



The principle of legality in international law: A study towards the reconciliation of justice and legality

Alejandro Lerena García

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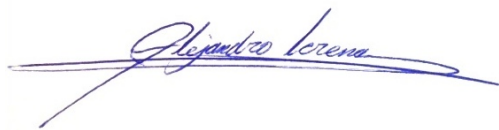
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Liste de publications et participation aux conférences

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5. Présentation orale : *Logros y retos de la Querella Argentina contra los Crímenes del Franquismo*. I Congreso Internacional : Territorios de la Memoria. El Franquismo a debate, Valladolid (Espagne), 2017.

Abstract

The principle of legality is a fundamental element of domestic and international criminal law systems, requiring crimes and punishments to be established by law at the time of commission to provide protection and legal certainty to individuals. Within the framework of the rule of law, criminal prosecutions aim to render justice and punish those responsible, but also to rigorously respect the rights of the defendants. However, particularly when prosecuting past atrocities, these rights and principles collide, in what can be summarized as a conflict between justice and legality. The principle of legality is at the junction of this tension and can tilt the balance one way or another. Depending on how the principle is interpreted and applied, the results might be radically different. While the strongest versions of legality could prevent prosecutions and lead to impunity, the laxer or less exigent notions could involve convictions without fair trial guarantees. Considering the recent emergence of certain international rights of the victims and States obligations to prosecute serious human rights violations, the aim of this research is to determine the actual content and legal status of the international principle of legality, and to assess legal techniques and interpretations aiming the reconciliation of the competing demands of justice and legality.

Keywords: principle of legality, international criminal law, international crimes, human rights, transitional justice.

Résumé

Le principe de légalité est une composante fondamentale des systèmes juridiques nationaux et internationaux, qui exige que les crimes et peines soient établis par la loi au moment de leur commission afin d'assurer la protection et la sécurité juridique des individus. Dans le cadre de l'État de droit, les poursuites pénales visent à rendre justice et à punir les responsables, mais aussi à veiller au respect rigoureux des droits des accusés, en respectant les normes les plus élevées relatives aux garanties d'un procès équitable. Cependant, particulièrement lors de la poursuite d'atrocités passées, ces droits et principes se heurtent parfois, créant des tensions entre les exigences différentes de légalité et de justice. Le principe de légalité se trouve à la jonction de ce conflit. En effet, selon la manière dont il est interprété et appliqué, le résultat des poursuites criminelles peut être radicalement différent, faisant pencher la balance d'un côté ou de l'autre. Alors que les interprétations les plus strictes du principe de légalité pourraient empêcher des poursuites pénales et conduire à l'impunité, les interprétations plus laxistes, ou moins exigeantes, pourraient entraîner des poursuites sans garanties d'un procès juste et équitable. Suite à l'émergence récente de droits internationaux des victimes et l'obligation des États d'engager des poursuites lors de violations graves des droits de l'Homme, cette recherche vise à déterminer le contenu actuel du principe de légalité international, son statut juridique, et à évaluer les techniques juridiques et interprétations qui pourraient servir à concilier les exigences opposées de la justice et de la légalité.

Mots clés : principe de légalité, droit international pénal, crimes internationaux, droits de l'homme, justice transitionnelle.

Resumen

El principio de legalidad es un elemento fundamental de los sistemas de derecho penal nacionales e internacionales, que exige que los delitos y las penas estén establecidos por ley en el momento de su comisión para ofrecer protección y seguridad jurídica a los ciudadanos. En el marco de un Estado democrático de derecho, los enjuiciamientos penales procuran hacer justicia y castigar a los responsables, pero también deben respetar rigurosamente los derechos de los acusados. Sin embargo, especialmente cuando se persiguen violaciones graves de derechos humanos cometidas en el pasado, estos derechos y principios pueden entrar en conflicto, creándose tensiones entre las exigencias de legalidad y justicia. El principio de legalidad se encuentra en el eje de esta tensión y puede inclinar la balanza hacia un lado u otro. Dependiendo de cómo se interprete y aplique, los resultados pueden ser radicalmente distintos. Mientras que las versiones más estrictas del principio pueden impedir los procesamientos y provocar impunidad, las nociones más laxas o menos exigentes pueden llevar a condenas sin las debidas garantías. Teniendo en cuenta la reciente aparición de ciertos derechos internacionales de las víctimas y la obligación de los Estados de enjuiciar las violaciones graves de los derechos humanos, el objetivo de esta investigación es determinar el contenido actual y el estatus jurídico del principio internacional de legalidad, así como evaluar técnicas legales e interpretaciones orientadas a reconciliar las demandas enfrentadas de justicia y legalidad.

Keywords: principle of legality, international criminal law, international crimes, human rights, transitional justice.

Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
ACJHR	African Court of Justice and Human Rights
ACmHPR	African Commission on Human and Peoples' Rights
ACtHPR	African Court on Human and Peoples' Rights
ArCHR	Arab Charter on Human Rights
ASEAN	Association of Southeast Asian Nations
AU	African Union
CJAU	Court of Justice of the African Union
CRC	Convention on the Rights of the Child
EAC	Extraordinary African Chambers
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention on Human Rights
ECmHR	European Commission on Human Rights
ECtHR	European Court of Human Rights
ECOSOC	United Nations Economic and Social Council
ECOWAS	Economic Community of West African States
ETSP	East-Timor Special Panels
FRG	Federal Republic of Germany
GC	Geneva Convention (I, II III or IV)
GDR	German Democratic Republic
HRC	Human Rights Committee
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross

ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunals for the former Yugoslavia
ILC	International Law Commission
ILO	International Labour Organization
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
IRMCT	International Residual Mechanism for Criminal Tribunals
MICT	Mechanism for International Criminal Tribunals
OAE	Organization of American States
OAU	Organization of African Unity
PCIJ	Permanent Court of International Justice
SCSL	Special Court for Sierra Leone
STL	Special Tribunal for Lebanon
UDHR	Universal Declaration of Human Rights
UK	United Kingdom
UN	United Nations
UNMIK	United Nations Interim Administration Mission in Kosovo
UNPROFOR	United Nations Protection Force
US	United States
USSR	Union of Soviet Socialist Republics
UNWCC	United Nations War Crimes Commission
VCLT	Vienna Convention on the Law of Treaties
WCC	War Crimes Chamber of Bosnia and Herzegovina

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INTRODUCTION

The principle of legality is a cornerstone of national and international criminal law and its importance has become particularly evident in the contexts of an increasingly extended accountability culture regarding international crimes and serious human rights violations. Within the framework of the rule of law, criminal prosecutions aim to render justice and punish those responsible, but at the same time they are expected to meet the highest fair trial standards and to rigorously respect the rights of the defendants. However, particularly when prosecuting past atrocities, these rights, interests and principles collide, in what can be summarized as a conflict between justice and legality. The principle of legality is at the junction of this tension and can tilt the balance one way or another. Depending on the *nullum crimen* notion adopted, the results might be radically different. The strongest or more stringent versions of the principle could prevent prosecutions and lead to impunity, and the laxer or less exigent notions could involve prosecutions without fair trial guarantees. In this context, the aim of this doctoral thesis is to study the actual content, requirements and legal status of the principle of legality under international law to determine the international obligations of States in this regard and to determine its compatibility with the prosecution of international crimes, both in international and domestic courts.

The principle of legality first emerged in domestic legal systems to provide legal certainty and protection to individuals against the abusive or arbitrary *ius puniendi* of the State. The emergence of international criminal law in the aftermath of World War II evidenced that the requirements associated to a strong version of the principle would render prosecutions impossible given the embryonic state of the international legal systems. Since then, international criminal law progressively evolved together with the international legality principle permitting the adoption of stronger requirements. However, the gap between developing international criminal norms and strong legality requirements still produces some impunity situations, and this is particularly true regarding domestic prosecutions of international crimes.

In the last decades domestic criminal trials have been increasingly used, among other transitional justice mechanisms, to address atrocities committed in dictatorial or warring pasts. National prosecutions are playing a key role in this global trend towards individual accountability, and domestic courts are assuming a rising role in the international criminal justice system. In this context the legality principle plays a central role since the feasibility of prosecutions often depends on how it is interpreted and applied.

Given its importance in criminal law systems and being the focal point of the tensions between justice and legality, the principle of legality has been the object of

great academic interest. Numerous scholars have studied the subject, particularly focusing on theoretical assessments of the domestic versions of the principle.¹ Similarly, some scholars have provided comparative analysis of legality in different domestic legal systems,² or have examined the notion and scope of particular elements or requirements of the principle in the international arena.³ In this vein, the legality issue has often been addressed tangentially by the literature when analysing other general issues of international criminal law.⁴ Comprehensive works can also be found on how the principle is understood in regional legal systems or applied by particular international courts.⁵ Similarly, some commentators have studied how the principle interacts with

¹ Carmen Lamarca Pérez, 'Principio de Legalidad Penal', *Eunomía. Revista En Cultura de La Legalidad*, no. 1 (2011): 156–60; Gonzalo Rodríguez Mourullo, 'Legalidad (Principio De)', in *Nueva Enciclopedia Jurídica* (Barcelona: Seix, 1978); Brian Z. Tamanaha, *On the Rule of Law. History, Politics, Theory* (Cambridge: Cambridge University Press, 2004); Rosario De Vicente Martínez, *El Principio de Legalidad Penal* (Valencia, Spain: Tirant lo Blanch, 2004); Bertrand de Lamy, 'Derives et Evolution Du Principe de La Legalite En Droit Penal Francais: Contribution a L'Etude Des Sources Du Droit Penal Francais', *Cahiers de Droit* 50, no. 3 and 4 (2009): 585–610.

² Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge: Cambridge University Press, 2008), 231–302; M. Cherif Bassiouni, 'Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions', *Duke Journal of Comparative & International Law* 3, no. 2 (1 April 1993): 291; Javier Dondé Matute, *Principio de legalidad penal: perspectivas del derecho nacional e internacional*, Colección Cicerón 1 (México: Barcelona: Editorial México Universitario; Bosch, 2007), 316.

³ On *nulla poena* see Shahram Dana, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing', *Journal of Criminal Law and Criminology* 99 (2009): 857–928; Kai Ambos, 'Nulla Poena Sine Lege in International Criminal Law', in *Sentencing and Sanctioning in Supranational Criminal Law*, ed. R Haveman and O Olusanya (Intersentia Antwerpen, 2006), 17–35; Damien Scalia, *Du Principe de Légalité Des Peines En Droit International Pénal* (Bruxelles: Bruylant, 2011). On the Nuremberg clause see Triestino Mariniello, 'The "Nuremberg Clause" and Beyond: Legality Principle and Sources of International Criminal Law in the European Court's Jurisprudence', *Nordic Journal of International Law* 82 (2013): 221–48. On the retroactive re-characterization technique see Talita De Souza Dias, 'Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law' (University of Oxford, 2019).

⁴ Thomas Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege* (Cham: Springer International Publishing, 2017).

⁵ Alicia Gil Gil, 'La Excepción al Principio de Legalidad Del Número 2 Del Art. 7 Del Convenio Europeo de Derechos Humanos', *Anuario de Derecho Penal y Ciencias Penales*, no. 63 (2010): 131–64; Marina Mínguez Rosique, 'The Principle of Legality in Criminal Law in the Inter-American System for the Protection of Human Rights', in *Multilevel Protection of the Principle of Legality in Criminal Law*, ed. Juan Antonio Lascaraín Sánchez, Marina Rosique Mínguez, and Mercedes Pérez Manzano (Madrid: Springer, 2018), 97–119; Kai Ambos and María Laura Bohm, 'Tribunal Europeo de Derechos Humanos y Corte Interamericana de Derechos Humanos:

different international crimes,⁶ or the consequences of its application in particular circumstances.⁷ Finally, the legal literature has shown interest for the problems arising when the principle becomes an obstacle for the prosecution of international crimes, as well as for the solutions domestic courts have found to answer these problems.⁸

¿tribunal Tímido y Tribunal Audaz?’, in *Sistema Interamericano de Protección de Los Derechos Humanos y Derecho Penal Internacional*, ed. Christian Steiner, vol. II (Montevideo, Uruguay: Konrad-Adenauer-Stiftung e. V., 2011), 43–70; Antonio Cassese, ‘Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law. The Kolk and Kislyiy v. Estonia Case before the ECHR’, *Journal of International Criminal Justice*, no. 4 (2006): 410–18; Christina Peristeridou, ‘The Principle of Legality in European Criminal Law’ (Antwerp, Maastricht University, 2015); Damien Scalia, ‘Article 23 - Nulla Poena Sine Lege’, in *Statut de Rome de La Cour Pénale Internationale: Commentaire Article Par Article*, ed. Julian Fernandez and Xavier Pacreau, vol. I (Paris: Pedone, 2012), 794–802; Talita De Souza Dias, ‘The Retroactive Application of the Rome Statute in Cases of Security Council Referrals and Ad Hoc Declarations’, *Journal of International Criminal Justice* 16, no. 1 (1 March 2018): 65–89; Davide Resta, ‘El principio “nullum crimen, nulla poena sine lege” en el Derecho Penal Internacional. En particular en el Estatuto de la Corte Penal Internacional’ (Granada, Universidad de Granada, 2019); Alejandro Ayala González, ‘El principio de legalidad penal desde la óptica de la Corte Interamericana de Derechos Humanos’, *Revista Internacional de Derechos Humanos* 8 (31 December 2018): 15–37; José Luis Guzmán Dalbora, ‘El Principio de Legalidad Penal En La Jurisprudencia de La Corte Interamericana de Derechos Humanos’, in *Sistema Interamericano de Protección de Los Derechos Humanos y Derecho Penal Internacional*, Gisela Elsner (Montevideo, Uruguay: Konrad-Adenauer-Stiftung e. V., 2010), 171–92.

⁶ Héctor Olásolo, ‘El Principio Nullum Crimen Sine Iure y El Elemento Contextual Del Delito de Genocidio’, in *La Evolución de La Definición y La Aplicación Del Delito de Genocidio. La Contribución Iberoamericana y El Legado Del Tribunal Penal Internacional Para La Ex-Yugoslavia*, vol. 9 (Valencia, Spain: Tirant lo Blanch, 2019), 425–52; Machteld Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes against Humanity, War Crimes* (Antwerpen: Intersentia, 2002); Hernán Hormazábal Malarée, ‘Notas Sobre El Principio de Legalidad Penal En El Derecho Internacional Penal, Sobre El Delito de Genocidio y La Apropiación d Recursos Naturales y La Ayuda Humanitaria’, in *Derechos Humanos y Desarrollo: Justicia Universal: El Caso Latinoamericano* (Icaria, 2007), 51–58; Marko Milanovic, ‘Aggression and Legality: Custom in Kampala’, *Journal of International Criminal Justice* 10, no. 1 (2012): 165–88.

⁷ De Souza Dias, ‘The Retroactive Application of the Rome Statute in Cases of Security Council Referrals and Ad Hoc Declarations’; Ward Ferdinandusse, ‘Direct Application of International Criminal Law in National Courts’ (Amsterdam, University of Amsterdam, 2005); Alexandre Skander Galand, *UN Security Council Referrals to the International Criminal Court: Legal Nature, Effects and Limits* (Brill Nijhoff, 2018).

