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Legality in international criminal law
A human rights standard?

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Contents

Summary

The principle of legality is a fundamental principle of criminal law. It grants the defendant in a criminal trial protection from the arbitrary use of state power by binding the state to certain rules and guarantees. The exercise of state power in criminal prosecutions is bound by the separation of powers, the rule of law and the idea that criminal law should provide fair warning to the individual. These principles require a level of quality in the enactment of law by the legislator as well as limit the discretion of the judiciary in the application and interpretation of criminal laws. The basic idea is that criminal laws provide for a level legal certainty so that the individual can be sufficiently aware of them and adapt his conduct accordingly.

What specific requirements are included in the principle of legality depends on the nature of the underlying legal system. Differences in the application of the principle can be identified, for example, in common law and civil law countries. Different doctrines regarding the principle can also be identified. Where the doctrine of strict legality focuses on the close adherence to positive law, substantive justice takes a less formalistic approach, incorporating an element of justice into the principle. However, the underlying philosophical idea and purpose of the principle is very similar, even in basically different legal systems. Accordingly, the level of protection the principle provides in national jurisdictions is essentially the same.

The existence of such a common standard is further established by human rights standards concerning the principle, in particular the case law of the European Court of Human Rights. The standard set by the ECHR, based on the accessibility and forseeability of rules of criminal law effectively reconciles different perceptions of the principle in one standard. The status the principle of legality has received in human rights law (a non-derogable right) confirms its status in national law as a fundamental principle of any criminal law system.

The principle of legality is also part of the system of international criminal law, but in this context it has often been disregarded. Both the purpose of international tribunals (achieving justice) and the character of international criminal law (an incomplete system incorporating many rules of customary law) have made it difficult to effectively implement an acceptable standard of legality. In particular the role of customary law, as a largely undefined and often unknown source of law, has proven to create complications when trying to achieve the principle purposes of the principle of legality, those of legal certainty and fair warning. As a consequence, findings of international tribunals have often failed to live up to the human rights standard of the principle of legality.

It is essential though, that such tribunals do live up to this standard. Though not formally bound by human rights treaties and the guarantees they provide, there is no logical reasons why the application of due process rights in general and the principle of legality in particular should fail to live up to this standard. If anything, the great impact on a person of being held

individually criminally responsible before an international tribunal should be accompanied by the recognition of certain fundamental rights.
After initial difficulties in this regard, international criminal tribunals have proven to be susceptible to the human rights standard for the principle of legality. In the case law of the ICTY, the incorporation of the standard set by the ECHR has proven invaluable. It has provided the possibility of bringing together the inherent limitations of international criminal law and the required sensitivity to the principle of legality, without relinquishing what remains the primary purpose of international criminal tribunals: the achievement of justice.

Abbreviations

ACHR	American Convention on Human Rights
AJCL	American Journal of Comparative Law
Appl.	Application
Art.	Article
AU	African Union
Aust. J. Publ. Int'l L.	Austrian Journal of Public International Law
BayVerfGHE	Bayerische Verfassungsgerichtshof Entscheidungen (decisions of the Bavarian Constitutional Court)
BGH	Bundesgerichtshof
BGHSt	Entscheidungen des Bundesgerichtshofes in Strafsachen (decisions of the BGH in criminal law cases)
BVerfG	Bundesverfassungsgericht
BVerfGE	Bundesverfassungsgericht Entscheidungen (decisions of the Federal Constitutional Court)
BYIL	British Yearbook of International Law
Calif. L. Rev.	California Law Review
CCL 10	Control Council Law No. 10
Cf.	Confer
Colum. L. Rev.	Columbia Law Review
Con. Op.	Concurring Opinion
Denv. J. Int'l L. & Pol'y	Denver Journal of International Law & Policy
Dis. Op.	Dissenting Opinion
Doc.	Document
Duke J. Comp. & Int'l. L.	Duke Journal of Comparative and International Law
ECHR	European Convention on Human Rights
EComHR	European Commission on Human Rights
ECtHR	European Court on Human Rights
Ed.(s)	Editor(s)
E.g.	Exempli gratia
EJC	European Journal of Crime, Criminal Law and Criminal Justice
EJIL	European Journal of International Law
Et al.	Et alii
ETS	European Treaty Series
FRG	Federal Republic of Germany
GAOR	General Assembly Official Records
GC	Geneva Conventions
GDR	German Democratic Republic
GG	Grundgesetz (Basic Law, German Constitution)
GYIL	German Yearbook of International Law
HRC	Human Rights Committee
Ibid.	Ibidem

ICC	International Criminal Court
ICJ	International Court of Justice
ICJR	International Criminal Justice Review
ICLQ	International and Comparative Law Quarterly
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
I.e.	Id est
ILA	International Law Association
ILC	International Law Commission
ILR	International Law Reports
IMT	International Military Tribunal (Nuremberg)
IMTFE	International Military Tribunal for the Far East
JICJ	Journal of International Criminal Justice
JZ	Juristenzeitung
LJIL	Leiden Journal of International Law
NJW	Neue Juristische Wochenzeitschrift
No.	Number
NYIL	Netherlands Yearbook of International Law
OAS	Organisation of American States
OLG	Oberlandesgericht
p.	Page
pp.	Pages
PCIJ	Permanent Court of International Justice
Rdnr.	Radnummer (margin number)
Rep.	Reports
Res.	Resolution
RGSt	Reichsgerichtsentscheidungen in Strafsachen (decisions of the (former) Imperial Court in criminal law cases)
SC	Security Council
S.C.R.	Supreme Court Reports (Canada)
SCSL	Special Court for Sierra Leone
Sep. Op.	Separate Opinion
Sess.	Session
Supp.	Supplement
Tul. J. Int'l & Comp. L.	Tulane Journal of International and Comparative Law
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNTS	United Nations Treaty Series
US	United States
v.	Versus
Vol.	Volume
WWII	World War II

1 INTRODUCTION

1.1 Background

Like many fundamental principles of international criminal law, the principle of legality finds its origin in national legal systems. National legal systems generally tend to embrace one of two doctrines concerning the principle of legality, substantive justice or strict legality.

1.1.1 Doctrines of legality

The aim of the doctrine of substantive justice is to protect society from danger or socially harmful behaviour, irrespective of whether that mode of behaviour has been criminalised by law at the time it is taken.[1] The primary goal of criminal law is to defend the social and legal system against any such deviant behaviour that threatens to harm it. Considerations of forseeability of the law and eradication of arbitrary prosecutions are of lesser concern. The focus is on the society rather than on the individual. The doctrine derives its legal legitimacy from its aspirations to achieve justice, but the notion of justice is an undefined and indeed relative one.[2] Furthermore, it is as much a philosophical concept as it is a legal one. It is not surprising that, because of this, the doctrine of substantial justice is prone to abuse, as in Soviet and Nazi criminal law. However, as will be shown, the concept of justice and its prevalence over positive law in certain cases has proven its value in the context of some cases of gross human rights abuses.
In contrast, the doctrine of strict legality relies exclusively on positive law as a basis for criminal prosecution. A person can only be criminally prosecuted and punished, if at the time he committed it, the conduct for which he is being prosecuted was regarded as a criminal offence under the applicable law. Strict legality is adhered to in most democratic, civil law countries and contains four sub-principles: (i) conduct can only be criminalised by written law, emanating from the democratically elected legislator (*nullum crimen sine lege scripta);* (ii) criminal laws must be sufficiently specific, thereby providing the individual with fair warning and eradicating unchecked judicial interpretation (*nullum crimen sine lege certa*); (iii) criminal laws may not be retroactive, they cannot at a later stage criminalise conduct that was not considered criminal when committed (*nullum crimen sine proevia lege*); (iv) criminal rules are not to be applied by analogy, meaning that the scope of criminal laws may not be extended to

[1] Cassese, A., *International Criminal Law* (2003), p. 139.
[2] See below 2.2.

cover conduct it was not intended to cover by the legislator (*nullum crimen sine lege stricta*).[3]
The focus here is very much on the individual. The four sub-principles aim to protect individuals from the arbitrary power of the government and an overzealous judiciary.

1.1.2 Justice and individual rights

The difference between the two doctrines of legality is obvious: society versus individual, justice versus law. These are the aims served in national jurisdictions. On the international level these basic notions are no less important. Crimes that are prosecuted before international criminal courts and tribunals are generally considered the most horrendous crimes that can be committed. Ranging from such acts as war crimes and crimes against humanity to genocide, they evoke emotional outrage among the international community and demands for punishment and justice are often the first reaction. The first international criminal tribunals after WWII (Nuremberg and Tokyo) proved to be sensitive to such demands and relied heavily on the notion of justice in reaching their judgment.[4] However, relying on the concept of justice (or natural law) often comes at the expense of the individual rights of the accused.
Since then, international criminal law has developed considerably but the notion of justice as one of its primary objectives (and even sources) has not substantially diminished. In the same period, individual human rights have exploded onto the scene of international law. Human rights protecting the rights of the accused in criminal proceedings have added a dimension to the demands made of the international criminal law system that was not strictly recognised in the immediate post-WWII period. These due process rights, in particular the *nullum crimen* principle, can clash with the notion of justice and with the character of international criminal law itself.

1.1.3 International law

International criminal law is a distinct legal system, different in character from national systems and with its own specificities.[5] As a part of international law its rules are not promulgated by a democratically elected legislator, they are not exhaustively codified and in many instances the actual existence and content of rules is uncertain.[6] The question then is what the value of the *nullum crimen* principle in international criminal law is.

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[3] Cassese, supra note 1, p. 141-142; Boot, M., *Genocide, Crimes Against Humanity, War Crimes* (2002), p. 94.
[4] See below 2.1.
[5] *Cf*. Balint, J., *The Place of Law in Addressing Internal Regime Conflicts*, 59 Law and Contemporary Problems (1996), p. 110.
[6] Cassese, A., *The ICTY: A Living and Vital Reality*, 2 JICJ 2 (2004), p. 590.

This question essentially contains two elements. The first question is what sources of law can be relied on to hold a person criminally responsible under international law. As opposed to national systems that for the most part rely on written law, international criminal law does not only apply treaties or conventions. Customary law and even general principles of law are also a large part of the body of international criminal law. In addition, international criminal law is in the precarious position of having to balance the rights of the accused and the preservation of world order, adding a political dimension that is absent in national law.[7] Against this background, it has been suggested that the principle that applies in international law should be *nullum crimen sine iure*,[8] a principle derived from national notions of legality but with its own character adjusted to the peculiarities of international law.
The second question is closely related to the matter of sources of law and concerns that of the quality of the applicable law. Under national legal systems, laws are required to have a certain degree of specificity when describing a crime. Though such specificity can be attained in treaty definitions, the content of customary law and general principles is far less clear.
The principle of legality in international criminal law then must deal with the peculiarities of international law by not obstructing prosecution for international crimes whilst at the same time maintaining appropriate human rights standards within the criminal process.

1.2 Scope

1.2.1 Purpose of the thesis

The purpose of this thesis is to identify how apparent strains put on the traditional understanding of the principle of legality in international criminal law can be relieved by relying on a human rights based approach. Not only does this approach effectively reconcile the rights of the defendant with the limitations inherent in the system of international criminal law, it also manages to incorporate a notion of justice without eroding the defendant's rights. Despite the fact that the principle takes slightly different forms in different contexts (common law or civil law, national law or international law), the key to its proper application is to recognise its value as a fundamental due process right.

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[7] Bassiouni, M. C., *Crimes Against Humanity in International Criminal Law* (1992), p. 112.
[8] Boot, *supra* note 3, p. 19.

1.2.2 Structure

In order to establish the content and the proper application of the principle of legality in international criminal law, reference will primarily be had to case law of international criminal tribunals, the European Court of Human Rights (ECtHR) as well as national jurisdictions.
As difficulties concerning the status of the *nullum crimen* principle first arose during trials for crimes committed during WWII, chapter 2 will evaluate the reasoning and outcome of the judgments reached, including the underlying legal philosophy. This chapter will be the starting point as it is as much a part of the question as it is part of the answer.
Chapter 3 will focus on the principle of legality in national jurisdictions, one a civil law country (Germany), the other a common law country (USA). This chapter will serve as the first step in identifying the essential elements of the principle of legality by comparing its status and application in fundamentally different systems of law.
Chapter 4 will be concerned with the status of the principle of legality as a fundamental human right. The case law of the ECtHR will be investigated to establish a minimum human rights standard. It will also serve to find a conceptual context based on accessibility and forseeability of rules of law that can be applied equally not only in civil law and common law countries, but also in an international criminal law context.
Chapter 5 will deal with the practice of the Ad Hoc Tribunals, the ICTY and ICTR. A specific look will be had at the difficulties already encountered at Nuremberg, namely the apparent incompatibility of customary law and the principle of legality. The chapter will investigate the *nullum crimen* principle as applied by the Tribunals in the light of the way the Tribunals construct customary law and their eventual referral to human rights concepts.
Finally, chapter 6 will concern the principle of legality as incorporated in the Statute of the International Criminal Court (ICC).

1.2.3 Methodology

The approach taken to the search for an effective principle of legality in international criminal law will be legal-philosophical. The primary focus will be on the legal aspects and consequences of the proper implementation of the principle. The status and application of the principle in national, human rights and international criminal law will be assessed. The main source for such an evaluation will be the case law available from national and international courts. However, such an approach also relies heavily on philosophical concepts underlying not only criminal law, but the concept of law as a whole.

1.2.4 Terminology

The term *nullum crimen sine lege* principle is sometimes considered to be only the prohibition on retroactivity as incorporated in the more all-encompassing principle of legality. In the thesis no distinction will be made between the terms "*nullum crimen sine lege* principle", "*nullum crimen* principle" and "principle of legality". These terms will be used interchangeably for the sake of variation and will be understood to have the same meaning, namely including all aspects of the principle of legality as set out above. Similarly, the term "principles of legality" will be understood to refer to all the sub-principles.

2 Conception and controversy

The true birth of international criminal law, or at least its conception in the modern sense, can be placed as directly following the Second World War. It is at this time also that the principle of legality in international criminal law receives attention for the first time. Though it had been considered before by the PCIJ in the *Advisory Opinion on the Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*,[9] this case dealt with domestic law, not international law.
The post-WWII trials, both national and international, struggled with the question of the punishment of war criminals. The need was felt greatly to punish the perpetrators of the horrendous atrocities, but international criminal law turned out to be too underdeveloped to effectively deal with the issues presented.[10] Courts were forced to revert to contestable natural law and customary law theories. The outcome of many of the trials then presented as many questions as it answered.[11] Nevertheless, it is important to know the background of a debate that is not yet settled today.

2.1 Post WWII trials

In order to evaluate the legal legitimacy and value of the Nuremberg trial and subsequent proceedings,[12] one needs to separate two issues. The first is whether the crimes the defendants were charged with already constituted crimes under international law at the time they were committed or whether they were new law. The second is whether the principle of legality at the time had already emerged as a principle of customary international law.[13] The two questions are nevertheless inseparably linked, as the first tries to answer the question of the retroactive application of the law and the second the legitimacy of that possibly retroactive application.

2.1.1 International crimes or new law?

With regard to the first issue, it is highly debatable that both crimes against peace and crimes against humanity, two of the three crimes contained in the

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[9] 1935 PCIJ, Series A/B, Vol. 3, No. 65, pp. 19-20.
[10] *Cf.* Röling/Cassese, *The Tokyo Trial and Beyond* (1993), pp. 85-91.
[11] For its continued influence, see Dixon/Kahn/May, *Archbold International Criminal Courts, Practice, Procedure & Evidence* (2003), §17-30.
[12] The primary focus will be on the Nuremberg Trial as this was the first such trial as well as the basis for the legal reasoning of most subsequent war crimes trials.
[13] Lamb, S., *Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law* in: Cassese/Gaeta/Jones, *The Rome Statute of the International Criminal Court* Vol. I (2002) p. 735.

Nuremberg Charter,[14] were considered international crimes before 1945. The category of crimes against peace in particular gave rise to difficulties. Not only was it questionable that this category did in fact constitute an international crime, the Nuremberg Charter also failed to provide a definition.[15]

Nevertheless, the prosecution argued on the basis of the Kellogg-Briand pact that war as an instrument of national policy had been abandoned in 1928.[16] It argued that "[t]here is no substantial retroactivity in the provisions of the Charter. It merely fixes the responsibility for a crime already clearly established as such by positive law upon its actual perpetrators".[17] The defence responded that the Kellogg-Briand pact did not declare a war of aggression a crime, nor did it endow states with the right to try individuals. According to them, this new category of crimes against peace was therefore applied retroactively.[18]

The Tribunal, in rejecting the defence claims, simply held that the sovereign legislative power in Germany was now vested in the occupying powers and criminalisation of certain acts in the Charter was valid and proper law by reason of that legislative power. It was therefore not even necessary to establish that they were international crimes when committed. It still considered the issue of retroactivity, though against the background of the legislative power argument, it acquires a strictly obiter dicta character.[19] Moreover, the Tribunal's reasoning when attempting to establish aggression as an international crime is patchy at best and far from convincing.[20]

There has been plenty of debate about the legal legitimacy of the findings of the Nuremberg Tribunal. The judgment remains controversial as the Tribunal failed to authoritatively establish that crimes against peace were part and parcel of international law and chose to derive individual criminal

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[14] Article 6 reads (in part): The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
(a) CRIMES AGAINST PEACE: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
(b) WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
(c) CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

[15] As recognized by Jackson, US Chief Prosecutor, 2 IMT 148.

[16] 1 IMT 219-222.

[17] Statement of Hartley Shawcross, British Chief Prosecutor, 3 IMT 106.

[18] 1 IMT 168.

[19] *Cf.* 19 IMT 575.

[20] *Cf.* 22 IMT 462-469.

responsibility from instruments that made no mention of this at all.[21] It can hardly be denied that the Tribunal applied certain categories of crimes retroactively. The argument that the occupying powers could state what the law was as they had sovereign legislative powers does not cure this. Even if they had such powers,[22] it does not necessarily mean they could use them ex post facto. Nevertheless, despite its application of what was essentially new law, the Tribunal did not consider the *nullum crimen* principle breached.

2.1.2 Nullum crimen?

Even though the Tribunal did not consider the *nullum crimen* principle breached, it added that the principle could in any way not find application in the present case:

"The maxim… is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished."[23]

The Tribunal then found that, based on the positions the defendants had occupied in the Nazi regime, they must have known that they acted in defiance of international law. Referring to various treaties and declarations the Tribunal held that aggressive warfare was already considered an international crime before the drafting of the Charter, which led it to proclaim that:

"[on] the view of the case alone, it would appear that the maxim has no application to the present facts."[24]

It is interesting to notice that the Tribunal refers to the forseeability of criminal prosecution, a notion that would later form the basis of the case law of the ECHR.[25] The ECHR relies on this notion of forseeability to establish whether a rule of law has been applied retroactively. If the consequences of conduct were sufficiently foreseeable at the time of that conduct the rule cannot be said to have been applied retroactively. Nevertheless, its application by the Tríbunal is questionable, as it does not refer to the forseeability of the consequences of an *existing* legal rule, but to the forseeability that one might be criminally convicted in the future even if

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[21] Sunga, L. S., *The Emerging System of International Criminal Law* (1997), p. 46, referring to the 1907 Hague Conventions and the 1928 Kellogg-Briand Pact.
[22] Which is highly dubious, see the Dis. Op. of Judge Pal at the IMTFE, Tokyo Judgment Vol. II, p. 551 where he states that under international law a victor nation may be competent to set up a war crimes tribunal, but is not competent to legislate on international law.
[23] 1 IMT 219; 22 IMT 462.
[24] *Ibid*.
[25] See below 4.1.1.2.

there is no rule providing for such a conviction at the time of the conduct.[26] One might be led to conclude that the Tribunal admits it is applying law retroactively, but does not consider this a problem because there is no strict prohibition of retroactivity in international criminal law.[27]
The Tribunal's views on principles of legality in international criminal law seem to be carried by two strands of argument. Firstly, there is a moral aspect, based on a person's knowledge that he is doing 'wrong' and the injustice of letting that 'wrong' go unpunished. Secondly, there is the more legalistic argument that the *nullum crimen* principle is not a general principle of international law that needs to be strictly adhered to. These two aspects will be further discussed in the context of the legal-philosophical debates spurned by the post WWII trials.
Moreover, it should be noted that the IMT only dealt with the ex post facto question in relation to crimes against peace. With regard to crimes against humanity, a category that was equally, if not more controversial, the same issue was never effectively tackled.[28] In addition it can be noted that the Tribunal's reticence to deal with *nulum crimen* claims stems partially from its composition. During the drafting of the Charter the drafters had already decided that the Charter should state authoritatively what the applicable law was, so as to exclude discussion on this point and the related issue of retroactivity. Subsequently, several of these drafters of the Charter were involved in the Trial itself as prosecutor or judge[29] and could steer the proceedings clear of extensive debate on the issue of *nullum crimen.*

2.1.3 Validation by repetition?

The influence of the controversial Nuremberg judgment was felt for a long time. In numerous trials concerning atrocities committed in WWII the Nuremberg judgment was relied upon without question. The IMT's finding that nothing in its Charter constituted new law, but that it was solely declaratory of existing international law and not ex post facto formed the basis of many post-WWII trials. This has led one author to comment that it was "as if the accumulation of time and precedents relying on the IMT's judgment had cured all possible legal effects. This leads to the legally incongruous conclusion that reiteration of the same argument confirms its validity".[30]

2.1.3.1 The Tokyo Tribunal

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[26] *Cf.* statement of Hartley Shawcross, 3 IMT 106.
[27] *Cf.* 19 IMT 575.
[28] But see the subsequent trials under CCL 10 for difficulties in this area; See also Lamb, *supra* note 13, p. 737.
[29] Donnedieu de Vabres, *Le Proces de Nuremberg,* 70 Recueil des Cours 1 (1947), p. 556: Nikitchenko was a judge for the USSR, Falco an alternate judge for France and Jackson chief prosecutor for the US.
[30] Bassiouni, *supra* note 7, p. 145-146.

The Tokyo Charter, which formed the basis of jurisdiction for the IMTFE, contained an almost identical provision on the Tribunal's subject matter. Similar defence motions claiming violations of the principle of legality were raised. The majority of the Tribunal, like the IMT, considered the *nullum crimen* principle not to be a limitation of sovereignty of states that would prevent them from setting up ex post facto tribunals. It was rather considered a principle of justice, whose application could be limited. It quoted the corresponding part from the Nuremberg judgment and stated that "[w]ith the foregoing opinions of the Nuremberg Tribunal and the reasoning by which they are reached this Tribunal is in complete accord".[31] Nevertheless, five extra opinions were attached to the majority opinion, two judges being unconvinced by the Tribunal's judgment, especially concerning the "crimes against peace" charge.[32] Judge Pal from India maintained that the rule concerning the crime against peace was ex post facto legislation and the trial itself merely the judgment of the victor on the vanquished.[33] The Dutch judge Röling also held that crimes against peace were not crimes per se, but considered the *nullum crimen* principle a rule of policy, valid only if expressly adopted, rather than a principle of justice.

2.1.3.2 Control Council Law No. 10

Proceedings undertaken by the Allies in their respective zones of occupation under Control Council Law 10 once again led to claims that the *nullum crimen* principle had been breached. Most of these judgments dealt with crimes against humanity rather than crimes against peace, which complicated matters as the connection between crimes against humanity and a war situation of the Nuremberg Charter was removed in CCL 10. This connection was essential from a *nullum crimen* perspective as it linked the controversial category of crimes against humanity to the established category of war crimes. Without this connection, crimes against humanity formed a new category of international crime, instead of being considered a special category of war crime.
Relying on different methods of reasoning, all judgments nevertheless reached the same conclusion and rejected the defence claims concerning violations of the nullum crimen principle. The German Supreme Court in the British Occupied Zone, much like the IMT, found that in the present case "retroactive punishment is in keeping with justice".[34] In the *Justice case*, the US Military Tribunal sitting at Nuremberg famously noted that "[t]o have attempted to apply the ex post facto principle to judicial decisions of common international law would have been to strangle the law at

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[31] Quoted in: Bassiouni, *supra* note 7, p. 127.
[32] Boot, *supra* note 3, p. 200.
[33] Dis. Op. Judge Pal, Tokyo Judgment, Vol. II, p. 551.
[34] Judgment of 4 May 1948, case against Bl., in Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen (1950) Vol. 1, at 5: quoted in Lamb, *supra* note 13 p. 738.

birth".[35] Other cases chose to rely directly on the argument as propounded by the IMT that the Charter and CCL 10 were simply an embodiment of customary international law as it stood at the time.[36] In effect, none of the judgments under CCL 10 dealt convincingly with the exclusion of application of the principle of legality.[37] Ultimately they all leaned on the questionable IMT argument that the sovereign legislative power in Germany had become vested in the occupying powers and that therefore the law encompassed in the Nuremberg Charter and CCL 10 was valid.[38]

2.1.3.3 National trials

Long after the end of WWII the question of interpretation of the *nullum crimen* principle came up in several national trials of Nazi fugitives. The most famous of these concerns the *Eichmann case*[39] in Israel, which dealt with the alleged retroactivity of the 1950 Nazi and Nazi Collaborators (Punishment) Law. Here too the Jerusalem District Court rejected the plea of ex post facto legislation, with the argument that the crimes concerned were known under the laws of all civilised nations, apparently claiming them to be general principles of international law.[40] In the by now familiar approach, the court found that the law in question, even though applied retroactively, did not conflict "with the rules of natural justice".[41] On appeal, the Supreme Court confirmed that no prohibition on retroactive law existed in international law. The *nullum crimen* principle was merely a procedural safeguard or ethical principle, not a recognized principle of international law.[42]
In other cases of national prosecution of war criminals, national courts adopted a similar approach to that of the Israeli courts in relying heavily on the Nuremberg line of reasoning. No new arguments were added to this line of reasoning in the French prosecution of Klaus Barbie in 1988,[43] the Canadian prosecution of Imre Finta[44] or the Australian case against

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[35] Trials of the War Criminals, Vol. III, p. 974.
[36] *Cf. Einsatzgruppen case*, Trials of War Criminal Vol. IV, p. 458-459; *Flick case*, Trials of the War Criminals Vol. VI, p. 1189.
[37] *Cf.* Lamb, *supra* note 13 p. 738-739; Bassiouni, *supra* note 7 p. 125-126.
[38] See also the *Krupp case*, Trials of the War Criminals Vol. IX, p. 1331; *High Command case,* Trials of the War Criminals Vol. XI, p. 487; *Hostages case*, Trials of the War Criminals Vol. XI, p. 1238-1242.
[39] *Attorney General of the Government of Israel v. Adolf Eichmann,* Jerusalem District Court judgment of 12 December 1961, 36 ILR 5, p. 5.
[40] This author agrees with Bassiouni, p. 121, that international criminal law has never relied on general principles as a source for international criminalization; for another view, see Sunga, *supra* note 21, p127; also statement of de Menthon, Chief Prosecutor for the French Republic, 5 IMT 373.
[41] *Attorney General v. Eichmann*, *supra* note 39, p. 23.
[42] *Attorney General of the Government of Israel v. Adolf Eichmann*, Israeli Supreme Court judgment of 29 May 1962, 36 ILR 5, p. 281-282.
[43] French Court de Cassation (Criminal Chamber), 20 December 1985, 78 ILR 125.
[44] *R. v. Finta* [1994], 1 S.C.R. 701.

