Introduction

0.a. RETROACTIVITY, JUSTICE, AND SOVEREIGNTY

The English-language version of the Nuremberg Judgment observes,

> [T]he maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice.[1]

This statement – that "nothing is criminal except by law [existing at the time of the act]" is a mere nonbinding principle of justice – has a cynical ring to it. It implies that judges can and should ignore principles of justice in service of the sovereign powers that created their court. This was pointed out rather explicitly in the dissent to the Tokyo Judgment by Justice Radhabinod Pal of India, who argued that the International Military Tribunal for the Far East should not create crimes that did not exist at the time a defendant acted: "for otherwise the Tribunal will not be a 'judicial tribunal' but a mere tool for the manifestation of power."[2] The depth of the disagreement over the issue of retroactivity might be judged by Justice Pal's use of this statement. It refers to – and perhaps parodies – a similar passage by Lord Wright. Wright had argued that all the crimes in the Nuremberg Charter (and hence in

[1] *United States v. Göring*, Judgment of 30 September 1946, 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL: NUREMBERG 14 NOVEMBER 1945–1 OCTOBER 1946 171, 219 (Nuremberg: International Military Tribunal 1947) [hereinafter IMT, TRIAL].

[2] *United States v. Araki*, Dissenting Opinion of Radhabinod Pal at 36, 109 THE TOKYO MAJOR WAR CRIMES TRIAL: THE JUDGMENT, SEPARATE OPINIONS, PROCEEDINGS IN CHAMBERS, APPEALS AND REVIEWS OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST (John R. Pritchard, ed., Robert M. W. Kemper Collegium & Edwin Mellen Press 1998) (November 1948) [hereinafter IMTFE RECORDS] (the pagination of the separate opinions in this case is problematic, as they are not consecutive with the rest of the trial or each other).

the Tokyo Charter) were, at the time, crimes under international law,[3] a position with which Justice Pal violently disagreed.

In the French version of the Nuremberg Judgment, even the reference to justice disappeared: "[N]ullum crimen sine lege *ne limite pas la souveraineté des États; elle ne formule qu'une règle généralement suivie.*"[4] The French version could be rendered into English as "*[n]ullum crimen sine lege* does not limit the sovereignty of States; it only formulates a rule that is generally followed."[5]

The Nuremberg statement carries with it the implication that individual human rights (especially of the evil) fade in the face of the collective powers that make up sovereignty. In the French version, it is a statement that might have been made by the Nazi leaders themselves[6] or the leaders of the former

[3] [Lord] Wright [of Dursley], *War Crimes under International Law*, 62 L.Q. Rev. 40, 41 (1946).

[4] Quoted in Henri Felix August Donnedieu de Vabres, *Le procès de Nuremberg devant les principes modernes du droit pénal international*, 70(I) Recueil des Cours 477, 503 (1947) [hereinafter Donnedieu de Vabres, *Le procès*] (Henri Donnedieu de Vabres was the principal French judge at the Nuremberg Trial of the Major War Criminals). Accord, A. Cassese, *Crimes Against Humanity: Comments on Some Problematical Aspects* [hereinafter Cassese, *CAH*], in The international legal system in quest of equity and universality: L'ordre juridique international, un système en quête d'équité et d'universalité: Liber Amicorum G. Abi-Saab 429, 433–35 (Laurence Boisson de Chazournes & Vera Gowland-Debbas eds., Martinus Nijhoff 2001) (also pointing out that the clause in the English of the Nuremberg Judgment, "on this view of the case alone, it would appear that the maxim has no application to the present facts" does not appear at all in the French text; and arguing that Donnedieu de Vabres and original French chief prosecutor François de Menthon at Nuremberg believed that the acts constituting crimes against humanity prosecuted there were war crimes in any event, and therefore there was no *nullum crimen* problem as to them), citing Donnedieu de Vabres, *Le procès*, as well as Henri Felix August Donnedieu de Vabres, *Le jugement de Nuremberg et le principe de légalité des délits et des peines*, 27 Revue de droit penal et de criminologie 813, 826–27 (1946–47); Susan Lamb, *Nullum crimen, nulla poena sine lege* in International Criminal Law, in 1 The Rome Statute of the International Criminal Court: A Commentary 733, 737 n.13 (Antonio Cassese, Paola Gaeta & John R. W. D. Jones eds. 2002).