⁸ Elena Maculan, ‘International Crimes or Ordinary Crimes? The “Dual Classification of the Facts” as an Interpretive Method’, *International Criminal Law Review* 21, no. 3 (22 April 2021): 403–44; Francesco De Sanctis, ‘Reconciling Justice and Legality: A Quest for Fair Punishment in Cases on Bosnian Atrocity Crimes’, *Journal of International Criminal Justice* 12, no. 4 (2014): 847–70; Javier Chinchón Álvarez, *El Tratamiento Judicial de Los Crímenes de La Guerra Civil y El Franquismo En España. Una Visión de Conjunto Desde El Derecho*

However, very few authors have provided a general and comprehensive study on how the principle is understood and applied both at the domestic and the international level. In 2008 Gallant presented the most relevant and complete general analysis on the international principle of legality in recent times.⁹ Other scholars have assessed the international principle of legality from a general perspective, but their works are not as comprehensive or accurate, missing in-depth analysis of each legality requirement, their international legal position, or the problems associated to their implementation.¹⁰

Therefore, it seems that the legal literature lacks a recent and comprehensive study on the evolution and actual understanding, content and legal status of the international principle of legality. It seems particularly relevant to assess the legal status of the principle in international law since most scholarly works do not go beyond the general affirmation that the principle has become a rule of customary international law, or an *ius cogens* norm. This is particularly relevant for situations when the principle is confronted with other international rules. The solutions to these conflicts depend on the legal status of the different norms involved. Since the principle of legality has very different meanings and its content significantly changes depending on the legal system, it seems necessary to determine the exact content, scope and legal nature of each legality version. Therefore, this work intends to analyse one by one the different elements and requirements conforming the international legality principle, to determine the legal status of each of them.

Similarly, the assessment of the actual content of the international legality principle is particularly relevant considering the latest developments in international law regarding the emergence of certain rights of the victims and particularly the expanding obligations of States to investigate, prosecute and punish international crimes and serious human rights violations. These new obligations and rights are raising significant challenges to the legality principle that have not yet been addressed

Internacional (Bilbao: Deusto Digital. Instituto de Derechos Humanos Pedro Arrupe, 2012); Héctor Olásolo and Pablo Galain Palermo, *Los Desafíos Del Derecho Internacional Penal: Atención Especial a Los Casos de Argentina, Colombia, España, México y Uruguay* (Valencia, Spain: Tirant lo Blanch, 2018).

⁹ Gallant, *The Principle of Legality in International and Comparative Criminal Law*.

¹⁰ Rodrigo Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional' (Madrid, Spain, Universidad Carlos III de Madrid, 2015); Héctor Olásolo, 'A Note on the Evolution of the Principle of Legality in International Criminal Law', *Criminal Law Forum* 18 (2007): 301–19; Claus Kress, 'Nulla Poena Nullum Crimen Sine Lege', *Max Planck Encyclopedia of Public International Law*, 2010; Susan Lamb, 'Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law', in *The Rome Statute of the International Criminal Court: A Commentary*, by Antonio Cassese, Paola Gaeta, and John R.W.D. Jones, vol. 1 (Oxford: Oxford University Press, 2002), 733–66.

in sufficient detail by legal commentators. Therefore, this research intends to provide insightful elements to cover these scholarly lacunas, assessing the different solutions, legal techniques and interpretations that might serve to reconcile the conflicting demands of justice and legality.

To meet these research objectives, this thesis is divided into three parts. In Part I the origins and actual notion of the legality principle in different domestic legal systems is analysed, together with a study of the origins and fundamental grounds of the principle in international law

Chapter 1 provides an overview of the rationales and different understandings of principle of legality in domestic legal systems around the world. To fully understand its actual meaning, content and interpretations, a journey through its history and development is proposed, from ancient Greek until its consolidation in the 19th century and its actual understanding in legal system of civil law, common law or Islamic tradition.

The emergence of the principle of legality in the international arena is assessed in Chapter 2. The first concerns about legality at the international level only appeared in the aftermath of the First World War, regarding the prosecution of the German Emperor Wilhelm II and other leading figures accused of committing war crimes. The initial attempts to implement international criminal justice came along with the first debates about the notion, scope and interpretations of the *nullum crimen* principle in international law. Particular attention is paid to the post-World War II trials where the notion of individual criminal responsibility was consolidated overcoming the previous exclusivity of collective liability for breaches of international law. The punishment of actions perpetrated in accordance with domestic law showed the rise of certain limits to the previous omnipotence of the State. As well, it revealed the emergence of individual rights in the international arena beyond the limits of State sovereignty. The Nuremberg and Tokyo trials confirmed the peculiarities of international prosecutions, which follow rules that may differ from those of domestic criminal law. This was particularly evident regarding the principle of legality that at the time was understood as a principle of justice and a prerogative of the States not giving rise to individual subjective rights nor limited State sovereignty.

Part II provides a detailed study of the evolution and actual notion, scope and content of the international principle through a comprehensive analysis of its recognition in international instruments and its interpretation and implementation by international courts and tribunals.

The notion of legality adopted by the post-World War II tribunals gradually gave way to stricter approaches. This evolution was directly related to the recognition

of the *nullum crimen* principle as a human right in various international and regional treaties, and to the development of international criminal law through its progressive codification and the case law of international courts. Therefore, in Chapter 3 the recognition of the principle of legality in international human rights law is analysed, followed by an overview of the progressive development and codification of modern international criminal law. The initiatives to establish an international criminal code and to create a permanent international criminal court had to wait the end of the Cold War to come to fruition. However, international crimes were progressively codified in sectorial treaties and conventions. The establishment of clear definitions of the acts and omissions carrying individual criminal responsibility allowed international prosecutions to adopt stronger and more exigent legality notions.

Chapter 4, analyses how the principle of legality has been understood and implemented by modern international courts and tribunals. While the doubts about the respect of *nullum crimen* overshadowed post-World War II trials, the *ad hoc* international criminal tribunals were determined to prevent this from tainting their work and did not question the applicability of the legality principle, despite it was not explicitly recognized in their statutes. The tribunals adopted a rather flexible notion of legality and explored different formulas to combine the respect of the basic rights of the accused with the prosecutions of international crimes grounded on a still emergent international criminal law system. The Rome Statute is considered as the first serious attempt to overcome the dichotomy between domestic criminal law systems and international criminal law, particularly regarding the concept and requirements derived from the principle of legality. Those detailed provisions, together with a jurisdiction of the International Criminal Court limited to crimes committed after the entry into force of the Statute, enabled the establishment of a strict principle of legality and the fulfilment of the strong requirements *lex scripta*, *praevia*, *certa* and *stricta*. The adoption of this extended legality notion culminates the development process of the legality principle in international law. However, the practical application of such exigent *nullum crimen* version to certain matters and situations remains uncertain, and flexible interpretations might still be needed as proved by recent ICC's decisions.

Given their significant contribution to the development of the legality principle, a detailed assessment of the case law of the different regional human rights courts is provided in Chapter 5. Domestic European courts have explored different legal formulas to prosecute and punish those responsible for the numerous atrocities committed in the region during the 20th century. These prosecutions of past crimes entailed important challenges for the legality principle and the prohibition of retroactive crimes and punishments. However, the European Court of Human Rights has often upheld domestic prosecution of past human rights violations, applying a

rather flexible notion of legality grounded on the accessibility and foreseeability test. Regarding the Latin-American area, during the last decades different legal provisions, as amnesties, statutes of limitations or the non-retroactivity rule, prevented domestic courts from investigating and punishing those responsible for the frequent human right violations committed in the region. However, the Inter-American Court of Human Rights has taken a leading role to revert this situation. The Court determined that States have the duty to investigate, prosecute and punish international crimes and serious human rights violations committed in their territory, and should take all appropriate measures to ensure the fulfilment of the victims' rights to justice, truth and reparation. Similarly, the Inter-American Court established that States should interpret and apply their domestic laws, including the legality principle, statutes of limitations or amnesty acts, in a manner compatible with these international duties.

Finally, in Part III the current international legal status of each legality element and requirement is assessed, together with the analysis of the conflict and possible reconciling solutions derived from the emergence of certain international rights and obligations, taking Spain as a case study.

Chapter 6 analyses the current content and legal status of the international principle of legality, as well as the limits arising from the emergence of certain victims' rights and States' obligations. Based on generally recognised criteria to identify rules of customary international law and *ius cogens* norm, the legal status of each element and requirement of the legality principle is assessed. Particularly, it will be examined whether the core rules of the international legality principle, articulated around the non-retroactivity rule and summarized in the formula *nullum crimen, nulla poena sine iure*, have become a rule of general international law. The legality principle is then analyzed in the context of an increasingly responded accountability culture regarding international crimes and serious human rights violations.

Once the international legal status of each legality element has been determined, Chapter 7 examines whether States are allowed to adopt stronger legality versions in their domestic legal systems, and if so, which are the consequences and limits of such extension. The general trend, both in domestic and international law, is to strengthen the requirements of the legality principle. However, the international community has also adopted in the last decades an already well-entrenched accountability culture regarding international crimes and human right violations grounded on the fight against impunity, on the emergence of certain victims' rights, and particularly on an expanding set of positive duties of States. In some specific circumstances these two parallel trends collide, and the implementation of strong legality requirements may appear as an insurmountable obstacle for criminal trials. These situations are first analyzed, followed by an assessment of the content and legal

status of the obligation of States to investigate, prosecute and punish international crimes. Then, an overview of the conflict between the principle of legality and these States obligations is provided, together with a summary of some exploratory solutions. Finally, Spain is taken as a case study since it provides a paradigmatic example of how the conflicting demands of justice and legality can be reconciled, and how the different notions and interpretations of the legality principle can tilt the balance one way or another.

Throughout this thesis different and complementary legal research methodologies are employed. This work is based on analytical study of primary legal sources, including a variety of domestic and international legal instruments and materials, as well as the case law of national and international courts and tribunals. However, particularly regarding the assessment of the abundant legality provisions in domestic legal systems around the world, this work also refers to already existent comparative studies. This research is also grounded on the critical assessment of secondary sources, as the most relevant scholarly works. Comparative approaches are as well relevant, especially regarding the assessment of the different legality versions existent in a variety of domestic and international legal systems. Historical approaches are also employed to analyze the development stages of the domestic and international legality principle. Throughout this work some logical-inductive methods are implemented, inferring from particular cases or decisions general values and principles. Correspondingly, logical-deductive methods are also used when applied and concrete practical solutions are deduced from general ideas, rights or principles.

PART I:
ORIGINS OF THE PRINCIPLE OF LEGALITY

CHAPTER 1: THE PRINCIPLE OF LEGALITY IN DOMESTIC LEGAL SYSTEMS

The principle of legality is one of the essential elements of the rule of law and a cornerstone of modern criminal law. It establishes that all public powers are subject to the law and their actions may only be carried out within the limits of current legislation. The principle of legality is applicable to all legal areas but it is probably regarding criminal law where it becomes more relevant, working as a limit to the *ius puniendi* of the State and as the main guarantee for the rights and liberties of the citizens. Indeed, this research work focuses primary on the principle of legality concerning criminal law, where it can be described as *nullum crimen, nulla poena sine lege* (no crime, no punishment without law).¹¹ The legal literature agrees to consider the European enlightened ideas of the 18th century as the origin of the political and philosophical rationales of the principle of legality, but scholars do not agree about how far back in history we should look to find the first precedents of the principle. Some authors refer to Ancient Greece, to Roman law or to the *Magna Charta Libertatum* in medieval times, but other writers consider that, even if having apparent similarities with the legality principle, these precedents respond to conceptions and rationales too different to be considered as relevant antecedents. This Chapter aims to provide a general theoretical and historical framework to better understand the actual meaning of legality, and to explore and ground the different elements, understandings and interpretations of the principle. Hereinafter, some of these remote antecedents will be analysed. Then, the emergence, codification and evolution of modern legality, from the Enlightenment until our days, will be studied. Finally, different legal systems embracing important legality features as common law countries, or Islamic systems, will be assessed.

1.1 Remote antecedents and evolution

Legal concepts and principles do not emerge abruptly. On the contrary, they are the result of progressive cultural and social evolution. The principle of legality is not an exception, and its actual understanding is the result of a long and discontinuous process that could have started even before Ancient Greece times. The ideas of the western Enlightenment, implemented in the liberal revolutions of the 18th and 19th centuries, are generally referred as the origin of the principle, though some legality

¹¹ Hereinafter, the expression *nullum crimen* is used referring both to *nullum crimen* and *nulla poena*. An explicit mention will be made when *nullum crimen* does not comprise *nulla poena*.

elements were already present in previous legal systems. However, we should be cautious when identifying antecedents in periods prior to the emergence of the liberal State, since the modern concept of “law” did not exist yet, and the meaning of the *nullum crimen* principle would be very different to the one we know today.¹²

The existence in ancient legal systems of particular features related to the modern principle of legality is not questioned by the doctrine, but the disagreements arise when assessing the real meaning and influence of such precedents. As explained above, some authors consider Ancient Greece the origin of the principle of legality; others refer to Roman law, the 1188 *Magna Charta* of the Kingdom of León, the 1215 *Magna Charta Liberatum*, or the 1532 *Constitutio Criminalis Carolina*. As well, some scholars consider that these precedents, even if having apparent similarities with the principle of legality, respond to conceptions and rationales too different to be considered as a true origin or precedent of the principle.

Even if all these precedents show a share concern about legal security, it has been objected that they were incomplete or imperfect.¹³ For example, Roman law or the *Constitutio Criminalis Carolina* did not forbid analogy,¹⁴ and the 1215 *Magna Charta* accepted customary law as source of crimes and penalties and had a rather procedural content. However, the main objection is that they substantially differ from the actual political sense of the principle. This meaning only emerged during the Enlightenment, together with the social contract theory that considered the laws as the expression of the general will, and the principle of legality as a limitation of the State *ius puniendi* and as a guarantee of the liberties of the citizens.¹⁵

Even if the fundamental rationales of the current principle of legality only emerged in Europe during the 17th and 18th century, it is relevant to examine these ancient legal systems to understand the grounds and the developments of the enlightened ideas. An overview of the entire development process will provide a better

¹² Carmen Lamarca Pérez, ‘Formación Histórica y Significado Político de La Legalidad Penal’, *Revista Jurídica de Castilla-La Mancha* 2 (1987): 44.

¹³ Rodrigo Lledó, ‘Sobre El Derecho Griego Antiguo Como Antecedente Remoto Del Principio de Legalidad Penal’, in *Derecho Penal, Constitución y Derechos*, by R. Rebollo Vargas and F. Tenorio Tagle (Barcelona, Spain: Bosch, 2013.), 308.

¹⁴ When an allusion is made in this work to the notion of analogy, without further specifications, it generally refers to *analogia legis* and *analogia juris*. For further information on the notion of analogy and its different meanings and sorts, as well as on its admissibility in modern domestic and international legal systems, see below, Section 4.2.2.4 and Section 6.3.1.2.

¹⁵ Lledó, ‘Sobre El Derecho Griego Antiguo Como Antecedente Remoto Del Principio de Legalidad Penal’, 308–9.

understanding of the actual meaning, content and interpretations of the principle of legality.

1.1.1 Ancient Greece

The first precedents of the legality principle have been traced back to the first existing written laws including provisions describing criminal actions and specific punishments.¹⁶ It is the case of the Hammurabi's Code of Laws (18th century BCE¹⁷) that included more than seventy criminal offences and penalties. As well, it is thought that in Ancient Egypt some codes regulated criminal actions. However, no complete code of law has reached our days and we only have today the example of the Decree of Horemheb (13th century BCE) concerning punishable corruption conducts of public officials.¹⁸ Despite their relevance, these remote codes are largely ignored by the doctrine, and the studies on the origins and evolution of the legality principle generally take Ancient Greece as the starting point.

During the last decades the doctrinal researches focused on Ancient Greece's criminal law, and particularly in Athens, have experienced a significant increase.¹⁹ However, the legal literature does not agree on the importance of Greek law for the development of the principle of legality. Some authors deny that the origin of modern legality could be found in Ancient Greece arguing that, at the time, important elements and rationales of the principle did not exist yet.²⁰ Other scholars openly defend that the axiom *nullum crimen nulla poena sine lege* finds its origins in Ancient Greek law.²¹ Other opinions consider that at least in Ancient Greece emerged for the first time some of the political and legal ideas corresponding to certain features of what today we know as the principle of legality.²² In fact, the legal systems of Greek *poleis* included some of

¹⁶ Aly Mokhtar, 'Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects', *Statute Law Review* 26, no. 1 (2005): 41.

¹⁷ Considered more neutral, in this work the abbreviations BCE (Before the Common Era) and BC (Common Era) are used instead BC (Before Christ) and AD (*Anno Domini* – Year of our Lord).