Polyukhovich as late as 1991.[45] As it would seem, indeed the reiteration of the same arguments established their validity.

2.2 Positivism and materialism

The question whether or not the post World War II trials of war criminals can be sufficiently justified with respect to the principle of legality remains open to debate. The outcome depends to a large degree on the legal-philosophical point of view one takes. A positivist approach to law, that is an approach that denies that morality is a part of the law, would lead to the conclusion that the trials violated principles of legality. A materialist approach, stressing the criterion of justice over the legal certainty concerns inherent in positivism, can find a basis for the trials. Reaching judgment after the horrors of WWII directly raised this question of the relation between law and morality and the controversy between natural law theory and legal positivism.[46]

2.2.1 The debate that wasn't: Kelsen v. Radbruch

Immediately after the collapse of the Nazi regime, Gustav Radbruch, one of the most influential German legal philosophers of the 20th century posited the principle that became famous as Radbruch's formula:

"The conflict between justice and legal certainty may be resolved in that the positive law, established by enactment and by power, takes precedence even when its content is unjust and improper, unless the contradiction between positive law and justice reaches such an intolerable level that the statute, as "incorrect law" [unrichtiges Recht], must yield to justice."[47]

Statutory rules that reach a level of extreme injustice are no longer to be considered law. This principle confronted the strictly formalistic approach to law that was propagated by positivist legal philosophers, most notably Hans Kelsen, whose "Pure Theory of Law" maintained that ethical and political questions should remain outside the law.[48] Though an actual debate never took place, it is more than informative to investigate the two theories.

2.2.1.1 Radbruch's formula

The impression left by the Nazi dictatorship led Radbruch to introduce his thesis and formula. The thesis proposed stated: "positivism, with its credo

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[45] Lamb, *supra* note 13 p. 739.
[46] Haldemann, F., *Gustav Radbruch vs. Hans Kelsen: A Debate on Nazi Law*, Ratio Juris Vol. 18 No. 2 June 2005, p. 162.
[47] Radbruch, G., *Gesetzliches Unrecht und übergesetzliches Recht*, Süddeutsche Juristen-Zeitung 1, 107, quoted in: Haldemann, *supra* note 46, p. 166.
[48] Kelsen, H., *Reine Rechtslehre* (1960), p. 70.

that 'law is a law' rendered the German legal profession defenceless against laws of arbitrary and criminal content".[49] Though the thesis is controversial and questionable[50], the accompanying formula has achieved great fame and support.
The formula consists of two parts. The first part contains the definition that states when positive law should be considered invalid, that is when it departs from justice to an intolerable level. As Radbruch recognised, it is virtually impossible to draw a sharp line between "statutory non-law and law that is still valid despite unjust content".[51] The second part of the formula considers when this is certainly the case:

"Where there is not even an attempt to achieve justice, where equality, the core of justice, is deliberately disavowed in the enactment of positive law, then the law is not merely "incorrect law," it lacks entirely the very nature of law."[52]

Equality then is the heart of justice and when such equality is deliberately denied legal certainty has to give way to justice.
Nevertheless, the formula is not strictly materialist. The notion of justice only comes into play in extreme cases (such as the Nazi regime). In day-to-day situations morality is not a part of determining the validity of law. In this sense the formula offers a middle road between strictly justice based natural law theory and formalist legal positivism. Radbruch's formula has its basis in positive law, but combines this with morality in certain specific situations.[53]

2.2.1.2 Kelsen and the Pure Theory of Law

Radbruch's theory can be seen as a direct critique of legal positivism as propounded by Kelsen. Kelsen shares with earlier positivists the conviction that morality and law are separable spheres.[54] Moral illegitimacy does not entail legal invalidity.[55] Morality is not a part of the law, so any content can be legal.[56]
Kelsen's "pure theory of law" attempts to bring the study of law to the level of a legal science. In such a legal system ethical statements have no value, as their validity cannot be properly verified due to the relativity of their

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[49] Radbruch, *supra* note 47, p. 107.
[50] Paulson, S. L., *Lon L. Fuller, Gustav Radbruch, and the "Positivist" Theses*, Law and Philosophy 13, p.313-315; Mertens, *Radbruch and Hart on the Grudge Informer: A Reconsideration*, Ratio Juris Vol. 15 No. 2 June 2002, p. 188, 193.
[51] Radbruch, *supra* note 47, p. 107.
[52] *Ibid.*
[53] Leawoods, H., *Gustav Radbruch: An Extraordinary Legal Philosopher*, Washington University Journal of Law & Policy 2, p. 491.
[54] *Cf.* John Austin, *The Province of Jurisprudence Determined*, Lecture V (5th edition 1885).
[55] Kelsen, *supra* note 48, p. 70.
[56] Haldemann, *supra* note 46 p. 167; Gattini, A., *Kelsen's Contribution to International Criminal Law*, 2 JICJ 3 (2004), p. 796.

content.[57] Justice should be separated from law, as only the content of positive law can be objectively ascertained.[58] The contradiction with Radbruch's theory is obvious.
The pure theory of law did present Kelsen with a problem in justifying the post-WWII trials. Under the pure theory of law, Nazi-law was considered perfectly valid.[59] Punishment then would be purely retroactive. Nevertheless, Kelsen claimed that the protection against retroactive legislation was not absolute. What's more, "justice required the punishment of these men, in spite of the fact that under positive law they were not punishable at the time they performed the acts made punishable with retroactive force".[60] Ironically, here Kelsen's views rely on a value judgment and seem to converge with Radbruch's.[61]

2.2.2 The debate that was: Hart v. Fuller

The Kelsen v. Radbruch debate never actually took place. However, if it had it could well have moved along the lines of the Hart v. Fuller controversy. The origin of this controversy lies in the willingness of post-war West German courts to rely, if necessary, on the Radbruch formula.[62]

2.2.2.1 Hart and Liberal Positivism

Hart took a stand against Radbruch's formula and its application by German courts.[63] He claimed that Radbruch's solution concealed the actual dilemma involved in the conviction of Nazi criminals, which was that one had to choose between two evils: that of retroactive punishment and that of leaving unpunished persons that had committed outrageously immoral deeds. Hart insisted on a distinction between invalidity of the law and its immorality.[64] This distinction would at least recognise the choice between the two evils. The solution to dealing with wicked law lies not in its invalidity, but in the recognition that "law may be law but too evil to be obeyed".[65]

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[57] Kelsen, *supra* note 48, p. 66.
[58] Brand-Ballard, J., *Kelsen's Unstable Alternative to Natural Law: Recent Critiques*, 41 American Journal of Jurisprudence 133 (1996), p. 139-140.
[59] *Cf.* Statement by Lovejoy, T., "Once something is approved by the government, it is no longer immoral."
[60] Kelsen, H., *Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?*, ICLQ 1 (1947), p. 165.
[61] *Cf.* also Kelsen, H., *Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals*, 31 Calif. L. Rev., p. 544; Bassiouni, *supra* note 7, p. 89.
[62] Haldemann, *supra* note 46, p.171 with reference to BGHSt 2, 234 [238].
[63] See Hart, H. L. A., *Positivism and the Separation of Law and Morals*, Harvard Law Review 71, 593-629.
[64] *Ibid.*, p. 618.
[65] *Ibid.*, p. 620.

2.2.2.2 Fuller and the Internal Morality of Law

Fuller's reply to Hart's positivism is to be seen as an attempt to once again import morality into the concept of law.[66] The dilemma, presented by Hart, between the obligation to obey the law and the obligation to act morally made no sense. It disregarded the necessary connection between law and morality, namely that the notion of law itself has inherent moral aspirations. There is an "internal morality of law"[67] that inspires the moral obligation of adherence to the law. Positivism failed to account for this.
With regard to post-war German justice, Fuller supported Radbruch's formula. Though he leaned towards application of retroactive statutes (as did Hart) the difference lies where no such statute had been enacted. Hart considered it worse to convict someone without a retroactive law than let him go unpunished. In this situation Fuller considered invalidity of 'evil' law, as in Radbruch's formula, the only recourse open to the courts.

2.2.3 Theory in practice

The difference between Radbruch and Kelsen centres on their views on ethical relativism. Kelsen excluded morality from the law because of the uncertainty of its relative content. Nevertheless, it can hardly be held that in different ethical systems there is not a common, convergent view on basic issues.[68] The problem is that Kelsen's premise leaves no room for the distinction between morally right and wrong, meaning that it is self-defeating in the sense that it is compatible with 'evil' systems that make a mockery of legal formalism by perverting the law.[69]
Similarly, Hart's alternative to Radbruch's natural law notion does not convince. One can say a person has a choice between obeying the law and obeying morality but then we are effectively back with Radbruch's theory, as one has to ignore positive law to steer clear of future criminal liability, though this time based on retroactive law. One can ask if there really is an essential difference between retroactivity and invalidity ab initio?[70]
More importantly, Radbruch's formula offers practical advantages that the more theoretical approach of Kelsen and Hart lacks. With a view to eradicating legalised injustice, Radbruch's formula makes it easier for a judge to refuse to enforce such unjust laws. In the formalist approach, the judge is effectively forced to apply it. The only response to unjust regimes that Kelsen and Hart offer is the enactment of retroactive laws, which is no solution to the underlying problem of legal validity of unjust laws. In fact, in this respect positivism as proposed by either Kelsen or Hart is

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[66] Dyzenhaus, D., *Hard cases in wicked legal sytems: South African law in the perspective of legal philosophy*. (1991), p.18.
[67] Fuller, L. L., *Positivism and Fidelity to the Law – A Reply to Professor Hart*, Harvard Law Review 71, p. 656.
[68] *Cf.* Brand-Ballard, *supra* note 58, p. 145 with further reference.
[69] Haldemann, *supra* note 46, p. 174.
[70] Mertens, *supra* note 50, p. 199.

inconsistent as it sacrifices what is its basic premise, namely legal certainty.[71] It is a purely procedural argument which led Fuller to note that the debate had now eroded to a discussion whether it was the legislator or the court "who should do the dirty work".[72]

2.3 A sound precedent?

Irrespective of the fact whether Radbruch's solution is the 'best' possible solution, it is the only consistent theory. As experiences with evil regimes have shown, Fuller's internal morality of law defeats Hart's choice between obedience to law or to morality. People tend to obey the known law, rather than the abstract notion of morality, which can only be counterbalanced by admitting morality as a part of the law. Radbruch's formula is the only theory to effectively balance positive law and moral aspirations. Nevertheless, the IMT chose to find its own path through the thicket, relying on a far less consistent combination of naturalist as well as positivist arguments. It can hardly be denied that the Tribunal did apply retroactive legislation.[73] Its value as a precedent for subsequent WWII war crimes trials is questionable,[74] though this has not withheld later courts from relying on it.

2.3.1 Equity as a source

Other than in German courts, the Radbruch formula has never been applied explicitly, though the IMT's judgment would have been all the more consistent for it. As noted, the IMT simply claimed it had not violated the principle of legality, but it applied the principle in a far more liberal way than is common in national jurisdictions.[75] This was certainly aided by the character of the crimes charged, which encouraged the court to be led by unhindered natural law notions.[76] Individual criminal responsibility could be based on customary law and even general principles of law or laws of humanity. In the end equity compelled the rejection of the perpetrators claims at Nuremberg, Tokyo and subsequent trials arising out of the WWII tragedy.[77] As US chief-prosecutor Jackson noted:

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[71] *Ibid*., p. 189; Hart admits that this is the price that must be paid, Hart, *supra* note53, p. 619.
[72] Fuller, *supra* note 67, p. 649.
[73] McGoldrick, D., *Criminal Trials Before International Tribunals: Legality and Legitimacy,* in: McGoldrick, Rowe and Donnelly (Eds.), *The Permanent International Criminal Court* (2004), p.16; Ratner, S. R. and Abrams, J. S., *Accountability for Human Rights Atrocities in International Law* (2001), p. 22.
[74] Kelsen, *supra* note 60, p. 171; cf. Fawcett, J. E. S., *The Eichmann Case*, 38 BYIL (1962), p. 215 on the value of the Eichmann judgment.
[75] *Cf*. Paust, J. J., *Nullum Crimen and Related Claims*, 25 Denv. J. Int'l L. & Pol'y (1997), p. 322.
[76] Boot, *supra* note 3, p. 219.
[77] Bassiouni, *supra* note 7, p. 132.

"That men may be protected in relying upon the law at the time they act is the reason we find retroactive operation unjust. But these men cannot bring themselves within the reason of the rule…"[78]

Even more telling perhaps, is the statement by Hartley Shawcross, the British chief prosecutor, concerning possibly new law in the Charter:

"If this be an innovation, it is an innovation long overdue – a desirable and beneficent innovation fully consistent with justice, fully consistent with common sense and with the abiding purposes of the law of nations"[79]

Even though some writers have admitted that the principle of legality was breached in Nuremberg,[80] this is generally countered by the claim that a rule against retroactive legislation is not valid in international law.[81] Based on the Nuremberg judgment, the view that the difference between international law and national law accounts for a different application of legality in the two spheres has become at least partly accepted.[82]

2.3.2 National v. International

It needs to be questioned whether this difference is really that substantial. An argument can be made that the material sources of law in international law are not all that different from sources applied in national law. The real difference lies in the forming of formal sources of law. International law lacks a legislator, meaning that its rules come about through different processes, but its main sources, treaties and custom, are similar in application and interpretation to national written and unwritten sources of law.[83] It is true that the international criminal law system is far less comprehensive than most national systems, but that does not mean that its imperfections should be compensated at the expense of defendants.[84]
In addition, the argument is an artificial one, as it does not clearly explain why the principle of legality should apply differently. The Nuremberg judgment contradicts itself here, as it does accept criminal responsibility based on general principles of law derived from national systems, but refuses to accept the *nullum crimen* principle as a general principle of law.

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[78] Opening statement, 2 IMT 144; see also Jackson's statement in 2 IMT 147.
[79] 3 IMT 104.
[80] Ehard, H., *The Nuremberg Trial against the Major War Criminals*, AJIL Vol. 43 (1949), p. 239.
[81] Kelsen, *supra* note 60, p. 165 presenting it as a *tu quoque* argument; for a different opinion, see Ehard, H., *supra* note 80, p. 231.
[82] *Cf.* Herik, L. J. van den, *The Contribution of the Rwanda Tribunal to the Development of International Law* (2005), p. 213; Glaser, S., *La Méthode d'Interpretation en Droit International Penal*, 9 Rivista Italiana di Diritto e Procedura Penale (1966), p. 762-764; also Bassiouni, *supra* note 7, p. 112.
[83] For analogy of the domestic and international sphere see Koskenniemi, M., *Hersch Lauterpacht and the Development of International Criminal Law*, 2 JICJ 3 (2004), p. 815.
[84] As opposed to statement of Hartley Shawcross, 3 IMT 106.

Perhaps it did not yet exist in the strictly positivist sense it seems to apply today, but a prohibition on retroactivity could be found in most any national legislation at the time.[85] Recognising its existence would have added to the persuasiveness of the Nuremberg judgment. Instead, the Nuremberg Tribunal chose to override the principle with considerations of justice. The prevalence of notions of justice over defendant's rights has not remained exclusive to Nuremberg though.[86]

2.3.3 Q & A

As mentioned, the Nuremberg judgment and its underlying philosophical debate raise almost as many questions as they answer. The argument concerning different application of legality in international and national law, questionable at the time, has become even more debatable. The principle of legality has found its way into many international human rights and humanitarian law instruments,[87] stressing its importance in both national and international law. It has become accepted as a general principle of international law, though its exact content is not yet clear.
From a philosophical perspective, one can say that this development has also overtaken the discussion on the relativity of morality. The enactment of numerous human rights instruments proves there is a convergence of ethics. Natural law theory has found a place in positive law. The principle of legality as an individual right of protection against arbitrary prosecution is now an equal part of this legal framework. Looking back, the Nuremberg judgment is irreconcilable with this individual rights based approach and in this light stands out even more as a political judgment. Though perhaps understandable, it is not the proper legal response when confronted with acts committed by 'evil' regimes. In its own (negative) way, because of the controversy surrounding it, the Nuremberg judgment can nevertheless be said to have been a catalyst for the development of international law after WWII. In contrast, Radbruch's formula, which the IMT did not apply, only seems to have been confirmed.[88]
The question remains what the value of the principle of legality in international law is and how the developments of international criminal law and human rights law have changed its perception. These questions will be discussed against the background of national doctrines of legality (chapter 3) and the case law of the European Court of Human Rights (chapter 4). Chapter 5 and 6 will deal with the Ad Hoc criminal tribunals and the International Criminal Court and investigate the value of the principle of legality as a human right in an international criminal law context.

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[85] Lamb, *supra* note 13, p. 737.
[86] See below, German Border Guard cases (4.3) and Conclusion (7).
[87] *E.g.*. Art. 99 Geneva Convention III relative to the Treatment of Prisoners of War (1949), entry into force 21 October 1950, 75 UNTS 135 and many human rights treaties, see below 4.
[88] See below 4.4.1.

3 NATIONAL SYSTEMS

The principle of legality finds its origin in national law. Its importance is recognised in most any national criminal law system. However, as different states have different systems of applying criminal law, the underlying principles, such as the principle of legality, can also be applied differently. In broad terms, national legal systems can be divided into common law and civil law systems. If these different systems take a different approach to the principle of legality, the question is if despite these differences similar underlying ideas about the *nullum crimen* principle can be identified.
The national systems of choice here are those of Germany and the USA. Germany is examined as an example of a civil law country with an elaborate legal doctrine that has exerted considerable influence over other European and non-European states.[89] The USA is an example of a common law country, but one that has seen progressively more codification of criminal law, the development of which resembles that of international criminal law.

3.1 Germany

The German legal system has one of the oldest and most consistent traditions in applying principles of legality, but has also faced some of the most vigilant assaults on it.[90] Historically, Germany can be regarded as the torchbearer among the legal systems of Continental Europe with its tendency to strictly apply the *nullum crimen* principle. The experiences of the Nazi era and the communist regime in the former German Democratic Republic have underlined its importance and serves to understand present German doctrines of legality.[91]
The German Criminal Code of 1871 contained a rigid norm on the principle of legality in its article 2. This article was identical to that in the Prussian Criminal Code of 1851, which in turn had borrowed it almost literally from the French Code Pénal of 1810.[92] The rule first found constitutional recognition in article 196 of the 1919 Weimar Constitution.[93] All these articles included the prohibition of analogy.
National Socialist theory in the 1920's and 1930's however, sought to create a new legal order. Legality was not a primary concern, as can be learned from the introduction of the Reichstag Fire Decree, which provided the

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[89] Boot, *supra* note 3, p. 81
[90] Bassiouni, *supra* note 7, p. 97.
[91] Boot, *supra* note 3, p. 88; Bassiouni, *supra* note 7, p. 99; but also influenced perceptions of legality in the US, Jeffries, J. C., *Legality, Vagueness and the Construction of Penal Statutes,* 71 Virginia Law Review 189 (1985), p. 195, see below 3.2.2.
[92] Jescheck, H-H. and Weigend T., *Lehrbuch des Strafrechts, Allgemeiner Teil* (1996), p. 132; Roxin, C., *Strafrecht, Allgemeiner Teil*, Band 1 (1997), p. 100, rdnr. 14
[93] Tröndle, H., *§1 StGB* in: Jescheck/Ruß/Willms, *Strafgesetzbuch, Leipziger Kommentar*, Band 1 (1985), rdnr. 4.

opportunity to retroactively impose capital punishment on the suspected arsonists who allegedly torched the Reichstag.[94] Subsequently, in 1935 article 2 of the Criminal Code was repealed and a new law enacted that abandoned the prohibition of analogy and permitted judicial crime creation.[95] The new maxim would be '*nullum crimen sine poena'*.[96] Protection of the state became the first priority. In addition to the law, in the absence thereof, criminal punishment could be based on the 'sound perception of the people' ('nach gesundenem Volksempfinden') or analogous application of existing laws, effectively creating a new and unchecked source of criminalisation. Though the actual significance of the new law has been disputed, it has been recognized by the German Constitutional Court that an enormous loss of legal certainty followed.[97] After the war, the Allied Control Council abolished the law of 1935 and in the new German Basic Law (Grundgesetz, GG) the principle of nullum crimen, nulla poena sine lege was reintroduced in article 103 (2). In reaction to the abuses during the Nazi period, German attitudes towards legality swung in the opposite direction. It has come to be recognized as an essential part of the criminal legal system.

3.1.1 Rechtsstaatprinzip

The root of the German principle of legality (Gesetzlichkeitsprinzip) can be found in article 20(3) GG, the Rechtsstaatprinzip.[98] It aims to protect the individual from legislative arbitrariness and guarantees legal certainty.[99] This is considered to be of particular importance in the area of criminal law, where government intrusion on individual rights is often felt most deeply. The Rechtsstaatprinzip contains a formal and a material element. The formal element is primarily aimed at the promotion of legal certainty. In the area of criminal law this role is filled by the Gesetzlichkeitsprinzip of article 103(2) GG and article 1 of the Criminal Code (Strafgesetzbuch, StGB). It is considered to consist of four prohibitions.[100] Firstly, conduct can only be punished if both criminality and penalty had been defined before the conduct took place. Secondly, criminalisation of conduct can only be based on a written law. Thirdly, such laws must be sufficiently clear and definite. And finally, application of laws by analogy is not permitted.

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[94] 'Lex van der Lubbe', Reichsgesetzblatt (1933), I, 83; Müller, I., *Hitler's Justice: The Courts of the Third Reich* (1991), p. 29.
[95] Law of June 28 1935, Reichsgesetzblatt (1935), I, 839; Roxin, *supra* note 92, p. 100, rdnr. 15; Müller, *supra* note 94, p. 74.
[96] Jescheck/Weigend, *supra* note 92, p. 137; Müller, *supra* note 94, p. 74.
[97] Boot, *supra* note 3, p. 87; Tröndle, *supra* note 93, rdnr. 6.
[98] Schmitz, R., *§1 StGB* in: Heintschell-Heinegg, *Münchener Kommentar zum Strafgesetzbuch*, Band I (2003), p. 40, rdnr. 8; Jescheck/Weigend, *supra* note 92, p. 128; also BVerfGE 85, 69 [73]; BVerfGE 87, 209 [224]; Tröndle, *supra* note 93, rdnr. 9.
[99] Krey, V., *Deutsches Strafrecht, Allgemeiner Teil* (2001), p. 23, rdnr. 59.
[100] Schmitz, *supra* note 98, p. 45, rdnr. 23; Köhler, M. *Strafrecht, Allgemeiner Teil* (1997), p. 75; Eser, A., *§1 StGB* in: Schönke/Schröder, *Strafgesetzbuch Kommentar* (2001), p. 25, rdnr. 6.

The material element of the Rechtsstaatprinzip concerns what the content of the law should be to conform as closely as possible to the ideal of a just state.[101] It is a value judgement of the law. An unjust law is not a law and injustice cannot be made just by dressing it up as law.[102] The element of 'materiele Gerechtigkeit' is also referred to as substantive justice.
The formal element of legal certainty and the material element of justice cannot always be taken into account evenly by the legislator. As the German Constitutional Court has found, when they collide, it is primarily for the legislator to decide whether legal certainty or substantial justice is to prevail. If this is done without arbitrariness, it will not be considered unconstitutional.[103]
The protection of the trust a person may put into legal certainty is therefore not absolute, the principle of legality is not applied without exceptions. In certain situations, when such trust cannot be objectively justified, it need not be protected. The possible conflict between legal certainty and substantive justice will be further considered below.[104]

3.1.2 Purposes of legality

The Gesetzlichkeitsprinzip as applied today finds its origin in the Enlightenment.[105] It is based on four notions that, to some degree, are still equally important today. The first two, rule of law and separation of powers, are of a constitutional nature. The second two, fair warning and the guilt principle, solely concern criminal law.