[5] Cassese, *CAH* at 433–34 attributes the difference between the two authoritative texts as due to the fact that the Nuremberg Tribunal was "reticent and vague" on the ex post facto issue.

[6] See Law of 28 June 1935 Amending the German Criminal (Penal) Code § I, published in 1935 Reichgesetzblatt, pt. I, p. 839 (Germany), translated and reprinted in United States v. Alstoetter (*Justice Case*), 3 Trials of War Criminals before the Nuernberg Military Tribunals under Control Council Law No. 10 [hereinafter T.W.C.] 176–7 (USMT, 4 December 1947), amending German Penal Code art. 2; Law of 28 June 1935, Code of Criminal Procedure and Judicature Act §I, published in 1935 Reichgesetzblatt, pt. I, p. 844 (Germany), translated and reprinted in *Justice Case*, 3 T.W.C. at 177–80, adding German Code of Criminal Procedure arts. 170a & 267a, and allowing the Reich Supreme Court to ignore precedent where inconsistent with "the change of ideology and of legal concepts

Soviet Union,[7] for they had no use for the restraint of legality as a matter of justice. Each of them, however, would have far different views on the identity of evildoers whose rights are to be ignored.

Bernard Victor Aloysius Röling, justice from the Netherlands at the Tokyo War Crimes Tribunal, agreed with the French version at Nuremberg. His statement, an attempt to face down the cynicism with which either version of the Nuremberg statement might be read, was even more remarkable:

> If the principle of "nullum crimen sine praevia lege" were a principle of *justice*, . . . the Tribunal would be bound to exclude for that very reason every crime created in the Charter ex post facto, it being the first duty of the Tribunal to mete out justice. However, this maxim is not a principle of justice but a rule of policy, valid only if expressly adopted, so as to protect citizens against arbitrariness of courts (nullum crimen, nulla poena sine lege), as well as against arbitrariness of legislators (nullum crimen, nulla poena sine praevia lege).[8]

Today, *nullum crimen, nulla poena sine lege* is not only a principle of justice. It embodies an internationally recognized human right. One of the most respected international law commentators and judges, Theodore Meron, has gone so far as to state, "The prohibition of retroactive penal measures is a fundamental principle of criminal justice, and a customary, even peremptory, norm of international law that must in all circumstances be observed in all circumstances by national and international tribunals."[9] The transformation of the principle of legality into rules of law has led to fundamental and continuing changes in how international criminal law is made and applied.

Consideration of the Nuremberg statement, its correctness at the time, its justice, and how it has been superseded by the growth of international human rights law, led to this book.

which the new state has brought about." Law of 28 June 1935 Code of Criminal Procedure and Judicature Act §II, translated and reprinted in 3 T.W.C. at 178–79. See Chap. 2.c.ii.A (on how these laws effectively abolished the legality principle in criminal law in the Third Reich).

[7] See Chap. 2.c.ii.C on the absence of the legality principle from the law of the USSR at this time.

[8] Separate Opinion of Röling, J., at 44–45, 109 IMTFE Records (italics substitute for underlining in typewritten original).

[9] Theodore Meron, War Crimes Law Comes of Age 244 (Oxford Univ. Press 1998) [hereinafter Meron] (discussed further in Ch. 7.i).

0.b. PLAN OF THIS BOOK

0.b.i. *Outline of Chapters*

Chapter 1 introduces the issues raised by the principles of *nullum crimen sine lege* and *nulla poena sine lege*, which are the core of the principle of legality in criminal law. It also raises a few other issues of legality in criminal law. It discusses the relationship of legality and retroactivity in criminal law to issues of the rule of law more generally. It discusses both the human rights and the criminal law purposes of legality. The emphasis is on the prior existence of not only a criminal law but also a criminal law that was applicable to the actor at the time of the alleged crime. The chapter also introduces two other issues connected to legality. The first concerns creation of courts and court systems according to law (including retrospectivity of court creation). The second is the requirement of individual criminal responsibility and the concomitant prohibition of collective punishment. Finally, this chapter addresses several doctrines and views that could cause erosion or rejection of various aspects of the principle of legality, including judicial crime creation, expansive interpretation of criminal statutes, analogy, the view that language – and hence criminal law – is always indeterminate, and the lure of authoritarianism.