¹⁸ Mokhtar, 'Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects', 42.

¹⁹ As explained, with further references in Lledó, 'Sobre El Derecho Griego Antiguo Como Antecedente Remoto Del Principio de Legalidad Penal', 309.

²⁰ Ferrajoli, *Derecho y Razón. Teoría Del Garantismo Penal*, 382; Lledó, 'Sobre El Derecho Griego Antiguo Como Antecedente Remoto Del Principio de Legalidad Penal', 321; Vicente Martínez, *El Principio de Legalidad Penal*, 16.

²¹ Dedes, 'Sobre El Origen Del Principio "Nullum Crimen Nulla Poena Sine Lege"', 141–43.

²² Michael Gagarin, *Writing Greek Law* (Cambridge, UK: Cambridge University Press, 2008).

the elements of the modern concept of rule of law, also comprising rudimentary features of the principle of legality.²³ However, Greek ideas, including those regarding the rule of law, were lost for centuries and were only recovered in the high Middle Ages by religious scholars, becoming exemplary models, inspiration, and authority for later periods.²⁴

The development of the ideas concerning the rule of law and the legality principle was an extensive and non-linear process, affecting more than 1500 city-states over several centuries across a vast geographical area. In fact, the debate about the unity of Greek law is still present in the academia.²⁵ It is uncertain to what extent it is possible to consider Greek Law as a single institution or system since it experienced great changes through the centuries, and Greece was divided in independent *polis* (city-states); each of them having their own legal system.²⁶ However, to simplify the analysis Greek Law will be treated here as a unity when addressing general and common features, although the main differences among periods will be anyway noted.

Hereinafter the Greek legal system, comprising some elements that could remind the actual rule of law, will be first analysed. An overview of the democratic system and the manner laws were adopted is then assessed, followed by a study of the main elements or requirements of Greek laws. Finally, the role of the judges and the way laws were implemented is analysed.

1.1.1.1 The Greek “rule of law”

From the end of the 5th century BCE some features of the rule of law and the principle of legality progressively emerged in the Greek legal system. In those years Athens experienced a period of significant changes. During several years a violent oligarchic regime took power, including the period of the Thirty Tyrants, when laws and tribunals were suspended and a regime of terror was installed.²⁷ The experience of the terrible consequences of the misuses of the law provoked a subsequent significant evolution of the Athens legal system. As a reaction against the abuses of power

²³ Canevaro, 215–18.

²⁴ Brian Z. Tamanaha, *On the Rule of Law. History, Politics, Theory* (Cambridge: Cambridge University Press, 2004), 7.

²⁵ For an overview of the debates, see Michael Gagarin, *Writing Greek Law* (Cambridge, UK: Cambridge University Press, 2008), 7.

²⁶ For a detailed analysis of this doctrinal debate see Gagarin, 7–12.

²⁷ Lledó, ‘Sobre El Derecho Griego Antiguo Como Antecedente Remoto Del Principio de Legalidad Penal’, 317.

experienced during these years, some new norms, that today we can identify today with some legality elements, were adopted.

When Athenians recovered their democracy the old laws were revised, compiled and re-engrave in stone.²⁸ Among others, the following five laws were enacted:

- “1. The magistrates are not to use any unwritten law on any matter whatsoever.
2. No decree, either of the Council or of the Assembly, is to have more authority than a law.
3. No law can be enacted concerning a single man unless the same law applies to all Athenians, unless it is approved by 6.000 in a secret vote.
4. Any trials and arbitration hearing that took place while the city was a democracy are to be valid.
5. These laws are to be used from the archonship of Eucleides.”²⁹

These norms clearly recall to some elements of the modern rule of law, showing a clear concern for legal certainty, the primacy of laws and the prevention of arbitrary and abusive use of power. As a reaction against the atrocities committed by the Thirty Tyrants, these rules attempted to prevent future abuses by reinforcing the power of the law, and ensuring the respect of legality.³⁰ The idea of the rule of law, as opposed to tyranny of the rule of man, was progressively consolidated based on a shared objective of countering the arbitrary power of individuals.³¹ From that moment the authority of those in command was controlled by fixed rules defining their competences, making them accountable and preventing the concentration of power.³²

The principle of legality and the rule of law, were among the most discussed issues in Greek political philosophy,³³ and the works of Plato and Aristotle on the matter are particularly well known.³⁴ Both philosophers, living during that period and influenced by the above-mentioned political events, were concerned about the potential

²⁸ Lledó, 317.

²⁹ As cited in Gagarin, *Writing Greek Law*, 185.

³⁰ Lledó, ‘Sobre El Derecho Griego Antiguo Como Antecedente Remoto Del Principio de Legalidad Penal’, 319.

³¹ Brian Tamanaha, ‘The History and Elements of the Rule of Law’, *Singapore Journal of Legal Studies*, 2012, 243.

³² Canevaro, ‘The Rule of Law as the Measure of Political Legitimacy in the Greek City States’.

³³ Lamarca Pérez, ‘Formación Histórica y Significado Político de La Legalidad Penal’, 46.

³⁴ Tamanaha, *On the Rule of Law. History, Politics, Theory*, 7.

dangers of the government of men.³⁵ They believed in the stability and restraining effect of the rule of law, and they promoted it. However, Plato did not consider the rule of law as the best possible system, preferring the rule of wise men. Guardians educated in philosophy governed Plato's ideal Republic, and in this system, law was an obstacle "in the way of justice like an obstinate and ignorant man".³⁶ Nevertheless, the author admitted the imperfection of humans, influenced by passions and distortions of reason, and understood that the power to rule over others had the potential of abuse and corruption, even among the best citizens.³⁷

Against Plato's ideal government, where no laws were needed, Aristotle held a vigorous defence of legality, advocating for general rules as opposition to arbitrary laws.³⁸ He considered that "the rule of law (...) is preferable to that of any individual. (...) Passion perverts the minds of rulers, even when they are the best of men. The law is reason unaffected by desire".³⁹ The author even envisaged the need of a separation of powers, later developed by Montesquieu, distinguishing between those who deliberate, those who run the State administration and those who dispense justice.⁴⁰

1.1.1.2 Democracy and the legitimacy of laws

One of the main objections to consider Greek law as the origin of the principle of legality, is related to the very concept and meaning of law. In Greek thought, the laws were not conceived as a guarantee of individual rights against the power of the State, but as the expression of political liberty, meaning the full integration of the individual in the social body.⁴¹ Laws were not the outcome of the works of a legislative

³⁵ Ibid., 8.

³⁶ Tamanaha, 'The History and Elements of the Rule of Law', 244.

³⁷ As explained in Brian Tamanaha, 'The History and Elements of the Rule of Law', *Singapore Journal of Legal Studies*, 2012, 244.

³⁸ Carmen Lamarca Pérez, 'Formación Histórica y Significado Político de La Legalidad Penal', *Revista Jurídica de Castilla-La Mancha* 2 (1987): 46; However, it is argued that as Plato, Aristotle did not see the rule of law as the best possible system in the ideal. See Brian Tamanaha, 'The History and Elements of the Rule of Law', *Singapore Journal of Legal Studies*, 2012, 243.

³⁹ Aristotle, *The Politics*, Stephen Everson (Cambridge University Press, 1988), Vol 3 at 78.

⁴⁰ William Benessiano, 'Légalité pénale et droits fondamentaux' (Aix-en-Provence, Aix-Marseille 3, 2008), 21.

⁴¹ Lamarca Pérez, 'Formación Histórica y Significado Político de La Legalidad Penal', 45.

body, but the product of the activities of its citizens.⁴² Law was considered as the reflection of a transcendent order standing behind the community, and had a sanctified status.⁴³ In fact, Greek philosophers dreamed of materialising a legal system so perfectly adapted to the true interests and conditions of the society as to be venerated as eternal and unalterable.⁴⁴

Even if Ancient Greece is often referred to as a democratic system, the truth is that in general the form of government of the *polis* was closer to oligarchies than democracies.⁴⁵ Athens was a remarkable exception and during some periods the Athenian citizens effectively governed their city.⁴⁶ Every male citizen over thirty years old was eligible to serve on the governing Council or on legislative assemblies.⁴⁷ Nonetheless, it is not clear yet if the laws were passed by an aristocratic class or by the majority of citizens detached from the social elite.⁴⁸ Anyways, the laws were perceived as originated in the community, and adopted in the interest of the city and the citizens.⁴⁹

As a consequence of their sacred status, popular courts or legislative assemblies could not modify the law easily.⁵⁰ The aim was to preserve the democratic system, by subordinating the principle of popular sovereignty to the principle of sovereignty of laws.⁵¹ In fact, the role of the courts and assemblies was to be guardians of the law, not

⁴² Philip Brook Manville, *The Origins of Citizenship in Ancient Athens* (Princeton, N.J.: Princeton University Press, 1997), 107. Cited in Tamanaha, *On the Rule of Law. History, Politics, Theory*, 7.

⁴³ Tamanaha, *On the Rule of Law. History, Politics, Theory*, 8.

⁴⁴ Ibid.

⁴⁵ Gagarin, *Writing Greek Law*, 88; Lledó, ‘Sobre El Derecho Griego Antiguo Como Antecedente Remoto Del Principio de Legalidad Penal’, 322–23.

⁴⁶ However, the Greek concept of citizenship was very restricted and only a minority of the population enjoyed the status of citizen in Greek *polis*.

⁴⁷ Tamanaha, *On the Rule of Law. History, Politics, Theory*, 7.

⁴⁸ For a detailed account of the academic debates on the issue see Lledó, ‘Sobre El Derecho Griego Antiguo Como Antecedente Remoto Del Principio de Legalidad Penal’, 323.

⁴⁹ Rodrigo Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’ (Madrid, Spain, Universidad Carlos III de Madrid, 2015), 324.

⁵⁰ John Walter Jones, *The Law and Legal Theory of the Greeks: An Introduction* (Oxford: Clarendon Press, 1956), 69–70. Cited in Tamanaha, *On the Rule of Law. History, Politics, Theory*, 8.

⁵¹ Tamanaha, *On the Rule of Law. History, Politics, Theory*, 8.

to create new ones.⁵² However, old laws could be changed and new laws be enacted, but the process was complex and proponents had to show the inadequacy of existing laws.⁵³

When democracy was re-established after the period of the Thirty Tyrants, a real legislative procedure for the creation of new laws was established, including the participation of different democratic organs of the city.⁵⁴ In fact, laws did not only regulate and limit authorities' and officials' powers, but as well contemplated the possibility of prosecuting them if they had excessed or had not adequately fulfilled their duties.⁵⁵

The above-mentioned five rules enacted in Athens after the Thirty Tyrants period have been interpreted as an explicit "rule of recognition", using Hart's terminology.⁵⁶ They determined the requirements of the laws to be valid, defining which rules were part or not of the Athens's legal system. Prior to these five rules, it existed as well an implicit rule of recognition. As analysed hereinafter, Greek laws had to have written format and were publicly displayed.⁵⁷ It has been considered as well that the fourth of the above-mentioned rules, confirmed the reality of a pre-existing rule of adjudication.⁵⁸

1.1.1.3 General, written and public laws

Among the elements and features that can be easily identified with the modern concepts of legality or rule of law, it can be underlined the fact that the Greek legal system was based on a certain hierarchy between norms, what provided coherence and clarity.⁵⁹ Another relevant element of the system was the requirement of laws to be

⁵² Ibid.

⁵³ Ibid.

⁵⁴ For a detailed description of the legislative procedure see Gagarin, *Writing Greek Law*, 38–65.

⁵⁵ Tamanaha, *On the Rule of Law. History, Politics, Theory*, 7; Lledó, 'Sobre El Derecho Griego Antiguo Como Antecedente Remoto Del Principio de Legalidad Penal', 314.

⁵⁶ Gagarin refers to the distinction established by Hart between primary and secondary rules, and among the latter, the rules of recognition, change and adjudication, in H. L. A. Hart, *The Concept of Law*, 2nd ed. (Oxford: Clarendon Press, 1994). As explained in Gagarin, *Writing Greek Law*, 185; Canevaro, 'The Rule of Law as the Measure of Political Legitimacy in the Greek City States', 215.

⁵⁷ Gagarin, *Writing Greek Law*, 185.

⁵⁸ Ibid., 186.

⁵⁹ Canevaro, 'The Rule of Law as the Measure of Political Legitimacy in the Greek City States', 215.

general, so they could not be directed against a specific individual. This requirement, like the whole idea of the rule of law, was grounded in the assumption that all citizens were equal.⁶⁰ Aristotle expressed it as follows:

“[S]ome people think that it is not according to nature for one person to have authority over all the citizens, where the city-state is established out of similar persons. For persons who are similar by nature necessarily have the same right and the same merit according to nature. [...] Consequently, it is just to rule no more than to be ruled, and it is just [to rule and be ruled] by turns. But this is already law; for law is the order [by which offices are shared]. Hence the rule of law is preferable to that of a single citizen”.⁶¹

However, even if equality before the law was a significant principle, this did not mean that all individuals would be subject to the same rules. In fact, the law established different categories of individuals, and different legal regulations were applied to each of them.⁶² For example, different punishments were established for the same crimes depending on the victims’ and the aggressors’ social class.⁶³ Equality was understood in the way that “the law would be applied to all in accordance with its terms without regard to whom, whether aristocrat or lowly artisan, stood before it”.⁶⁴

Another characteristic of Greek law that can be certainly linked to the principle of legality is the intention to make the laws known and understood by the population.⁶⁵ It is thought that this notion existed at least from the mid 7th century BCE,⁶⁶ since the first identified written Greek laws, engraved in stone or bronze, date from that period. This informative aim was facilitated by the peculiarities of Greek script, easier to write and read than other contemporary scripts.⁶⁷ The engraved laws were shown in public

⁶⁰ Tamanaha, *On the Rule of Law. History, Politics, Theory*, 7.

⁶¹ Aristotle, *The Politics*, 1287a10-14, 16-20. As cited in Michael Lobban, *A Treatise of Legal Philosophy and General Jurisprudence: Vol. 6: A History of the Philosophy of Law from the Ancient Greeks to the Scholastics*, Miller FD, Biondi C-A (Springer Science & Business Media, 2007).

⁶² Tamanaha, *On the Rule of Law. History, Politics, Theory*, 7.

⁶³ Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’, 315.

⁶⁴ Tamanaha, *On the Rule of Law. History, Politics, Theory*, 7.

⁶⁵ Lledó, ‘Sobre El Derecho Griego Antiguo Como Antecedente Remoto Del Principio de Legalidad Penal’, 312; Gagarin, *Writing Greek Law*, 65.

⁶⁶ Gagarin, *Writing Greek Law*, 39.

⁶⁷ For a comprehensive study of the characteristics and evolution of Greek script, see Gagarin, 39.

places, generally in prominent locations of the city where many could see them.⁶⁸ As well, in most cases, texts were written in clear and large letters, and the content was drafted aiming easy understanding.⁶⁹ Similarly, all Athenian laws were freely accessible in the archives.⁷⁰ It is interesting noting that altering the plates where the laws were engraved was punished with the most severe penalties contemplated in Greek laws, including in certain cases, the death of the offender and his family.⁷¹

As explained, the deep differences regarding the political meaning of legality is the main argument against considering Greek Law as the origin of the principle.⁷² However, some scholars have found in the validity requirement of publishing the laws, a direct link to the political rationale of the actual legality principle. In this vein, Dedes argues that, especially after the re-establishment of democracy in Athens following the Thirty Tyrants period, the requirement of publicly displaying the laws was grounded on the objective of protecting the citizens.⁷³ Dedes describes it with the axiom “without publication, there is no crime”.⁷⁴ At the same time, the obligation to publish the laws would fulfil the actual legality requirement of foreseeability, and partially that of specificity.⁷⁵ Similarly, and following this line of reasoning, it can be added that the obligation of publicly displaying the laws would contribute to fulfil the legality requirement of accessibility.⁷⁶

Particularly after the restoration of democracy at the end of the 5th century BCE, laws were required to be in a written format, as opposed to customary norms or other unwritten legal sources. Such requirement can be easily related to the *lex scripta*

⁶⁸ Gagarin, 65; Lledó, ‘Sobre El Derecho Griego Antiguo Como Antecedente Remoto Del Principio de Legalidad Penal’, 312; Canevaro, ‘The Rule of Law as the Measure of Political Legitimacy in the Greek City States’, 216.