3.1.2.1 Rule of law

An essential foundation of the Gesetzlichkeitsprinzip is that both executive and judiciary are bound by law. The historical explanation lies in the unbridled arbitrariness of absolute rulers right through the 18th century. The rights slowly won by the citizens required protection, which could only be achieved by limiting such arbitrary powers through binding them by law.[106] Though circumstances today are substantially different, rule of law notions continue to play a substantial part in achieving similar purposes. When the goal of article 103(2) GG is considered to be the protection of trust in the law, legal certainty and forseeability[107], as well as the protection of individual rights from arbitrary

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[101] *Cf.* BGH 24, 173 [175].
[102] Jescheck/Weigend, *supra* note 92, p. 126.
[103] BVerfGE 25, 269 [290-291] referring to BVerfGE 3, 225 [230].
[104] See below 4.3.
[105] Roxin, *supra* note 92, p. 101, rdnr. 18.
[106] Tröndle, *supra* note 93, rdnr. 3; Roxin, *supra* note 92, p. 102, rdnr 19.
[107] Eser, *supra* note 100, p. 24, rdnr. 1a; also BVerfGE 85, 73; BVerfGE 87, 224; BVerfGE 92, 12.

intervention[108], binding executive and judiciary to abstract rules is still essential and should be considered its primary guarantee.[109]

3.1.2.2 Separation of powers

Equally influential is the notion of separation of powers. The punishment of certain conduct is considered such a strong interference with individual rights, that only the institution directly representing the people can legitimise them.[110] Lawmaking is first and foremost the prerogative of parliament, as the democratically elected representation of the people.[111] The role of the judiciary largely remains limited to application of the law. The importance of the separation of powers doctrine can be noted when recognising that it carries three of the four prohibitions included in the Gesetzlichkeitsprinzip.[112] The prohibition of applying custom, the prohibition of analogy and the prohibition of indefinite criminal statutes directly concern parliament's primacy in creating law and distinguishing this role from the judiciary's.

3.1.2.3 Fair warning (generelle Prevention)

The third notion that forms part of the basis for the Gesetzlichkeitsprinzip is that of fair warning. An individual has to receive fair warning of what the law is, what conduct is considered punishable and what the consequences of such conduct are. Criminal laws are considered more effective in their role of general prevention when they are phrased more precisely.[113] This goes for the threat that emanates from the statute in question (negative aspect) as well as stimulating adherence to the law through the building of legal certainty (positive aspect).[114]
A lack of certainty in criminal law will neither ensure any sort of preventive function or deterrence, nor will it provide the necessary guidance for the average, law-abiding citizen.

3.1.2.4 Guilt principle (Schuldprinzip)

The final basis for the Gesetzlichkeitsprinzip is the Schuldprinzip. This is considered a fundamental constitutional principle.[115] It denotes that an offender must in fact be 'culpable' for his conduct; punishment presupposes

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[108] BVerfGE 64, 393.
[109] Krey, *supra* note 99, p. 23; Roxin, *supra* note 92, p. 102, rdnr; 19.
[110] Jescheck/Weigend, *supra* note 92, p. 128; Eser, *supra* note 100, p. 24, rdnr. 1a.
[111] BVerfGE 47, 109 [120]; BVerfGE 71, 114; BVerfGE 73, 235; BVerfGE 87, 223.
[112] Roxin, *supra* note 92, p. 103, rdnr 21; see below 3.1.3.
[113] Boot, *supra* note 3, p. 93; Eser, *supra* note 100, p. 28, rdnr. 17.
[114] Roxin, *supra* note 92, p. 103, rdnr. 23.
[115] Jescheck/Weigend, *supra* note 92, p. 23; BVerfGE 25, 269 [285].

culpability.[116] The Schuldprinzip implies that the offender must have had a real opportunity to act in conformity with the law in order to be punishable.[117] The relation to fair warning is obvious; if an individual has not received fair warning, he has had no opportunity to act in conformity with the law.
It is worth noticing though, that article 17 StGB does not require that an offender is aware that his conduct is punishable, only that it is unjust. Though in practice it will be assumed that the offender must have had the opportunity to know the particular criminal rule to fulfil the injustice requirement,[118] it does leave the door open for a wider assumption of culpability based on an offender's comprehension of injustice.

3.1.3 The Gesetzlichkeitsprinzip

The Gesetzlichkeitsprinzip has been laid down in article 103(2) GG and article 1 StGB. Both articles employ the same wording: "an act may be punished only if it was defined by a law as a criminal offence before the act was committed".[119] As mentioned, it contains four prohibitions.

3.1.3.1 Prohibition of custom

The use of the word 'gesetzlich' (by law) in articles 103(2) GG and 1 StGB clarifies that German criminal law doctrine is based on penal statutes, thereby excluding customary law as a basis for punishment.[120] The Gesetzlichkeitsprinzip establishes that only a written statute can be regarded as the basis for criminalisation of conduct and attach punishment as a legal consequence. This includes every written legal norm, not just formal laws.[121] Even international obligations to make certain conduct punishable cannot create a national custom that can be enforced.[122]
However, custom that works in favour of the defendant, such as reasons for exculpation, is recognised.[123] The prohibition is qualified; custom is not to be relied on to the defendant's detriment.

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[116] Boot, *supra* note 3, p. 90-91.
[117] BGHSt 2, 194 [200]; BGHSt 10, 259 [261]; BGHSt 18, 87 [94].
[118] Roxin, *supra* note 92, p. 104, rdnr. 25; Eser, *supra* note 100, p. 24, rdnr. 1a.
[119] "Eine Tat kann nur bestraft werden, wenn die Strafbarkeit gesetzlich bestimmt war, bevor die Tat begangen wurde.", translation: Flanz, G., *Constitutions of the Countries of the World*, Band VII Germany (2003), p. 77.
[120] Boot, *supra* note 3, p. 95.
[121] BVerfGE 75, 329 [342]; BVerfGE 78, 374 [382].
[122] Tröndle, *supra* note 93, rdnr. 20; Eser, *supra* note 100, p. 26, rdnr. 8; Arnold, J., Karsten, N. And Kreicker, H., *The German Border Guard Cases before the European Court of Human Rights*, 11 European Journal of Crime, Criminal Law and Criminal Justice 1 (2003), p. 71.
[123] Jescheck/Weigend, *supra* note 92, p. 134; Roxin, *supra* note 92, p. 116, rdnr. 50; *cf.* BGHSt 18, 136 [140]; also German border guard cases, below 4.3.

The prohibition of custom as a basis for punishability has several justifications. Sticking to written sources of law will effectively protect individuals from judicial arbitrariness, it secures the primacy of the legislator over the creation of new law and serves to increase legal certainty and provide fair warning of what constitutes criminal conduct.

3.1.3.2 Prohibition of indeterminate statutes (Bestimmtheitsgebot)

The second requirement of the Gesetzlichkeitsprinzip is that criminal laws must be sufficiently precise (bestimmt). Criminal law can only fulfil its purpose properly when both the criminalised conduct and its consequences are defined with sufficient definiteness. The elements of the conduct especially need to be phrased precisely, penalties need only be certain within a particular framework.[124] It prevents judicial lawmaking, creates forseeability of the law and leaves it up to the legislator to make policy decisions.[125]
The statutory definition of a crime is only considered sufficiently 'bestimmt' when the conditions for punishability as well as the type and gravity of punishment are defined in a way that makes it possible for an individual to know, by measure thereof, what the consequences of his conduct will be.[126] It is however recognised that the Bestimmtheitsgebot should not be exaggerated. It is acceptable to use open norms (Generalklauseln) or general phrasings that require judicial interpretation to avoid overly rigid and casuistic statutes.[127] It does require the legislator to use definite concepts as far as possible. The legislator cannot choose to leave value judgements it should make itself to the judiciary.[128]
Bestimmtheit is more a matter of degree than a definite standard, making it difficult to identify hard criteria to measure possible violations.[129] A penal statute will be considered sufficiently definite if its meaning can be extracted through normal methods of interpretation, supplemented by the existence of case law.[130] In addition, Bestimmtheit may depend on the person to whom a statute is addressed. When addressed to a person with specialised knowledge in a particular area, the use of less definite concepts or jargon will be less likely to violate article 103(2).[131]

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[124] Schmitz, *supra* note 98, p. 54, rdnr. 52; Roxin, *supra* note 92, p. 130, rdnr. 82; Eser, *supra* note 100, p. 31, rdnr. 23; *cf.* also Tröndle, *supra* note 93, rdnr. 19.
[125] BVerfG NJW 86, 1671; BVerfG 87, 44; BVerfGE 14, 252; BVerfGE 25, 285; BVerfGE 26, 42; BVerfGE 37, 207.
[126] Boot, *supra* note 3, p. 96-97 with reference to BVerfGE 47, 109 [120]; also BVerfGE 92, 12 [18]; Schmitz, *supra* note 100, p. 41, rdnr. 12.
[127] BVerfGE 14, 245 [251]; BVerfGE 4, 352 [358].
[128] Boot, *supra* note 3, p. 97; also Köhler, *supra* note 100, p. 75; BVerfGE 45, 363 [371ff].
[129] Eser, *supra* note 100, p. 29, rdnr. 20.
[130] BVerfGE NJW 1978, 101; BGHSt 28, 313.
[131] BVerfGE 48, 48 (= NJW 1978, 1423).

Finally, there is also a degree of proportionality involved. The more severe a possible penalty will be or the greater the interest a statute seeks to protect, the more precisely it needs to be phrased.[132]
Application of the Bestimmtheitsgebot in practice has not remained without criticism though. The (too) widespread use of open norms and phrases that require a judicial value judgement have made it an often-overlooked norm.[133] Nevertheless, it will not easily be considered breached. Seldom are statutes rejected for being indefinite.[134] The German Constitutional Court considers the Bestimmtheitsgebot satisfied when indefiniteness is cleared by a consistent application by the courts.[135]

3.1.3.3 Prohibition of analogy

The Gesetzlichkeitsprinzip also prohibits founding of punishability and aggravation of punishment based on an application by analogy. Though analogy is accepted in private law, it cannot be used in penal law, as the Bestimmtheitsgebot would be rendered meaningless without it.[136]
Application by analogy refers to extending the scope of a law to a situation it is not intended to cover and that is not addressed in any law.[137] It is essentially a judicial method of filling gaps in the law.
The distinction between statutory interpretation and application by analogy is not always easily identified, but the limit of interpretation defines analogy. The aim of interpretation is clarifying legislative intent and adapting the law to changed circumstances. Analogy seeks to fill gaps in the law, thereby effectively creating new, judge-made law.[138]
In practice, it will be the 'möglichen Wortsinn' (possible meaning) that distinguishes interpretation from analogy.[139] The framework for judicial interpretation is limited by the explanation that the words in question can still support. Surpassing this limit will be considered analogy. In this sense, 'theft' of electricity was not seen as being covered by the statutory definition of theft, as electricity could not be regarded as an object in the sense of the article. The word 'object' could not support the intangible phenomenon of electricity.[140]
The prohibition of analogy concerns both the elements that make up the criminal conduct as well as the punishment. However, as with the prohibition of custom, application by analogy is allowed in the defendant's favour. Grounds for justification of conduct or exculpation can be applied

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[132] Eser, *supra* note 100, p. 30, rdnr. 21; also BVerfGE NJW 79, 1445-1448; BVerfGE 14, 251; BVerfGE 26, 42.
[133] Schmitz, *supra* note 98, p. 41, rdnr. 10 with further reference.
[134] *Cf.* BVerfGE 26, 41 [41]; BVerfGE 87, 209 [222]; occasionally phrasings are rejected: BVerfGE 78, 370 [374]; BayVerfGHE 4, 194 [204].
[135] BVerfGE 28, 175 [183]; BVerfGE 37, 201 [208]; BVerfGE 45, 363 [372].
[136] Schmitz, *supra* note 98, p. 55, rdnr. 55; Tröndle, *supra* note 93, rdnr. 40.
[137] Eser, *supra* note 100, p. 31, rdnr. 24; RGSt 44, 35; OLG Hamburg, NJW 1972, 1290.
[138] Jescheck/Weigend, *supra* note 92, p. 158; Boot, *supra* note 3, p. 102.
[139] Roxin, *supra* note 92, p. 105-106, rdnr. 28; Tröndle, *supra* note 93, rdnr. 31.
[140] RGSt 29, 111; RGSt 32, 165; also RGSt 29, 111 [115]; BGHSt 2, 317 [319].

by analogy.[141] Moreover, analogy is permitted as a method of interpretation as long as it does not concern the basis for punishability and does not aggravate the possible penalty.
The prohibition of analogy has been regularly breached though. This occurs most often when the courts, in interpreting a statute, rely on the purpose of a law rather than its wording.[142]

3.1.3.4 Prohibition of retroactivity (Rückwirkungsverbot)

The Rückwirkungsverbot states that an act, which was not punishable at the time it was committed, cannot be made punishable after that time, nor can a possible punishment be aggravated after that time. It serves not just the forseeability of punishability for the individual, but it also provides the opportunity to adapt ones conduct accordingly, which it essential for establishing culpability.[143] The Rückwirkungsverbot is not absolute though; there is no general prohibition of retroactivity.[144] Consistent with other prohibitions encapsulated in article 1 StGB, deviation in favour of the defendant is allowed.[145]
Other exceptions have also been made. The Schuldprinzip requires a defendant's culpability. This culpability need not necessarily be based on a statute, but can also be based on the material injustice of the act committed. Culpability can therefore also exist, when the act in question has not been criminalised yet.[146] In such cases, substantive justice can overrule the strict application of the prohibition of retroactivity.[147]
The prohibition is aimed at both the legislator and the judiciary. Its influence over the judiciary is limited though. It cannot be regarded to cover changes in interpretation, as this is per definition retroactive. Changes in interpretation do not violate the principle of legality, so long as they stay within the limits of interpretation set by the Bestimmtheitsgebot.[148]

3.2 United States

The principle of legality as understood and applied in the United States is neither based on the same ideological background as the Continental system, nor is it still directly related to English common law notions.[149] The elements that make up the principle of legality are the result of different ideas and different times.

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[141] Eser, *supra* note 100, p. 33, rdnr. 30; RGSt 59, 412; BGHSt 15, 199; BGHSt 14, 217.
[142] BGHSt 10, 375 [375ff]; BGHSt 29, 311 [312]; BGHSt 18, 114 [117].
[143] See above 3.1.2.4.
[144] Maunz, T. and Dürich, G., *Grundgesetz: Kommentar*, Art. 103 II, rdnr. 238.
[145] Eser, *supra* note 100, p. 28, rdnr. 16.
[146] Jescheck/Weigend, *supra* note 92, p. 138.
[147] *Cf.* German Border Guard cases: BVerfGE 95, 96 [130ff]; also below 4.3.
[148] *Cf.* Roxin, *supra* note 92, p 122, rdnr. 61.
[149] Boot, *supra* note 3, p. 109, 117.

The foundation of the present day US criminal law systems was laid by the reception of the English common law in the 18th century. Along with common law definitions of crimes made by English courts, the assumption that judges could create new crimes was adopted. Around the same time, 'enlightened' thinking in Continental Europe developed the idea of the principle of legality in the modern sense. Whereas the common law had been readily accepted, attempts to implement the Continental principle of legality through extensive criminal law codification were unsuccessful.[150] Until as late as the beginning of the 20th century the common law methodology continued to exist.
During the 19th century however, the gradual accumulation of criminal statutes and precedent progressively filled existing gaps in the law and reduced the need to rely on common law notions and judge made law. The United States criminal law system began a move from its common law foundations to a statute-based system. Today, it can neither be said to be a common law system, nor a civil law system in the strict sense.
The United States effectively encompasses 51 criminal law systems, 50 states and 1 federal. The Tenth Amendment of the US Constitution proclaims that the federal government only possesses those powers that the Constitution expressly or impliedly grants. Extensive use of those powers by Congress has substantially increased the reach of federal criminal law throughout the 20th century. The majority of federal criminal law is found in Section 18 of the United States Code. Nevertheless, federal criminal law is far from a systematic codification.[151] On the state level, common law crimes continue to exist. In addition, both on the federal and on the state level, common law methods of legal reasoning continue to be applied.[152]
The principle of legality as found today is very much a reflection of this mixed situation. Rather than having a strict ideological basis, it is a pragmatic outcome of the development of the criminal legal system. It shows that the perception of the principle of legality in general is shaped by the legal system from which it flows and is not an independent principle.

3.2.1 Principle of legality

The principle of *nullum crimen sine lege*, or more specifically, the desirability of advance legislative specification of criminal misconduct today is firmly established in the United States.[153] It is considered "the first principle of American justice", overriding all other criminal law doctrines and "applies even though its application may result in a […] culpable person escaping punishment.[154] In contrast to the German 'Gesetzlichkeitsprinzip', the elements of the American principle of *nullum crimen* are not laid down

[150] Jeffries, *supra* note 91, p. 191-192; Boot, *supra* note 3, p. 112, 114; LaFave, W. R., *Criminal Law* (2000), p. 71.
[151] Boot, *supra* note 3, p. 110.
[152] LaFave, *supra* note 150, p. 85; Boot, *supra* note 3, p. 114.
[153] Jeffries, *supra* note 91, p. 190
[154] Dressler, J., *Understanding Criminal Law* (1995), p. 29.

in one single provision. Elements can be found in article 1(9) of the US Constitution and in the Fifth and Fourteenth Amendments.
Article 1(9) contains the prohibition of ex post facto clauses. The article has been explained by the Supreme Court to contain four elements. Firstly, it prohibits retroactive criminalisation of acts that were not punishable when committed. Secondly, it prohibits retroactive aggravation of a crime. Thirdly, it prohibits a retroactive increase in the prescribed penalty for a crime. Finally, it prohibits the retroactive alteration of the rules of evidence.[155] The ex post facto clause is aimed solely at the legislator though, as its place in Part I of the Constitution confirms.
The operational arm of legality is formed by the judicial doctrines used to implement it, the void-for-vagueness doctrine and the doctrine of strict construction against the state.[156] These doctrines are deemed to be included in the due process clauses of the Fifth and Fourteenth Amendments. Though undoubtedly linked, historically they are not to be seen as a direct corollary of the *nullum crimen* principle. Their development has rather been stimulated by the violations of legality principles in Nazi Germany and the Soviet Union.[157]

3.2.1.1 Void-for-vagueness

The void-for-vagueness doctrine requires that legislative crime definitions be meaningfully precise, or at the very least not meaninglessly indefinite.[158] English common law courts already refrained from enforcing laws that were not considered sufficiently certain.[159] The US Supreme Court has continued this tradition, initially without referring to a specific constitutional prescription and later invoking a separation of powers argument and referring to the Sixth Amendment.[160]
Throughout the 20th century the Supreme Court has developed its case law and it is now accepted that both federal and state legislative acts, when considered too vague in defining a criminal offence, violate the Fifth and Fourteenth Amendment.[161] A statute is considered too vague if "men of common intelligence must necessarily guess at its meaning and differ as to its application".[162] Vagueness can concern any aspect of the statute in question, whether it be the conduct that is prohibited, the person it concerns

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[155] *Calder v. Bull*, 3 US 386 (1878); see Kobrick, E. S., *The Ex Post Facto Prohibition and the Exercise of Universal Jurisdiction over International Crimes*, 87 Colum. L. Rev. (1987), p. 1516-1517 for background of the case.
[156] Jeffries, *supra* note 91, p. 196.
[157] Boot, *supra* note 3, p. 123.
[158] Jeffries, *supra* note 91, p. 196.
[159] LaFave, *supra* note 150, p. 97.
[160] See *United States v. Reese*, 92 US 214 (1876); *United States v. Brewer*, 139 US 278 (1891); *James v. Bowman*, 190 US 127 (1903).
[161] See *International Harvester Co. v. Kentucky*, 234 US 216 (1914).
[162] *Connaly v. General Construction Company*, 269 US 385 (1926); *Lanzetta v. New Jersey*, 306 US 444 (1939); *Colauti v. Franklin*, 439 US 379 (1979).

or the prescribed penalty.[163] These principles apply to both statute law and common law crimes.[164]
The assessment of vagueness is one of degree rather than definition. Unconstitutional indefiniteness is itself an indefinite concept[165], which will depend on the context. The degree of indefiniteness that is considered acceptable is dependant upon such factors as the interest a statute seeks to protect, the feasibility of being more precise and whether the statute's uncertainty implicates certain protected freedoms.[166] In addition, acceptability of uncertainty also depends on the person to whom the statute is addressed.[167]
Statutes are not tested for vagueness "on its face", but rather with its "judicial gloss". Either the statute, standing alone, should be sufficiently clear, or its meaning should be able to be constructed with the aid of case law or common law notions.[168] The Supreme Court has found that the law must be clear to the "average man", to "men of common intelligence" or to "ordinary people".[169] Finding a statute's meaning may require a person to seek legal advice.
The void-for-vagueness doctrine, though not essentially dissimilar from the German notion of Bestimmtheit,[170] provides a contextual and pragmatic approach. This raises the question whether there runs a consistent thread through the Supreme Court's case law. Such a thread can be identified though when focusing on the Supreme Court's approach to fair warning and arbitrariness.[171]

3.2.1.2 Strict construction

The origins of the rule of strict construction against the state lie in 18th century English law, where a disturbing amount of petty crimes were considered capital punishment offences.[172] Strict construction of penal statutes was used to alleviate the harshness of the criminal law.
Despite changed circumstances, the rule has continued to find application in American criminal law, though its role has been diminished. The Supreme Court has reiterated the rule in several cases: "ambiguity concerning the

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[163] LaFave, *supra* note 150, p. 97 with reference to *United States v. Evans,* 333 US 483 (1948).
[164] Though voiding of common law crimes is rare: *Ashton v. Kentucky*, 384 US 195 (1966)
[165] *Winters v. New York*, 333 US 507 (1948), Dis. Op. Judge Frankfurter.
[166] *Winters v. New York*, *supra* note 165; LaFave, *supra* note 150, p. 102; Lensing, J. A. W., *Amerikaans Strafrecht* (1996), p. 57.
[167] *Conally v. General Construction Company, supra* note 162; also below 2.2.3.2.
[168] *Winters v. New York*, *supra* note 165; Ward v. Illinois, 431 US 767 (1977).
[169] *Lanzetta v. New Jersey*, *supra* note 162; *Cline v. Frink Dairy Co*., 274 US 445 (1927).
[170] See above 3.1.3.2.
[171] LaFave, *supra* note 150, p. 98; see below 3.2.2.2.
[172] *Ibid*., p. 83.

ambit of criminal statutes should be resolved in favour of lenity".[173] It is however not just considered a rule of interpretation, but a fundamental principle of due process, primarily aimed at providing fair warning to the individual about the punishability of certain conduct.[174]
Application of the rule of strict construction has been limited however. Statutes that are sufficiently clearly drafted and do not contain ambiguities, leave no room to be constructed strictly.[175] Also, a statute is not to be constructed strictly against the obvious intent of the legislation[176] or even common sense.[177] In addition, there is no requirement to construct the statute in question as narrow as possible.[178]
Several states have abolished the rule of strict construction of criminal statutes[179], and replaced it with statutory construction "according to the fair import of their terms" but still aimed at providing fair warning, as well as other aspects of general prevention. Despite such practice, the rule of strict construction, though perhaps in a qualified way, still finds application and "seems to be an attitude of mind that is not readily changed by legislation".[180] Due to the disappearance of the common law crimes from which it originated, it is no longer a distinct policy of statutory interpretation, but has taken on a role as a balancing weight of equity, being applied on an essentially ad hoc basis.[181]
The due process clauses of the Fifth and Fourteenth Amendment are the basic guidelines for the limits of interpretation, which is not distinctly dissimilar from the German demand of Bestimmtheit and prohibition of analogy whilst accepting exceptions to legality in favour of the defendant.[182] Void-for-vagueness and strict construction remain influential in American statutory interpretation, but have come to be applied pragmatically rather than dogmatically.

3.2.2 Purposes and interpretation

The principle of legality and the doctrines of void-for-vagueness and strict construction are generally justified by three arguments.[183] The first is the

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[173] *Rewis v. United States*, 401 US 808 (1971); *Liparota v. United States*, 471 US 419 (1985); *United States v. Kozminski*, 487 US 931 (1988); *McNally v. United States*, 483 US 350 (1987).
[174] *Dunn v. United States*, 442 US 100, 112 (1979); *Crandon v. United States*, 494 US 152 (1990); *United States v. Bass*, 404 US 336 (1971).
[175] *United States v. Culbert*, 435 US 371 (1978); *State v. Dean*, 357 N.W.2d 307 (Iowa 1984); *Caron v. United States*, 524 US 308 (1998).
[176] Boot, *supra* note 3, p. 123, with reference to *Barrett v. United States*, 423 US 212 (1976).
[177] *United States v. Moore*, 423 US 122 (1975).
[178] *Ibid*.; also *State v. Carter*, 89 Wash.2d 236, 570 P.2d, 218 (1978).
[179] LaFave, *supra* note 150, p. 84.
[180] *Ibid*., p. 84.
[181] Jeffries, *supra* note 91, p.
[182] See above 3.1.3.3.
[183] LaFave, *supra* note 150, p. 99-103; Jeffries, *supra* note 91, p. 201.

separation of powers notion. Lawmaking is the democratically elected legislator's prerogative; judicial lawmaking should be restrained. Secondly, it is considered unfair to the individual and contrary to constitutional due process rights not to provide fair warning of what constitutes criminal conduct and what the consequences of such conduct are. And thirdly, arbitrary application of criminal law needs to be restrained by law; what is referred to as the rule of law.
Contrary to what may be expected, these arguments do not necessarily justify void-for-vagueness or strict construction, or at least not a strict version thereof, as Jeffries has noted.[184] They can be just as well served by a less strict, qualified approach. This casuistic approach to statutory interpretation of American courts suggests rigid adherence to notions of legality might not be as important as one would think.