Chapter 2 briefly reviews the history of the principle of legality in criminal law up to World War I, drawing material from common law, civil law, Islamic law, and a few other sources. It then covers interwar events, focusing on the German abandonment of the principle in the 1930s and the international legal reaction.

Chapter 3 covers World War II and the Nuremberg, Tokyo, and other postwar trials. It emphasizes the issues of legality and retroactivity that were raised during the war concerning war crimes and international prosecutions, in the negotiations leading up to the London Charter, and in the judgments of the Nuremberg and Tokyo Tribunals. This chapter also focuses particularly on the French view of legality in the London negotiations and at Nuremberg and Tokyo – which has been far more influential than it has been given credit for being. The chapter also covers legality as dealt with by a number of different nations in the aftermath of World War II. Rather than rehash the debates of the past sixty years over whether the Nuremberg Judgment was proper, the discussion of the judgment focuses on its claim that *nullum crimen* was not a limitation of sovereignty or lawmaking authority at the time. The section on the Tokyo Tribunal deals with the open debate

on issues of legality in the different opinions. The chapter concludes that the claim that *nullum crimen* was not a limitation on sovereignty was correct at the end of World War II. One of the points of the book is that this is no longer so.

Chapter 4 covers the international activities of states concerning legality in criminal law in the modern period. It begins with the Universal Declaration of Human Rights (UDHR) and the drafting history of its non-retroactivity provisions. It discusses the major international human rights treaties requiring non-retroactivity in criminal law, including the International Covenant on Civil and Political Rights (ICCPR) (including the *travaux préparatoires* of the non-retroactivity provisions); the regional human rights conventions; and the Convention on the Rights of the Child. It also covers the international humanitarian law (IHL) treaties demanding legality in criminal proceedings, including the Third and Fourth Geneva Conventions of 1949 and the two Additional Protocols of 1977. Concerning the regional human rights treaties and the IHL treaties, it examines the requirement of individual criminal responsibility – including the ban on collective punishment – as well as non-retroactivity issues. In the IHL material, the chapter gives special attention to Common Article 3 of the 1949 Conventions and Additional Protocol II of 1977, because these involve the obligations that states have taken on themselves even during the stresses of civil war. The chapter examines the reservations that states have made to both the human rights and humanitarian law treaties to determine the effect on their obligations concerning non-retroactivity in criminal law. It also considers some of the jurisprudence from international tribunals and commissions interpreting the legality provisions of these documents.

Chapter 5 examines the constitutional and other legal provisions of the various states around the world to the extent that they deal with legality in criminal law. In those states with no constitutional provision, other applicable law is considered. This chapter examines prohibitions of retroactivity of crime creation, increases in punishment, and creation of new and special courts. It also considers the issue of individual responsibility and collective punishment and the issue of general liberty to do everything that is not forbidden by law. Three appendices collect and classify these provisions from nations worldwide. Appendix A indicates the existence and source of non-retroactivity provisions worldwide. Appendix B collects legality provisions current as of 1946–47, when the United Nations first studied the matter. Appendix C collects legality provisions as they exist around the world today.

Chapter 6 examines the principle of legality in the international and internationalized courts and tribunals from the International Criminal Tribunal for the Former Yugoslavia (ICTY) through the International Criminal Court (ICC) and the new tribunals such as Sierra Leone, Kosovo, East Timor, and Cambodia. It examines both legal texts of the courts and practice for those courts where there is practice. The ICC provisions particularly are more complex than they are sometimes given credit for being, and limit the jurisdiction of the court, including in some cases of referrals by the UN Security Council. The ad hoc and internationalized tribunal materials will discuss how the principle of legality in criminal law binds international organizations as well as states in the process of lawmaking.

Chapter 7 shows that both *nullum crimen* and *nulla poena* (in reasonably strong – though not the strongest – forms) have become rules of customary international law that bind both states and international organizations. They apply as binding customary and treaty international human rights protections to prosecutions brought under both national and international criminal law, and in both national and international tribunals. It shows how the principles of notice, foreseeability, and accessibility of law can provide a working definition of non-retroactivity of crimes and punishments, even though language itself always has some indeterminacy. This chapter demonstrates, contrary to views popular in some circles, that *nullum crimen* and *nulla poena* (the prohibitions of retroactive crime creation or increases in punishments) truly apply in international criminal law. It also demonstrates that the requirement of some sort of individual criminal responsibility and the prohibition of collective criminal punishment are rules of customary international law, binding both states and international organizations.