⁶⁹ Gagarin, *Writing Greek Law*, 65.

⁷⁰ Canevaro, ‘The Rule of Law as the Measure of Political Legitimacy in the Greek City States’; Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’, 22.

⁷¹ Lledó, ‘Sobre El Derecho Griego Antiguo Como Antecedente Remoto Del Principio de Legalidad Penal’, 314; Gagarin, *Writing Greek Law*, 63.

⁷² Vicente Martínez, *El Principio de Legalidad Penal*, 16; Lamarca Pérez, ‘Formación Histórica y Significado Político de La Legalidad Penal’, 45–46; Lledó, ‘Sobre El Derecho Griego Antiguo Como Antecedente Remoto Del Principio de Legalidad Penal’, 330.

⁷³ Dedes, ‘Sobre El Origen Del Principio “Nullum Crimen Nulla Poena Sine Lege”’, 143.

⁷⁴ Freely translated from the original in Spanish: “sin divulgación, no hay delito”. See Dedes, 145.

⁷⁵ Dedes, 145.

⁷⁶ For a comprehensive analysis of the accessibility and foreseeability requirements, particularly developed by the ECtHR, see above, Section 5.1.4.

element comprised in some versions of the actual principle of legality. During the period of the Thirty Tyrants, numerous abuses were committed invoking non-written norms, and when democracy was restored the necessity of written laws to prevent future abuses was strengthened.⁷⁷ The requirement of written laws is clearly established in the first of the above-mentioned five rules: “The magistrates are not to use any unwritten law on any matter whatsoever.” However, it is not clear yet if this meant the complete exclusion of customary laws.⁷⁸ It seems that during a long period previous oral law was applied together with new written rules. Nevertheless, even if the judges could apply both kinds of norm, the sentences could never contradict written laws.⁷⁹

Regarding specificity, another element conforming the actual principle of legality (*lex certa*), it should be noted that, in general, Greek criminal laws described the crime, the procedure, and sometimes the punishment, but they did not describe in detail punishable conducts.⁸⁰ However, some authors consider that this vagueness of criminal laws was presumably not perceived as such at the time. The numerous shared values, traditions and religious beliefs existent at the time might have orientated citizens to understand which conducts would entail criminal liability.⁸¹

With regard to retroactivity, at least from the end of the Thirty Tyrants government, the maxim “without publication, there is no crime” was applicable.⁸² However, nothing prevented such laws from including retroactive rules.⁸³ In fact, examples of laws prohibiting their *ex post facto* application can be found together with

⁷⁷ Dedes, ‘Sobre El Origen Del Principio “Nullum Crimen Nulla Poena Sine Lege”’, 142.

⁷⁸ It exist a intense doctrinal debate on the subject as explained, together with an overview of the main positions, in Dedes, 142; Lledó, ‘Sobre El Derecho Griego Antiguo Como Antecedente Remoto Del Principio de Legalidad Penal’, 319.

⁷⁹ Gagarin, *Writing Greek Law*, 91–92; Lledó, ‘Sobre El Derecho Griego Antiguo Como Antecedente Remoto Del Principio de Legalidad Penal’, 313.

⁸⁰ Lledó, ‘Sobre El Derecho Griego Antiguo Como Antecedente Remoto Del Principio de Legalidad Penal’, 324.

⁸¹ Ibid., 326.

⁸² Dedes, ‘Sobre El Origen Del Principio “Nullum Crimen Nulla Poena Sine Lege”’, 145. Referring to the *Timokrates and the Athenian Ambassadors*.

⁸³ Lledó, ‘Sobre El Derecho Griego Antiguo Como Antecedente Remoto Del Principio de Legalidad Penal’, 328.

statutes establishing its retroactivity implementation.⁸⁴ However, some cases have been identified where laws were declared invalid due to their retroactive content.⁸⁵

1.1.1.4 The role of the judges

The above-mentioned ideas regarding the limitations of government and officials' powers, reached as well judicial proceedings. Some guarantees for the accused, easily associated to the legality principle, were also established. It emerged the concept of due process, the obligation to decide cases based on the applicable laws, and the need to prove the guilt of the accused according to the law.⁸⁶ As an example, Hyperides, a notorious politician and one of the ten Attic orators, established:

“There cannot be complete happiness without independence. For men to be happy they must be ruled by the voice of law, not the threats of a man; free men must not be frightened by accusation, only by proof of guilt; and the safety of our citizens must not depend on men who flatter their masters and slander our citizens but on our confidence in the law.”⁸⁷

Every year 6000 citizens were selected by lottery in Athens to serve as judges and they had to take the Judicial Oath that included, among other guarantees, the obligation to decide cases based on the applicable laws.⁸⁸ Judges had to sentence according to existing laws, avoiding the application of customary or unwritten laws. As well, judges had to act within the limits of the law, and to ensure accountability, magistrates could be subject to criminal proceedings by complaints from private citizens if they had not adequately fulfilled their duties or had abused their powers.⁸⁹

⁸⁴ Canevaro, ‘The Rule of Law as the Measure of Political Legitimacy in the Greek City States’, 216; Lledó, ‘Sobre El Derecho Griego Antiguo Como Antecedente Remoto Del Principio de Legalidad Penal’, 328.

⁸⁵ Mokhtar, ‘Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects’, 42. Referring to the *Timokrates and the Athenian Ambassadors* case (4th century BCE), where a law intending to retroactively relieve the penalty imposed to some ambassadors for misuse of city’s funds, was declared invalid.

⁸⁶ Canevaro, ‘The Rule of Law as the Measure of Political Legitimacy in the Greek City States’, 213–15.

⁸⁷ Hyperides Epit. 25, as cited in Canevaro, 213.

⁸⁸ Canevaro, 213.

⁸⁹ Tamanaha, *On the Rule of Law. History, Politics, Theory*, 7; Lledó, ‘Sobre El Derecho Griego Antiguo Como Antecedente Remoto Del Principio de Legalidad Penal’, 314; Canevaro, ‘The Rule of Law as the Measure of Political Legitimacy in the Greek City States’, 224.

In relation to the problematic of uncertainty or vagueness of laws and the role and discretion margin of the judges, Aristotle arrived to surprisingly modern conclusions.⁹⁰ He established that “(...) well-drawn laws should themselves define all the points they possibly can and leave as few as may be to the decision of the judges”,⁹¹ and this because “laws are made after long consideration, whereas decisions in the courts are given at short notice, which makes it hard for those who try the case to satisfy the claims of justice and expediency”,⁹² but the main reason is that “the decision of the lawgiver is not particular but prospective and general,” while the judges, deciding on particular cases, would not be as objective as the law and could be influenced by feelings or personal considerations. He concluded that “in general (...) the judge should (...) be allowed to decide as few things as possible.”⁹³ These arguments clearly remind some lines of thought developed many centuries later by Enlightenment authors.

1.1.2 Ancient Rome

The importance and influence of Roman law in western legal systems is undeniable, but even if a Latin formula is used nowadays to enunciate the legality principle, only primitive and rudimentary features of the principle were present in Roman times.⁹⁴ The impact of Roman law in the current concept of legality is discussed by the academia. Certain authors consider that Greek legal philosophy had a relevant impact in Roman legal system, and that some of the above-mentioned theoretical legal concepts were implemented and applied to concrete practices.⁹⁵ Other scholars believe that, even if Romans provided some positive contributions, their impact to the rule of law tradition was rather negative.⁹⁶ As well, some specialist openly defend the Roman origin of the principle, or at least of some of its relevant features.⁹⁷ On the contrary,

⁹⁰ Lamarca Pérez, ‘Formación Histórica y Significado Político de La Legalidad Penal’, 46.

⁹¹ Aristotle, *Rhetoric* (Biblioteca on-line de ciencias da comunicação, 350AD), 4, <http://www.bocc.ubi.pt/pag/Aristotle-rhetoric.pdf>. All electronic references and links cited throughout this thesis have been last consulted the 26 January 2023.

⁹² Aristotle, 4.

⁹³ Ibid.

⁹⁴ Claus Kress, ‘Nulla Poena Nullum Crimen Sine Lege’, *Max Planck Encyclopedia of Public International Law*, 2010, para. 8.

⁹⁵ Wojciech Daszkiewicz, ‘Greek and Roman Roots of European Civilisation’, *Studia Gilsoniana* 6, no. 3 (2017): 381–404.

⁹⁶ Tamanaha, *On the Rule of Law. History, Politics, Theory*, 11.

⁹⁷ Ferrajoli, *Derecho y Razón. Teoría Del Garantismo Penal*, 383.

some authors deny that the foundations of the *nullum crimen* principle can be traced back to Roman times.⁹⁸

Roman legal system experienced important changes and evolutions through the centuries, but we can distinguish two main periods: the Roman Republic, governed by an aristocratic assembly (509 BCE – 27 BCE) and the Roman Empire (27 BCE – 479 CE).⁹⁹ The elements and features that could be linked to the principle of legality and the rule of law, varied with time. Hereinafter the Roman legal system, comprising some elements that could remind the actual rule of law, will be first assessed. An analysis of the legality elements that could be found in Roman criminal law is then provided. Finally, the role of the judges and the way laws were implemented is examined.

1.1.2.1 The Roman legal system and the rule of law

Roman criminal law cannot be considered an unitary system. On the contrary, it was a complex and unsystematic accumulation of various laws and legal opinions reflecting the political territorial distribution of the Empire, composed by numerous and diverse local legal systems applicable in each autonomous or quasi-autonomous territory.¹⁰⁰ During the Republic, and particularly during the Empire, the central government had the power to impose general norms to all the territories. However, despite this authority being effectively used regarding different legal areas, the harmonization did not reach criminal law.¹⁰¹ It was only later, after the division of the Empire, when a real unification of the laws was finally undertaken. After reaching power, the Eastern Emperor Justinian commanded a systematic, organized and coherent codification of existing Roman law, including customs, rules, decisions and scholarly opinions.¹⁰² The result was the Justinian Code, later called *Corpus Iuris Civilis*,

⁹⁸ Ferrajoli, 428; Edmund Mezger, *Derecho Penal: Libro de Estudio*, vol. 1 (Buenos Aires: Librería El Foro, 2001), 62; Vicente Martínez, *El Principio de Legalidad Penal*, 16; Jiménez de Asúa, *Tratado de derecho penal*, II:383. For a comprehensive overview of scholarly debates on whether Roman law should be considered the origin of the legality principle, see Luigi Ferrajoli, *Derecho y Razón. Teoría Del Garantismo Penal*, 9th ed. (Madrid: Trotta, 2009), 428.

⁹⁹ Among many other differences between both periods it should be noted that equality of all free citizens before the law was a principle present during the Republic. However, in Imperial times a relevant distinction between nobility and the rest of citizens was introduced, being as profound as the existing division between free citizens and slaves. Teodoro Mommsen, *Derecho Penal Romano* (Bogotá, Colombia: Temis, 1999), 638–39.

¹⁰⁰ Mommsen, 80, 338; Tamanaha, *On the Rule of Law. History, Politics, Theory*, 13.

¹⁰¹ Mommsen, *Derecho Penal Romano*, 84.

¹⁰² Tamanaha, *On the Rule of Law. History, Politics, Theory*, 13.

considered the most important legal text of the Antiquity, and together with the Bible and Aristotle's writings, "one of the three pillars of Western culture".¹⁰³

The eminent statesman and philosopher Cicero provided some of the most positive inputs from Roman times to the rule of law tradition. The author strongly advocated for the respect of the laws, emphasising their importance to restrain and control the authority of those in power.¹⁰⁴ Opposing the rule of a king with the rule of law, and criticizing sovereigns who do not comply with the law, he stated: "How can anyone be properly called a man who renounces every legal tie, every civilized partnership with his own citizens".¹⁰⁵ Living during the last period of the Republic and the rule of Julius Caesar, Cicero strongly criticized the rise of the autocratic government considering that the Republic's rule of law system was being transformed into the rule of the strongest.¹⁰⁶ Cicero considered that the supreme status of laws was grounded on its consistency with natural law, understood as the rule of reason.¹⁰⁷ This way, and following Plato and Aristotle's ideas, the supremacy of laws depended on their fairness. Cicero believed that laws had to be just and good for the community, and consequently, harmful or unjust rules could not be considered as "law".¹⁰⁸ However, Cicero's ideas did not prevail, and subsequent Emperors enjoyed progressively increasing powers. The legal codification of this tendency can be found in the *Corpus Iuris Civilis*, where it was established that "the prince is not bound by the laws."¹⁰⁹ This way, the Emperor was placed above the law. However, in practice, even if he was not accountable for his acts, some legal constraints were imposed to his actions.¹¹⁰

¹⁰³ Rafael Domingo, 'Justinian and the Corpus Iuris: An Overview', *SSRN Electronic Journal*, January 2017, 1.

¹⁰⁴ Tamanaha, *On the Rule of Law. History, Politics, Theory*, 11.

¹⁰⁵ Cicero, *The Republic*, Book two, 48, p. 50, as cited by Tamanaha, 11.

¹⁰⁶ Tamanaha, 11.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid. The dialectic tension between this line of thought, underpinned on natural law, and the ideas of juridical positivism marked the development of criminal law. The argument that extremely unfair laws could not have legal force remerged in the post-World War II trials (see below, Section 2.2.2), but as well it seems to ground some decisions of the ECtHR, particularly those regarding German border guard cases (see below, Section 5.1.4.4).

¹⁰⁹ Digest 1.3.1, as cited in Tamanaha, 13.

¹¹⁰ Tamanaha, 14.

1.1.2.2 *Legality elements in Roman criminal Law*

Roman legal system was generally divided in two: public law, concerning the protection of State interests, and private law, concerning the legal situation of individuals, their interests and private interactions.¹¹¹ Criminal law was part of both systems, with public crimes, regarding the obligations of individuals towards the community and the State, and private crimes, concerning the relations between individuals.¹¹² The criminal procedure and the guarantees granted for each type of crimes were significantly different.

Despite some elements of Roman criminal law could remind the principle of legality, many rules, principles and rationales deeply diverged from the actual principle.¹¹³ A fundamental function of the *nullum crimen* principle is to protect individuals against State arbitrary authority. However, even if including certain legality features, Roman law did not grant any right to individuals constraining the authority of the State.¹¹⁴ In the same vein, criminal law was not a consistent and complete legal system formed by precise and well-articulated principles. On the contrary, it was created and shaped responding to the circumstances and needs of the different periods, it lacked complete and exhaustive laws and it was generally characterized by its police nature and its rather arbitrary character.¹¹⁵ For instance, a fundamental criminal law principle was that any action harming the City was subject to the most severe punishments.¹¹⁶

Roman criminal law was frequently silent or very vague regarding the characterization of crimes or punishments.¹¹⁷ For example, it was particularly the case of the *criminal extraordinaria*, a broad category of unclear and unspecified offences. Therefore, regarding such sort of crimes, courts had the discretionary power to punish a wide range of conducts not clearly described as criminal.¹¹⁸ In the same vein, criminal

¹¹¹ Mommsen, *Derecho Penal Romano*, 3.

¹¹² Mommsen, 4–6.

¹¹³ As explained, with further references, in Vicente Martínez, *El Principio de Legalidad Penal*, 16; Lamarca Pérez, ‘Formación Histórica y Significado Político de La Legalidad Penal’, 45–46; Jiménez de Asúa, *Tratado de derecho penal*, II:383.

¹¹⁴ Mokhtar, ‘Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects’, 43.

¹¹⁵ Benessiano, ‘Légalité pénale et droits fondamentaux’, 25; Mokhtar, ‘Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects’, 43.