3.2.2.1 Separation of powers

The separation of powers argument has lost much of its validity. Due to an abundance of criminal law statutes major conflicts between legislator and judicial lawmaking are avoided. Cases of illegal delegation of legislative power to the judiciary are rare.[185]
Naturally, relatively smaller issues such as the interpretation of statutory ambiguity remain, but here separation of powers is too broad a notion to provide answers.[186] Resolving statutory ambiguity by definition requires judicial choice, which will be perfectly legitimate from a separation of powers perspective as long as it does not contravene legislative intent.[187] Courts should refrain from innovation, but strict construction is not required unless prescribed by law.[188] Separation of powers then hardly provides guidance in cases where a statute can support more than one acceptable interpretation.[189] A more important concern is to interpret ambiguous statutes in such a way as to relieve the lack of legal certainty.

3.2.2.2 Fair warning

Similarly, the argument that criminal conduct must be defined in advance to provide fair warning to the individual is not as closely tied to void-for-vagueness and strict construction as could be expected.
Fair warning is a qualified concept. Legislation need only give fair warning to those potentially subject to it. For instance, statutes that might not be

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[184] Jeffries, *supra* note 91, p. 201.
[185] *Cf. State v. Grinstead*, 206 S.E. 2d 912 (1974), 11 CLB 100.
[186] Jeffries, supra note 91, p. 202.
[187] Atrill, S., *Nulla Poena Sine Lege in Comparative Perspective: Retrospectivity under the ECHR and US Constitution*, Public Law (2005), p. 112-113.
[188] Which it rarely is, see above 3.2.1.2.
[189] See Jeffries, *supra* note 91, p. 205 with reference to *Keeler v. Superior Court*, 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970).

understandable to laymen can be considered constitutional when aimed at a particular group of professionals, who are assumed to understand it.[190] An ambiguous statute is more likely to be voided when addressed to the general public or to persons who have not voluntarily subjected themselves to a particular regulatory regime.[191] It seems that persons who willingly engage in conduct that might involve certain risks are expected to actively seek the "fair warning" of what that conduct may entail.
A problem here is that a formal concept of fair warning is sometimes relied upon. 'Lawyer's notice' is the yardstick, meaning that a fiction is created wherein the individual would have been able to retrieve fair warning or notice from endless research of statutes and case law. This situation is essentially unrealistic and can obscure the outcome of certain cases.[192] In practice, however, invoking void-for-vagueness is most often successful when the defendant in fact consulted the statute in question. As the Supreme Court found in Lambert v. California, the focus should be the elimination of unfair surprise. Punishment for conduct that the average citizen would have had no reason to avoid is constitutionally impermissible.[193]
The notion of fair warning can be said to have an objective element in this elimination of unfair surprise, as well as a more subjective element, based on a person's professional status or indulgence in conduct that requires sufficient care.

3.2.2.3 Rule of law

Rule of law considerations relate most closely to void-for-vagueness and strict construction. It is supposed to outlaw arbitrariness in the application of criminal law by binding the judiciary as well as the executive to legal rules to guide its conduct. Statutes that are not sufficiently clearly defined invite a variety of interpretations and can thereby lead to arbitrary application of such statutes and a lack of equal protection. Such abuse of the law can occur both by the police and prosecution officials[194] as well as judges and juries. Voiding overly vague statutes or constructing them strictly will counteract arbitrariness.[195]
Adherence to the rule of law is a matter of degree though. No legal system can consist only of fixed, mechanical rules.[196] Discretion will remain, but in interpreting that discretion rule of law notions deserve ample consideration. Regard should be had for the necessity of such discretion and it should be interpreted in a way to make the law more certain.

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[190] *Conally v. General Construction Co*., *supra* note 162.
[191] LaFave, *supra* note 150, p. 99.
[192] See *Keeler v. Superior Court*, *supra* note 89; *People v. Sobiek*, 30 Cal. App. 3d 458, 463-464, 106 Cal. Rptr. 519, 523 (1973).
[193] *Lambert v. California*, 355 US 225 (1957).
[194] *City of Chicago v. Morales*, 527 US 41 (1999); *Thornhill v. Alabama*, 310 US 88 (1940).
[195] Cf. *Giaccio v. Pennsylvania*, 382 US 399 (1966).
[196] Jeffries, *supra* note 91, p. 213.

3.2.2.4 Regulated pragmatism

Legality, void-for-vagueness, and strict construction are not as easily justifiable as might be expected. The arguments presented do not necessarily call for a very strict form of legality. As Jeffries has noted however, such a qualified approach to legality is not a great concern. Judges will not interpret statutes on a purely ad hoc basis, but should rather adhere to three general constraints derived from the traditional arguments mentioned above.[197]
Firstly, courts should not usurp legislative authority. Judicial lawmaking does not need to be eradicated, as long as it is consistent with the legislator's intentions.
Secondly, courts should avoid interpretations that threaten unfair surprise. The yardstick for such unfair surprise should not be the fictional 'lawyer's notice', but what a common citizen has reason to believe in the circumstances in question.
Finally and perhaps most importantly, courts interpreting ambiguous statutes have to consider whether their explanation makes the law more or less certain.[198] Interpretation should be sufficiently non-fact-specific to have value as a precedent.

3.3 Conclusions

The principles of *nullum crimen, nulla poena sine lege* (legality) are recognized both in the United States and Germany. Though not in the same manner, the principles have acquired constitutional status in both countries. The German Gesetzlichkeitsprinzip of article 103(2) has a wider scope and contrary to the American system contains all elements of legality in one provision. Elements of the American legality principle are spread over article 1(9) and the Fifth and Fourteenth Amendments.
The German Gesetzlichkeitsprinzip contains the requirement of a written statute, the prohibition of analogy and a prohibition of retroactivity aimed at the judiciary, elements that are absent in the American principle. These elements are by definition irreconcilable with the American criminal law system. The Schuldprinzip does not have an explicit equivalent in American law, but is effectively very closely related to the concept of fair warning.

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[197] *Ibid*., p. 220.
[198] *Cf*. the standard used in *United States ex rel. Attorney General v. Delaware & Hudson Co*., 213 US 366 (1909); also *Almendarez-Torres v. United States*, 523 US 224 (1998).

3.3.1 Similarities

Despite such differences, there are many similarities between the two systems. The ideas underlying legality in both systems are virtually identical. The principle of legality is primarily a guarantee of legal certainty. Arbitrary and discriminatory application of criminal law is to be prevented. The separation of powers, rule of law and fair warning concepts are easily identifiable in both systems. It is very important to note that the principle of legality in both countries is considered to be a fundamental due process right. This status is in line with the status it has in human rights law. The importance of the principle as protection against arbitrary prosecution is considered one of the pillars of criminal law in both systems.
Despite (gradual) differences concerning the powers of the judiciary, it is the democratically elected legislator (Reichstag/Congress) that has primacy over the enactment of criminal law. Additionally, the notion of fair warning (forseeability) or notice is a critical element of both systems. The individual must be able to adapt his conduct on the basis of a statute.
The Bestimmtheitsgebot and the void-for-vagueness doctrine, two doctrines that in practice are quite alike, primarily service fair warning. Definiteness of a criminal statute is determined through similar parameters. The meaning of a statute will be established through normal methods of interpretation aided by case law. The first principle in both instances is that the meaning of a statute, through such methods, should be determinable for the citizen of average or common intelligence. A statute should be sufficiently definite in all its aspects, the elements of the criminal conduct, the person concerned and the possible penalty. A notion of proportionality is also present in both systems: statutes that carry a higher penalty or protect a greater public interest must be phrased with a higher degree of clarity. Another important similarity is the role of the addressee of a criminal statute. Both in the US and Germany fair warning can imply a responsibility to "seek" fair warning, especially when engaging in conduct that has inherent risk. Such a notion may be of particular importance when constructing a principle of legality applicable in international criminal law.[199]

3.3.2 Differences?

Differences between the systems, as mentioned above, are not necessarily as great as initially may be expected. It is important to note that the ideas served and doctrines applied are interrelated and interdependent. Though specific elements present in the one system may be absent in the other, due to the coherence of the concepts involved, the safety net is spread almost equally wide. Fair warning, eradication of arbitrariness and the legislator's primacy are concepts that in the framework of legality are not readily separable concepts, but rather are fluent parts of one continuum. Similarly, non-retroactivity, Bestimmtheit, void-for-vagueness and strict construction

[199] See below 5.5.3

are not independent concepts, but form part of the total package of legal certainty. It is not surprising then, that the application of principles of legality is not distinctly different.
Existing differences are caused primarily by the underlying nature of the legal system, the civil law system in Germany and the (qualified) common law of the United States. Common law notions in the United States are slowly losing ground though. Many states have enacted comprehensive criminal law codes, replacing the fragmented combination of common law and statute that existed before. Common law methods of reasoning are harder to eradicate, but are effectively controlled by due process rights, in particular the elements of legality in the Fifth and Fourteenth Amendments. The notions of fair warning or the unconstitutionality of unfair surprise effectively curb the use of analogy and over-extensive interpretation. The absence of a prohibition of retroactive application of criminal law for the judiciary is compensated by the same ideas. Legal certainty is effectively guaranteed in the same way as in Germany.

3.3.3 A core concept

Legality should be seen as an essential element of criminal justice. A mature legal system requires a principle of legality that is applied consistently and coherently. That is not to say that legality is an absolute concept. Neither in Germany, nor in the United States is the principle applied rigidly. Legality is shaped by the legal system it serves and is not an abstract entity, existing in a vacuum. Legality itself is a matter of degree, which cannot easily be divided into civil law and common law notions, or into systems based on strict application or substantive justice. Equating civil law systems with strict application and common law systems with substantive justice is an oversimplification. In fact, substantive justice considerations are accepted in Germany, but not in the United States.
The demands of different legal systems require different applications. American notions of legality do not fit in with a strictly civil law system such as Germany. Similarly, the Gesetzlichkeitsprinzip could not effectively be applied in the United States.
Nevertheless, it is clear that there are far more similarities between American and German legality principles than differences. One can conclude that there is a core concept of legality. This core concept is formed by the notion of legal certainty.
Legal certainty is served by giving legislative primacy to the legislator, providing fair warning to individuals and eradicating arbitrariness. These three elements form the basis for any mature legal system. Within these three elements**,** similar methods of interpretation are used in applying statutes and interpreting them.[200] The value of this core notion of legality in international criminal law will be discussed below.[201]

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[200] See above 3.3.1.
[201] See below 5.6.

4 European Court of Human Rights

The principle of legality has found its way into numerous human rights instruments. Starting with the Universal Declaration of Human Rights of 1948 (art. 11(2)), it is included in the International Covenant on Civil and Political Rights (art. 15), the American Convention on Human Rights (art. 9), the African Charter of Human and Peoples Rights (art. 7 (2)) and the European Convention on Human Rights (art. 7). The focus here will be on the European Convention, as the most sophisticated and practically advanced human rights system.[202]
Article 7 of the European Convention is concerned with the application of criminal law in domestic systems. The Convention is binding only on the States party. Nevertheless, the Court's case law is by no means irrelevant to the practice of international criminal tribunals. International criminal proceedings constitute an equally, if not deeper, intrusion into the rights of an individual. International criminal tribunals then should not be exempt from providing the due process and legality guarantees that guide national courts.[203] In that light, article 7 ECHR and similar articles in other human rights instruments should be seen as providing a minimum standard of protection an individual is entitled to, irrespective of the fact whether he faces a national or an international court. The importance of human rights standards, in particular article 7 of the ECHR, has been not only recognised, but also heavily relied on by the ICTY. [204]

4.1 Article 7 ECHR

Article 7 of the European Convention on Human Rights reads:

"Article 7. No punishment without law
1. No one shall be held guilty of any criminal offence on account of any act or omission, which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.
2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilized nations."

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[202] Malanczuk, P., *Akehurst's Modern Introduction to International Law* (1997), p. 219.
[203] Fletcher, G. P. and Ohlin, J. D., *Reclaiming Fundamental Principles of International Criminal Law in the Darfur Case*, 3 JICJ 3 (2005), p. 540.
[204] See further below 5.2 and 5.4.3.

In the view of the Court, article 7 is an essential element of the rule of law.[205] Its prominent place in the Convention system is underlined by the fact that it is non-derogable.[206]
The article primarily serves two functions.[207] Firstly, it aims to prevent punishment of individuals under domestic law for conduct of which he or she did not know it was criminal. Though laid down apparently as this simple prohibition on the retroactive application of criminal law to the detriment of a defendant, the Court, through its case law, has developed it into a far wider and more encompassing provision.[208] "Article 7 should be construed and applied as to do full justice to its object and purpose and therefore also aims at providing effective safeguards for the individual against arbitrary prosecution, conviction and punishment."[209] This has been interpreted to mean that article 7 also includes the principle that only the law can define a crime and prescribe a penalty and that criminal offences must be clearly defined in law. Finally, the criminal law must not be extensively construed to an accused's detriment through analogy.[210]
By importing these elements into the article, the Court has expanded the prohibition on retroactive criminal legislation into a fully-grown principle of legality.

4.1.1 Content of article 7

In order to satisfy all these elements, a criminal offence must be clearly defined in law, before the act in question was committed. It is the notion of 'clearly defined in law' that is at the centre of attention of the Court's case law.[211]
When considering national law and its compatibility with the Convention, the Court does not interpret or apply national law or deal with errors of fact

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[205] *S.W. v. UK*, judgment of 22 November 1995, Series A No. 335-B, §34.
[206] *Cf.* Art. 15(5) ECHR.
[207] Boot, *supra* note 3, p. 144.
[208] *Streletz, Kessler and Krenz v. Germany*, judgment of 21 March 2001, §50; *Kokkinakis v. Greece*, judgment of 25 may 1993, Series A No. 260-A, §52; S.W. v. UK, *supra* note 119, §35.
[209] *Andersson (Roger and Margareta) v. Sweden*, judgment of 25 February 1992, Series A No. 226-A, §75; S.W. v. UK, *supra* note 205, §34; *Kruslin v. France*, judgment of 24 April 1990, Series A No. 176, §29 referring to *Silver and Others v. UK*, judgment of 25 February 1983, Series A No. 61, §88-89.
[210] *Kokkinakis v. Greece*, *supra* note 208, §52; *Coëme and Others v. Belgium*, judgment of 22 June 2000, Reports, 2000-VII, §145; most recently *Veeber v. Estonia (No. 2)*, judgment of 21 January 2003, §31.
[211] *Cf. Erdoğdu and Ince v. Turkey*, judgment of 8 July 1999, Reports, 1999-IV, §58; *Başkaya and Okçuoğlu v. Turkey*, judgment of 8 July 1999, Reports, 1999-IV, §39; *Grigoriades v. Greece*, judgment of 25 November 1997, Reports, 1997-VII, §37; *Cantoni v. France*, judgment of 15 November 1996, Reports, 1996-V, §29; *Kokkinakis v. Greece*, *supra* note 208, §51.

or law. This is the role of the national court.[212] The Court merely decides on whether the national law violates the Convention.
What is meant by 'law' is exhaustively explained.[213] 'Law' has an autonomous meaning under the Convention. It refers to the same standard when used in 'prescribed by law' or 'in accordance with the law' in case of exceptions to the rights to respect of private life (art. 8(2)) or freedom of expression (art. 10(2)). As stated in *Andersson v. Sweden* 'law' in this sense firstly requires a basis in domestic law.[214] The nature of the domestic law is not crucial. Be it statutory or common law, written or unwritten, article 7 requires a domestic law that is in force at the time the conduct took place.[215] Unwritten law can even include a state's practice.[216]
More importantly in the present context is that 'law' also refers to the quality of the law in question. As the Court has explained in the *Sunday Times case* when considering the phrase 'prescribed by law', two requirements flow from the expression, those of accessibility and forseeability.[217]

4.1.1.1 Accessibility

The first requirement is that of adequate accessibility. An individual must be able to have sufficient opportunity to gain awareness of the legal rules that are applicable to his conduct. The relation to the concept of fair warning in domestic legal systems is clear.[218] If the individual has no access to the law he cannot conform his conduct to those laws and the effects of general prevention and fair warning will be lost.
Under the Convention system the notion of accessibility is rarely a stumbling block.[219] As the Court has pointed out in the case of *K. -H.W. v. Germany*, written law is considered accessible as long as it is not overly obscure.[220] A properly promulgated law, combined with the axiom 'ignorance of the law is no defence' will most often satisfy the requirement

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[212] *Kopp v. Switzerland*, judgment of 25 March 1998, Reports, 1998-II, §59; *Hadjianastassiou v. Greece*, judgment of 16 December 1992, Series A No. 252, §42.
[213] *Sunday Times v. UK*, judgment of 26 April 1979, Series A No. 30, §49; *Andersson v. Sweden*, *supra* note 209, §75; *Coëme and Others v. Belgium*, *supra* note 210, §145; *K.-H.W. v. Germany*, judgment of 22 March 2001, §45.
[214] *Andersson v. Sweden*, *supra* note 209, §75.
[215] *Sunday Times v. UK*, *supra* note 213, §40; *Dudgeon v. UK*, judgment of 22 October 1981, Series A No. 45, §44; *Chappell v. UK*, judgment of 30 March 1989, Series A No. 152, §52.
[216] *Streletz, Kessler and Krenz v. Germany*, *supra* note 208, §67.
[217] *Sunday Times v. UK*, *supra* note 213, § 49; *Tolstoy Miloslavsky v. UK*, judgment of 13 July 1997, Series A No. 316-B, §37.
[218] *Cf.* Above 3.1.2.3 and 3.2.2.2.
[219] *Cf. C.R. v. UK*, judgment of 25 November 1995, Series A No. 335-C; *S.W. v. UK*, *supra* note 205.
[220] *K. –H.W. v. Germany*, *supra* note 213, §73.

of accessibility. Case law is also considered accessible as long as it is published,[221] which is of particular importance for common law countries. Accessibility also includes a responsibility for the individual to in fact look for the legal rule in question. This may even require engaging legal aid. Such an active stance is of particular importance for persons who, due to their position or profession, should assess their conduct with a certain degree of care.[222]

4.1.1.2 Foreseeability

The second requirement is that of foreseeability. A law is not considered a law unless it is formulated with sufficient precision to enable the individual to regulate his conduct accordingly. He must be able to foresee to a reasonable degree, and if need be with appropriate advice, which consequences a given action may entail.[223] Though certainty is highly desirable, those consequences need not be foreseeable with absolute certainty. In fact, the Court recognises that absolute certainty is often unattainable. The character of the law is such that it must be of general application and has to keep pace with changing circumstances.[224] Too high a degree of certainty may leave laws excessively rigid. Therefore, terms are often used which require interpretation and clarification.[225]
The foreseeability of consequences flowing from a particular law does not depend solely on the wording though. Other sources may add to the degree of foreseeability.

4.1.1.2.1 Case law

In the case of *Kokkinakis v. Greece,*[226] the applicant alleged that a Greek law prohibiting proselytism was so vaguely phrased that it was impossible to foresee what it encompassed. The Court however, refused to acknowledge a breach of article 7. Reiterating its findings in the case of *Müller and Others*, the Court noted that statutes do not necessarily need to be phrased with absolute preciseness.[227] An offence is sufficiently clearly defined in law "where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the Court's

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[221] *G. v. France*, judgment of 27 September 1995, Series A No. 325-B, §25; *Kokkinakis v. Greece*, *supra* note 208, §40.
[222] See below 4.1.1.2.2.
[223] *Sunday Times v. UK*, *supra* note 213, §49.
[224] *Kokkinakis v. Greece*, *supra* note 208, §40; *Cantoni v. France*, *supra* note 211, §31; Başkaya and Okçuoğlu v. Turkey, *supra* note 211, §39.
[225] *Tolstoy Miloslavsky v. UK*, *supra* note 217, §37; *Andersson v. Sweden*, *supra* note 209, §75: S.W. v. UK, *supra* note 205, §36.
[226] *Kokkinakis v. Greece*, *supra* note 208.
[227] *Ibid*., §40, referring to *Müller and Others v. Switzerland*, judgment of 24 May 1988, Series A No. 133, §29.

interpretation of it, what acts and omissions will make him liable."[228] In the case of Mr. Kokkinakis, a body of settled, national case law existed, which was published (and therefore accessible) and enabled him to foresee the consequences of his conduct.
Similarly, in the case of *G. v. France*, the existence of "consistent case law" provided the applicant with sufficient opportunity to foresee the consequences of his actions.[229]
The case of *Baškaya and Okçuoğlu v. Turkey* provides a somewhat different perspective.[230] Once again the European Court had to deal with an alleged lack of clarity in a statutory provision, which left the interpretation of the provision to the national court's discretion. Once again the European Court did not consider this discretion overly broad and held that *the interpretation* made by the national court was sufficiently foreseeable.[231] This wording raises the question if an interpretation needs to be foreseeable based only on the provision it interprets, or if an existing line of case law already needs to be in place.[232] Clearly the second situation would be preferable, as it provides more clarity based on the consistent application of the law by the courts, very similar to the German system.[233] Nevertheless, this is simply not always possible. Newly enacted laws can equally require interpreting and changed circumstances might call for changes in interpretation. In such cases the degree of forseeability can be distinctly diminished.[234]
The reliance on case law to supplement a lack of guarantees against arbitrariness in a particular criminal provision is an essential part of article 7. Nevertheless, reliance on case law has been criticised as being too vague and too susceptible to changing political and social circumstances in a country as to effectively guard against arbitrariness.[235] Such criticism lacks substance though, as the Commission and the Court have established sufficiently clear parameters within which interpretation is acceptable. As recognized by the Court, interpretation within those parameters is only fulfilling the duty of the courts to clarify provisions and adapt the law to the changing circumstances of the times.[236] It is prohibited to interpret definitions of existing offences so broadly that they come to cover facts which previously clearly did not constitute a criminal offence (effectively application by analogy). The constituent elements of a provision may therefore not be essentially changed through extensive interpretation. It is not objectionable though to clarify existing elements of an offence and adapt them "to new circumstances which can reasonably be brought under

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[228] *Kokkinakis v. Greece*, *supra* note 208, §52; confirmed in *Larissis and Others v. Greece*, judgment of 25 February 1998, Reports 1998-I, p. 362.
[229] *G. v. France*, *supra* note 221, §25.
[230] *Başkaya and Okçuoğlu v. Turkey*, *supra* note 211.
[231] *Ibid*., §40.
[232] See Shahabuddeen, M., *Does the Principle of Legality Stand in the Way of Progressive Development of Law?,* 2 JICJ 4 (2004), p. 1009.
[233] See above 3.1.3.2.
[234] See below 4.2, marital rape cases.
[235] *Kokkinakis v. Greece*, *supra* note 208, partly Dis. Op. Judge Martens, §5.
[236] *Cf*. *Kokkinakis v. Greece*, *supra* note 208, §40; *Cantoni v. France*, *supra* note 211, §31.

the original concept of the offence."[237] Interpretation is allowed; creating new law through analogy that is insufficiently foreseeable is not.[238] "The role of adjudication vested in the courts is merely […] to dissipate doubts that may arise from the wording of a provision."[239]

4.1.1.2.2 Other sources of forseeability

In addition to interpretation by courts, there are other factors that will determine the degree of foreseeability. As the Court has held in the case of *Groppera Radio AG and Others v. Switzerland*, the scope of the notion of forseeability depends not only on the content of the text at issue and the field it is designed to cover, but also directly on the individual to whom it is addressed.[240]

The individual may be under a responsibility to actively consider what consequences a given action may entail. A law may still satisfy the requirement of forseeability if it requires the individual concerned to take appropriate legal advice to establish its meaning. This is more specifically the case in relation to persons carrying on a professional activity and are used to having to proceed with a high degree of caution when pursuing that activity.[241] The case of *Cantoni v. France* dealt with the wording 'medicinal product' contained in the French Health Code, which the applicant claimed to be insufficiently clear. The Court found no violation of article 7 and, pointing at existing French case law, noted that Mr. Cantoni, as the manager of a supermarket, with the benefit of appropriate legal advice "should have appreciated […] that […] he ran a real risk of prosecution for unlawful sale of medicinal products."[242]

The personal responsibility is also one of assessment of risk then. When engaging in conduct that might bring certain risks and require a certain degree of caution, a person is expected to thoroughly consider the possible consequences of that conduct. For the contention that a law is unclear to be successful, one must have actually tried to discern its meaning. Similar to an appeal to void-for-vagueness in the US, failure to try to find what the law is damages the right to make such a claim.[243]

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[237] *G. v. Federal Republic of Germany*, Appl. No. 13079/87, 6 March 1989, found at http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=13079/87&sessionid=4039614&skin=hudoc-en (last visited 7 October 2005).
[238] *Cf. C.R. v. UK*, *supra* note 219, §34.
[239] *Cantoni v. France*, *supra* note 211, §32.
[240] "number and status of those to whom it is addressed", *Groppera Radio AG and Others v. Switzerland*, judgment of 28 March 1990, Series A No. 173, §86.
[241] *Cantoni v. France*, *supra* note 211, §35.
[242] *Ibid*.
[243] See above 3.2.2.2.

