.[327] However, the ICT Statutes lacked such differentiation.

Fifth, a violation of a fundamental right of the defendant is not typically considered a mitigating factor. Rather, mitigation of a sentence is based on the seriousness of the offense or the culpability of the defendant, not errors committed by the justice system.[328] Sixth, relying on global domestic sentencing practice will yield an astonishing array of sentencing, including the death penalty, which the UN has systematically opposed since the 1960s.[329] Of course, this can be limited by choosing the sentencing practice of a particular country, as was done at the ICTs, but this does not provide a consistent ICL approach nor one justified by legal principles. Seventh, the idea that sentencing could mitigate violations of legality sidesteps the main issues, which is the need to uphold the rule of law and human rights. It focuses on the

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324. *See* Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L. J. 165 (1937).

325. Positive sentencing law at the ICTs was bare bones to say the least: arts. 24 and 23 of the ICTY and ICTR Statutes respectively contained only very general instructions, citing gravity and individual circumstances as sentencing factors, without further detail. United Nations, Only Rules of Procedure and Evidence, Rule 151, Dated June 8, 2012, Mechanism for International Criminal Tribunals, U.N. Doc. IT/32/Rev.4Y (2012) added additional sentencing factors, but lacked specifics such as a list of aggravating or mitigating factors, articulating only two mitigating factors; *see also* Shahram Dana, *Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law*, 99 J. CRIM. L. & CRIMINOLOGY 857 (2009) (arguing that ICL's failure to develop a coherent and just sentencing doctrine must be rectified).

326. Zawati, *supra* note 240, at 27.

327. *Id.*

328. *E.g.*, Rules of Procedure and Evidence, Rule 151, U.N. Doc. IT/32/Rev.4Y (2012) mentions "substantial cooperation with the Prosecutor" as a mitigating factor. In the sentencing law of England and Wales, mitigating factors include a greater degree of provocation; mental illness; youth or age; a minor role in the offence; remorse; or cooperation with the authorities. *See* Aggravating and Mitigating Factors, https://www.sentencingcouncil.org.uk/explanatory-material/item/aggravating-and-mitigating-factors/.

329. The drafters of the ICCPR argued for the abolition of the death penalty under international law in the 1960s. *See* Death Penalty, OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, http://www.ohchr.org/EN/Issues/DeathPenalty/Pages/DPIndex.aspx. Opposition continued steadily and most recently has resulted in General Assembly resolutions calling for a global moratorium on the death penalty. *See, e.g.*, Moratorium on the Use of the Death Penalty, G.A. Res. 149, U.N. G.A.O.R., 62nd Sess., U.N. Doc. A/RES/62/149 (2007).

wrong stage of ICL development: in this era of creating a new legal system, it behoves the architects to focus carefully on just construction, rather than repair in the final stages.

Finally, as with all violations of fundamental rights, while remedies might be necessary,[330] the original violation cannot be undone.[331] While domestic criminal justice systems allow for a stay of proceedings in which fair trial cannot be achieved,[332] international criminal tribunals have been reluctant to permit this.[333] A legal system that allows for slippage of fundamental principles—in particular ones that comprise its core nature—cannot hope to repair this damage via lighter sentencing. Such an approach does not serve justice.

VII. CONCLUSION

Modern ICL has an opportunity to learn from its past and to be proactive rather than reactive. Crafting a clear and comprehensive legality principle will better protect the integrity of the international criminal justice system. To avoid abuses of power, protect human rights, and better achieve ICL's aims, actors within the field must faithfully develop and adhere to a robust definition of legality. Enshrining the principle as the keystone of the international criminal justice system is necessary to ensure fidelity to it. Previous treatment of legality as a flexible principle can be understood but not defended. It is time to believe in an

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330. See DINAH SHELTON, REMEDIES IN INTERNATIONAL HUMAN RIGHTS LAW (1999) for a thorough explication of when and why violations of human rights should be remedied.