¹¹⁶ Benessiano, ‘Légalité pénale et droits fondamentaux’, 25.

¹¹⁷ Ibid.

¹¹⁸ Warren Goldstein, *Defending the Human Spirit: Jewish Law’s Vision for a Moral Society* (Feldheim Publishers, 2006), 277.

law provisions were not only established in statutory regulations, and often a distinction was made between statutes establishing crimes and statutes that were just declaratory of inherently criminal behaviour (*mala per se*).¹¹⁹

According to some scholars the *nulla poena, nullum crimen sine lege* existed and was respected in Roman times, at least during some years.¹²⁰ Only criminal conducts included in the laws could be prosecuted and therefore, *ex post facto* created crimes were not admissible.¹²¹ In the same vein, some authors affirm that in Roman times only pre-established crimes could be prosecuted and therefore, the statement *nullum crimen sine lege* could be applied to the criminal law of the time.¹²² In the same vein, in times of peace during the Republic and the first two centuries of the Empire, there were periods when only pre-established punishments were applied.¹²³ This way, Roman criminal system embraced at times the principles of no crime without previous criminal law, no criminal proceeding without previous procedural law, and no punishment without previous criminal law.¹²⁴

However, all these legality features were severely limited and restrained. In fact, the scope of application of these legal provisions was rather narrow compared with the proceedings lacking such guarantees.¹²⁵ For instance, the criminal procedures following such requirements were only applicable inside the city of Rome, and only to male

¹¹⁹ Kress, 'Nulla Poena Nullum Crimen Sine Lege', 2010, para. 8.

¹²⁰ The author refers in particular to the *per quaestiones* proceeding, introduced in the 2nd century BCE, but only employed during few years. Ferrajoli, *Derecho y Razón. Teoría Del Garantismo Penal*, 383.

¹²¹ In a characterization of the principle of legality that can be useful for the rest of this work, the author distinguishes between the "principle of *mere* legality" and the "principle of *strict* legality". The former is a norm directed to the judges, imposing their exclusive subjection to the law, and determining that only criminal conducts included in the laws can be prosecuted (*nulla poena, nullum crimen sine lege*). The non-retroactivity rule is the direct consequence of this "principle of *mere* legality". On the contrary, the "principle of *strict* legality" is a norm directed to the legislator, prescribing, among other requirements, the strictness and precision of legal precepts, having as a consequence the prohibition of analogy. Ferrajoli considers that only the principle of *mere* legality and the prohibition of retroactivity, but not *strict* legality, existed in Roman times, at least during some years. Ferrajoli, 35, 95.

¹²² Jill Harries, *Law and Crime in the Roman World*, Key Themes in Ancient History (Cambridge: Cambridge University Press, 2007), 2-3; Mokhtar, 'Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects', 43.

¹²³ Benessiano, 'Légalité pénale et droits fondamentaux', 25; Mokhtar, 'Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects', 43.

¹²⁴ Mommsen, *Derecho Penal Romano*, 37, 553-55.

¹²⁵ Ibid., 137.

citizens. Similarly, this partial application of these legality elements was only in force during some periods of the Republic, but with the arrival of the Empire they progressively disappeared and gave way to unlimited discretionary powers of the magistrates.¹²⁶

From its emergence, Roman criminal law experienced a progressive codification process. During the first periods, criminal law was based on morality, and conducts subject to prosecution were considered to be evident and well known by the society, not existing the need to codify them in written statutes.¹²⁷ Later on, laws experienced a certain process of detachment from ethical underpinning, and criminal conducts were progressively included in written laws. However, the idea of the primacy of the spirit of the law over its concrete wording never vanished. In fact, expansive interpretations of the laws were accepted in order to comply with the aims and the essence of the norms.¹²⁸ The above-mentioned Justinian compilation represented the height of the codification process and it included a part devoted to criminal law, called *libri terribiles* by the Emperor himself.¹²⁹ Many criminal actions were categorised and systematically organized, nonetheless the code did not comprise all punishable conducts.¹³⁰

1.1.2.3 The role of the judges

According to Cicero, the role of the judges was to solve disputes and to issue directives in accordance with the laws in force. He stated: “As magistrates are subject to the laws, the people are subject to the magistrates. In fact it is true to say that a magistrate is a speaking law, and law a silent magistrate”.¹³¹ However, Cicero’s ideas did not prevail either in this regard. As explained, roman criminal law lacked well-articulated principles, and complete and exhaustive laws, and was frequently silent or very vague regarding the characterization of crimes and punishments. Therefore, judges had broad capacities in the exercise of their functions, even considered as “legislative” powers due to their wide margin of decision when determining which conducts entailed

¹²⁶ Mommsen, 330; Barbara Natalie Nagel, ‘The Tyrant as Artist: Legal Fiction and Sexual Violence under Tiberius’, *Law and Literature* 25, no. 2 (2013): 301.

¹²⁷ Mommsen, *Derecho Penal Romano*, 88.

¹²⁸ Ibid., 89.

¹²⁹ Benessiano, ‘Légalité pénale et droits fondamentaux’, 25.

¹³⁰ Ibid.

¹³¹ Cicero, *The Republic*, Book three, 2-3, p. 151, as cited in Tamanaha, *On the Rule of Law. History, Politics, Theory*, 11.

criminal liability.¹³² The discretionary power of the judges was reinforced by the above-mentioned idea of the primacy of the spirit of the law over its concrete wording.

There were some attempts to limit the wide authority of judges, establishing some legal restraints and procedural guarantees, but their discretion power remained considerably broad. The public criminal proceedings were grounded on the magistrate's *imperium* that was only regulated by the law inside the city of Rome and only regarding private offences, remaining free and discretionary outside the capital.¹³³ Among the procedural guarantees established, it can be highlighted the judge's obligation to provide, together with a judgment, the grounds of the decision and evidence of the condemned's guilt.¹³⁴ As well, at least during certain periods, the use of analogy was prohibited in Rome.¹³⁵ In the same vein, the retroactive application of the laws was forbidden for some specific cases. Anyhow, even during the time the above-mentioned guarantees were effective in Rome, judicial discretion was not abolished. Only a small part of criminal law was subject to these formalities. In fact, the judges could still punish actions not included as crimes in the law, doing so with no need to respect any legal proceeding, and discretionally determining the punishment.¹³⁶

1.1.3 Middle Ages and the *Constitutio Criminalis Carolina*

After the fall of the Roman Empire, and for several centuries, it is difficult to find in western countries many legal elements connected to the rule of law or the principle of legality. However, from the 12th and 13th centuries legal systems experience important developments and relevant legality features re-emerged. The combination of different factors and circumstances grounded this progress, as the rediscovery of Greek philosophy and Roman legal codes, or the development of legal thought fostered by the foundation of the first universities.¹³⁷

After being lost or unused for centuries, classical ideas were recovered. Aristotle's works, preserved by the Muslims, were rediscovered and adapted to medieval thought by Thomas Aquinas.¹³⁸ Among many other contributions to legal

¹³² Benessiano, 'Légalité pénale et droits fondamentaux', 25.

¹³³ Mommsen, *Derecho Penal Romano*, 101.

¹³⁴ Ibid., 225.

¹³⁵ Jiménez de Asúa, *Tratado de derecho penal*, II:383. For a contrary opinion, see Ferrajoli, *Derecho y Razón. Teoría Del Garantismo Penal*, 383.

¹³⁶ Mommsen, *Derecho Penal Romano*, 37.

¹³⁷ Tamanaha, *On the Rule of Law. History, Politics, Theory*, 18.

¹³⁸ Ibid.

development, the Italian theologian, echoing Aristotle, claimed for laws based on reason and aiming the common good. In the same vein, he considered that positive law was a reflection of divine law and natural law and therefore, unjust rules could not be considered valid law.¹³⁹ Aquinas, directly influenced by Aristotle's ideas, also emphasized the importance of a general respect of legal statutes, particularly regarding judges, that should act and sentence according, and within the limits of the law.¹⁴⁰ In this vein, Aquinas ideas about the limits of power significantly influenced political and legal doctrine and practice of his time.¹⁴¹

The rediscovery of the Justinian Code, combined with the existing canon laws, led to the creation of the medieval *ius commune*. This combination of the *Corpus Iuris Civilis* and the *Corpus Iuris Canonici* (canon law), governed legal education and legal practice in continental Europe from the 12th century, and included some features of the principle of legality.

Canon law did not systematically distinguish sins and crimes before the 12th century, but from this moment a conceptual distinction was established.¹⁴² All crimes continued to be considered sins, but not all sins constituted crimes. This conceptual distinction underpinned the emergence of canon criminal law. The distinction between criminal sins and all other immoralities was grounded on their sinfulness. This way, to be criminal a sin had to be serious, based on the traditional division between mortal and minor sins, and should be displayed in an external action.¹⁴³ While the non-criminal sins remained a matter of the sacrament of confession, specific courts were established to prosecute criminal sins.¹⁴⁴ The new canon criminal law established that no criminal sin could be prosecuted if it was previously prohibited. In fact, this norm

¹³⁹ Ibid., 19.

¹⁴⁰ Ibid.

¹⁴¹ Lamarca Pérez, 'Formación Histórica y Significado Político de La Legalidad Penal', 36. For further information on the Aquinas' legal thought see, among others, Anthony J. Lisska, *Aquinas's Theory of Natural Law: An Analytic Reconstruction*, Clarendon Paperbacks (Oxford: Clarendon Press, 1996); Martin Rhonheimer, 'St. Thomas Aquinas and the Idea of Limited Government', *The Journal of Markets & Morality* 22, no. 2 (2019): 439–55.

¹⁴² Virpi Mäkinen and Heikki Pihlajamäki, 'The Individualization of Crime in Medieval Canon Law', *Journal of the History of Ideas* 65, no. 4 (2004): 531; Jana V. Beznosova, Anna N. Kondratyeva, and Vera B. Romanovskaya, 'Crime and Punishment, Sin and Retribution: From the History of Religious and Legal Traditions of East and West', *Mediterranean Journal of Social Sciences* 6, no. 2 (2015): 663.

¹⁴³ Beznosova, Kondratyeva, and Romanovskaya, 'Crime and Punishment, Sin and Retribution: From the History of Religious and Legal Traditions of East and West', 664.

¹⁴⁴ Mäkinen and Pihlajamäki, 'The Individualization of Crime in Medieval Canon Law', 531.

has been sometimes identified as the origin of the principle of legality.¹⁴⁵ However, this rule had no general application and the Church often applied an almost opposing principle: “no crime is to be left unpunished” (*ne crimina remaneant impunita*).¹⁴⁶

The doctrine about the limits of power, among with other important legality features, found practical implementation in *Magna Cartas*: legal documents recognizing rights to the estates of the realm that kings were bound to respect. In fact, some authors have identified in these medieval statutes, and in criminal canon law, the roots of the principle of legality.¹⁴⁷

The *Magna Carta Libertatum* (“the Great Charter of the Liberties”, in medieval Latin) is generally identified as a landmark for the principle of legality.¹⁴⁸ In 1215 King John of England accepted this charter of rights, limiting his powers, to make peace with a group of rebel barons. It was intended to restore legality and prevent future abuses of the king, and with time it became a symbol of the rule of law against the tyranny of the State.¹⁴⁹

The renowned clause 39 of the *Carta* is clear evidence of the emergence of some legality elements: “No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.”¹⁵⁰ In the same vein, clause 38 prevents royal bailiffs from bringing criminal actions against anyone unless the charges are supported by strong evidence.¹⁵¹

It is argued that the *ius commune* had a significant influence on the drafting of the *Magna Carta*, including the above-mentioned clauses 38 and 39. In fact, some legal requirements were at the time already comprised in canon law, and their presence in

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Edmund Mezger, *Derecho Penal: Libro de Estudio*, vol. 1 (Buenos Aires: Librería El Foro, 2001), 63.

¹⁴⁸ Cassese, *International Criminal Law*, 22; Ferrajoli, *Derecho y Razón. Teoría Del Garantismo Penal*, 383; Tamanaha, *On the Rule of Law. History, Politics, Theory*, 25; Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’, 5; Lamarca Pérez, ‘Formación Histórica y Significado Político de La Legalidad Penal’, 48.

¹⁴⁹ Richard Helmholz, ‘Magna Carta and the Ius Commune’, *University of Chicago Law Review* 66, no. 2 (March 1999): 299.

¹⁵⁰ *Magna Carta Libertatum*, clause 39, available at: https://www.occourts.org/directory/education/Magna_Carta_English_Translation.pdf.

¹⁵¹ Helmholz, ‘Magna Carta and the Ius Commune’, 337.

the *Carta* could not be explained only based on the common law.¹⁵² It is the case of the prohibition of punishments without a prior valid judgement in which the accused could enjoy certain prerogatives and procedural guarantees.¹⁵³

There is not a consensus among scholars about the importance and influence of the *Magna Carta Libertatum* on the actual principle of legality. However, it is generally recognised that it constitutes the origin of the common law concept of rule of law that, despite sharing some elements with the principle of legality, has as well important distinctive features.¹⁵⁴ Anyhow, some authors affirm that the aforementioned *Magna Carta* Article 39 was the origin of the modern principle of criminal legality. It is argued that the principle would have been brought by English migrants to the United States (US), then included in the 1774 Declaration of Rights of Philadelphia, and finally took up by the French Declaration of the Rights of Man and of the Citizen of 1789.¹⁵⁵ However, this theory is refuted by different arguments. It is claimed that during the same period, and even before the *Magna Carta Libertatum* was enacted, numerous documents of similar legal and political meaning already existed.¹⁵⁶ Among others, the 1037 Decree of the Holy Roman Emperor Conrad II, the 1188 *Decreta* of Leon,¹⁵⁷ or 1247 Huesca Compilation.¹⁵⁸

Anyhow, the direct connection between the *Magna Carta* and the principle of legality is enhanced by the fact that its Article 39 was explicitly cited in the first North American constitutions and declarations, and in the 1789 French Declaration of the Rights of Man and of Citizens. In fact, these codes understood Article 39 as comprising

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ As explained, with further references in Vicente Martínez, *El Principio de Legalidad Penal*, 16; Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional', 6; Colin Turpin and Adam Tomkins, *British Government and the Constitution*, 6th ed. (Cambridge: Cambridge University Press, 2007).

¹⁵⁵ Luis Jimenez de Asua, *L'analogie en droit penal* (RSC, 1949), 187; José Antón Oneca, *Derecho penal*, 2a ed. (Madrid, 1986), 109, as cited in Benessiano, 'Légalité pénale et droits fondamentaux', 53.

¹⁵⁶ Lamarca Pérez, 'Formación Histórica y Significado Político de La Legalidad Penal', 48.

¹⁵⁷ The UNESCO considers the 1188 *Decreta* of Leon as the oldest known written information regarding the European parliamentary system. UNESCO, International Memory of the World Register, *The Decreta of León of 1188. The oldest documentary manifestation of the European parliamentary system* (Spain). Collection ID 2012-02, available at: <https://en.unesco.org/memoryoftheworld/registry/251>.

¹⁵⁸ As analysed in Lamarca Pérez, 'Formación Histórica y Significado Político de La Legalidad Penal', 48.

the *nullum crimen, nulla poena sine lege* principle.¹⁵⁹ Nevertheless, it is argued that the original sense of the Article was very different, and that the impact of the document was relatively minor until the 17th century when it acquired a glorified mischaracterization.¹⁶⁰ It is claimed that *Magna Carta*, as well as the others above-mentioned documents, reflected a conception of law and of the State political organization incompatible with the principle of legality. They were the result of feudal ideology, based on the fight for power between the existing estates of the realm that determined social hierarchy at the time. The nobility forced the kings to sign these document, whose objective was not to guarantee liberties but “*libertas*”, a set of rights and immunities of an estate.¹⁶¹

It is argued as well that Article 39 of the *Magna Carta Libertatum* only includes procedural safeguards.¹⁶² As well, as it will be further analysed, English criminal law is significantly based on customary and judge-made law, and the principle of legality under *common law* lacks many of the elements considered fundamental in civil law systems.¹⁶³ Moreover, the principle of legality can only exist in the framework of a State where the judiciary is subject to the laws and its functions are limited by their content. When the *Magna Carta* was enacted these notions were inexistent, and judges held almost unrestricted powers.¹⁶⁴

Anyhow, in continental Europe during Middle Ages and until the 14th century, judges founded as well their decisions on customs and held great discretionary faculties. In France, for example, two sorts of punishments existed. The ordinary penalties, based on a law or a custom, and the extraordinary punishments, depending on the discretionary power of the judge, including death penalties.¹⁶⁵ Progressively, and in a not very methodical manner, customs started to be codified. The development of royal authority and the centralization of administrative power enhanced the codification process and the publication of different criminal codes, even though they were mainly focused on procedural issues.¹⁶⁶

¹⁵⁹ Mezger, *Derecho Penal: Libro de Estudio*, 63.