4.2 Marital rape cases

Most of the Court's case law is concerned with statutory law. Occasionally though, the Court is confronted with common law. As mentioned, common law is not excluded from the notion of "law" in the Convention. The way in which the ECtHR assesses breaches of article 7 also accommodates such unwritten law. This ability has not only proven its value
In the cases of C.R. v UK[244] and S.W. v. UK,[245] claims of a violation of article 7(1) were brought based on a retroactive application of criminal law based on common law. The defendants in both cases had been found guilty of having had forced sexual intercourse with their wives and been charged with rape. When confronted with this charge both men invoked the traditional marital immunity to rape, which existed in the common law dating back to 1736.[246] A husband was held immune to charges of raping his wife because of the "implied consent" inherent to the marital state. Only in 1976 did a statutory provision for rape come into force, which held punishable "unlawful" sexual intercourse with a woman without consent.[247] Forced sexual intercourse with one's wife was still not considered unlawful according to consistent case law though. Nevertheless, both men were convicted based on a change of that case law, by extending the scope of rape to exclude the common law immunity. Subsequently, a violation of article 7(1) was claimed before the Commission and the Court.

4.2.1 Interpretation

The majority of the Commission rejected the alleged violation of article 7(1). It did not find that the basic ingredients of the offence of rape were changed when the Court of Appeal, and subsequently the House of Lords reviewed the application of Hale's principle of marital immunity and declared in effect that the immunity no longer applied.[248] A minority however, pointed out that the law regarding one of the existing elements of the offence of rape, i.e. consent, had been fundamentally changed to the applicant's detriment and could not be considered a mere clarification.[249] The Court also did not find a violation. Referring back to its earlier case law in *Kokkinakis v. Greece*, it reiterated that legal provisions, however clearly drafted, always require a measure of interpretation. Extensive interpretation is permissible to adapt to changing circumstances, provided that it concerns

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[244] *C.R. v. UK*, *supra* note 219.
[245] *S.W. v. UK*, *supra* note 205.
[246] Sir Hale CJ, History of the Pleas of the Crown, p. 629, published 1736, quoted in: Boot, *supra* note 3, p. 152.
[247] Section 1(1) of the Sexual Offences (Amendment) Act 1976.
[248] *C.R. v. UK* (Commission), Application No. 20190/92, 27 June 1994, found at http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=C.R.%20%7C%2020190/92&sessionid=4052570&skin=hudoc-en (last visited 8 October 2005), §55.
[249] *Ibid.*, Dis. Op. Judges Loucaides and Nowicky, sub (e).

a gradual clarification that could be reasonably foreseen and is consistent with the essence of the offence. The Court held that the decisions of the English court did not breach this principle. Citizens may have to reckon with possible changes in the law.[250]
This outcome would seem to be inconsistent with previous case law of the Commission.[251] It is highly debatable whether the principle that the Court developed with regard to permissible interpretation was applied correctly. Nevertheless, this outcome may be explained by another argument incorporated by the Court.

4.2.2 Moral element

After deciding that the change in case law had been sufficiently foreseeable the Court included a seemingly moral argument to justify its findings.

"The essentially debasing character of rape is so manifest that the result of the decisions of the Court of Appeal and the House of Lords - that the applicant could be convicted of attempted rape, irrespective of his relationship with the victim - cannot be said to be at variance with the object and purpose of Article 7 (art. 7) of the Convention, namely to ensure that no one should be subjected to arbitrary prosecution, conviction or punishment (see paragraph 34 above). What is more, the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom."[252]

The "essence of the offence" is the yardstick by which to measure whether an interpretation has departed too far from the wording of a provision. As the character of rape is considered essentially debasing, and therefore criminal, there would be no question of arbitrariness in its prosecution.[253]
This reasoning has been criticized, as such compensation for arbitrariness by a moral judgment is contradictory to one of the underlying elements of *nullum crimen sine lege*, namely that the legislator should decide upon criminal liability.[254]
This criticism lacks force though, because the judgment made is not necessarily a moral one. The wording that the marital rape immunity was contrary to "the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom" suggests that the judgment is made relying on other rights contained in the convention. The marital rape immunity is irreconcilable with the right to private life and personal integrity enshrined in article 8(1). As such, the judgment made is one based on positive law rather than moral considerations. Actions that

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[250] Boot, *supra* note 3, p. 154.
[251] See above 4.1.1.2.1; also *X Ltd. And Y v. UK*, Appl. No. 8710/79, 7 May 1982, 28 DR 77, p. 80-81.
[252] *C.R. v. UK*, *supra* note 219, §42; *S.W. v. UK*, *supra* note 205, §44.
[253] Boot, *supra* note 3, p. 156.
[254] *C.R. v. UK* (Commission), *supra* note 248, Dis. Op. Judge Békés.

constitute human rights violations can be considered sufficiently foreseeable as to be punishable without being considered arbitrary.

4.3 German border guard cases

The German border guard cases concern the applications of Streletz, Kessler and Krenz, three former high-ranking officials of the German Democratic Republic, and K.-H.W., a former border guard at the intra-German border. Following the German reunification they were prosecuted for the killings of East-German citizens attempting to flea to West Germany. Though GDR law contained provisions on protection of human rights and proportionality in the use of force, these rules were interpreted to justify the killings.[255] State practice instituted a "shoot to kill" policy, which was considered in conformity with that interpretation. The courts of the reunified Germany convicted all four applicants. Subsequently, they took their cases to the ECtHR and claimed a violation of article 7(1).
The Court was confronted for the first time with the question whether it was permissible to apply an ex post facto legal interpretation to the detriment of the accused to conduct that occurred in a fallen political system not governed by the rule of law. It considered it legitimate though, that a nation governed by the rule of law prosecutes persons who committed offences in a former regime.[256] Nevertheless, its inconsistent reasoning may have obscured a more obvious outcome.

4.3.1 Proceedings before German courts

The two cases were brought separately before the Berlin Regional Court, but in both cases the court held that grounds for justification for the killing of fugitives found in GDR law or practice could not be relied on.[257] It noted that the GDR state practice "flagrantly and intolerably infringed elementary precepts of justice and human rights protected under international law",[258] and that even for a private soldier it should have been obvious that firing at an unarmed person infringed the duty of humanity.[259]
The Federal Court of Justice upheld the Regional Court's decision.[260] It too held that no grounds of justification existed under a correct interpretation of the GDR's national law and international law obligations. The applicants could not rely on grounds of justification that contravened higher-ranking

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[255] Geiger, R, *The German Border Guard Cases and International Human Rights*, EJIL 9 (1998), p. 542.
[256] *Streletz, Kessler and Krenz v. Germany*, *supra* note 208, §81,88.
[257] Hobe, S. and Tietje, C., *Government Criminality: The Judgment of the German Federal Constitutional Court of 24 October 1996*, GYIL Vol. 39 (1996), p. 526.
[258] Judgment of 16 September 1993, Landsgericht Berlin, quoted in: *Streletz, Kessler and Krenz v. Germany*, *supra* note 208, §19.
[259] *Ibid.*
[260] BGHSt 40, 218; BGHSt 40, 241 and BGHSt 45, 270.

legal rules, as laid down in international human rights instruments.[261] The statutory rules concerning the border regime should have been interpreted in a manner favourable to human rights.[262] The acts in question were considered so dreadful that no justification could be offered, either in written law or in state practice. In a passage found in both cases, the court, falling back on the Radbruch formula, noted that "in such a case positive law must give way to justice".[263]
The cases were joined in their appeal to the Federal Constitutional Court which dismissed the appeals and held that article 103(2) GG had not been breached.[264] The court recognised article 103(2) GG as an expression of the Rechtsstaatprinzip, which also includes the requirement of substantive justice.[265] It concluded that in the circumstances of this case, recognising the need to respect human rights, the requirement of objective justice makes it impossible to accept the justifications offered in the GDR legal system.[266]

4.3.2 Criminal liability before the ECHR

Article 7 of the Convention requires that criminal liability is derived either from national or from international law, as it existed at the time of the offence.[267] The Court's reasoning to find this criminal liability is apparently far from consistent and creates the impression that the Court is willing to consider selected provisions of GDR law in isolation to reach its desired conclusion.[268]

4.3.2.1 National law

In interpreting the GDR's national law, the Court takes a strict rule-of-law approach. It handles the GDR's national law as that of a Convention state, strictly applying its statutory provisions. In this fashion, the Court found that the actions of the applicants were contrary to and not justifiable under the written law in force at the time, which (formally) contained human rights provisions that were to be observed.[269] As regards the GDR's state practice, the Court found this to be non-binding due to its incompatibility with those strictly applied statutes. Contrary to what would be the outcome

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[261] Judgment on appeal of 26 July 1994, Bundesgerichtshof, quoted in *Streletz, Kessler and Krenz v. Germany*, *supra* note 208, §20.
[262] *Cf.* Dreier, H., *Gustav Radbruch und die Mauerschützen*, 52 JZ (1997), p. 426.
[263] Judgment on appeal of 26 July 1994, Bundesgerichtshof, quoted in *Streletz, Kessler and Krenz v. Germany*, *supra* note 208, §22.
[264] BVerfGE 95, 96.
[265] See above 3.1.2.4.
[266] Judgment of 24 October 1996, Bundesverfassungsgericht, quoted in *Streletz, Kessler and Krenz v. Germany*, *supra* note 208, §22.
[267] Arnold, *supra* note 122, p. 72.
[268] *Ibid*., p. 78-79.
[269] *Cf*. Quint, P. E., *The Border Guard Trials and the East German Past: Seven Arguments*, 48 AJCL (2000), p. 557.

under GDR law, the Court decided that criminal liability could be based on national law.
This reasoning is not irrefutable as the Court bases criminal liability on law that was never applicable in the GDR.[270] The applicant's actions were not criminal under GDR law. Article 7(1) ECHR and article 103(2) GG require an interpretation of GDR law that is inherent to the GDR's system, but the Court has chosen to disregard this requirement in favour of human rights considerations, much like the Federal Court of Justice.

4.3.2.2 International law

The Court's line of reasoning in finding criminal liability based on international law is equally unpersuasive.[271] In examining to what extent the border regime was compatible with international human rights instruments, the Court found violations of article 3 UDHR, articles 6(1) and 12(1) ICCPR and article 2(1) ECHR.[272] These provisions do not carry individual criminal responsibility. The Court derived this responsibility from article 95 of the GDR's Criminal Code, which excluded justifications for actions breaching human or fundamental rights or international obligations of the GDR. However, in relying on this article of domestic law the Court did not base criminal liability on international law, but on national law.

4.3.2.3 Natural law

Legitimacy and legality do not disintegrate however, when one takes a closer look at the illegality of the killings. A more obvious approach would have been to recognise that the actions of the applicants were not criminal under GDR law and subsequently establishing that they were illegal under international human rights law.[273] This would not have solved the problem of individual criminal responsibility, but the reasoning of the Federal Criminal Court, which relied on natural law in applying the Radbruch formula, could be adopted there: the justifications for the killings were irreconcilable with the UDHR[274] and ICCPR[275] and therefore invalid from the outset.[276] Criminal liability would then result solely from the remaining articles in the GDR's Criminal Code. The ECtHR would have avoided the awkward step it had to take to establish individual criminal responsibility, but its reasoning in relation to human rights violations would remain intact. As it is, the ECHR at least seems to recognise the legitimacy of application

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[270] *Cf.* Rudolf, B., *Streletz, Kessler and Krenz v. Germany*, AJIL Vol. 95 (2001) p. 909.
[271] *Cf.* Arnold, *supra* note 122, p. 77.
[272] Note that the UDHR is a non-binding instrument and the ECHR was never in force in the GDR.
[273] Arnold, *supra* note 122 p. 81.
[274] Article 3 (right to life) and 13(2) (freedom to leave one's country).
[275] Article 6(1) (right to life) and 12(2) (freedom to leave one's country).
[276] Quint, *supra* note 269 p. 552.

of the Radbruch formula and, as the German courts, it relies on the natural law character of human rights.

4.3.3 Forseeability before the ECHR

Apart from the argument whether or not criminal liability could be established, the Court also had to deal with the applicants' complaint that a criminal conviction was not foreseeable to them. The reasoning to establish forseeability was slightly different in both cases, leading to the conclusion that forseeability has a subjective as well as an objective element.

4.3.3.1 Streletz, Kessler and Krenz

In the case of Streletz, Kessler and Krenz the Court applied a fairly straightforward argument. As high-ranking officials they were themselves primarily responsible for the discrepancy between the GDR's statutory provisions and the state practice. Due to their positions they could not have been unaware of the GDR's constitution or its international obligations. The state practice that they had instituted in contradiction of such statutory provisions could not be relied on, as in this way state officials could preclude their own responsibility for illegal acts.

4.3.3.2 The border guard

With regard to the border guard the Court used its traditional line of reasoning.[277] The written law, which contained human rights provisions and advocated proportionality in the use of firearms, was considered accessible to all.[278] In addition, the guard had voluntarily enlisted and, based on the common knowledge of the nature of the border regime, should have been aware that he would run the risk of being obliged to fire on unarmed fugitives.[279] Furthermore, the Court took the view that even a private soldier could not show total, blind obedience to orders which flagrantly infringed not only the GDR's own legal principles but also internationally recognised human rights.[280] Lastly, the Court agreed with the German courts that the difference in responsibility between the guard and the other applicants should be taken into consideration.[281] Nevertheless, not all judges agreed to forseeability in the case of K.-H.W.[282]

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[277] See above 4.1.
[278] *K.-H.W. v. Germany*, *supra* note 213, §73.
[279] *Ibid*., §74.
[280] *Ibid*., §75.
[281] *Ibid*., §81.
[282] *Cf. K.-H.W. v. Germany*, *supra* note 213, partly Dis. Op. Judge Cabral Barreto, §2-3; partly Dis. Op. Judge Pellonpää, joined by Judge Zupančič; see also Dreier, *supra* note 262, p. 430.

4.4 Conclusions

The focus of the European Court's case law is on the same element as identified as the core notion of legality in Chapter 2. The basis of legality is legal certainty, expressed by the Court in its requirements of accessibility and especially forseeability. Though the Court might employ slightly different wordings than national courts, its application of these principles is similar to that in the domestic jurisdictions discussed above.
Starting point is the phrasing of a criminal law in question and what interpretations can reasonably be brought under that phrasing. Forseeability will be increased by case law and consistent application of criminal law provisions. In addition, the role of the individual as the addressee of a particular criminal law is influential.
Apart from these general principles identifiable in the Court's case law, the marital rape and German border guard cases provide insights that could very well be influential in an international criminal law context. The role that human rights can play in international criminal law is underlined by the fact that from these cases answers can be distilled to questions that have plagued international criminal law. In particular, solutions are offered for the substantive justice v. strict legality debate and the role of individual responsibility for the establishment of forseeability of criminal liability. Furthermore, the Court's case law provides a framework that has proven valuable to international criminal tribunals in regard of dealing with customary law as a basis for international criminal prosecution.[283]

4.4.1 Radbruch formula

The outcome of the border guard cases in Germany and in Strasbourg was the same, the reasoning not critically different.[284] The German courts rely, explicitly or implicitly, on the Radbruch formula. The ECtHR relies on the same human rights provisions as the German courts to reject the applicants' justifications. The ECtHR does not reject the application of the Radbruch formula.[285] In fact, the reasoning of the German courts and the ECHR has given the Radbruch formula a distinct basis in positive law. Its natural law nature and notions of justice have found a place in positive international law through codification of human rights.[286] One of the problems with holding persons accountable for actions committed under fallen regimes (almost all cases of international criminal liability), has thereby been effectively eradicated. National law that contravenes internationally recognised human rights cannot serve to deny individual criminal responsibility. Holding

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[283] See below 5.4.3.
[284] *Cf. Streletz, Kessler and Krenz v. Germany*, *supra* note 208, §64-66.
[285] Rudolf, *supra* note 270, p. 910; contrary to what some writers claim: Miller, R., *Rejecting Radbruch: The ECHR and the Crimes of the East German Leadership*, 14 LJIL (2001), p. 654.
[286] Geiger, *supra* note 255, p. 545; Dreier, *supra* note 262, p. 429.

people responsible for such human rights violations is not contrary to principles of legality, as at no time (national law) justifications for this conduct could have been accepted due to their inherent incompatibility with human rights law. As such, it is not a matter of retroactive application of law,[287] but a matter of hierarchy of law, human rights provisions superseding national law.

4.4.2 Forseeability

With regard to forseeability the marital rape cases and the border guard cases also provide interesting insights and complement each other. In the border guard cases the Court is not only concerned with the objective ability to recognise a criminal offence, but, due to its different reasoning in the respective cases, also with a subjective ability depending on the specific defendant.[288] Therefore, in identical factual situations, the question regarding forseeability can be answered differently depending on the defendant in question. It becomes a question of whether a defendant can be subjectively held accountable, thereby effectively importing an element of guilt into the notion of forseeability.[289] Such guilt could easily be identified in the cases of Streletz, Kessler and Krenz, as they were co-responsible for the border regime. It can also be identified in the case of K.-H.W. though, were the Court points out the risk he willingly took by voluntarily enlisting as a border guard. This complements the Court's general case law that requires people with a particular responsibility or professional position that calls for a degree of caution, to inform themselves of the possible consequences of the actions they may have to undertake.[290] Effectively, the Radbruch formula itself can be seen as part of the individual based approach to forseeability.
Moreover, with regard to the forseeability of criminal liability, reliance on human rights can be a useful reference. Criminal courts[291] as well as human rights courts[292] have often used the "atrocity factor" as a means of establishing forseeability. Forseeability is considered implied due to the gruesome nature of certain acts. Reference to human rights provisions, as both the German courts and the ECtHR have done, can form an excellent practical alternative to the indefinite "atrocity factor".[293] Forseeability may be presumed in the case of serious human rights violations.[294]

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[287] As Dreier claims, *supra* note 262, p. 432.
[288] Arnold, *supra* note 122, p.85.
[289] *Cf.* the German Schuldprinzip, above 3.1.2.4.
[290] See above 4.1.1.2.2.
[291] See 1 IMT 219; 22 IMT 462.
[292] *C.R. v. UK*, *supra* note 219, §44; *S.W. v. UK*, *supra* note 205, §42.
[293] *Cf.* Cassese, A., *The Influence of the ECHR on International Criminal Tribunals* in Bergsmo, M (Ed.), *Human Rights and Criminal Justice for the Downtrodden* (2003), p. 26.
[294] Rudolf, *supra* note 270, p. 910; for a different point of view, see Arnold, supra note 122, p. 90.

The case law of the Court concerning a subjective, individual-based approach to accessibility and forseeability has not only succeeded in providing a standard that fits domestic jurisdictions in both civil law and common law countries, it has also proven to be an effective instrument for international criminal tribunals to deal with the difficulties presented by customary law in particular.

5 ICTY and ICTR

The ICTY and ICTR represent the first instance after the Nuremberg and Tokyo trials where individuals have been prosecuted on an international level. The two Tribunals can be properly considered as the first international criminal tribunals, as opposed to the multilateral character of Nuremberg and Tokyo.
The Tribunals are generally regarded as a great advancement as compared to Nuremberg, though they have not been able to completely avoid criticism. As noted, one of the major criticisms of the Nuremberg Tribunal concerned the question of application of *ex post facto* laws. The ICTY has suffered similar accusations, though not in regard of its statute, which was drafted with particular care to avoid this,[295] but in regard to its case law.
The purpose of this chapter is not to give a complete overview of the Tribunals' case law however. Much more, its purpose is to identify difficulties regarding the *nullum crimen* principle, especially in relation to customary law,[296] that can be alleviated using a human rights based approach. Not only does this approach respect defendants' rights, it provides a more coherent context of finding and applying the law.

5.1 Nullum crimen

5.1.1 The Statutes

The *nullum crimen* principle is not included in either the ICTY Statute or the ICTR Statute.[297] Nevertheless, the principle is explicitly referred to in the UN Secretary-General's Report concerning the establishment of the ICTY. The Report states, with regard to the Tribunal's subject matter jurisdiction, that the *nullum crimen sine lege* principle requires "that the international tribunal should apply rules of international humanitarian law, which are beyond any doubt part of customary law".[298] This reference however is solely a delimitation of the law to be applied by the Tribunal to ensure it would not exceed the limits of existing international law or those set by the Security Council.[299] It does not explain in what way the principle would apply in the practice of the Tribunal.
This is confirmed by the fact that the Report does not mention the principle in relation to article 7 or article 21 of the ICTY Statute, the provisions

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[295] Morris, V. and Scharf, F. P., *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia* (1995) Vol. 1, p. 333.
[296] Blakesley, C. L., *Jurisdiction, Definition of Crimes and Triggering Mechanisms*, 25 Denv. J. Int'l. L. & Pol'y (1997).
[297] It is also not included in the Statute of the SCSL.
[298] Report of the Secretary-General pursuant to paragraph 2 of SC Res. 808, 3 May 1993, UN Doc. S/25704, §34.
[299] Boot, *supra* note 3, p. 247.

concerning individual criminal responsibility and the rights of the accused. In addition, no reference is made to the status of the *nullum crimen* principle as a human right as laid down in article 15 ICCPR. In contrast, article 14 ICCPR was referred to with regard to the rights of the accused.[300]
The absence of a provision on the *nullum crimen* principle then implies that the law to be applied by the Tribunal would in no way conflict with this principle in respect of the prohibition of ex post facto or retroactive legislation.[301] The Report does not address other aspects of the principle, such as the prohibition of vagueness or indeterminacy of the law or rules concerning strict construction and the prohibition of analogy. The ICTY's Appeals Chamber has confirmed this view that the Report only considered the jurisdictional aspects of *nullum crimen*.[302] Other aspects would be left to the Tribunal itself to deal with.

5.1.2 Nullum crimen theory

The ICTY has considered the content and value of the principle of legality extensively in the *Celebici case* when investigating various aspects of the construction of criminal statutes.[303] The Tribunal first stated that the principles of *nullum crimen* and *nulla poena sine lege* are well recognised in the world's major criminal justice systems as being fundamental principles of criminality. Such principles also include the prohibition of ex post facto and retroactive criminalization. Additionally, the requirements of specificity and prohibition of ambiguity form part of these fundamental principles. As the Tribunal put it: "[t]hese considerations are the solid pillars on which the principle of legality stands. Without the satisfaction of these principles no criminalisation process can be accomplished and recognized".[304]
It is clear that the Tribunal views these combined principles of legality as "general principles of criminal law common to the major systems of the world",[305] and not necessarily a "general principle of international criminal law". This follows from the wording, but is also clarified when the Tribunal continues to state that, due to the difference in methods of criminalization in national and international systems, it is uncertain in how far these principles have become part of international legal practice, separated from their domestic roots.[306]
The principle of legality in international criminal law then has a meaning distinct from that in national law with regard to its applicability and

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[300] Report of the Secretary-General, *supra* note 298, §106.
[301] Boot, *supra* note 3, p. 247.
[302] *Prosecutor v. Dusko Tadic*, Case IT-94-1, Appeals Chamber Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, §143.
[303] *Prosecutor v. Zdravko Mucic et al.,* Case IT-96-21 ("*Celebici*"), Trial Chamber judgment, 16 November 1998.
[304] *Ibid*., §402.
[305] Wording of the ICTY Trial Chamber, *Prosecutor v. Kupreskic et al*., Case IT-95-16, Trial Chamber judgment, 14 January 2000, §591.
[306] *Prosecutor v. Zdravko Mucic et al.*, *supra* note 303, Trial Chamber judgment, 16 November 1998, §403.

standard, as in the field of international criminal law the rights of the accused have to be measured against the limitations inherent in the international law making process.[307]
After these general considerations the Tribunal seemed to make a jump, leaping towards what it undoubtedly considers to be part of the principle of legality in international law, namely non-retroactivity and the rule of strict construction.[308] Oddly enough, this time it does seem to refer to these principles as general principles of international criminal law. Like in national law and human rights law, the Tribunal confirmed the legislator's primacy over the definition of crimes and penalties, even though in international law no legislator can be readily identified, particularly not with regard to rules of customary law. The rule of strict construction stems from this primacy, and requires that no conduct can be brought under a rule of criminal law that does not comprise all the elements of that rule. It is not for a court to fill existing gaps in the law where these gaps are deliberate. The role of a court is to interpret existing rules of law.[309] The importance of the rule of strict construction has been stressed repeatedly.[310] Nevertheless, the gradual clarification of a rule through interpretation stays within the boundaries set by the principle of legality.[311]
This statement, combined with the Tribunal's findings earlier in the same case[312] make it clear that the Tribunal cannot revert to reasoning by analogy. This view is further confirmed by the Report of the Secretary-General, as judicial law making through reasoning by analogy conflicts with the idea that the Tribunal is only to apply what is beyond a doubt already part of customary law.
The sensitivity to the demands of legality the Tribunal seems to expose in the *Celebici case* is quite remarkable. In fact, its interpretation of the principle of legality is almost identical to that found in national jurisdictions. This is not really surprising though as the Tribunal does not explicitly state on what sources these findings are based and seems to rely almost exclusively on national standards in its reasoning. Even so, the Tribunal's understanding of legality seems even stricter than the American notion of this principle, in particular concerning the rule of strict construction. Also, apart from the application of customary law, the Tribunal stresses the same elements of legality found in the German Gesetzlichkeitsprinzip, generally considered a principle of legality in the strict sense. This influence of customary law though is what sets the practice

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[307] *Ibid*., §405.
[308] *Ibid*., §408.
[309] See *Prosecutor v. Zlatko Aleksovski*, Case IT-95-14/1, Appeals Chamber judgment, 24 March 2000, §127.
[310] See also *Prosecutor v. Stanislav Galic*, Case IT-98-29, Trial Chamber judgment, 5 December 2003, §93; also Cassese, *supra* note 1, p. 49.
[311] *Prosecutor v. Zdravko Mucic et al*, *supra* note 303, Appeals Chamber judgment, 20 February 2001, §576; *Cf.* the ECHR's identical approach in S. W. v. UK, *supra* note 205, §36.
[312] *Prosecutor v. Zdravko Mucic et al*, *supra* note 303, Appeals Chamber judgment, 20 February 2001, §165.

of the Tribunal with regard to *nullum crimen* apart from national notions and even its own theoretical concept as presented above. As the ECHR already discovered, unwritten law is difficult to reconcile with any strict approach to legality.[313]

5.2 The ad hoc tribunals and human rights

Despite the fact that the *nullum crimen* principle is not mentioned in the statutes of the ad hoc tribunals, there is reason enough to argue that it is applicable to the practice of the tribunals, not only as a general principle but also as a human right.