0.b.ii. *Principles and Rules: Two Key Definitions*

This book is about the principles of legality and non-retroactivity, as well as specific rules of legality and non-retroactivity in different legal systems. Principles and rules cannot be completely separated. Notice, for example, the usage of *principle* in the English version of the Nuremberg Judgment excerpt herein, and the use of *règle* ("rule") in the French version. Nonetheless, it is useful to adopt usages of the terms that are as clear as possible.

To the extent possible, the term *rules* will apply to rules of law. That is, it will refer to normative statements that are binding on relevant actors and may be enforced through the use of government coercion. For example, a constitution might provide, "No person may be convicted of a crime for an act which was not a crime when committed." This states a rule of

non-retroactivity of criminal definition that is applicable in the legal system controlled by the constitution. If necessary, it may be enforced by the courts, through a refusal to convict or punish a person pursuant to a retroactively defined crime. A rule of treaty law or customary international law may bind states or other actors.

H. L. A. Hart distinguished between first- and second-order rules (primary rules of conduct and rules of recognition and adjudication).[10] This book will include both types in the usage of *rules*. For example, the prohibition of robbery is, in Hart's terms, a first-order rule controlling the conduct of each of us. The rule mentioned in the preceding paragraph on the non-retroactivity of criminal definition is, for Hart, a second-order rule. It determines when and to which acts a first-order criminal definition might apply. In some cases, a rule may come into conflict with another rule, and a choice may have to be made between them (or, in a system allowing for use of judicial precedent, one or both rules may be modified).[11]

In contrast, the term *principles* will apply to normative concepts or statements that may or may not have hardened into rules of law. They may or may not be reflected in the legal system of particular states. A principle may articulate a norm or other idea distilled from examination of specific rules of law or may state a formulation of an idea that is normatively preferred by the speaker. Principles may play a role in the determination of specific cases.[12] For most purposes of this book, what matters is that a principle may be instantiated in various different legal systems by differently articulated rules. To some extent, the rules instantiating principles may actually have different content.

Principles will also be used in the technical phrase "general principles of law," one of the canonical sources of international law listed in the Statute of the International Court of Justice and the earlier Statute of the Permanent Court of International Justice which can be used in international adjudication.[13] In this usage, a general principle may operate as one rule that is used to decide a case. Indeed, a "general principle of law recognized by the community of nations" may provide a rule that makes an act criminal.[14]

[10] H. L. A. Hart, THE CONCEPT OF LAW 94–99 (2d ed., Clarendon Press 1994) (1st ed., 1961).
[11] Cf. *id.* at 261–63 (in the second-edition postscript).
[12] Cf. *id.* (agreeing with Ronald Dworkin and other critics of Hart's work that legal principles exist and play this type of role).
[13] Statute of the International Court of Justice art. 38(1); Statute of the Permanent Court of International Justice art. 38.
[14] See, e.g., International Covenant on Civil and Political Rights art. 15(2); Prosecutor v. Tadic (Appeal of Vujin), Judgment on Allegations of Contempt against Prior Counsel, Milan

This is just one example of the ways in which lawmakers, translators, and others frequently fail to distinguish between *rule* and *principle* in a consistent way.[15] It is therefore vital that the reader and advocate consider how these words, like all other words, are actually being used by the speaker or writer.

The first two chapters of this book consider the principle of legality in criminal law, its purposes, and its development into rules of law, mostly in national systems. Chapter 3 shows how varying views of the principle of legality influenced the post–World War II prosecutions of the German and Japanese war criminals, even though, as indicated in the Nuremberg Judgment, it had not at that time hardened into a rule of international law. Chapter 4 shows how the principle of legality became articulated into related rules in various modern human rights and humanitarian law treaties. Chapter 5 examines the scope of implementation of the principle of legality as rules of law among the countries of the world, and Chapter 6 does the same for the modern (i.e., post-Nuremberg and Tokyo) international and mixed international and national criminal tribunals. Finally, Chapter 7 brings together the materials in Chapters 4 through 6 to show that there is now a rule of legality in customary international criminal law. (However, as already pointed out, legality is also a "general principle of law" in the technical international law sense.)