¹⁶⁰ Tamanaha, *On the Rule of Law. History, Politics, Theory*, 25.

¹⁶¹ As analysed in Lamarca Pérez, ‘Formación Histórica y Significado Político de La Legalidad Penal’, 48.

¹⁶² Benessiano, ‘Légalité pénale et droits fondamentaux’, 53; Lamarca Pérez, ‘Formación Histórica y Significado Político de La Legalidad Penal’, 48.

¹⁶³ Turpin and Tomkins, *British Government and the Constitution*, 99.

¹⁶⁴ Benessiano, ‘Légalité pénale et droits fondamentaux’, 26.

¹⁶⁵ Benessiano, 27.

¹⁶⁶ Beccaria, *An Essay on Crimes and Punishments*, 106.

The *Constitutio Criminalis Carolina* was enacted in 1532, under the rule of Holy Roman Emperor Charles V. His Empire was composed by relatively self-ruling States enjoying certain degree of legislative autonomy. The *Carolina* was promulgated with the aim of unifying the diverse legal systems under the rule of the Empire, and to control the growing territorial powers.¹⁶⁷ It is considered the first complete, systematic, abstract and dogmatically structured criminal and procedural code, and it is often identified as well as an important antecedent of the principle of legality.¹⁶⁸ The *Carolina* was applied as supplementary law in all Imperial States, respecting the primacy of local law.¹⁶⁹ The only obligatory provisions were those concerning procedural guarantees and maximum punishments.¹⁷⁰ Even though regional laws continued to have general prevalence, they were modified to comply with the new imperial *ius comune* and a significant effort was made to transform customary criminal laws in written statutes.¹⁷¹

The importance of the *Carolina* lies in its public-law conception of punishments, moving away from the previous arbitrariness of sentences.¹⁷² In fact, it pursued granting a fast, safe and fair trial to the accused.¹⁷³ Among other significant advances, the code included a detailed definition of numerous criminal conducts. Despite some crimes and punishments were not clearly described or a remission was made to custom for its definition, in general the *Carolina* tried to precisely determine crime elements.¹⁷⁴ However, it should be noted that the use of analogy was permitted by its Article 105.¹⁷⁵

Even if the *Carolina* and the other precedents explained in this chapter show a shared concern about legal certainty, and some elements reveal a growing adherence to important features of the principle of legality, they are far from a full acceptance of the principle.¹⁷⁶ As it has been analysed, the existence of legality elements in ancient legal

¹⁶⁷ Hellmut Von Webber, 'La "Constitutio Criminalis Carolina" de 1532', *Cuadernos de Política Criminal*, no. 86 (2005): 129.

¹⁶⁸ Bernd Marquardt, 'El Primer código Penal Sistemático de la modernidad temprana Europea: La Constitutio Criminalis Carolina de 1532', *Pensamiento Jurídico*, no. 45 (2017): 15.

¹⁶⁹ Von Webber, 'La "Constitutio Criminalis Carolina" de 1532', 129.

¹⁷⁰ Marquardt, 'El Primer código Penal Sistemático de la modernidad temprana Europea', 35.

¹⁷¹ Ibid.

¹⁷² Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional', 5.

¹⁷³ Von Webber, 'La "Constitutio Criminalis Carolina" de 1532', 137.

¹⁷⁴ Marquardt, 'El Primer código Penal Sistemático de la modernidad temprana Europea', 26.

¹⁷⁵ As explained, with further references in Marquardt, 26.

¹⁷⁶ Kress, 'Nulla Poena Nullum Crimen Sine Lege', 2010, para. 8.

systems is not questioned by the doctrine, but opinions are very diverse regarding the real meaning and influence of such precedents. However, the legal literature agrees to consider the enlightened ideas of the 18th century as the origin of the political and philosophical rationales of the principle of legality.¹⁷⁷

1.2 The emergence of the modern principle of legality

Most of the theoretical rationales of the principle of legality, and their acceptance in a complete sense, are rooted in the period of the Enlightenment.¹⁷⁸ The Age of Enlightenment was a period of deep intellectual and philosophical changes in Europe during the 18th century. The new ideas, based on reason as the primary source of knowledge, undermined the authority of the absolute monarchy and the Church, sowing the seeds for the liberal revolutions of the 18th and 19th centuries. However, such revolutions cannot be understood without the significant role played by the new ascending social class, the bourgeoisie. The social and economical structure of the *Ancient Regime* became a burden to its economic and political aspirations. To ensure economic growth and the development of commercial activities, legal security and economic freedom were needed. As well, only in a new regime the bourgeoisie could obtain the political influence corresponding to its economic power. The convergence of these aspirations with enlightened philosophical ideas led to the liberal revolutions that gave rise to the new State under the rule of law.¹⁷⁹

The Enlightenment was not an homogenous movement and different and competing currents of thought coexisted, depending as well on national and geographical specificities.¹⁸⁰ However, a set of basic common ideas can be identified based on the prevalence of science as an authoritative worldview and the triumph of

¹⁷⁷ See, among others Ferrajoli, *Derecho y Razón. Teoría Del Garantismo Penal*, 33; Cassese, *International Criminal Law*, 23; Muñoz Conde and García Arán, *Derecho Penal, Parte General*, 87; Vicente Martínez, *El Principio de Legalidad Penal*, 17; Kress, 'Nulla Poena Nullum Crimen Sine Lege', 2010, 9; Machteld Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes against Humanity, War Crimes* (Antwerpen: Intersentia, 2002), 83-85.

¹⁷⁸ Cassese, *International Criminal Law*, 23; Luis Prieto Sanchís, *La Filosofía Penal de La Ilustración* (Lima: Palestra, 2007), 7; Vicente Martínez, *El Principio de Legalidad Penal*, 17; Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 47-48.

¹⁷⁹ Luis López Guerra and Jorge de Esteban, *El Régimen Constitucional Español*, 1st ed. (Barcelona: Labor, 1984), 113.

¹⁸⁰ Christina Peristeridou, 'The Principle of Legality in European Criminal Law' (Antwerp, Maastricht University, 2015), 34.

rationality over superstition. Enlightened ideas grounded social and political uprisings, but as well a legal revolution, particularly concerning criminal law.¹⁸¹

For the first time comprehensive and articulated criminal law proposals were developed.¹⁸² In fact, criminal law was one of the favourite subjects of enlightened philosophy, pursuing two main objectives;¹⁸³ first, to strengthen the power of the State against the Church, the nobility or the judges, pursuing the unity of criminal law under a centralized and monopolized *ius puniendi*; and secondly, to limit this punitive supremacy, grounded on the individual rights of the citizens and not on the rights and privileges of other powers or public bodies as the nobility or the Church. While the first objective could be compatible with absolute monarchies, the second one was only fully implemented when the revolutions gave rise to the liberal State under the rule of law.¹⁸⁴

Accordingly, hereinafter the most relevant Enlightenment's ideals are first assessed, followed by their influence and application to criminal law. Then, further relevant doctrinal developments of the 19th and 20th century regarding criminal law in general and the principle of legality in particular, are analysed. Finally, the progressive codification of the legality principle in constitutions and criminal codes is examined.

1.2.1 General ideals of the Enlightenment

The ideals and concepts developed during the Enlightenment conformed the theoretical ground for the emergence of the modern principle of criminal legality.¹⁸⁵ Therefore, it is relevant to briefly analyse the most important enlightened contributions, starting by the notion of social contract and general will, continuing with the separation of powers theory, the monopoly of law production and the role assigned to the judges, and finishing with the main characteristics and requirements of the laws.

1.2.1.1 Social contract and general will

England had a significant influence on the enlightened ideas and the philosophy of legality. It was in this country where, in the 17th century, the idea of limitation of

¹⁸¹ Benessiano, 'Légalité pénale et droits fondamentaux', 27.

¹⁸² Lamarca Pérez, 'Formación Histórica y Significado Político de La Legalidad Penal', 55; Prieto Sanchís, *La Filosofía Penal de La Ilustración*, 17.

¹⁸³ Prieto Sanchís, *La Filosofía Penal de La Ilustración*, 20–22; Lamarca Pérez, 'Formación Histórica y Significado Político de La Legalidad Penal', 55–56.

¹⁸⁴ Lamarca Pérez, 'Formación Histórica y Significado Político de La Legalidad Penal', 56.

¹⁸⁵ Kress, 'Nulla Poena Nullum Crimen Sine Lege', 2010, para. 9.

power under the rule of law was for the first time articulated in a clear and comprehensive manner and implemented in practice.¹⁸⁶ In fact, modern contractualism endowed the old idea of limitation of power with full operability and applicability.¹⁸⁷ The origins of the notion of social contract can be traced back to Thomas Aquinas and other scholastics, but it was Hobbes in its well-known *Leviathan* (1651), who developed the idea of a constitutive social pact. According to this author, individuals living without a political organization, in the so-called state of nature or permanent anarchy, could reach an agreement to be subjects of a sovereign. This sovereign would have the monopoly on the use of force and would protect citizens guaranteeing social peace.¹⁸⁸ Later on, Locke developed Hobbes' concept of social pact, affirming that its aim was not only to preserve life, but also liberties and possessions.¹⁸⁹

Rousseau combined social contract theories with Greek democratic principles, and enounced the concept of "general will" (*la volonté générale*): "Each of us puts his person and all his power in common under the supreme direction of the general will, and, in our corporate capacity, we receive each member as an indivisible part of the whole".¹⁹⁰ The author conceived the community as an autonomous body conformed by the union of all citizens, agreeing upon the rules by which they are governed.¹⁹¹ Individuals only surrender their freedom to the interest of the majority, to the general will, and as a member of the self-ruling community they become sovereigns.¹⁹² The existence and the powers of the State are derived from the will of the community, setting the basis for the modern concept of representative democracy and the rule of law.¹⁹³ The general will is transformed in laws by a body of elected representatives, and

¹⁸⁶ For a detailed analysis of the British influence on enlightened western philosophy of legality see Lamarca Pérez, 'Formación Histórica y Significado Político de La Legalidad Penal', 53.

¹⁸⁷ Lamarca Pérez, 36.

¹⁸⁸ Thomas Hobbes, *Leviathan, or the Matter, Forme and Power of a Common-Wealth Ecclesiasticall and Civil* (Project Gutenberg, 1651), <https://www.gutenberg.org/ebooks/3207>.

¹⁸⁹ John Locke, *Two Treatises of Governement* (Cambridge: Cambridge University Press, 1689), 332, 350–51. For further information on these social contract theories, with additional references, see Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional', 9; Antonio Truyol Serra, *Historia de la filosofía del derecho y del Estado. Tomo 2: Del Renacimiento a Kant*, 4th ed., Alianza universidad. Textos 40 (Madrid: Alianza, 1988), 220.

¹⁹⁰ Jean Jacques Rousseau, *The Social Contract: And Discourses (Original Title: Du Contrat Social)* (New York: Dutton, 1762), 15.

¹⁹¹ Peristeridou, 'The Principle of Legality in European Criminal Law'.

¹⁹² Rousseau, *The Social Contract: And Discourses (Original Title: Du Contrat Social)*, 56.

¹⁹³ Peristeridou, 'The Principle of Legality in European Criminal Law', 44.

in this way legality and legitimacy are directly connected.¹⁹⁴ The direct consequence of these ideas is the emergence of the rule of law and the principle of legality. These laws, expression of the general will, are at the same time the base and the limit of State actions. This way, all State bodies, including the government and the judiciary, would be subject to the law.

1.2.1.2 Separation of powers, monopoly of law production and the role of the judges

The separation of powers theory, generally attributed to Montesquieu, had an extensive historical background.¹⁹⁵ English writers of the 17th century advocated for the separation of the legislative and executive, and even the judiciary, in order to restrain the abuse of governmental power,¹⁹⁶ but it was particularly John Locke who further developed these ideas.¹⁹⁷ There are as well multiple examples of political regimes based on the equilibrium of different centres of power. England was in fact a paradigmatic example since king's power was balanced with other State actors, in contrast to continental absolute monarchies.¹⁹⁸ Based on these previous ideas and experiences, and being particularly influenced by the British Glorious Revolution,¹⁹⁹ Montesquieu established a systematized theory on separation of powers, proposing a rational distribution of roles between State actors.²⁰⁰ He considered that separate and well-defined functions of the executive, the legislative and the judiciary were fundamental for a good implementation of democracy.²⁰¹ When two or more of these powers are in the hands of the same person or body, freedom disappears and tyranny, arbitrariness

¹⁹⁴ Josep M. Castellá Andreu, 'El Estado Social y Democrático de Derecho: El Estado de Derecho', in *Temas de Derecho Constitucional* (Barcelona: Cedecs Editorial, 1998), 169.

¹⁹⁵ Luis López Guerra, *Introducción al Derecho Constitucional*, 1st ed. (Valencia, Spain: Tirant lo Blanch, 1994), 71.

¹⁹⁶ Turpin and Tomkins, *British Government and the Constitution*, 103.

¹⁹⁷ Locke, *Two Treatises of Government*, bk. 2.

¹⁹⁸ Turpin and Tomkins, *British Government and the Constitution*, 345.

¹⁹⁹ Castellá Andreu, 'El Estado Social y Democrático de Derecho: El Estado de Derecho', 172. The Glorious Revolution (1688 - 1689) culminated with the accession to the throne of King William III and Queen Mary II. The new monarchs accepted a new constitution that significantly constrained their powers and realigned the balance of power between the Parliament and the Crown.

²⁰⁰ Charles de Secondat Montesquieu Baron de, *The Spirit of Laws* (Kitchener, Canada: Batoche Books, 1748), Book XI, Chapters IV and VI.

²⁰¹ Peristeridou, 'The Principle of Legality in European Criminal Law', 48.

and oppression breaks out.²⁰² Therefore, the separation of powers constitutes a strong rampart against State arbitrariness and the best guarantee to protect individual freedoms.²⁰³

Montesquieu further developed the idea of the monopoly of law production, assigned to the legislative power. This notion was already present in centralized States of absolute monarchies, but the innovation was to transfer the legislative authority from the monarch, who was not even bound by his own laws, to the general will.²⁰⁴ It should be noted that enlightened ideas naively idealized the notion and content of democratically adopted laws. According to Rousseau, laws were necessarily rational, fair and favourable to the interest of the citizens since they were the expression of the general will. In other words, if citizens were truly free, laws emanating from the general will could not be unfair since no one is unfair with himself.²⁰⁵ Other contemporary thinkers as Voltaire shared this trust in law considered as the foundation of freedom.²⁰⁶ This flawless and unrealistic conception of the laws had direct consequences in the limited role granted to the judges when interpreting and implementing them.

As a reaction to the abuses committed by the courts during *Ancien Regime*, when they had almost unrestrained authority, the limitation of the discretionary power of the judges became a priority for enlightened authors.²⁰⁷ According to their ideas, the capacity to determine which conducts were to be considered criminal should be reserved to the laws that, being the expression of the general will, were infallible, rational and fair for everyone. In the same vein, criminal laws should be precise and clear in order to prevent misinterpretations.²⁰⁸ The function of the courts was confined to deliver judgements exclusively based on the laws and not on personal beliefs. According to enlightened ideas, judicial interpretations were considered as the creation of new norms.²⁰⁹ Therefore, the role of the judge was drastically limited, being reduced

²⁰² Montesquieu, *The Spirit of Laws*, Book XI, Chapter IV.