The principle is an internationally recognised human right, laid down in various human rights instruments. The standards set by these instruments are naturally only binding on the states party. The tribunals are not and cannot become parties to them. Nevertheless, there are compelling arguments to assume that the ad hoc tribunals should at least adhere to such internationally recognised human rights standards.[314]

The tribunals are set up as subsidiary organs of the UN Security Council. As such, they are to be expected at the very least not to contradict the principles that underlie various UN instruments, most notably the UN Charter. Article 24(2) of the UN Charter states that in performing its duties, the Security Council is to act in accordance with the purposes and principles of the UN. Among those purposes, as mentioned in article 1(3) UN Charter is the promotion of respect for human rights and fundamental freedoms. The Security Council also must act "in conformity with the principles of justice and international law",[315] meaning that it cannot disregard international law when exercising its powers in establishing subsidiary organs. By extension, such subsidiary organs must be expected to respect international law standards to the same extent as the organ from which it derives its authority. An additional and convincing argument is that the UN, when exercising criminal jurisdiction, acts with official authority in a state-like manner. There is no reason why the UN, in this exercise of the joint criminal jurisdiction of its member states, should not be bound by the same international legal rules as its members.[316] "[W]here enforcement action is taken by the UN – one of the major promoters of human rights in the international arena – an exemplary respect for human rights can be legitimately demanded." [317]

The statutes of the tribunals do live up to this in respect for the rights of accused and suspects in article 21 ICTY Statute and article 20 ICTR Statute

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[313] See above 4.2.

[314] Cf. Reinisch, A., *Das Jugoslawien-Tribunal der Vereinten Nationen und die Verfahrensgarantien des II. VN-Menschenrechtspaktes: Ein Beitrag zur Frage der Bindung der Vereinten Nationen an nicht-ratifiziertes Vertragsrecht*, 47 Aust. J. Publ. Int'l L. (1995), p. 173-213.

[315] Article 1(1) UN Charter.

[316] Reinisch, *supra* note 314, p. 211-212.

[317] *Ibid*., p. 213.

respectively. These articles were intended to mirror the guarantees laid down in article 14 ICCPR and other human rights instruments.[318] The importance of the rights of the accused as a human right were confirmed by the Secretary-General in his Report, where he noted that the tribunal must fully respect internationally recognised standards regarding the rights of the accused, which are, in particular, contained in article 14 ICCPR.[319]

5.2.1 The ICTY

The ICTY has on various occasions considered the relevance of international human rights standards to the practice of the Tribunal, though practically always in regard to fair trial guarantees and seldom concerning the *nullum crimen* principle. Still, the ICTY's approach to human rights standards is important both to the applicability of the *nullum crimen* principle in general, as well as the Tribunal's approach to finding custom.[320] In the first case before it, the Appeals Chamber of the ICTY found that, for the Tribunal to have been properly established, it must have been established in accordance with international standards and "must provide all the guarantees of fairness, justice and even-handedness in full conformity with internationally recognized human rights instruments".[321] It would seem that the Appeals Chamber considers such human rights standards to be directly applicable to proceedings before the ICTY.
Nevertheless, a different opinion can be found in the *Tadic* Appeals Chamber judgment of 1999. With regard to fair trial guarantees, the Tribunal noted that article 21 of its Statute mirrors the fair trial guarantees in the ICCPR, the ECHR and the ACHR.[322] However, after an extensive investigation of the case law of the EComHR, the ECtHR and the HRC, the Tribunal found that the fair trial guarantee in the present case had to be given a more liberal interpretation than under human rights law.[323] As the Trial Chamber had found earlier in a 1995 Decision in the *Tadic case*, the Tribunal was considered to have to interpret the fair trial guarantee "within its own legal context".[324] This context was considered substantially different from that in which the ICCPR or ECHR is applied, namely that of "ordinary" criminals in a domestic jurisdiction, as opposed to the Tribunal, which adjudicates "crimes which are considered so horrific as to warrant

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[318] *Prosecutor v. Dusko Tadic*, *supra* note 302, Trial Chamber Decision on the Prosecutor's Motion requesting Protective Measures for Victims, 10 August 1995, §27; *Prosecutor v. Dusko Tadic*, *supra* note 302, Appeals Chamber judgment, 15 July 1999, §43.
[319] Report of the Secretary-General, *supra* note 298, §106.
[320] See below 5.4.
[321] *Prosecutor v. Dusko Tadic*, *supra* note 302, Appeals Chamber decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, §45.
[322] *Prosecutor v. Dusko Tadic*, *supra* note 302, Appeals Chamber judgment, 15 July 1999, §43.
[323] *Ibid*., §52.
[324] *Prosecutor v. Dusko Tadic*, *supra* note 302, Trial Chamber decision on the Prosecutor's Motion requesting Protective Measures for Victims, 10 August 1995, §27; also *Prosecutor v. Anto Furundzija*, Case IT-95-17/1, Appeals Chamber judgment, 21 July 2000, §177.

universal jurisdiction". It continued stating that, due to the different circumstances in which the right to a fair trial is to be interpreted, the Tribunal was more akin to a military tribunal, "which often has limited rights of due process and more lenient rules of evidence".[325]

5.2.2 The ICTR

The ICTR has taken a somewhat different and more direct approach to the influence of human rights instruments to its proceedings. It has considered that the ICCPR is a part of general international law and should be applied on that basis. With regard to regional human rights mechanisms, though they are not binding on the Tribunal, it found that they provide assistance in interpreting and applying the Tribunal's applicable law and constitute authoritative evidence of international custom.[326] This more direct approach, especially concerning the ICCPR, has led the ICTR on at least one occasion to apply provisions from the ICCPR directly to the case before it, not only in regard of article 14 ICCPR, [327] but also article 2(3) ICCPR.[328] In addition, the ICTR has found that human rights standards as laid down in international instruments represent the bare minimum to which the Tribunal must live up.[329] Nevertheless, this more direct approach seems to be an exception rather than the rule. The ICTR generally sticks to the same interpretation as the ICTY that human rights instruments do not apply on an equal level with the law governing the Tribunal, but are considered as assistance in finding the Tribunal's contextual value of these rights.[330]

5.2.3 Human rights standards?

The arguments why human rights standards apply differently do not convince per se. The distinction that domestic law deals with ordinary crimes while international criminal tribunals deal with "horrific" crimes cannot be so readily made.[331] Domestic law can deal with ordinary crimes,

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[325] *Prosecutor v. Dusko Tadic, supra* note 302, Trial Chamber decision on the Prosecutor's Motion requesting Protective Measures for Victims, 10 August 1995, §28.
[326] *Jean Bosco Barayagwiza v. Prosecutor*, Case ICTR-97-19-AR72, Appeals Chamber Decision, 3 November 1999, §40; also *Juvenal Kajelijeli v. Prosecutor*, Case ICTR-98-44A, Appeals Chamber judgment, 23 May 2005, §209.
[327] *Juvenal Kajelijeli v. Prosecutor*, *supra* note 326, Appeals Chamber judgment, 23 May 2005, §210-251.
[328] *Ibid*., §255.
[329] *Jean Bosco Barayagwiza v. Prosecutor*, *supra* note 326, Appeals Chamber Decision, 3 November 1999, §79.
[330] *Cf. Laurent Semanza v. Prosecutor*, Case ICTR-97-20, Appeals Chamber decision, 31 May 2000, §78; also *Jean Kambanda v. Prosecutor*, Case ICTR-97-23, Appeals Chamber judgment, 19 October 2000, §33.
[331] Cassese, *supra* note 293, p. 26 as opposed to: McIntyre, G., *Defining Human Rights in the Arena of Humanitarian Law: Human Rights in the Jurisprudence of the ICTY*, in Boas, G. and Schabas, A. (Ed.), *International Criminal Law Developments in the Case Law of the ICTY* (2003), p. 200.

as well as crimes that fall into the category of international crimes.[332] One only needs to look at the various prosecutions on a national level of WWII war criminals.[333] Similarly, both national courts and the ECtHR have dealt with the former GDR's border regime, which could easily be qualified as constituting a crime against humanity.[334]
In addition, considering itself akin to a military tribunal does not mean that lesser human rights guarantees would apply. As the HRC noted in General Comment 13, even though the ICCPR does not exclude the legality of military tribunals, such tribunals should be exceptional and "genuinely afford the full guarantees stipulated in article 14".[335]
Even so, the ICTY in particular tends to stress the specificity of international criminal tribunals and for that reason limits the transposition of general principles of national law and human rights law into the international atmosphere.[336] From its case law it can be deducted that the Tribunal, due to its unique position and subject matter, sees itself as a self-contained legal system. The influence of human rights in its proceedings, in particular those concerning fair trial, is not necessarily determined by pre-existing human rights standards.[337] It is the tribunal itself that sets the standard on a case-by-case basis.[338]
Even though the Tribunal proceeds from this basis that the interpretation of human rights principles by other international judicial bodies is not binding upon it, it does often refer to the case law of human rights bodies, especially the HRC and ECtHR, in finding its own contextual meaning of these rights. The case law of the ECtHR in particular has become the yardstick from which the Tribunal measures its position.[339]

5.3 Custom and criminal liability

The Tribunals then apply a qualified version of the *nullum crimen* principle. In part, this is due to the Tribunals' reluctance to directly apply human rights standards to its cases. In part this is also due to the fact that the

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[332] For the importance of the role of national courts in the field of humanitarian law see Meron, T., *International Criminalization of Internal Atrocities*, AJIL Vol. 89 (1995), p. 555-556.
[333] I.e. the Eichmann trial in Israel, see above 2.1.3.3.
[334] See *Streletz, Kessler and Krenz v. Germany*, *supra* note 208, Con. Op. Judge Loucaides; *K.-H.W. v. Germany*, *supra* note 213, Con. Op. Judge Loucaides.
[335] HRC General Comment No. 13: *Equality before the courts and the right to a fair and public hearing by an independent court established by law (Art. 14),* 13 April 1984.
[336] *Prosecutor v. Zoran Kupreskic et al*., supra note 305, Trial Chamber judgment, 14 January 2000, §740; *Prosecutor v. Mile Mrksic et al*., Case IT-95-13/1, Trial Chamber Decision on the Motion for Release by the Accused Slavko Dokmanovic, 22 October 1997, 111 ILR 459, §59-60.
[337] This contextual approach to human rights standards can also be found in *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion 8 July 1996, ICJ Rep. 1996 (I), p. 226, §25.
[338] McIntyre, *supra* note 331, p. 199; Cassese, *supra* note 1, p. 30.
[339] *Ibid*., p. 201.

Tribunals, the ICTY in particular, rely heavily on customary law as a basis for individual criminal responsibility. This approach is irreconcilable with most national notions of the principle of legality. The German principle strictly forbids reliance on customary law to criminalise conduct. Similarly, most common law countries, like the United States, often require a basis in written law for individual criminal responsibility.
The European Court of Human Rights takes a different approach, relying on the notions of accessibility and forseeability, whilst not excluding unwritten law as a source for criminal responsibility,[340] but its case law shows that this doesn't always fit in well with stricter ideas of legality.[341] Though the specific nature of international criminal law may explain why the principle of legality applies differently from the national level, it still does not explain why its application would be substantially different from the human rights standard. The investigation of the case law of the ECHR has shown that its take on the principle of legality is flexible enough to accommodate both civil law and common law countries. As will be shown, the human rights standard can be equally important for international criminal law, and in particular customary law.

5.3.1 Article 3 ICTY Statute

The difficulties in dealing with rules of customary international law and the requirements of *nullum crimen* principles in the field of international criminal law came to the forefront in the first case brought before the ICTY. The Appeals Chamber decision of 2 October 1995 is of particular significance.[342]
In this case the *Tadic* defence claimed that article 3 ICTY Statute only applied to situations of international armed conflict. The Appeals Chamber however, in interpreting article 3, concluded that the list of crimes enumerated in this article was not exhaustive. Therefore, the list may be construed as to include other violations of international humanitarian law.[343] The content of article 3 was only limited by articles 2, 4 and 5 of the Statute, meaning that article 3 is a residual clause, aimed at making the ICTY's jurisdiction "watertight and inescapable".[344] This interpretation would fully realise the "primary purpose of the establishment of the International Tribunal, that is, not to leave unpunished any person guilty of any such serious violation, whatever the context within which it may have been committed".[345] The Appeals Chamber went on to set out four criteria that had to be fulfilled for conduct to be considered a violation of article 3 of the Statute: (i) a violation must infringe on a rule of international humanitarian

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[340] See above 4.1.1.
[341] *Cf. C. R. v. UK*, *supra* note 219; *S. W. v. UK*, *supra* note 205.
[342] *Prosecutor v. Dusko Tadic*, *supra* note 302, Appeals Chamber decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.
[343] *Ibid*., §87.
[344] *Ibid*., §91.
[345] *Ibid*., §92.

law; (ii) it must be customary in nature or be part of a treaty in force between the parties; (iii) the violation must be serious and (iv) it must entail individual criminal responsibility.[346] It follows from these criteria that the nature of the conflict, internal or international, is irrelevant.
Referring to the Nuremberg precedent solved the issue of establishing individual criminal responsibility for violations of rules that did not specifically mention this. The Nuremberg Tribunal had held that the absence of treaty provisions is not an obstacle to finding individual criminal responsibility:

"Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[347]

The Appeals Chamber even held that individuals must be held criminally responsible.[348] Relying on an amalgam of military handbooks and national legislation, including that of the former Yugoslavia, as well as various other sources, the Appeals Chamber stated that customary law imposes criminal liability for serious violations of common article 3, as supplemented by related general principles and rules.[349]

5.3.2 Article 4 ICTR Statute

The ICTR has had similar difficulties in establishing the content of article 4 of its statute. This article concerns violations of common article 3 of the Geneva Conventions and Additional Protocol II. The Tribunal was faced with essentially the same question as the ICTY in the *Tadic case*, namely that of the customary status of common article 3 of the Geneva Conventions, as well as the status of Additional Protocol II.
In the *Akayesu case* the Tribunal was first faced with this question. It started by recalling the Secretary-General's Report upon the establishment of the ICTY, recalling the statement that the ICTY should only apply rules of international humanitarian law that beyond doubt are part of customary international law. The Tribunal considered that the subject-matter jurisdiction of the ICTR was broader and also incorporated international instruments, which were not necessarily part of customary law or included reference to individual criminal responsibility. Article 4 referred to such instruments, and it was therefore for the Tribunal to establish if it contained norms, which did not form part of customary law.[350]

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[346] *Ibid*., §94.
[347] The Trial of Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany (1950), Part 22, p. 447.
[348] Prosecutor v. Dusko Tadic, *supra* note 302, Appeals Chamber decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, §128.
[349] *Ibid*., §134; also *Prosecutor v. Zdravko Mucic et al*., *supra* note 303, Appeals Chamber judgment, 20 February 2001, §162.
[350] *Prosecutor v. Jean Paul Akayesu*, Case ICTR-96-4, Trial Chamber judgment, 2 September 1998, §605.

The Trial Chamber found that Common Article 3 of the Geneva Conventions had acquired the status of customary international law. It stated that, in their domestic criminal codes, most states have criminalised those acts "which if committed in an internal armed conflict, would constitute violations of Common Article 3".[351] In addition, the Trial Chamber referred to the findings of the ICTY in the *Tadic* case, where it had been stated that article 3 of the ICTY Statute contained the body of customary international humanitarian law not included in articles 2, 4 and 5, and that article 3 ICTY Statute included Common Article 3.[352] The ICTR's Trial Chamber findings in the *Akayesu case* therefore agreed with the ICTY's concerning the status of Common Article 3.

The Report of the Secretary-General had not considered the whole of Additional Protocol II part of customary law. The ICTY's Appeals Chamber had confirmed this in the *Tadic case*.[353] The Trial Chamber in the *Akayesu case* found that at the fundamental guarantees of article 4(2) Additional Protocol were part of customary law.[354] In contrast to the ICTY though, the ICTR did confine its jurisdiction to specific violations of international humanitarian law.[355]

Despite these findings, the Trial Chamber in the *Kayishema and Ruzindana case* applied a very different approach. The Trial Chamber here deemed an investigation into the customary status of instruments contained in article 4 ICTR Statute superfluous. Firstly, both the Geneva Conventions and Additional Protocol II were in force in Rwanda at the relevant time. Secondly, the offences contained in article 4 of the Statute were all considered offences under Rwandan national law.[356] This was enough for the Chamber to conclude that persons incurred individual criminal responsibility and could be prosecuted for breaches of the Geneva Conventions and Protocol II.[357]

The two approaches were combined in the *Rutuganda case*, where the Trial Chamber referred back to the Secretary-General's Report and its interpretation in the *Akayesu judgment*,[358] but also mentioned the findings

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[351] *Ibid*., §608.

[352] *Ibid*., with reference to *Prosecutor v. Dusko Tadic*, *supra* note 302, Trial Chamber judgment, 7 May 1997, § 609.

[353] *Prosecutor v. Dusko Tadic*, *supra* note 302, Appeals Chamber decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, §117.

[354] *Prosecutor v. Jean Paul Akayesu supra* note 350, Trial Chamber judgment, 2 September 1998, §610.

[355] Herik, *supra* note 32, p. 211.

[356] *Prosecutor v. Clement Kayishema and Obed Ruzindana*, Case ICTR-95-1, Trial Chamber judgment, 21 May 1999, §156-157; also *Prosecutor v. Laurent Semanza*, *supra* note 330, Trial Chamber judgment, 15 May 2003, §353.

[357] For similar reasoning by the ICTY see *Prosecutor v. Dario Kordic and Mario Cerkez*, Case IT-95-14/2, Trial Chamber judgment, 26 February 2001, §167.

[358] *Prosecutor v. Georges Rutuganda*, Case ICTR-96-3, Trial Chamber judgment, 6 December 1999, §86-88.

of the *Kayishema and Ruzindana case*.[359] Individual criminal responsibility could be incurred both on the basis of conventional and customary law.[360]

5.3.3 Conclusions

It is clear that the Tribunals, the ICTY in particular, are not necessarily held back by the requirement that they apply only rules that are beyond doubt part of customary law. Extensive interpretations are the main part of the reason why the Tribunals have faced criticism. As will be seen, such extensive interpretations often come about because of the arbitrary nature in which the Tribunals construct custom. A prime example of this is the ICTY's findings that article 3 of its Statute applies to both internal and international armed conflicts, despite the fact that the ICRC as well as a substantial amount of states did not share this opinion.[361] The Tribunal's subsequent ruling when a violation of article 3 is considered to have been committed can easily be seen as law making rather than interpretation.[362]

5.3.3.1 Criminal responsibility

It is also clear from these cases that both Tribunals consider themselves competent to prosecute violations of rules of customary international law, whether or not such a rule entails individual criminal responsibility.[363] This approach however fails to separate the issue of the existence of a rule of customary law from the question if said rule entails individual criminal responsibility under international law. This distinction has been recognised by the ICTY in the *Vasiljevic case*, where it stated that "[f]or criminal liability to attach, it is not sufficient, however, merely to establish that the act in question was *illegal* under international law".[364]
The reliance on conventional law to establish individual criminal responsibility in both the cases of Yugoslavia and Rwanda obscures the fact that individual criminal responsibility needs to be established apart from the mere existence of a rule.[365] The separate opinion of Judge Nieto in the *Galic case* recognises this distinction and the implications for the Tribunals

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[359] *Ibid*., §89.
[360] See also *Prosecutor v. Alfred Musema*, Case ICTR-96-13, Trial Chamber judgment, 27 January 2000, §242; *Prosecutor v. Ignace Bagilishema*, Case ICTR-95-1A, Trial Chamber judgment, 7 June 2001, §98.
[361] *Some Preliminary Remarks by the International Committee of the Red Cross on the Setting-up of an International Tribunal For the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed on the Territory of the Former Yugoslavia*, DDM/JUR/422b, 25 March 1993, reprinted in Morris/Scharf, *supra* note 295 Vol. 2, §4.
[362] *Prosecutor v. Dusko Tadic*, *supra* note 302, Appeals Chamber decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Sep. Op. Judge Li, §13.
[363] Boot, *supra* note 3, p. 280.
[364] *Prosecutor v. Mitar Vasiljevic*, Case IT-98-32, Trial Chamber judgment, 29 November 2002, §199.
[365] Herik, van den, *supra* note 32, p. 213-214; Ratner, *supra* note 73, p. 104.

jurisdiction. Referring back to conventional law that doesn't mention criminal liability may satisfy the Tribunals jurisdiction *ratione materiae*, but not *ratione personae*.[366] Similarly, in his separate opinion in the *Norman case* before the SCSL justice Robertson stressed the significance of separately establishing the existence of individual criminal responsibility.[367] The *nullum crimen* principle concerns both the existence of the rule and the existence of criminal liability.[368] In national penal law this distinction is mostly irrelevant as penal statutes directly address the citizens. In international law however, this distinction is relevant, as individual criminal responsibility is not always established directly by virtue of the existence of rules of law. International law often firstly concerns states; individual criminal responsibility is derivative.[369] This distinction is furthermore important as the emergence of a rule of customary law and the emergence of individual criminal responsibility for a breach of that rule may very well occur at different times.[370]

5.3.3.2 Criminal responsibility and forseeability

The nullum crimen sine lege principle as applied by the Tribunals however has come to focus on the forseeability of the criminal character of norms to establish individual criminal responsibility, not on the aspect of preventing arbitrary exercise of jurisdiction over these norms.[371] This is particularly clear from the ICTY's findings in the *Celebici* case, where the Trial Chamber referred to article 15(2) ICCPR in stating that it "strains credibility to contend that the accused would not recognise the criminal nature of the acts [committed]",[372] and based criminal liability on that finding. Acts such as murder, torture and rape are criminal according to the general principles of law recognised by all legal systems. Therefore it was foreseeable for the perpetrator that such conduct would entail criminal liability. Though it is debatable to what extent general principles should be used for the

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[366] *Prosecutor v. Stanislav Galic*, *supra* note 310, Trial Chamber judgment, 5 December 2003, Sep. and partially Dis. Op. Judge Nieto-Navia, §113.
[367] *Prosecutor v. Samuel Hinga Norman*, Case SCSL-04-14, Appeals Chamber decision based on preliminary motion based on lack of jurisdiction, 31 May 2004, Dis. Op. Justice Robertson.
[368] Boot, *supra* note 3, p. 272.
[369] Cf. *Prosecutor v. Dragoljub Kunarac et al.,* Case IT-96-23&23/1, Trial Chamber judgment, 22 February 2001, §489; *Prosecutor v. Mitar Vasiljevic*, *supra* note 364, Trial Chamber judgment, 29 November 2002, §199.
[370] Cf. Report of the Secretary-General on the Establishment for a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, §17; Cf. also defence claim in *Prosecutor v. Fatmir Limaj et al.,* Case IT-03-66, Trial Chamber judgment, 30 November 2005, §177, claiming that individual criminal responsibility for violations of Common Article 3 was not yet custom *at the time*.
[371] Boot, *supra* note 3, p. 280.
[372] *Prosecutor v. Mucic et al*, supra note 303, Trial Chamber judgment, 16 November 1998, §313.

criminalisation of conduct,[373] the introduction of the notion of forseeability is a step forward. Not only is the *nullum crimen* principle as interpreted by the Tribunal brought closer to the (ECtHR's) human rights standard, but the forseeability criterion also ties the establishment of the existence of a customary rule directly to individual criminal responsibility. As long as a rule is foreseeable to an individual, it exists and he can be punished for violating it.
The notion of forseeability however is one that can be difficult to reconcile with the concept of customary law. Indeed, establishing not only the existence, but also the content of a particular rule of customary law (or a general principle for that matter) can be challenging enough for states, let alone private individuals.[374] Though it is difficult to completely eradicate this problem regarding the forseeability of customary norms, the key to alleviation can be found in a reconceptualisation of the manner in which the Tribunals identify custom.[375]

5.4 Finding custom: problems and process

The ICTY applies both conventional and customary international law. With regard to customary international law, the UN Secretary-General, upon the establishment of the Tribunal, noted that the principle of *nullum crimen sine lege* requires that the Tribunal should apply only those rules of international humanitarian law, which are beyond any doubt part of customary law.[376]
The Report stressed the particular importance of this principle for an international tribunal prosecuting persons responsible for serious violations of international humanitarian law.
The Tribunal seems to have taken this to heart at least in spirit, as it has repeatedly referred to the Secretary-General's Report before embarking upon a quest to find rules of customary international law.[377] Nevertheless, in practice the way in which the Tribunal has gone about identifying custom deviates substantially from this ideal. A thorough investigation into the ICTY's practice of finding custom shows that it is neither transparent nor consistent. The Tribunal's approach is hard to reconcile with the requirements of the principle of legality.