331. Various legal responses to violations communicate the view that fundamental violations cannot be undone. For example, the appropriate response to evidence obtained by torture is exclusion, not mitigation. *See, e.g.*, Tobias Thienel, *The Admissibility of Evidence Obtained by Torture under International Law*, 27 EURO. J. INT'L L. 349 (2016) (citing authorities such as ECHR, *supra* note 51, art. 6; ICCPR, *supra* note 50, art.14; CAT, art. 15; and English law).

332. E.g., in the criminal law of England and Wales, a stay of proceedings is the appropriate response for serious abuse of proceedings i.e. violations of fundamental fair trial rights. *See R v Loosely*, Attorney General's Reference (No.3 of 2000), [2002] 1 Cr. App. R. 29 (HL); *R v Mullen (Nicholas)*, [1999] 2 Cr. App. R. 143 (HC(QB)); *R v Horseferry Road Magistrates Court Ex p. K*, [1996] 2 Cr. App. R. 574 (HC(QB)); *Ex Parte Bennett*, [1809] 34 E.R. 1070 (Ct of Chancery).

333. E.g., in March 2011, Trial Chamber I judges dismissed Thomas Lubanga's application to permanently stay proceedings, stating that "the Chamber must weigh the nature of the alleged abuse of process against the fact that only the most serious crimes of concern for the international community as a whole fall under the jurisdiction of the Court." Prosecutor v Lubanga Dyilo, ICC-01/04-01/06, Trial Judgment ¶ 195 (Mar. 14, 2012). This decision has been criticized. *See, e.g.*, INT'L BAR ASSOCIATION HUMAN RIGHTS INSTITUTE [IBA], *Fairness at the International Criminal Court*, at 28, IBA/ICC Programme (2011) (stating that "the *Lubanga* case has established a high threshold for abuse of process applications and no interim remedy has been devised to fully address alleged breaches of a defendant's fair trial rights prior to the conclusion of the trial").

international system that can function as equal to or better than the most developed domestic criminal justice counterpart. Only once the belief is there will the actions to achieve it follow.

Today, the gold standard for legality in ICL resides in the Rome Statute. The Rome Statute's definition of legality is an improvement on legality at the ICTs, and in many ways a reaction to the ICTs' perceived shortcomings.[334] Distinct from the ICT Statutes, which only list broad categories of crime rather than enumerating or defining specific crimes, the Rome Statute articulates more than ninety crimes.[335] Interestingly, it lists sexual violence crimes in a non-exhaustive manner with residual categories.[336] However, given the clarity and diversity of the acts specified as sexual violence in the Elements, as well as the certainty with which the term sexual violence is defined under the Rome Statute, this residual category exhibits a low risk of violating legality. The Statute also sets out and articulates the general principles applicable to the crimes within the ICC's jurisdiction.[337]

To many, this is an important step forward from the ICTs, as without these clarifications, the ICC would likely simply to continue to apply the ICTs' flawed approaches. Of course, the Rome Statute only applies to the ICC and, despite the impending closure of the ICTs, other *ad hoc* tribunals such as the Special Tribunal for Lebanon and the newly minted Kosovo Specialist Chambers may still find themselves on the wrong side of legality. And, not everyone agrees that the Rome Statute's legality standard is an improvement. The addition of this detailed hierarchy of applicable law has been both praised and condemned, with some stating that it better serves legality by providing judges with instruction on which law(s) to apply if "[t]he Rome Statute, Elements of Crime and Rules of Procedure and Evidence fail to resolve an issue,"[338] and others arguing that it "unnecessarily, and problematically, limited the way in which the ICC can approach the sources of

334. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 201 (5th ed. 2017) ("Article 22(2) is in many respects a reaction to the large and liberal approach to construction taken by the judges of the International Criminal Tribunal for the Former Yugoslavia. The approach to the definition of crimes taken in such cases as the *Tadić* jurisdiction decision, which quite dramatically opened up the category of war crimes to include offences committed in non-international armed conflict, was rather clearly not within the spirit of strict construction.")