²⁰³ Benessiano, 'Légalité pénale et droits fondamentaux', 21.

²⁰⁴ Lamarca Pérez, 'Formación Histórica y Significado Político de La Legalidad Penal', 57. For further information on the similarities and differences of liberal ideas and absolute monarchies regarding the rationales of the monopoly of law production, see with further references Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional', 8.

²⁰⁵ Rousseau, *The Social Contract: And Discourses (Original Title: Du Contrat Social)*, Book II, Chapter VI, par.6.

²⁰⁶ Rodrigo Lledó, 'El Principio de Legalidad en el Derecho Penal Internacional' (Madrid, Spain, Universidad Carlos III de Madrid, 2015), 10.

²⁰⁷ Ignacio de Otto, *Derecho Constitucional. Sistema de Fuentes* (Barcelona: Ariel, 1987), 146.

²⁰⁸ Prieto Sanchís, *La Filosofía Penal de La Ilustración*, 16.

²⁰⁹ *Ibid.*, 62.

to a mechanical application of the laws created by the legislative. The strongest expression of this idea can be summarized by the renowned Montesquieu's phrase: "the national judges are no more than a mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigor."²¹⁰

1.2.1.3 General, abstract, clear and unified laws

Even though in the 18th century there were already laws applicable to all the territories of a State, numerous regional statutes, remaining from feudal times, were still in force and applied at local level. Voltaire ironically wrote, referring to France: "a man travelling in this country changes laws almost as often as he changes horses."²¹¹ A normative and jurisdictional unity was needed to put an end to the evident problems posed by the great diversity of local legal systems.²¹² The establishment of an unified legal system was key objectives of enlightened ideas.²¹³

As a reaction to the privileges of the monarchy, and derived from the theories of social contract and democracy, the principle of equality before the law emerged. Accordingly, the laws, as an expression of the general will, should treat equally every individual and all individuals should be subject to the same laws. For this to be true, the laws had to comply with two requirements that had significant implications for criminal law in general and the legality principle in particular: laws had to be general and abstract. As Rousseau explained: "When I say that the object of laws is always general, I mean that law considers subjects en masse and actions in the abstract, and never a particular person or action".²¹⁴ Following this reasoning, the author considered that the legislative should not issue laws only affecting particular citizens, and if certain privileges were to be approved, they could not be granted individually to anyone.²¹⁵

In the same vein, laws had been drafted in a clear, direct and easy manner in order to facilitate their general understanding, but as well to limit the interpretative discretion of judges.²¹⁶ The monopoly of law production by a democratically elected

²¹⁰ Montesquieu, *The Spirit of Laws*.

²¹¹ M. de Voltaire, *Philosophical Dictionary* (Boston: J. Q. Adams, 1836), 248.

²¹² Lamarca Pérez, 'Formación Histórica y Significado Político de La Legalidad Penal', 48–50.

²¹³ Prieto Sanchís, *La Filosofía Penal de La Ilustración*, 15.

²¹⁴ Jean Jacques Rousseau, *Social Contract and Discourses: The Social Contract or Principles of Political Right* (New York: E.P.Dutton and Co., 1913). Book II, Chapter VI, Law, para. 6.

²¹⁵ Ibid.

²¹⁶ Prieto Sanchís, *La Filosofía Penal de La Ilustración*, 16.

parliament, the separation of powers and the submission of all State bodies to the law, understood as the expression of the general will, constitute the basic elements of the emerging liberal rule of law.²¹⁷

1.2.2 Enlightened ideas applied to criminal law: the idealization of the law

The enlightened ideas implemented by the French Revolution entailed a breakup with previous criminal law and set the basis of modern criminal law.²¹⁸ At the same time, first expressions of the modern principle of legality were shaped to put an end to the arbitrary and abusive exercise of States' power, to limit and control its *ius puniendi*, but as well to adapt to the rationales and goals of new criminal law theories. The emerging legality principle imposed simultaneous requirements and limitations to the judiciary and the legislative.²¹⁹ Regarding the former, the principle provides that judges should only prosecute conducts previously described as offences in the law. At the same time, the *nullum crimen* principle requires the legislative to elaborate, clear, precise, general and abstract criminal laws, which has been considered as the truly original contribution of the Enlightenment.²²⁰

Beccaria is generally considered as the precursor of modern criminal law and he established the basis of the principle of legality as we know it today.²²¹ In his masterpiece *On crimes and Punishments* (1764) he developed and applied enlightened ideas to criminal law, incorporating many new and innovative notions as the need of written and precise laws, the moderation of punishment and the proportionality between crimes and punishments.²²² Regarding the legality principle, Beccaria considered

²¹⁷ Castellá Andreu, 'El Estado Social y Democrático de Derecho: El Estado de Derecho', 169.

²¹⁸ Frédéric Desportes and Francis Le Guneac, *Droit pénal général*, 16th ed. (Paris: Economica, 2009); Benessiano, 'Légalité pénale et droits fondamentaux', 27.

²¹⁹ As above explained (see footnote 121), Ferrajoli distinguishes between the principle of *mere* legality and the principle of *strict* legality, being the former directed to the judges, and the latter to the legislator. As explained in Ferrajoli, *Derecho y Razón. Teoría Del Garantismo Penal*, 35.

²²⁰ Prieto Sanchís, *La Filosofía Penal de La Ilustración*, 58.

²²¹ Beccaria was not the only thinker of his time fostering the development of criminal law. For further information on other contemporary authors having a relevant role on the advancement of criminal law see, with further references, Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional'; Prieto Sanchís, *La Filosofía Penal de La Ilustración*, 16–24.

²²² For a detailed analysis of Beccaria's *On crimes and Punishments*, and its influence on modern criminal law see, among others, Nicolas Catelan, 'L'influence de Cesare Beccaria sur la matière pénale moderne', Collection du Centre de recherches en matière pénale Fernand Boulan

that only conducts previously described as offences in the law could be punishable. Similarly, he claimed that all crimes and punishments should be established by the legislative, excluding intermediate powers or judicial decisions: “The laws only can determine the punishment of crimes; and the authority of making penal laws can only reside with the legislator, who represents the whole society united by the social compact.”²²³

The parliament would establish in the law all the conducts that society considers necessary to repress, but as well the procedural guarantees needed to ensure a fair trial. Accordingly, he established that “The law should therefore determine the crime, the presumption, and the evidence sufficient to subject the accused to imprisonment and examination”.²²⁴ Regarding punishments, Beccaria considered that they should be clearly established in a previous law. Therefore, “No magistrate (...) can, with justice, inflict on any other member of the same society punishment that is not ordained by the laws”.²²⁵ In the same vein, “No magistrate, (...), should increase the punishment already determined by the laws”.²²⁶ Therefore, the role of the judges is significantly restrained, limited to the strict application of what has been previously determined by law.

Enlightened legal thinkers also established a set of basic requirements for criminal laws. The laws defining crimes and punishments could no longer have unwritten character, as previous customary criminal norms, since due to their non-written nature its content might not be as clear, precise or stable as statutory norms.²²⁷ Similarly, if in general laws were to be the expression of the general will articulated through a democratically elected parliament, criminal laws could no longer be an exception. Only laws issued by a parliament could establish crimes and punishments and therefore, customary or other non-written legal norms were no longer considered valid sources of criminalization or punishment.

(Aix-en-Provence, Presses universitaires d'Aix-Marseille, 2004); Prieto Sanchís, *La Filosofía Penal de La Ilustración*, 97–98; Eugenio Raúl Zaffaroni, ‘La influencia del pensamiento de Cesare Beccaria sobre la política criminal en el mundo’, *Anuario de derecho penal y ciencias penales* 42 (1989): 521–52; Truyol Serra, *Historia de la filosofía del derecho y del Estado. Tomo 2: Del Renacimiento a Kant*, 315–16.

²²³ Beccaria, *An Essay on Crimes and Punishments*, 12.

²²⁴ Ibid., 56.

²²⁵ Ibid., 13.

²²⁶ Ibid.

²²⁷ Ibid., 16.

In the same vein, criminal law should be precise, clear and general, and therefore, applicable to all citizens, excluding exceptions or regulations for particular cases.²²⁸ Last but not least, the law defining a conduct as criminal and establishing the associated penalties should be already in force at the time of commission. As a reaction to former abuses and legal uncertainty, enlightened ideas had as a fundamental objective that individuals could know beforehand the consequences of their actions. Therefore, for any punishment to be applied, it was required a previous law clearly defining the criminal action and the consequences it would carry. Coherently, such law had to be accessible, understandable and well known by all citizens.

Before that period, all criminal theories were grounded on retributive justice, conceiving punishment as an end in itself justified by its inherent axiological value.²²⁹ Retributive penalties were based on three religious ideas: revenge, expiation and rebalancing punishment and crime. Even though these ideas have never been completely abandoned in criminal law, during the Enlightenment they were replaced by an utilitarian notion of punishment.²³⁰ Penalties were only considered as necessary means to achieve the utilitarian goal of preventing future crimes and therefore, penalties not contributing to this objective were excluded.²³¹ The utilitarian understanding of punishments significantly contributed to the formation and development of the principle of legality. In fact, the emergence of the principle and the recognition of numerous guarantees cannot be understood only based on the aim to rationalise the punitive power of the State. It responded as well to the new utilitarian rationales and functions given to criminal law at the time.

The definition of certain conducts as criminal and the establishment of punishments was understood as a threat deterring individuals from performing such behaviours, what today is known as the general deterrence theory.²³² This theory was developed as such by Feuerbach some years later, but some of the fundamental ideas

²²⁸ Desportes and Le Gunehec, *Droit pénal général*, 28; Marta Sosa, 'Aut Dedare Aut Judicare, Crimen de Lesa Humanidad y Corte Penal Internacional' (Madrid, Universidad Carlos III de Madrid, 2013), 20.

²²⁹ Ferrajoli, *Derecho y Razón. Teoría Del Garantismo Penal*, 253–54.

²³⁰ During the 19th century retributive theories were recovered by two secular versions. (i) Kant's concept of penalties as ethical retributions justified by the moral value of the infringed criminal law. (ii) Hegelian concept of punishment as an opposing violence justified by the need to restore the legal order. As explained in Ferrajoli, 254.

²³¹ Remote antecedents of criminal utilitarianism can be found in Plato, Aristotle and Epicurus as analysed in Ferrajoli, 259.

²³² For a comprehensive analysis of the content, emergence and development of the general deterrence theories, see Ferrajoli, 274.

could already be found in the thinking of Beccaria.²³³ This author considered that the purpose of punishments “is no other than to prevent the criminal from doing further injury to society, and to prevent others from committing the like offence.”²³⁴ Accordingly, punishments and the mode of inflicting them “ought to be chosen, as will make the strongest and most lasting impressions on the minds of others, with the least torment to the body of the criminal.”²³⁵ This way, Beccaria alleged that “crimes will be less frequent, in proportion as the code of laws is more universally read, and understood; for there is no doubt, but that the eloquence of the passions is greatly assisted by the ignorance and uncertainty of punishments.”²³⁶

As it seems evident, the deterrence theory was of great importance for the development of the principle of legality, particularly concerning legal certainty.²³⁷ In order to have a deterrence effect, criminal law should be accessible and understandable for all individuals, and the crimes and punishments should be defined in previous laws in a precise and clear manner. As well, influenced by the utilitarian ideas and the humanism of the Enlightenment, and following the aim of rationalise the punitive power of the State, French revolutionaries abolished the crimes of conscience, or inner crimes, and only considered punishable those conducts threatening social order.²³⁸ Similarly, punishments were established in a rational manner and depending on the gravity of the crime.

1.2.3 Doctrinal developments during the 19th and the 20th century: from the decline of legality to intermediate solutions

Liberal legal culture fully embraced the principle of legality during the 19th century.²³⁹ Criminal law continued evolving and new doctrinal contributions made the principle more complete and sophisticated, but the theoretical conception remained practically unchanged. Nowadays the principle is phrased with the Latin formula *nullum crimen, nulla poena sine lege*, or its complete expression *nulla poena sine lege, nulla poena sine crimine, nullum crimen sine poena legali*. This renowned formula was

²³³ Johannes Andenaes, ‘The Morality of Deterrence’, *University of Chicago Law Review* 37, no. 4 (1 June 1970): 651.

²³⁴ Beccaria, *An Essay on Crimes and Punishments*, 26.

²³⁵ Ibid.

²³⁶ Ibid., 16.

²³⁷ Peristeridou, ‘The Principle of Legality in European Criminal Law’, 41.

²³⁸ Desportes and Le Guehac, *Droit pénal général*, 28.

²³⁹ Lamarca Pérez, ‘Formación Histórica y Significado Político de La Legalidad Penal’, 39.

first articulated by Feuerbach in his book *Lehrbuch des gemeinen in Deutschland gültigen Peinlichen Rechts*, published in 1801.²⁴⁰

Feuerbach was one of the maximum exponents of the general deterrence theory, and the principle of legality was a pre-requirement for his conception of criminal law. Previous retributive objectives of criminal punishments, based on the dichotomy guilt-expiation, were replaced by penalties understood as threats aiming general deterrence.²⁴¹ Feuerbach's theory was grounded on the principle that any infraction breaches the State's purpose of establishing the legal conditions necessary to guarantee individual freedom. Therefore, the State would try to prevent infractions, having two complementary manners to do so. First, by a physical coercion (punishment) applied after the commission of an illegal conduct. And second, by a psychological constraint (*psychologischer zwang*).²⁴² This psychological constraint, dissuading individuals from criminal conducts, is based on the fear and the legal threat of a punishment.

To serve as an effective threat, criminal conducts and their criminal consequences should be previously established in a clear, precise and accessible manner to all citizens.²⁴³ Consequently, Feuerbach considered that all punishment should be grounded on a previous criminal law (*nulla poena sine lege*), and the punishment established could only be applied if the conduct was previously classified as an offence. Therefore, the existence of a punishment depends on the existence of a criminal conduct (*nulla poena sine crimine*). As well, in order to accomplish a deterrence objective, Feuerbach considered that punishments should have a greater effect than the potential offender's regret of not having committed the criminal action.²⁴⁴

One of the mayor advances experienced by the principle of legality was due to Beling at the end of the 19th century. The author introduced in criminal law theory the concept of *actus reus*, also known as the external or objective element, establishing a legal description of the elements conforming a criminal behaviour, as opposed to the concept of *mens rea*, the mental element meaning "guilty mind", referring to the

²⁴⁰ Paul Johann Anselm Ritter Von Feuerbach, *Lehrbuch des gemeinen in Deutschland gültigen Peinlichen Rechts* (G.F. Heyer, Giessen, 1850) 8, as cited in Benessiano, 'Légalité pénale et droits fondamentaux', 23.

²⁴¹ Lamarca Pérez, 'Formación Histórica y Significado Político de La Legalidad Penal', 60.

²⁴² Feuerbach, 12. Cited in Benessiano, 'Légalité pénale et droits fondamentaux', 23.

²⁴³ Ferrajoli, *Derecho y Razón. Teoría Del Garantismo Penal*, 278; Lamarca Pérez, 'Formación Histórica y Significado Político de La Legalidad Penal', 60.

²⁴⁴ Benessiano, 'Légalité pénale et droits fondamentaux', 24.

person's intention or awareness needed to commit a crime.²⁴⁵ This way, the principle of legality evolved, requiring more comprehensive and sophisticated criminal descriptions. However, as analysed hereinafter, the principle of legality experienced a significant setback at the end of the 19th century and the beginnings of the 20th. Beling was not alien to these emerging schools of thought and considered that the concept of *actus reus* did not necessarily imply the need of a previous law.²⁴⁶

Nowadays the principle of legality is unanimously recognized as a cornerstone of western legal systems and the main features and rationales that emerged from the enlightened ideas have lasted until our days. However, from the middle of the 19th century and during the first decades of the 20th century, the doctrinal support for the principle significantly declined, and several schools of thought articulated important critics and proposed different alternatives. Among them, the most prominent and influential were the Italian school of positive criminology and the social defence theory.²⁴⁷ Even if these theories do not have much doctrinal support today, they had a significant impact in criminal law theory evolution, and their influence reaches actual criminal law.