0.c. THE ARGUMENTS OF THIS BOOK

This book is generally written in what Europeans call the "scientific" style of writing about law – or at least some of the author's European friends and colleagues tell him so. That involves a good bit of collection, description, classification, and characterization of sources. Yet writing about law almost always involves an argument of one sort or another. To the extent that this book makes arguments, they are as follows.

0.c.i. *The Argument: Non-retroactivity of Crimes and Punishments*

Legality in criminal law, especially its most important constituent, the non-retroactivity of crimes and punishments, applies in both national and international criminal law, as a matter of customary international human rights

Vujin, Case No. IT-94-1-A-R77 (ICTY App. Ch., 27 February 2001) (general principles of law provide law under which contempt of the Tribunal may be punished).

[15] See, e.g., Finland Const., ch. 2, § 8.

law. These rules are also general principles of law recognized by the community of nations. No one may be convicted for an act that was not criminal at the time done under some applicable law. No one may be subjected to a punishment that was not authorized for the act at the time done under some applicable law. At present, international law applies this rule of nonretroactivity. Claims that these principles do not apply as rules of international law are no longer correct.

The requirement of individual criminal responsibility and the prohibition of collective punishments are other elements of legality that have become part of customary international human rights law. They are also general principles of law recognized by the community of nations.

There is diversity in the national treatments of legality in criminal law. These include many versions stronger than that found in customary international law. These versions may require crime and punishment definition by prior statute (rather than allowing for case law or customary international law development as well), require something resembling a tariff of punishments for each crime, prohibit special courts or the retroactive creation of new courts, or prohibit the retroactive expansion of criminal jurisdiction. There are some patterns in the distribution of these rules by type of legal system but not strict consistency. These stronger versions are binding in their respective national legal systems but have not passed into requirements of customary international law.

Because there is such diversity of legal systems worldwide, specific rules of international law developed from national systems must work for each of the major systems of law. Thus, the rule developed here is stated in terms that will make sense in the civil law, common law, and Islamic law systems, as well as the international human rights system of treaties and organizations for monitoring and enforcing the treaties.

o.c.ii. *Some Sub-arguments*

In reaching its major conclusions, naturally this book reaches additional conclusions. A few of them are set forth here because they address controversial issues or simply because the author finds them interesting.

As of World War II, the conclusion of the Nuremberg Tribunal that nonretroactivity of crimes and punishments was a principle of justice (or, as in French, a rule that is generally followed), but was not a limitation on sovereignty, was correct.[16]

[16] See generally Chap. 3.

At the London Conference, which drafted the Charter of the International Military Tribunal, and at Nuremberg, the views of the French participants on legality in criminal law were very important.[17]

Very few persons or states involved in the drafting of the International Covenant on Civil and Political Rights (ICCPR) held the view that "general principles of law," which may be the basis of criminalization in Article 15(2) of the ICCPR, are anything other than a subset of international law, which may be a basis of criminalization in Article 15(1) of the ICCPR.[18]

Since Nuremberg, there has been a tremendous increase in the acceptance of non-retroactivity of crimes and punishments in national constitutions[19] and in international treaties and other legal documents.[20]

0.c.iii. *The Meta-argument: Law as Created by International Criminal Courts and International Organizations in Light of Claims Made by Individuals*

This book deals with customary international criminal law and customary international human rights law related to criminal proceedings. It makes at least one claim about changes in how such law is made.

Customary international criminal law and international human rights law related to such proceedings are now made in substantial part through the acts and *opinio juris* of international organizations as well as states. The acts of international organizations described here are principally, though not exclusively, judgments and other acts of international criminal courts and tribunals. Other relevant acts of international organizations include judgments and other acts of regional human rights tribunals; views stated by worldwide and regional human rights treaty commissions; and acts of organs of international organizations doing such things as establishing and operating tribunals and defining or making other statements about international criminal law and international human rights law. The judgments of the international criminal courts and tribunals and the judgments and views of the human rights courts and commissions are almost always made in response to claims of right made by individuals.

This indicates a growth of the international legal personality both of international organizations and of individuals.

[17] See generally Chap. 3.b.ii.
[18] See generally Chap. 4.b.ii.C.
[19] See generally Chap. 5.b–c.
[20] See generally Chap. 4.