335. Elements of Crimes, U.N. Doc. PCNICC/2000/1/ Add.2 (2000).

336. *See* Rome Statute, arts. 7(1)(g), 8(b)(xxii) and (e)(vi) (listing "any other form of sexual violence of comparable gravity" among specific enumerated acts).

337. *Id.* arts. 22-33.

338. GROVER, *supra* note 91, at 107.

international law."[339] The decision to circumscribe the sources of law has been characterized as political[340] and as exhibiting a mistrust of the ICC judges.[341] Mistrust is not the issue. Rather, judges—and all other relevant actors—are necessarily circumscribed by legality. This means prospectively clarifying sources, the hierarchy of sources, and the definitions of crimes, and embracing *lex scripta* for ICL, if not other areas of public international law. Further, for the Rome Statute, there is a predefined, transparent, published process for how crimes can evolve that is profoundly distinct from the way they evolved at the ICTs. This means that it satisfies both legality and flexibility.

In the end, the choice between strict or flexible legality comes down to a value judgment. This paper contends that "the legality principle should override all other criminal law doctrines."[342] Arguing for strict legality in ICL belies faith in the international criminal justice system. In contrast, fear of strict legality suggests that positive law running out, especially in the face of an atrocity, is the worst thing that could happen to the international legal system. Yet, a focus on positive law is a solution to disagreements about the meaning of justice,[343] suggesting that strict legality solves the issue of norm clash, divergent values, and morals and values that evolve irregularly across time and space. The core issue is that substantive justice claims can be weighed equally against the claim that legality occupies untouchable normative ground upon which ICL depends.

With so much diversity in the international sphere, positive international law is the only solution to legality's demands. This also helps the law occupy a healthy—and more importantly, predictable—middle ground between "superpositive law (such as the "Radbruch formula" in Germany) or retrospective interpretation of pre-transition law" [344] "[t]hat [the defendant] will go largely unpunished. . . is frustrating,"[345] to say the least. It can also be a grave injustice. In this sense, it serves as a wake up call to update international law. Together with and indeed

339. Robert Cryer, *Royalism and the King: Article 21 of the Rome Statute and the Politics of Sources*, 12 NEW CRIM. L. REV. 390, 392 (2009).

340. *Id.*; Bruce Broomhall, *Article 22 – Nullum crimen sine lege*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 713-17 (Otto Triffterer ed., 2nd ed., 2008).

341. *See* Pellet, *supra* note 24; David Hunt, *The International Criminal Court: High Hopes, 'Creative Ambiguity' and an Unfortunate Mistrust in International Judges*, 2 J. INT'L CRIM. JUST. 56 (2004).

342. DRESSLER, *supra* note 20, at 41.

343. Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1563, 1692-95 (2005).

344. MARTTI KOSKENNIEMI, THE POLITICS OF INTERNATIONAL LAW 178 (2011).

345. Hughes v. State, 868 P.2d 730, 736 (Okla. Crim. App. 1994).

fostered by strict legality, such sea change moments can help ensure core goals of international criminal justice can be better secured.

The best way to ensure for strict legality and positive International Law Commission is through a comprehensive, written international criminal code. This could be achieved via the ILC, via civil society initiatives later taken up by the ILC as per the current draft convention on crimes against humanity, or via a group of interested states that later broaden and eventually universalize the process. Unlike previous suppression treaties, this code would truly be directed at the individual rather than states, although state acceptance of the code will remain crucial if it is to become a document with the force of CIL behind it. This code could achieve many things. It would be a place to articulate both the general part of international law, solving thorny issues like *mens rea* in ICL and modes of participation,[346] as well as a place to enshrine specific crimes including detailed elements. Legality and its effect on sources and judicial interpretation could be codified in the general part. The code could also address sentencing, which has been woefully underdeveloped in ICL, and could offer detailed rules of evidence, another area in which ICL could grow substantially.