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[373] Cf. Wise, E. M., *General Rules of Criminal Law*, 25 Denv. J. Int'l L. & Pol'y (1997), p. 315.
[374] Verhoeven, J., *Article 21 of the Rome Statute and the Ambiguities of Applicable Law*, 33 NYIL (2002), p. 22.
[375] Gradoni, L., *Nullum crimen sine consuetudine: A Few Observations on How the ICTY Has Been Identifying Custom*, found at: http://www.esil-sedi.org/english/pdf/Gradoni.PDF (last visited 17 November 2005), p. 2-3.
[376] Report of the Secretary-General, *supra* note 298, §34.
[377] *Prosecutor v. Dusko Tadic*, *supra* note 302, Appeals Chamber decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, §143; *Prosecutor v. Goran Jelisic*, Case IT-95-10, Trial Chamber judgment, 14 December 1999, §61.

5.4.1 Finding custom

In finding custom the ICTY chooses to rely on a wide range of sources.[378] Prominent amongst these are judicial decisions of other international and national courts.[379] The approach taken with regard to using "foreign" judicial decisions as a basis for judgments is critical to its compatibility with notions of legality.

Cassese identifies two possible approaches to relying on such "foreign" bodies of case law.[380] The first is referred to as the "wild" approach. In this approach international judges rely on case law from other judicial bodies not to establish the existence of a rule of international law, but to directly solve the legal problem they are confronted with. Law from outside its own particular framework, including national case law, is applied on equal footing with that governing the tribunal's legal system and in fact can form a precedent for the international tribunal in question to be followed. It is clear that this approach is fairly erratic and unpredictable and difficult to reconcile with either the fundaments of international law or fair trial guarantees and notions of legality.

The second approach is what is referred to as the "wise" approach. Under this theory, the nature of the sources of law applied by international courts and tribunals is strictly adhered to. The basis of this approach is found in the sources of law recognised in article 38 of the ICJ Statute. National and international case law, as referred to article 38 (1)(d), are to be used only as a supplementary means to establish the existence of a rule of customary international law or a general principle of international law. This approach incorporates the pre-eminence both of international law over national law and of the law governing the international court in question over other international legal systems. It is not only legally more fundamentally sound, it also adds to the satisfaction of fair trial guarantees and in particular the *nullum crimen* principle. The margin for arbitrary decisions based on improperly constructed sources of law is smaller, adding to the forseeability of content and interpretation of rules of international law.[381]

This "wise" approach is the one propagated by the ICTY Trial Chamber in the *Kupreskic* judgment,[382] as well as the ICTR Appeals Chamber in the *Barayagwiza case*.[383] Nevertheless, as will be shown, it has taken the Tribunals considerable effort to realise this in practice.

Though Cassese presents this framework with reference to the use of "foreign" case law, there is no reason why it cannot be applied to the

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[378] *Prosecutor v. Goran Jelisic*, *supra* note 377, Trial Chamber judgment, 14 December 1999, §61.
[379] *Prosecutor v. Zoran Kupreskic et al., supra* note 305, Trial Chamber judgment, 14 January 2000, §537.
[380] Cassese, *supra* note 293, p. 20.
[381] Cassese, *supra* note 293, p. 21.
[382] *Prosecutor v. Zoran Kupreskic et al., supra* note 305, Trial Chamber judgment, 14 January 2000, §540.
[383] *Jean-Bosco Barayagwiza v. Prosecutor*, *supra* note 326, Appeals Chamber decision, 31 March 2000, §69.

various other elements the Tribunal relies on when attempting to find custom, such as national legislation and international instruments. Such sources of custom can equally be applied wisely or wildly, in particular national legislation as the Tribunal sometimes does not differentiate clearly between national case law and national law.[384]

5.4.2 Problems: a wild approach?

There is no question that national case law and legislation, as well as case law of international courts, are relevant sources when searching for international custom.[385] The use of national case law to establish international custom has long been accepted. [386] Such national judicial acts can be considered both as *opinio iuris* and state practice. [387] National legislation can be an equally important factor in establishing international custom. It is generally considered to constitute state practice.[388]
Nevertheless, two questions are very important when relying on national case law or legislation, as well as judgment of other international judicial bodies. Firstly, is this selection of case law and legislation directly relied upon or is it merely considered as evidence of a rule of international law? Separate from this, it is also critical to analyse what selection of case law and legislation is considered relevant. The two questions are closely related, as reliance on fewer sources will increase the risk of, intentionally or not, applying those sources directly.

5.4.2.1 What selection of materials is used?

A critical question in the establishment of customary international law is what materials are used to construct custom. This is in particular of importance when relying on national law or legislation. In the case of the ICTY, this choice of materials often seems arbitrary at best.
In the *Tadic case* for example, in establishing that Common Article 3 entails individual criminal responsibility, the Appeals Chamber considered only the judicial practice of Nigerian courts.[389] It is difficult however to establish how representative the case law used by the Tribunal is because of the

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[384] *Cf. Prosecutor v. Zoran Kupreskic et al., supra* note 305, Appeals Chamber judgment, 23 October 2001, §46; also *Prosecutor v. Drazen Erdemovic*, Case IT-95-16, Appeals Chamber judgment, 7 October 1997, Joint Sep. Op. Judges McDonald and Vohrah.
[385] *Cf.* ILA Principle 9, Statement of Principles Applicable to the Formation of General Customary International Law, Report of the 69th Conference (2000), p. 728.
[386] *Lotus case (France v. Turkey),* 1927 PCIJ, Series A Vol. 2, No. 10, p. 28-29; *Arrest Warrant case (Congo v. Belgium),* judgment 14 February 2002, ICJ Rep. 2002, p. 3, §58.
[387] *Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Merits, 1926 PCIJ, Series A Vol. 1, No. 7, p. 19.
[388] *Cf. Nottebohm case (Liechtenstein v. Guatemala),* judgment 6 April 1955 (2nd Phase), ICJ Rep. 1955, p. 4, at p. 22.
[389] *Prosecutor v. Dusko Tadic*, *supra* note 302, Appeals Chamber decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, §130.

absence of access to worldwide sources on national case law.[390] In this case though, the reliance on one single instance of judicial practice was compensated by referring to other sources to base custom on, such as national military manuals and legislation. In such cases the arbitrary choice of some sources will not be an obstruction to finding custom. This was not the case however in the same *Tadic decision*, when the Appeals Chamber examined the question whether crimes against humanity can be committed for purely private reasons. This time case law almost exclusively formed the basis for finding custom, but the choice of cases remained very limited.[391] Still, the Chamber considered this "relevant case law" to make the customary rule sufficiently clear.[392]

Though it is hard to authoritatively establish what constitutes a representative selection of case law, it would very much benefit the persuasiveness of the Tribunal's judgments, if it could make clearer why it chooses to rely on certain particular evidence to prove custom.[393]

This is of special importance because statistical analysis of the ICTY's case law shows, that as the level of evidence for the existence of a rule of customary law decreases, national judicial decisions acquire pre-eminence. In these instances, the ICTY tends to revert to relying on an elite of national jurisdictions. [394] The less evidence of state practice is available, the more the Tribunal tends to rely on the practice of western states (see supplement A). In fact, the 20 states the Tribunal most often refers to when attempting to find custom include 14 European and North American states (including the top 11) and 6 Latin American states.[395] In addition, the Tribunal often seems to rely primarily on notions extracted from common law systems without explaining why or under what authority (see supplement B).[396]

The choice of sources then is of great importance to the proper establishment of custom. The ICTY's choice however, is often erratic and remains largely unexplained. With reference to the notion of forseeability it needs to be noted that those trying to anticipate customary law, as established by the ICTY, in many cases should have kept their eyes on the judicial practice of only a handful of states.[397]

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[390] Nollkaemper, A., *Decisions of National Courts as Sources of International Law*, in Boas/Schabas, *supra* note 331, p. 285; Meron, T., *Geneva Conventions as Customary Law*, AJIL Vol. 81 (1987), p. 361.

[391] *Prosecutor v. Dusko Tadic*, *supra* note 302, Appeals Chamber decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, §256-267.

[392] *Ibid*., §270.

[393] Nollkaemper, *supra* note 390, p. 285; also Meron, T., *The Continuing Role of Custom in the Formation of International Humanitarian Law*, AJIL Vol. 90 (1996), p. 240.

[394] Gradoni, *supra* note 375, p. 8.

[395] *Ibid*., p. 13.

[396] As identified by Cassese, *Prosecutor v. Drazen Erdemovic*, *supra* note 384, Appeals Chamber judgment, 7 October 1997, Sep. and Dis. Op. Judge Cassese, §11; for this tendency in the case law of the ICTR see: *Jean-Bosco Barayagwiza v. Prosecutor*, *supra* note 326, Appeals Chamber decision, 3 November 1999, §56-59.

[397] Gradoni, *supra* note 375, p. 13.

5.4.2.2 How are they used?

Apart from the actual selection of materials the Tribunal chooses to rely on in establishing custom, it is also important to assess in what way these materials are used. Are they considered evidence of state practice (and can they really be considered as such) or are they treated as an existing rule or precedent?
When considering the judgments of both the ICTY and ICTR, it shows that both Tribunals have often tended to apply foreign judicial decisions directly to the cases before them. Alternatively, such judicial decisions are often referred to in support of a conclusion the Tribunal had already reached without explaining the relevance of such a reference.[398] Here too, the influence of common law notions is felt, as the appeal to regard foreign case law as precedent is strong.
In the case of *Jean-Bosco Barayagwiza*, the ICTR Appeals Chamber relied on case law from only two states, both with a common law system, to establish the legality of the accused's arrest and detention.[399] As identified above, reliance on such a small, homogeneous selection of national case law greatly increases the risk that what is primarily a national rule applicable in a specific legal system (i.e. common law) finds its way directly onto the international stage. In a different decision in the same case, national case law was relied upon only to confirm a conclusion the Tribunal already reached for largely unclear reasons.[400]
Other instances where the Tribunals' establishment of customary law is unclear can be referred to. In the *Kordic judgment*, the ICTY Trial Chamber did not even bother to establish the existence of a rule of customary law, but relied on a direct analogy to establish individual criminal responsibility for violations of Additional Protocol I.[401]
In addition, the ICTY tends to construct custom, regardless of the fact whether it reflects current or pre-existing custom. In the *Furundzija case*, the Trial Chamber referred to the ICC Statute as evidence of state practice, even though most acts prosecuted before the ICTY were committed well before the ICC Statute's adoption.[402] Similarly in the *Tadic case*, when rejecting the Nicaragua test for *de facto* state organs, the ICTY Appeals Chamber relied, amongst others, on two decisions by German courts and the

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[398] Cassese, *supra* note 293, p. 21.
[399] The United States and Singapore, *Jean-Bosco Barayagwiza v. Prosecutor*, *supra* note 326, Appeals Chamber decision, 3 November 1999, §56-59.
[400] *Jean-Bosco Barayagwiza v. Prosecutor*, *supra* note 326, Appeals Chamber decision, 31 March 2000, §65-68.
[401] *Prosecutor v. Dario Kordic and Mario Cerkez*, *supra* note 357, Trial Chamber judgment, 26 February 2001, §168-169.
[402] *Prosecutor v. Anto Furundzija*, *supra* note 324, Trial Chamber judgment, 10 December 1998, §227; also *Prosecutor v. Milorad Knrojelac*, Case IT-97-25, Appeals Chamber judgment, 17 September 2003, §221.

ECtHR's *Loizidou* judgment, none of which had been rendered at the time the acts in question were committed.[403]

5.4.3 Process: the ECHR approach

A marked change in the ICTY's approach to finding custom was initiated by the Trial Chamber's judgment in the *Vasiljevic case*. The accused was charged with committing violence to life and person, as listed in Common Article 3 GC. The Trial Chamber found that the first two requirements as enumerated in the *Tadic case*,[404] those of criminalisation of the conduct and individual criminal responsibility, were satisfied. It added however, that the criminal conduct in question needed to be sufficiently defined and accessible at the relevant time to warrant a criminal conviction.[405] To convict a person despite insufficient precision or accessibility of the criminal provision in question would be incompatible with the *nullum crimen* principle. The Trial Chamber stressed the importance of these requirements in particular against the background of the specificity of customary law. Referring back directly to the ECtHR's case law,[406] the Chamber went on to say that "a criminal conviction should indeed never be based upon a norm which an accused could not reasonably have been aware of at the time of the acts, and this norm must make it sufficiently clear what act or omission could engage his criminal responsibility".[407]
This development was followed up by the Appeals Chamber in the *Ojdanic decision*. The Appeals Chamber confirmed the findings in *Vasiljevic*, stating that individual criminal responsibility under customary international law can only exist if the law providing for it was sufficiently accessible and its consequences sufficiently foreseeable.[408] The Chamber went on to identify several factors that contribute to accessibility and foreseeability of a customary norm.
Firstly, the Appeals Chamber referred to national law, in particular that of the accused. Such domestic law may be relied on to establish that the accused could reasonably have foreseen that his conduct was prohibited and punishable.[409] One can refer to this as the "proximity factor".[410] A

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[403] Gradoni, *supra* note 375, p. 5; *cf. Prosecutor v. Momcilo Krajisnik*, Case IT-00-39, Trial Chamber Decision on Motion Challenging Jurisidction1, 22 September 2000, Sep. Op. Judge Bennouna.
[404] See above 5.4.1.
[405] *Prosecutor v. Mitar Vasiljevic*, *supra* note 364, Trial Chamber judgment, 29 November 2002, §193.
[406] The Trial Chamber mentioned *S.W. v. UK*, *supra* note 205, *G. v. France, supra* note 221 and *Kokkinakis v. Greece*, *supra* note 208.
[407] *Prosecutor v. Mitar Vasiljevic*, *supra* note 364, Trial Chamber judgment, 29 November 2002, §193.
[408] *Prosecutor v. Milan Milutinovic et al.,* Case IT-99-37, Decision on Dragoljub Ojdanic's Motion challenging jurisdiction – Joint Criminal Enterprise ("Ojdanic decision"), Appeals Chamber decision, 21 May 2003, §21.
[409] *Ibid*., §40.
[410] Gradoni, *supra* note 375, p. 15.

customary norm is brought closer to the accused through an equivalent in national law.
Secondly, rules of customary law themselves may provide sufficient guidance as to the existence of individual criminal responsibility.[411] In the *Ojdanic decision*, sufficient notice could be derived from a stream of judicial decisions as well as international instruments. The Tribunal made it clear that this factor, by itself, can be decisive for the accessibility of a rule of customary law, as opposed to the reference to national law, which is a complementary method. In the case of sufficient evidence of state practice, such a reference to national law is unnecessary.
Thirdly, the Appeals Chamber mentioned the atrocity factor.[412] The grave nature of certain acts can serve as an indication to the perpetrator that he is committing a crime. Though the atrocity factor is not enough to establish a crime under international law, it does serve to counter defence claims that it did not know of the criminal nature of an act. This too is a factor complementary to the traditional way of establishing custom through assessing state practice.

5.4.3.1 Accessibility and forseeability

The outcome is a method of finding custom that is closely linked to the *nullum crimen* principle and borrows heavily from the ECtHR's case law concerning article 7 ECHR. Accessibility and forseebility are the criteria by which to determine the existence of a rule of customary international law in the ICTY's criminal law context.
Accessibility is determined by three factors. Traditional state practice and the atrocity factor are elements belonging specifically to the international criminal law sphere. The proximity factor is used to assess applicability of customary rules already established to belong to that sphere by assisting accessibility in the particular case in question. This approach, rooted in the principle of legality, forces judges to ascertain custom from the perspective of the individual, [413] much like the practice of the ECtHR. It requires a wide-ranging and consistent selection of evidence of state practice. This selection determines the accessibility of a customary rule, which can be (somewhat) adjusted by referring to natural law (atrocity factor) or national law.
The value of the second requirement, that of forseeability, follows the determination of accessibility. Only after a rule of customary law is considered applicable in a case, can the specificity of its content be assessed.[414] In the *Vasiljevic judgment* the Trial Chamber considered "sufficient precision" to be a critical element of a rule of customary law. An

[411] *Prosecutor v. Milan Milutinovic et al., supra* note 408, Ojdanic decision, §41.
[412] *Ibid*., §42.
[413] Gradoni, *supra* note 375, p. 15.
[414] Bassiouni, M. C., *Introduction to International Criminal Law* (2003), p. 225.

indeterminate rule cannot be applied in international criminal law.[415] In that sense forseeability or specificity is a hierarchically superior norm,[416] invalidating customary rules that fail to meet its requirements, a position that is very much in line with its status as a human right and national doctrines of Bestimmtheit and void-for-vagueness.

5.5 Conclusion

The reliance by the ICTY on a human rights based approach to the *nullum crimen* principle and to finding customary law is a positive development in its case law. Initially, through its extensive interpretations of customary law, the ICTY seemed to fall back on the Nuremberg method regarding the *nullum crimen* principle. Legality got snowed under in complex and questionable constructions of customary law, inspired by aspirations to achieve a "just" outcome. In the face of atrocities, *lex ferenda* merges with *lex lata*, the "ought" with the "is".[417] Were such justice considerations easily recognisable in the IMT judgment, they can also be identified in the ICTY's practice.[418] Early in the *Tadic case* already, the ICTY Appeals Chamber described the purpose of the establishment of the Tribunal as "not to leave unpunished any person guilty of any such serious violation, whatever the context within which it may have been committed".[419] This interpretation of the Statute clearly shows that traditional aspects of the *nullum crimen* principle, such as legal certainty and fair warning, were not a primary concern for the Tribunal. What's more, the Tribunal has on occasion relied on the Nuremberg judgment as a precedent. Considering the questionable value of the Nuremberg judgment as a precedent[420] this is not wise because it disregards the developments that have taken place in the meantime in international criminal law itself and in human rights law. The direction chosen in the *Vasiljevic case* and the *Ojdanic decision* shows however that the Tribunal is well aware of the relevance human rights standards have claimed for the international criminal law process. The framework provided by referring to accessibility and forseeability recognises the individual's perspective when establishing criminal responsibility, as in the case law of the ECtHR, from which the concepts are borrowed. What's more, as in the case law of the ECtHR, this framework also provides room for natural law or justice notions without losing sight of the law, through the incorporation of an atrocity factor. When referring to the ECtHR's case law, the Tribunal has not specifically incorporated the "assessment of risk factor, as identified by the ECtHR in the *Cantoni*

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[415] *Prosecutor v. Mitar Vasiljevic*, *supra* note 364, Trial Chamber judgment, 29 November 2002, §203.
[416] Gradoni, *supra* note 375, p. 16.
[417] Meron, *supra* note 390, p. 361
[418] Klarin, M., *The Tribunal's Four Failures*, 2 JICJ 2 (2004), p. 549.
[419] *Prosecutor v. Dusko Tadic*, *supra* note 302, Appeals Chamber decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, §92.
[420] See above 2.3.

case.[421] This factor could be of particular importance in the context of an armed conflict, as an individual participating in this conflict should be well aware that he is engaging in risky conduct. Nevertheless, in the case law of the Tribunal, this factor seems to have been subsumed in the atrocity factor. On the whole, this relatively new direction can be seen as a move from "lawyer's notice", where an individual was expected to be aware of customary law the Tribunal itself had difficulties establishing, to a more subjective approach. The perspective on the existence of rules of customary law has changed. Once it can reasonably be assumed that the defendant was aware of the existence of the rule in question, it can be said to have customary status and be applied in his case.[422] This is not only in line with human rights standards, it also brings the Tribunal's case law closer to national conceptions of legality, requiring sufficient specificity in rules of criminal law to provide the critical element of fair warning or notice.

[421] See above 4.1.1.2.2 and 4.2.2.
[422] Gradoni, *supra* note 375, p. 18.

6 The International Criminal Court

The International Criminal Court represents a new step in the development of international criminal law. After the Nuremberg Tribunal, which was established after the crimes it prosecuted were committed and applied essentially new law, and the Ad Hoc Tribunals, which were also set up to prosecute crimes already committed, the ICC is the first forum for prosecution of future crimes. As opposed to Nuremberg, Yugoslavia and Rwanda, this provided the opportunity to draft a statute without being heavily influenced by emotional or political motives. This difference is important, as it virtually eliminates justice considerations inspired by the atrocity of crimes committed. In addition, the ICC is set up by a treaty, as opposed to the previous tribunals. This has given the ICC Statute a specificity and comprehensiveness absent in general international criminal law. The provisions regarding the principle of legality reflect this specific character of the ICC Statute.

6.1 Drafting history

The initial ILC Draft Statute proposed a jurisdictional distinction between treaty crimes and crimes under general international law. The *nullum crimen* principle was intended to reflect that distinction.[423] With regard to crimes under general international law, draft article 39(a) established that no accused would be held guilty of such crimes unless his conduct constituted a crime under international law at the time it occurred. The *nullum crimen* principle, at this point, was regarded as no more than a prohibition of retroactive application of criminal law.
The ILC Draft did not exhaustively define the crimes over which the Court would have jurisdiction. Jurisdiction was defined by reference to "crimes under general international law". It was argued however, that the principle of legality, as a guideline for the legislator, required the crimes within the jurisdiction of the Court to be defined expressly in the Statute. General international law (and in particular customary law definitions) as interpreted by the Court would be too imprecise to satisfy the demands of legality.
The ILC subsequently enumerated four crimes, whose content however was still not defined.[424] The Court, using the relevant sources of international law, would interpret their content. This approach was also not considered satisfactory from the perspective of the principle of legality. The 1995 Ad

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[423] *ILC Draft Statute for an International Criminal Court*, in: *Report of the ILC on the Work of its Forty-Sixth Session*, UN GAOR, 49th Sess., Supp. No. 10, UN Doc. A/49/10 (1994), p. 112.
[424] *Ibid*., §60.

Hoc Committee proposed that the principle required a complete definition of crimes, rather than an enumeration.[425] The 1996 Preparatory Committee subsequently decided that "the crimes within the jurisdiction of the Court should be defined with the clarity, precision and specificity required for criminal law in accordance with the principle of legality".[426]
The 1996 Preparatory Committee Report contained three proposals for a revised *nullum crimen* article, essentially retaining the ILC's Draft, whilst incorporating the principle of "*in dubio pro reo*" as well as a precursor to the present paragraph 3. One of the proposals also included the prohibition of analogy to construct crimes and penalties.
The outcome of these proposals was an article with three paragraphs, very close to the eventual article 22. The first paragraph contained the prohibition of retroactivity, though still split between treaty crimes and "core" crimes. The second paragraph contained the prohibition of analogy, whilst the third was essentially the same as the present article 22(3).[427] This text made it through to the 1998 Diplomatic Conference where the Working Group on General Principles of Criminal Law suggested inclusion of a rule on strict construction.[428] The rule of strict construction was subsequently incorporated by the Drafting Committee and, after dropping the reference to treaty crimes in the paragraph concerning non-retroactivity,[429] article 22 of the ICC Statute emerged:

"Article 22
Nullum crimen sine lege

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.
3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute."[430]

6.2 Content

As opposed to ICTY and ICTR Statutes, the ICC Statute recognises both the jurisdictional aspect and the interpretational aspect of the principal of

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[425] *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, UN GAOR, 50th Sess., Supp. No. 22, UN Doc. A/50/22 (1995), §52.
[426] *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, UN GAOR, 51th Sess., Supp. No. 22, UN Doc. A/51/22 (1996), Vol. 1, §52.
[427] *Decisions Taken by the Preparatory Committee at its Session Held from 11 to 21 February 1997*, UN Doc. A/AC.249/1997/L.5 (1997).
[428] *Chairman's suggestions for article 21, 26, and 28*, UN Doc. A/CONF.183/C.1/WG.GP/L.1 (1998).
[429] Treaty crimes as a whole were excluded from the Draft Statute.
[430] Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998, 2187 UNTS 90, entry into force 1 July 2002.

legality. The principle of is both a law-making restraint and the basis for rules of judicial interpretation.[431] These two functions can be clearly identified in the way the Statute has been drafted and in the guarantees laid down in article 22.

6.2.1 Nullum crimen and sources of law

Article 22 is based upon the basic premises of the principle of legality, which assumes a rational, autonomous legal subject and a known or knowable law.[432] Of particular concern for the drafters was how to effectively reconcile the principle with custom as a source of international law. The Statute itself was to be the fundamental source to identify what crimes came under the jurisdiction of the Court. What remained was the question of the role of customary law. The complete exclusion of custom was contemplated, as reference to the Statute to establish a crime under international law would make reference to other sources of law superfluous.[433] Eventually, a compromise was included in the Statute, which gave prevalence to the Statute for the definition of crimes, whilst not excluding custom as an additional source. Under article 21(1)(b), The Court may revert to customary law "where appropriate", for example to interpret already existing charges or elucidate their meaning.[434]
The principle of legality was the prime concern for those who wanted crimes defined expressly and exhaustively in the Statute. General international law was not considered sufficiently precise to define elements of crimes, in particular where no treaty definition of a crime existed.[435] Though undoubtedly the concern about the uncertainty of customary law definitions played a part in this push for codification, it was also a result of states' awareness that their officials too could be indicted and that strict delimitation of the Court's jurisdiction was therefore desirable.
This aspect of the role of the principle of legality has not become redundant with the adoption and entry into force of the Statute. It will continue to be a guideline to any future amendments to the Statute, such as those under article 9.

6.2.2 Non-retroactivity

Paragraph 1 of article 22 deals with the traditional corollary of the *nullum crimen* principle: the prohibition on retroactive application of criminal law. This prohibition incorporates the temporal aspect of the principle of legality.

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[431] Bassiouni, *supra* note 7, p. 88.
[432] Broomhall, B., *Article 22: Nullum Crimen Sine Lege*, in Triffterer, O. (Ed.), *Commentary on the Rome Statute of the International Criminal Court* (1999), p. 450.
[433] *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, UN GAOR, 51st Sess., Supp. No. 22, UN Doc. A/51/22 (1996), Vol. 2, §79-80.
[434] Lamb, *supra* note 13, p. 750.
[435] This was specifically a concern for the crime of aggression.