Arguing for an international criminal code is not new. The interwar period following World War I appears to be the first time that international jurists advocated for such a code. Matthew Lippman notes that multiple lawyers and academics, spurred by the small number of trials and convictions and the short sentences for the war crimes that were prosecuted under the Versailles Treaty, promoted an international criminal code as the best way to promote adherence to international law.[347] Lippman noted that, in this same vein, in 1920 the advisory committee of jurists regarding the League of Nation's Permanent Court for International Justice (PCIJ) adopted a resolution calling for an international criminal court and annexed it to the PCIJ's Draft Statute.[348] This idea stalled when the first Assembly of the League of Nations decided

346. *See, e.g.*, Mohamed Elewa Badar, The Concept of Mens Rea, in INTERNATIONAL CRIMINAL LAW: THE CASE FOR A UNIFIED APPROACH (Hart ed., 2013); Kai Ambos, Remarks on the General Part of International Criminal Law, 4 J. INT'L. CRIM. JUSTICE 660 (2003); James G. Stewart, *Ten Reasons for Adopting a Universal Concept of Participation in Atrocity, in* PLURALISM IN INTERNATIONAL CRIMINAL LAW (Elies van Sliedregt & Sergey Vasiliev eds., 2014).

347. Matthew Lippman, *Nuremberg: Forty-Five Years Later,* 7 CONN. J. INT'L L. 1, 12-14 (1991).

348. BENJAMIN FERENCZ, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE – A DOCUMENTARY HISTORY AND ANALYSIS 36, 193 (1980).

that an international criminal code would be necessary for an international criminal court.[349]

The topic re-emerged following the assassination of King Alexander of Yugoslavia in 1934 and Italy's refusal to extradite his assassin, resulting in a 1937 League of Nations resolution to establish an international criminal court.[350] However, no State ratified this convention,[351] and thus the idea of an international criminal court stalled again. Some academics seemed to support this, arguing that practically and politically such a court was untenable;[352] others continued to call for an international code.[353]

Calls for an international criminal code continued following WWII. Justice Jackson declared that the Nuremberg Principles would be applied beyond the post WWII trials to any future leader acting against them.[354] Initially, this claim seemed to have some traction, when in December, 1946 the UN General Assembly (UNGA) unanimously adopted a resolution affirming these principles.[355] Decades before the creation of the ICC, Bassiouni claimed that these principles formed the legal basis for an international criminal code.[356] In 1947, the UNGA took steps towards creating this code, adopting a resolution asking the ILC to create a Draft Code of Offenses Against the Peace and Security of Mankind.[357] The ILC completed the first draft in 1950,[358] but the UNGA did not adopt it. Following this, the ILC presented several drafts

349. *See* League of Nations Assembly, *Voeux Submitted by the Advisory Committee of Jurists at the Hague, III Committee, Permanent Court of International Justice, in* Permanent Court of Justice Documents 19-40 (20/48/249) (Dec. 17, 1920).

350. *See Reports Adopted by the Committee for the International Repression of Terrorism*, League of Nations Doc. C.222. M. 162 1937 V (1937).

351. FERENCZ, *supra* note 348, at 54.

352. *See* J.L. Brierly, *Do We Need an International Criminal Court?*, 8 BRIT. Y.B. INT'L. L. 81, 83 (1927).

353. *See* Philip M. Brown, *International Criminal Justice*, 35 AM. J. INT'L. L. 118, 120 (1941); George Manner, *The Legal Nature and Punishment of Criminal Acts of Violence Contrary to the Laws of War*, 37 AM. J. INT'L. L. 407, 432 (1943).

354. *See* Robert H. Jackson, *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials*, US GOV'T PRINTING OFF., 1945, at 362-63

355. *See* G.A. Res. 95(I), U.N. Doc. A/RES/1/95), Affirmation of the Principles of International Law Recognized by the Charter of the Nurnberg Tribunal (Dec. 11, 1946).

356. M. Cherif Bassiouni, *International Law and the Holocaust*, 9 CAL. W. INT'L L. J. 202, 235 (1979).

357. ILC, *Report of the International Law Commission to the General Assembly Covering its Second Session, 5 June–29 July 1950*, U.N. Doc. A/1316 (1950).