A person cannot be held criminally responsible under the Statute for conduct that, at the time it was committed, did not constitute a crime under the Court's jurisdiction.
The inclusion of a provision on the prohibition of retroactivity was considered essential from the beginning of the drafting process.[436] Elements of the prohibition are spread out over articles 22(1), 24(1) and 11(1). The articles overlap to a certain degree, but they can be told apart. Article 11(1) is concerned with the Court's jurisdiction *ratione temporae*, as opposed to the other two articles, which deal with criminal responsibility. As a focus on jurisdiction, article 11(1) is logically applied before considerations of criminal responsibility can be entertained. With regard to criminal responsibility, article 22(1) makes this conditional on the existence of an applicable crime in the Statute, whereas article 24(1) refers to the prior entry into force of the Statute. Though this distinction may be of importance in certain instances where conduct falls under a statutory prohibition but the Statute has not yet come into force in relation to the perpetrator, the added value of article 24(1) is questionable, as the same result will be reached in the jurisdictional phase by article 11(1).

6.2.3 Statutory interpretation

Article 22(2) contains three further principles that are generally considered to be part of the principle of legality, namely the prohibition on analogy, the rule of strict construction and the principle of "*in dubio pro reo*". These principles have become part of most modern domestic legal systems,[437] and have found recognition in human rights law,[438] as well as international criminal law.
The extent of the prohibition on analogy is not perfectly clear. The matter did not receive continued attention in the Preparatory Committee, leaving open the question if it is an absolute prohibition or if it allows for certain forms of analogy.[439] Nevertheless, it seems reasonable to accept the prohibition to be intended primarily to debar the imposition of criminal responsibility for newly created crimes.[440] Analogy remains an appropriate tool of interpretation to fill holes in definitions of crimes in the Statute. Such a narrow use of analogy is not incompatible with human rights standards and is even permitted under stricter national notions of legality.[441]

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[436] Saland, P., *International Criminal Law Principles*, in: Lee, R. S. (Ed.), *The International Criminal Court: The Making of the Rome Statute* (1999), p.194-195.
[437] See above chapter 3. Historically the prohibition on analogy has been less strictly observed in common law systems, but there is currently more convergence, see Broomhall, *supra* note 432, p. 457.
[438] See above 4.1.
[439] Different national jurisdictions allow for different use of analogy, see above chapter 3. For different categories of analogy, see Bassiouni, *supra* note 7, p. 88.
[440] Lamb, *supra* note 13, p. 753.
[441] See above 3.1.3.3.

The explicit recognition of the rule of strict construction also primarily serves to confirm the Court reserved approach to interpreting its Statute. It is closely tied to the resolution of ambiguities in favour of the defendant, which can be considered a corollary of this rule. As with the prohibition of analogy however, national applications of the rule of strict construction, in particular in common law countries, is not always consistent,[442] so its influence in the international sphere is difficult to anticipate.
The rule of strict construction solely applies to the crimes enumerated in articles 6 through 8 of the Statute. In some circumstances therefore, the judges will be able to use more liberal methods of interpretation in line with the object and purpose of the Statute, for example with regard to grounds excluding criminal responsibility.[443]

6.2.4 Limitations

By specifically providing in article 22(3) that article 22 will not affect the characterisation of any conduct as criminal under international law independently of the Statute, the delimitations of article 22 and the Statute are more clearly defined. The effects of the *nullum crimen* principle as embodied in the Statute are limited to the Statute only. Individual criminal responsibility will continue to arise directly under international law. The provision of paragraph 3 in fact confirms what is already stated in paragraph 1, namely that the *nullum crimen* principle in the Statute applies only to the finding of criminal responsibility "under this Statute". Nevertheless, it erases any doubt that the Statute does not exclusively or exhaustively codify international criminal prohibitions and was designed to ensure that the Statute would not have a negative impact on the independent evolution of customary law.[444] In that sense, it is a specialised version of article 10 of the Statute.

6.3 A human rights standard?

Like other international courts and tribunals, the ICC is not strictly bound by human rights standards laid down in international instruments, as it is not a party to any of these instruments. Nevertheless, as the practice of the Ad Hoc Tribunals has shown, the observance of human rights standards concerning the rights of the accused can be critical for the persuasiveness of an international court's judgment. The applicability of human rights standards, and in particular the *nullum crimen* principle, to the ICC under its Statute is far more direct than that accepted by the Ad Hoc Tribunals.[445]

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[442] See above 3.2.1.2.
[443] Broomhall, *supra* note 432, p. 457.
[444] Lamb, *supra* note 13, p. 754.
[445] See above 5.3.

6.3.1 The ICC and human rights

The applicability of the *nullum crimen* principle as a human rights standard to the practice of the ICC does not just follow from its explicit inclusion in article 22. It is reinforced by the attitude of the states participating in the negotiations for the Rome Statute.[446] It was generally agreed that consistency with internationally recognised human rights standards required the Court's interpretation of the Statute to be consistent with the *nullum crimen* principle.[447] This view was incorporated into the Statute by article 21(3), which states that "The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights". Though the Court is not a party to any human rights instruments, the principle of legality as a human rights standard is part of its law by virtue of this provision.

In addition to the principle laid down in article 22, which applies strictly to crimes within the jurisdiction of the Court, the *nullum crimen* principle as a "general principle of law derived by the Court from national laws of legal systems of the world" applies to the Court's practice through article 21(1)(c).[448] Article 22 itself is the first article of Part 3 of the Statute, entitled "general principles of criminal law". The Statute seems to regard the principle as just that, a general principle. Nevertheless, distinguishing between *nullum crimen* as a general principle and as a human right has importance with regard to its status. Nullum crimen as codified in various human rights instruments is considered a non-derogable right, confirming its fundamental character. This fundamental character of the principle as a human right serves to emphasize its critical role as a safeguard against arbitrary prosecutions, something that is less obvious from labelling it a general principle.

In this regard it is important to be reminded of the IMT's statement that "the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice".[449] The negotiating states have unmistakably indicated that the ICC should not apply the principle as the IMT had done. They have consistently pointed at the fundamental character of the principle as a right of the accused within the criminal process, as opposed to regarding it as a principle that may or may not apply. Article 22 is intended to mirror article 15 ICCPR.[450] This concern for the proper implementation of the principle of legality, though "only" labelled a general principle, has resulted in a provision that is stricter than that of the ECHR.

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[446] Boot, *supra* note 3, p. 366.

[447] Bassiouni, M. C.(Ed.), *The Statute of the International Criminal Court: A Documentary History* (1998), p. 140, note 63.

[448] As for *nullum crimen* as a general principle, see Bassiouni, M. C., *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 Duke J. Comp. & Int'l L. (1993), p. 290-291.

[449] 1 IMT 219; 22 IMT 462.

[450] Crawford, J., *The ILC Adopts a Statute for an International Criminal Court*, AJIL Vol. 89 (1995), p. 414.

6.3.2 A specific standard

The *nullum crimen* principle as laid down in the Statute in many ways resembles the principle as applied in civil law countries. The ICC subject matter jurisdiction is a closed system, making it possible to apply strict notions of legality, other than those applied in general international criminal law. The Statute exhaustively enumerates the subject matter jurisdiction of the Court, instead of providing more of a framework of crimes as in the Statutes of the Ad Hoc Tribunals. Relatively little room is left for development of the law by the Court. The constraints imposed by the rule of strict construction and the prohibition on analogy further restrict the freedom of the Court.

The concern for legal certainty and the eradication of arbitrariness bring the understanding of legality in the ICC Statute much closer to national and human rights standards than was common in international criminal law to date.[451] War crimes tribunals have tended to apply the principle rather flexibly.[452] Though the attention awarded to defendant's rights and human rights standards in the ICC Statute is praiseworthy, it need not be overlooked that a substantial part of this attention is inspired by policy motives.

As opposed to the Statutes of the Ad Hoc Tribunals, which came into being as Security Council resolutions, the ICC Statute is a treaty. As such, the negotiating and acceding states sought to minimize the extent to which they would surrender part of their sovereignty. Accessibility and forseeability are no longer just guarantees for individuals, they apply equally to states. Legal certainty for individuals as well as states underlies the *nullum crimen* principle as incorporated in the Statute.[453] Quite possibly the Ad Hoc Tribunals' inclination to an expansive interpretation of their Statutes further inspired the contracting states to eradicate any sources of uncertainty from a treaty directly applicable to them.

The manifestation of the *nullum crimen* principle in the ICC Statute therefore is not necessarily a step forward in the recognition of its importance for international criminal law. It is not evidence of the continued development of the principle as a rule of customary law, as its specificity in relation to the Statute sets it apart from the principle as recognised in general international law.[454] The preoccupation with national sovereignty motives for inclusion of a strict take on legality also added to the lack of attention given to the practical effects of the principle on the future operation of the Court. It remains difficult to predict whether the *nullum crimen* principle will meaningfully contain the powers of the ICC when

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[451] See above chapter 5.

[452] Schabas, W. A., *General Principles of Criminal Law in the International Criminal Court Statute (Part III),* EJC Vol. 6/4 (1998), p. 90.

[453] Broomhall, *supra* note 432, p. 451.

[454] Cf. Wise, E. M., *The International Criminal Court: A Budget of Paradoxes*, 8 Tul. J. Int'l & Comp. L. (2000), p. 272-275.

interpreting the scope of the core crimes and thus its own competence.[455] In the practice of the ICTY and ICTR, it has failed to do so.[456]

[455] Lamb, *supra* note 13, p. 756; Wise, *supra* note 454, p. 275.
[456] Mokhtar, A., *Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects*, Statute Law Review 26(1) (2005), p.53.

7 Conclusions and Analysis

The principle of legality is an essential part of most any national criminal law system. It is primarily a guarantee of legal certainty for the individual and a protection against the arbitrary use of prosecutorial powers by the state.
The principle is built on several elements that serve to achieve this purpose. The proper separation of powers between the legislator and the judiciary as well as the adherence to the rule of law principle is an institutional guarantee binding the discretion of state organs. The requirement that criminal law provide fair warning to the individual further defines the roles of legislator and judiciary, demanding quality in law and recognisable methods of interpretation and application of the law.
These are also the concerns in human rights law, where the principle of legality, as in national criminal law, has become recognised as a basic principle of any criminal law system and a fundamental due process right. Considering the pre-eminence of the principle of legality in national criminal law and human rights law, one would expect that it is also one of the fundaments of international criminal law. Its role to provide for legal certainty and eradicate arbitrary prosecution would seem even more critical in an international setting than in a national one, as the institutional framework of international criminal law is far less developed.
Nevertheless, the principle of legality has often received but a passing mention in the practice of international criminal tribunals. Its relevance was practically denied by the IMT, and the current Ad Hoc tribunals, until recently, have not been held back from dangerously treading the line between the progressive development of law and the creation of new law. The specificity of international criminal law is often cited as the reason why the principle of legality would not require excessive attention. This is an improper approach to the issue though. As the investigation of national notions of legality has shown, different systems have different applications of the principle, but its role and the scope of its protection are very similar throughout. The specificity of the area of international criminal law may require a specific application of the principle, but this does not mean that its standard of protection should be lowered. More importantly, the specificity argument would certainly not explain why notions of legality in international criminal law should fall short of human rights standards.

7.1 Difficulties

Difficulties regarding the principle of legality are inherent to the limitations of international criminal law though. They stem from the deeper-rooted limitations underlying the system of international law as a whole. The critical difference with national legal systems lies in the absence of the

public law dimension in international law.[457] In national legal systems the definition and prosecution of crime and the guarantees of individual rights emanate from this public law dimension. Traditionally, these roles have been part of the sovereign rights and duties of the state. The development of international law, in particular its influence on the individual, has complicated this traditional picture by deconstructing the sovereign state based system in the absence of an international public law dimension. When referring back to traditional aspects of the principle of legality, the difficulties this causes become clear. The notion of separation of powers is effectively obsolete in international law, as no powers in this sense can be identified. Law should emanate from the democratically elected legislator, but no such legislator exists. International law is made by states and the development of international law for a large part depends on the existence of a political will among states to do so.

This immediately presents a second difficulty, namely the obscurity and in some cases absence of law. Even though international criminal law has developed substantially since the end of WWII, many rules, in particular those of customary law, remain undefined. It is not a positivist system.[458] International criminal tribunals confronted with such an incomplete system of law are forced to revert to filling gaps in the law in the fulfilment of their duty to adjudge crimes. Such an extensive role for the judiciary in the development of the law conflicts with traditional notions of legality. Not only is the separation of powers further mooted, but rules that only come to light after extensive interpretations by tribunals hardly provide any form of fair warning to individuals.

Another aspect of the problem is that the purpose of international criminal tribunals is often interpreted in such a way that defendants' rights are regularly considered secondary to political considerations. Due to the gruesome nature of the acts adjudged and the moral outcry for such acts to be punished, the first objective is to achieve what the world community considers "justice". Indeed, the decision to institute a tribunal is a political as well as a moral one.[459] Such sentiments can easily be identified in the IMT judgment[460] and are also present in the case law of the ICTY.[461] Understandable or not, in this way political objectives sometimes overtake proper legal methodology, causing the occasional accusation of constituting mere show trials.[462]

All these aspects contribute to a system of criminal law where the gap between the individual defendant and the law is far greater than in national jurisdictions, complicating the role of the principle of legality. In such a

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[457] Simpson, G. J., *War Crimes: A Critical Introduction*, in: McCormack, T. L. H. and Simpson G. J. (Eds.), *The Law of War Crimes* (1997), p. 16.
[458] Cf. Wright, Q., Legal Positivism and the Nuremberg Judgment, 42 AJIL (1948), 408.
[459] Cebulak, W., *The Role of Moral Standards in some Selected Dimensions of Law and Criminology: The International Approach*, ICJR Vol. 7 (1997), p. 106-107.
[460] See above 2.3.1.
[461] *Cf. Prosecutor v. Dusko Tadic*, supra note 302, Appeals Chamber decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, §92.
[462] Simpson, *supra* note 457, p. 11.

context, guaranteeing defendants' rights in accordance with generally recognised human rights standards should be considered a priority.

7.2 Solutions

The traditional manner of application and interpretation of international criminal law by international tribunals has fallen short of this human rights standard. The guarantees enshrined in the principle of legality as interpreted by human rights courts are rendered ineffective by the way international criminal tribunals have traditionally constructed and interpreted international criminal law. Concepts such as legal certainty and fair warning have received relatively little attention. However, it is certainly possible to provide solutions that live up to the human rights standard.
When referring back to the doctrines of legality in national law (strict or formal legality and substantive justice) in essence three possibilities present themselves in the field of international criminal law.

7.2.1 Strict legality

One can hold on to notions of strict legality. Recognising that both the special part and the general part of international criminal law are still underdeveloped leads to two alternatives. Firstly, as judicial guarantees of certainty and equality can only be served in their entire scope in a fully developed legal system, the prosecution of international crimes could be left to single states in their respective penal systems.[463] Only in this manner can the requirements of legality be really met. However, the obvious difficulty is that national prosecution depends upon the willingness and ability of the State concerned to actually prosecute. As practice has shown, willingness and ability are often lacking and the balance often tends to tip in favour of impunity as opposed to prosecution. This alternative then comes at the expense of trying to achieve justice through international criminal law.
Alternatively, strict legality could be upheld through a comprehensive codification of both the special part and the general part of international criminal law. In this way the same guarantees inherent in national penal systems could effectively be transferred to the international sphere. Difficulties regarding legality are removed, as such a codification would sufficiently clarify definitions and elements of crimes and applicable principles of criminal law providing the definiteness that is currently lacking. Despite the obvious (theoretical) advantages of this alternative, codification efforts for a large part have failed. Refusal to relinquish state sovereignty, distrust of international jurisdiction and the continued reliance

[463] Mantovani, F., *The General Principles of International Criminal Law*, 1 JICJ 1 (2003), p. 28.

on violence as a political weapon has left such attempts fruitless.[464] This approach has been successfully applied in drafting the ICC Statute though.

7.2.2 Substantive justice

The option that has consistently been chosen by international tribunals is the third alternative, that of substantive justice. International criminal Tribunals from Nuremberg to Arusha and The Hague have not shied away from applying imprecise and largely uncodified rules on all aspects of criminal responsibility. This is not necessarily a problem. Even in national jurisdictions based on a doctrine of strict legality, this doctrine is seldom applied in the strictest sense. In some instances legality has to yield to considerations of substantive justice. The reliance on justice as a primary objective of international tribunals is not necessarily a bad thing. One could even claim it to be a necessity.
Substantive justice is a matter of degree though. In certain instances it may be justified to deviate from the formal constrictions of the principle of legality to achieve an outcome in a criminal case that is considered more just than what strict application of the law can provide for. But it remains that justice is a relative concept, requiring those that seek to achieve it to proceed with care. Holding individuals responsible for crimes under international law before an international tribunal is quite possibly the most *direct* manner in which infringements can be made into an individual's rights. It is therefore in particular in this context that human rights standards regarding the principle of legality should be observed. And indeed, it is exactly the human rights approach that provides the answer in effectively reconciling the shortcomings of international criminal law and substantive justice notions with the principle of legality.

7.3 Justice and legality

Human rights law has consistently been somewhat undervalued by international criminal courts tribunals. At the time of the tribunals in Nuremberg and Tokyo the concept itself was not yet fully developed. In other war crimes prosecutions following WWII right up to and including the practice of the current Ad Hoc tribunals human rights standards have mostly been referred to only to define the crimes committed, much less as a safeguard for the defendant. There is no logical reason however why the human rights standard, in particular that concerning the principle of legality, should be lower in international criminal law then it is in national jurisdictions.

[464] *Ibid*., p. 29.

7.3.1 Human rights standards

Individual criminal responsibility before international criminal tribunals is part of the break-up of a sovereign state based system. The difficulties that accompany this break-up have been described.[465] To compensate for this, the process needs to be accompanied by allowing the penetration of the international sphere by human rights that are also traditionally guaranteed by the sovereign state. In law too the distinction between national and international is no longer as distinct as it was. Allowing the individual to be part of the international dimension in some areas (individual criminal responsibility) but lagging behind in others (sufficient due process protection) only undermines the systematic development of international law. Moreover, it stimulates fragmentation and disparity between not only different areas of law (criminal law and human rights law) but also different levels (national and international).
The value of human rights standards in international criminal law is equally big as that in the national criminal law process. The intrusions on an individual's rights are felt equally hard, if not harder, when that person is taken from the national level onto the international stage. It would also not make sense that the rights of a defendant depend on the forum in which he is being prosecuted, in particular in the case of tribunals that do not exercise primary jurisdiction but share jurisdiction with national courts, as in the case of the ICTR.[466] The choice where to prosecute the person in question would determine which standards of due process apply. This also creates a discriminatory effect between defendants charged for the same offence in the same context but charged before different courts. The name or status of a court should not legitimise a lower level of protection for the defendant. The underlying purpose of international criminal tribunals, namely that of justice, also calls for proper implementation of human rights standards. Not letting go unpunished those that are suspected of having committed crimes that are an outrage to humanity motivated the tribunals at Nuremberg and Tokyo, as well as Arusha and The Hague. If it is the ambition of international tribunals to exert such a high moral standard, every aspect that can contribute to this should be adhered to. Living up to human rights standard only contributes to the authority of the court applying them. And it should be those institutions that exercise this semblance of public powers in a manner comparable to that exercised in national jurisdictions that guarantee human rights to a comparable level.

7.3.2 An individual standard

The case law of the ECtHR has effectively reconciled the human rights standard regarding the principle of legality with both civil law and common law systems, with both the strict legality and the substantive justice

[465] See above 7.1.
[466] See Article 8(1) ICTR Statute.

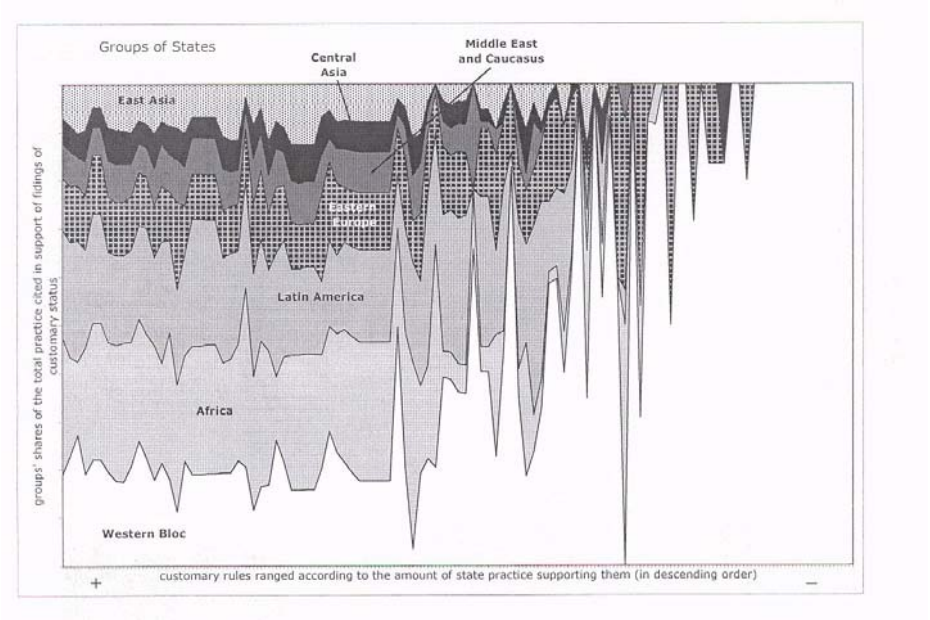
doctrine. It has found the key to achieving this in a subjective approach to the principle of legality. The perspective of the alleged perpetrator is chosen to establish whether or not the demands of the principle have been sufficiently satisfied. Accessibility and forseeability are the criteria used. This is essentially very close to the formula first proposed by Radbruch. In his formula too, the strict application of the law is limited by the criterion of forseeability regarding the criminal character of an act.

The application of this standard with a reversed perspective has also proven to be the key bring closer together the incomplete system of international criminal law and the individual defendant. No longer need tribunals rely on a form of "lawyer's notice" in which defendants are supposed to have been aware of rules often unknown even to states. Rules are constructed from what the defendant could and should have been aware of, thereby breathing new life into the components of the principle of legality. The focus is once again on forseeability and specificity of the law, thereby providing the legal certainty the principle of legality traditionally seeks to achieve. In addition to connecting to the elements of protection for the individual, these notions also establish a more structured approach to the development of international criminal law. The limitations imposed on the judiciary in traditional doctrines of legality are incorporated in the forseeability and accessibility criteria. Overly extensive interpretations of the law are prevented as they could not be properly foreseen. In this manner the function of the judiciary is brought back to its original form, that of "speaking" the law rather than making it.

This human rights approach takes little away from the "justice" notions usually underlying international tribunals. It provides a legally defined framework in which a concept of justice still has a part to play. Justice, essentially, is incorporated in the forseeability criterion. The standard by which to define what a person could have known to be criminal is partly still a moral one. Irrespective of the philosophical discussion about the morality of law, rules of international humanitarian law do have a moral standard.

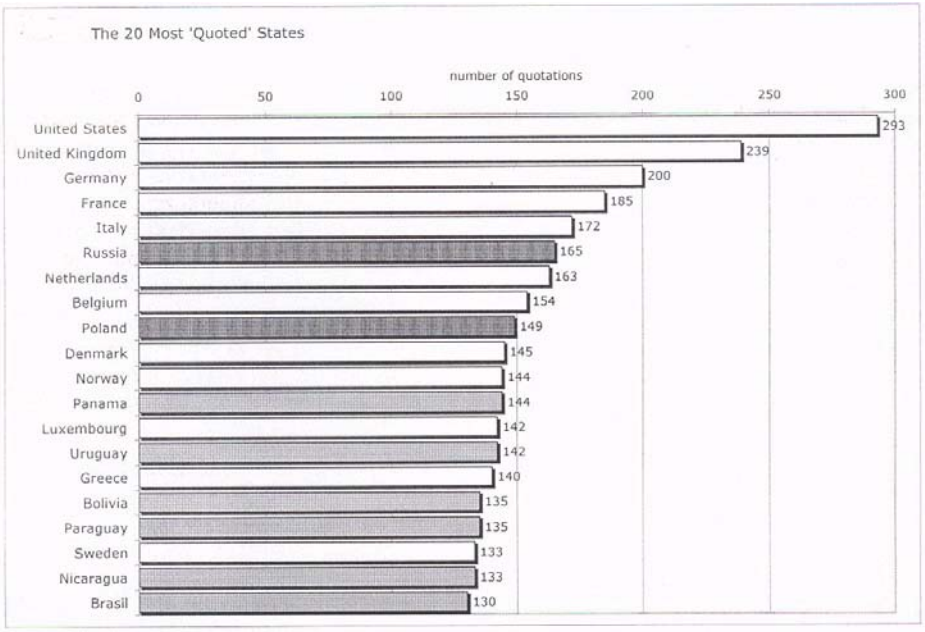
In addition to bridging the gap between individual and law, the human rights approach to legality also bridges gaps between national and international criminal law, as well as international criminal law and human rights law. Applying the same minimum standard of legality provides a defendant with the same standard of protection before national courts and international tribunals. It recognises the importance of the application of human rights, irrespective of the nature of the court before which the defendant is brought. Moreover, it also encourages the development of a uniform standard of human rights over the whole of international law. Recognising this principle character of human rights is the real requirement of achieving justice through law.

8 Supplement A



Courtesy of L. Gradoni

9 Supplement B



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