358. *See Text Prepared by the Drafting Committee* (A/CN/4/R.6) (1950), Summary Record of the 72nd Meeting, U.N. Doc. A/CN.4/SR.72 (ILC, 1950).

until 1954, when it halted its efforts.[359] Commentators cite the Cold War[360] and the inability of States to agree on the definition of the crime of aggression as the main reasons.[361]

When the work of the ILC halted, ICL developed via suppression treaties on topics such as drug trafficking and terrorist crimes.[362] Unlike the concept of an international criminal code, "[t]hese suppression treaties did not seek to be comprehensive."[363] James Crawford has opined that "these developments took us further away from, not closer to, an international criminal court" and international as opposed to national jurisdiction.[364] He noted that these suppression treaties "effectively provided for the extension of national process and jurisdiction. There was no international criminal process as such."[365] Additionally, these suppression treaties did not contain gravity thresholds, resembling national law more than early ICL documents such as the Nuremberg Principles or the Genocide Convention.[366] All of this led to what Crawford called a huge "institutional problem" facing those trying to review the idea of an international criminal code or international criminal court in the 1990s.[367]

Notably, later ILC draft codes became more limited and circumscribed, and therefore less and less like a complete international criminal code. This narrowed even further as the ILC transitioned from drafting a global code to drafting the Rome Statute. As Crawford stated, "[i]t is a remarkable feature that the ICC's subject-matter jurisdiction

359. *See* G.A. Res. 897 (IX) United Nations General Assembly, *Draft Code of Offences Against the Peace and Security of Mankind* (1954).

360. *See, e.g.*, James Crawford, *The Drafting of the Rome Statute, in* FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 119 (Philippe Sands ed., 2003); Philippe Kirsch & Valerie Oosterveld, *The Preparatory Commission for the International Criminal Court*, 25 FORDHAM INT'L L.J. 1145 (2001); Robert Cryer, *The Doctrinal Foundations of International Criminalization, in* BASSIOUNI, *supra* note 29, at 115.

361. M. Cherif Bassiouni, *The History of the Draft Code of Crimes Against the Peace and Security of Mankind*, 27 ISR. L. REV. 247, 253, 257-59 (1993). *See generally* International Law Commission, *Analytical Guide to the Work of the International Law Commission – Draft Code of Crimes Against the Peace and Security of Mankind (Part I)* (Aug. 3, 2015), http://legal.un.org/ilc/guide/7_3.shtml.

362. *See, e.g.*, Single Convention on Narcotic Drugs, Mar. 13, 1961, 520 UNTS 151, *entered into force* Dec. 13, 1964, as amended by the Protocol amending the Single Convention on Narcotic Drugs, 1961 (Geneva, 25 Mar. 1972) 976 U.N.T.S. 3, *entered into force* 8 Aug. 1975; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 1035 UNTS 167, *entered into force* Feb. 20, 1977.

363. Crawford, *supra* note 360, at 120.

364. *Id.*

365. *Id.*

366. *Id.* at 122-23.

367. *Id.* at 124.

began as a longish list of crimes defined by existing treaties in force, and ended as a detailed specification of a few crimes under international criminal law, without explicit reference to any existing treaties."[368] Opposite to what this article is advocating, the ILC declared their draft of the Rome Statute to be "primarily an adjectival and procedural instrument," rather than one that would define new crimes or codify crimes under general PIL.[369] The time is ripe to return to a code with the express purpose of codifying international crimes, including penalties, with the aim that this code becomes part of CIL and achieves as universal a reach as possible.

368. *Id.* at 152.

369. Sara Wharton, *Redrawing the Line: Serious Crimes of Concern to the International Community Beyond the Rome Statute*, 52 CAN. Y.B. INT'L L. 129, 183 (2014) (citing *Draft Statute for an International Criminal Court and Commentary*, in Int'l Law Comm'n, Report of the International Law Commission on the Work of is Forty-Sixth Session, U.N. Doc. A/49/10 (1994)).