During the first half of the 19th century the enlightened concept of legality was embraced by political and legal philosophy. However, the emergence of the anti-formalist schools of thought triggered what has been called the crisis of the "law".²⁴⁸ Past experiences evidenced the limitations of the radical conception of the *nullum crimen* principle implemented by French revolutionaries.²⁴⁹ The law, despite being the expression of the general will, was not always perfect and fair, and its mechanical applications by the judges not always offered the best possible solution. The defeat of revolutionary legalism brought back opinions questioning the "sacred" status of the

²⁴⁵ For further information on Beling's proposals and his contribution to criminal law, see Kai Ambos, '100 años de la "Teoría del delito" de Beling: ¿Renacimiento del concepto causal de delito en el ámbito internacional?', *Revista electrónica de ciencia penal y criminología*, no. 9 (2007); Hans-Heinrich Jescheck, 'The Doctrine of Mens Rea in German Criminal Law - Its Historical Background and Present State', *Comparative and International Law Journal of Southern Africa* 08, no. 1 (1 March 1975): 112-20; Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional', 14.

²⁴⁶ Lamarca Pérez, 'Formación Histórica y Significado Político de La Legalidad Penal', 65.

²⁴⁷ Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional', 15.

²⁴⁸ For an analysis of these schools of thought, see Lamarca Pérez, 'Formación Histórica y Significado Político de La Legalidad Penal', 40.

²⁴⁹ Caroline Gau-Cabée, 'Arbitrium Judicis. Jalons Pour Une Histoire Du Principe de La Légalité Des Peins', in *À Propos de La Sanction*, by Corinne Mascala (Toulouse: Presses de l'Université Toulouse 1 Capitole, 2007), para. 5.

law, criticizing legal formalism and advocating for the recovery of certain margin of decision for the judges.²⁵⁰

New doctrinal movements rejected the alleged flawless rational virtues of the law and considered it a rigid and stiff body compared to the virtues of judicial interpretation that infers and applies the authentic law lived by the community.²⁵¹ General laws were considered incapable to provide adequate solutions to the problems arising from a changing society. To produce satisfactory and fair sentences, judges could not be limited by the legal codes. Anti-formalist theories advocated for the reestablishment of judicial discretion and proposed new methods of interpretation that incorporated approaches of other social sciences, taking into account social and economic factors when deciding particular cases. These ideas were shared, with diverse nuances, by different doctrinal trends as Géný's free scientific research, Kantorowicz's free-law movement, American legal realism or Ehrlich's sociology.²⁵²

The crisis of the principle of legality affected as well criminal law. However, it was the legal area that better resisted the use of analogies and the growing creative powers of the judges.²⁵³ Even if having its own characteristics, the fundamental argument undermining legality was very similar to other legal fields: the law, as a general and abstract provision, is not the ideal instrument to fulfil the objectives assigned to criminal law. The scientific method and the rationalism that had created general and abstract laws autonomous from perceivable reality, was questioned.

The Positive School of Criminology and social defence theories recovered empiricism and naturalism and applied them to criminal law. This theoretical change involved a shift of the centre of interest, and that "the crime" was replaced by "the criminal" as the main object of concern and study.²⁵⁴ General deterrence was abandoned and the purpose of punishments evolved, becoming a tool to intervene in society.²⁵⁵ Together with a new organic concept of society, specific deterrence theories emerged aiming to cure the offender, who was considered to be ill, and to segregate and neutralize him, since he was considered dangerous for society.²⁵⁶ If punishment pursued

²⁵⁰ Benessiano, 'Légalité pénale et droits fondamentaux', 25; Gau-Cabée, 'Arbitrium Judicis. Jalons Pour Une Histoire Du Principe de La Légalité Des Peins', para. 5.

²⁵¹ Lamarca Pérez, 'Formación Histórica y Significado Político de La Legalidad Penal', 61.

²⁵² For an overview of these theories, with further references, see Lamarca Pérez, 61–65.

²⁵³ Lamarca Pérez, 61.

²⁵⁴ Nathaniel Cantor, 'Measures of Social Defense', *Cornell Law Review* 22, no. 1 (1936): 20.

²⁵⁵ Ferrajoli, *Derecho y Razón. Teoría Del Garantismo Penal*, 264; Lamarca Pérez, 'Formación Histórica y Significado Político de La Legalidad Penal', 62.

²⁵⁶ Ferrajoli, *Derecho y Razón. Teoría Del Garantismo Penal*, 265–66.

the social reintegration, rehabilitation or neutralization of the criminal, the capacity of the law to establish penalties fitting such objectives was questioned. Each offender is different and therefore, requires a specific and particular treatment that no previous general and abstract law could provide. This way, the principle of legality was understood as an obstacle to reach these new objectives of criminal law, and the figure of the judge emerged as the only one capable to adapt the law to the specific characteristics and needs of each offender.²⁵⁷

Enrico Ferri, the most prominent representative of the Positive School and the drafter of the 1921 Italian Criminal Code, supported social defence theories. He considered that the objective of criminal law was to protect society against the danger represented by criminals.²⁵⁸ According to this author, the criminal and not the crime had to be the point of departure of criminal laws. Therefore, the law could not set fixed punishments but individualized treatments depending on the personality and social dangerousness of the offender.²⁵⁹ Ferri considered that when sentencing, judges should assess the ethical and social nature of the crime, the dangerousness of the offender, the social living conditions and regional differences regarding customs and habits, as well as the concrete circumstances of the event.²⁶⁰

Even if the general postulates of these new theories seem incompatible with the principle of legality, they did not systematically discard its application and, on the contrary, often recognised its importance.²⁶¹ Ferri, for example, considered that the fulfilment of social defence postulates would logically require the retroactive application of criminal law. However, he warned of the dangers resulting from retroactivity if it was not limited by the objective necessity of social defence.²⁶² Similarly, Franz von Liszt developed a flexible and multifunctional criminal law model aiming the neutralization, re-socialization or intimidation of the offender depending on his personality. Even if this model was hardly compatible legal certainty and the principle of legality, Liszt always considered himself a firm defender of the principle.²⁶³

²⁵⁷ For a comprehensive analysis of currents of thought embracing specific deterrence theories see Ferrajoli, 264–74.

²⁵⁸ Cantor, ‘Measures of Social Defense’, 27.

²⁵⁹ Ibid., 20.

²⁶⁰ Enrico Ferri, *Principios de derecho criminal* (Madrid, 1933), 179. Cited and analysed in Lamarca Pérez, ‘Formación Histórica y Significado Político de La Legalidad Penal’, 64.

²⁶¹ Lamarca Pérez, ‘Formación Histórica y Significado Político de La Legalidad Penal’, 64.

²⁶² Ferri, *Principios de derecho criminal*, 140.

²⁶³ Ferrajoli, *Derecho y Razón. Teoría Del Garantismo Penal*, 268.

Even if these proposals do not count today with much doctrinal support, they significantly influenced the development of criminal law. Nowadays the role of our judges steer a middle course between revolutionary legalism and anti-formalist theories. Neither they are “the mouth that pronounces the words of the law”, nor they have unlimited decision powers. At least in western legal systems, and with nuances depending on the country, the judges currently enjoy certain margin of discretion for the individualization of penalties, but always within the framework of general and abstract laws.²⁶⁴

1.2.4 The progressive codification of the legality principle

Among many other legal notions emerged from Enlightenment’s ideas, the principle of legality was soon reflected in legal codes. Only ten years after the publication of Beccaria’s *On crimes and Punishments* (1764) the Principle of Legality started being reflected in criminal codes and constitutions. Even absolute monarchies were strongly influenced by enlightened ideas and implemented important legality features.²⁶⁵ For instance, the principle of legality was incorporated in the 1786 criminal code reform promulgated in Tuscany by the Grand Duke Peter Leopold, the future Leopold II, Holy Roman Emperor. As well, the principle was enshrined in the Austrian Criminal Code of 1787, best known as the Josephine Code.²⁶⁶

However, absolute monarchies were an obstacle to the implementation of many Enlightenment’s new ideas. Therefore, fundamental rights in general, and individual liberties in particular, found in the former colonies of North America a more favourable political context for a comprehensive development.²⁶⁷ Indeed, after declaring their independence, some British ex-colonies enshrined for the first time the principle of legality in constitutional texts, as was the case of Philadelphia (1774), Virginia (1776) and Maryland (1776). The Constitution of Maryland was particularly advanced regarding the legality principle and included a provision establishing the non-retroactivity rule: “That retrospective laws, punishing facts committed before the

²⁶⁴ Gau-Cabée, ‘Arbitrium Judicis. Jalons Pour Une Histoire Du Principe de La Légalité Des Peins’, para. 44.

²⁶⁵ Lamarca Pérez, ‘Formación Histórica y Significado Político de La Legalidad Penal’, 58.

²⁶⁶ As explained, with further examples and references in Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’, 12–13.

²⁶⁷ Lamarca Pérez, ‘Formación Histórica y Significado Político de La Legalidad Penal’, 58.

existence of such laws, and by them only declared criminal, are oppressive, unjust, and incompatible with liberty; wherefore no ex post facto law ought to be made.”²⁶⁸

In Europe, French revolutionaries included the *nullum crimen* principle in the 1789 Declaration of the Rights of Man and of Citizens. Article 7 established that “No man may be accused, arrested or detained except in the cases determined by the Law, and following the procedure that it has prescribed.”²⁶⁹ In the same vein, Article 8: “The Law must prescribe only the punishments that are strictly and evidently necessary; and no one may be punished except by virtue of a Law drawn up and promulgated before the offense is committed, and legally applied”.²⁷⁰ Similarly, the principle of legality was incorporated in the 1791 and 1793 French Constitutions.²⁷¹ However, the principle was not always effectively observed, and even the non-retroactivity rule was repealed during the Reign of Terror (1793-1794).²⁷²

The 1791 French Criminal Code included what now can be considered an extreme conception of the principle of legality. French revolutionaries went far in their cult to the law understood as the expression of the general will and therefore, considered flawless and infallible. A system of fixed punishments was established, limiting the role of the judges and not leaving them any margin of discretion when applying the laws. Montesquieu’s above-mentioned idea of the judge being just the “mouth that pronounces the words of the law” was effectively codified. Judges had to automatically apply the pre-established punishments, not having any discretion to adapt them or to make any individualisation.

However, the shortcomings of this naïf and radical conception of the principle soon aroused. The research of an adequate intermediate solution between excessive judicial *arbitrium* and rigid and inadaptate punishments has been since then one of the most interesting debates in criminal law doctrine and jurisprudence.²⁷³ The defeat

²⁶⁸ Constitution of Maryland, 11 November 1776, Art. 15, available at: http://avalon.law.yale.edu/17th_century/ma02.asp.

²⁶⁹ Declaration of the Rights of Man and of Citizens, 26 August 1789, Art. 7, available at: <https://www.elysee.fr/en/french-presidency/the-declaration-of-the-rights-of-man-and-of-the-citizen>.

²⁷⁰ Declaration of the Rights of Man and of Citizens, Art. 8.

²⁷¹ French Constitution, 3 September 1791, Section V, Art. 8, available at: <https://www.conseil-constitutionnel.fr/les-constitutions-dans-l-histoire/constitution-de-1791>; French Constitution, 24 June 1793, Art. 14, available at: <https://www.conseil-constitutionnel.fr/les-constitutions-dans-l-histoire/constitution-du-24-juin-1793>.

²⁷² Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’, 13–15.

²⁷³ Benessiano, ‘Légalité pénale et droits fondamentaux’, 25.

of revolutionary legalism meant the recovery of certain capacities of the judges and the legality principle became a fundamental limit to control a necessary margin of the discretion granted to judges in contemporary criminal law.²⁷⁴ Anyhow, starting from the above-mentioned codifications at the end of the 18th century, the principle of legality has been progressively included in the vast majority of subsequent constitutions and criminal codes. The general consolidation of the principle during the 19th and 20th century was a long and discontinuous process that experienced numerous advances and setbacks depending on the specific political circumstances of each country.²⁷⁵

For instance, Spanish constitutions and criminal codes were no exceptions to the consolidation tendency of the principle of legality. The 1812 Constitution included a very limited version of the principle, but from then on, legality became a generally recognised constitutional principle.²⁷⁶ Similarly, at the beginning of the 19th century, Spanish criminal codes started to recognise the *nullum crimen* principle, and the legality provision of the 1822 and 1848 codes are fairly similar to that of the actual Criminal Code.²⁷⁷

Since 1789 the principle of criminal legality remains untouched and untouchable in France, enjoying constitutional status.²⁷⁸ However, its content, effects and implementation have experienced a significant evolution. As explained above, the failure of revolutionary legalism resuscitated judicial *arbitrium*, timid at first, but progressively more daring throughout the 19th century.²⁷⁹ The drafters of the 1810

²⁷⁴ Ibid., 25.

²⁷⁵ For a comprehensive study of Constitutions and Criminal Codes incorporating the principle of legality, see Jiménez de Asúa, *Tratado de derecho penal*, II:388–91.

²⁷⁶ For a historical review of the principle of legality in Spanish Constitutions, see Agustín Ruiz Ruiz Robledo, *El Derecho Fundamental a La Legalidad Punitiva* (Valencia: Tirant lo Blanch, 2003), 67–109.

²⁷⁷ Compare Spanish Criminal Code, 8 June 2022, Art. 3, available at: <https://personasjuridicas.es/wp-content/uploads/2019/08/C%C3%B3digo-Penal-1822.pdf>; Spanish Criminal Code, 19 March 1848, Art. 2, available at: <https://www.boe.es/gazeta/dias/1848/03/21/pdfs/GMD-1848-4937.pdf>; Spanish Criminal Code, 23 November 1995, Arts. 1 and 2, available at: <https://www.boe.es/buscar/act.php?id=BOE-A-1995-25444>. As analysed in Santiago Mir Puig, *Derecho Penal: parte general*, 8^a ed. (Barcelona: Reppertor, 2008), 106; Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’, 13–14. For further general information on these criminal codes, see José Antón Oneca, ‘Historia del Código penal de 1822’, 1965, 263–78; María Dolores del Mar Sánchez González, *La codificación penal en España: los códigos de 1848 y 1850*, Estudios Políticos (Madrid: Centro de Estudios Políticos y Constitucionales, 2004).

²⁷⁸ Gau-Cabée, ‘Arbitrium Judicis. Jalons Pour Une Histoire Du Principe de La Légalité Des Peins’, para. 58.

²⁷⁹ Ibid., 36.

Criminal Code took note of the shortcomings of a strict principle of legality and, for example, renounced to fixed determination of penalties for certain minor crimes. In the same vein, and aiming a better individualization of penalties, mitigating circumstances were included in 1832 for all criminal offences. The 1810 Criminal Code was in force until 1994, when a new code was issued, enshrining a strong principle of legality that, at the same time, allows certain judicial capacity to adapt general legal concepts to particular circumstances.²⁸⁰

During the 20th century, the legality principle continued to be progressively incorporated in constitutions and criminal codes, but some relevant exceptions can be identified. The above-mentioned anti-formalist ideas provided ideological and theoretical grounds for the development of legal policies confronting the legality principle. The collapse in Europe of the liberal model after World War I, gave rise to political systems that openly moved away from legalist postulates. The first examples can be found in the post-revolutionary Russia. The 1919 Guiding Principles of Criminal Law in the Soviet Russia defined as a criminal offence any action or omission considered dangerous for society. As well, in the 1922 and 1926 Soviet Criminal Code analogy was accepted. It was only in 1958 that the principle “*nullum crimen, nulla poena sine lege*” was restored, at least in formal terms.²⁸¹

The crisis of the principle of legality during the decade of 1930 was a rather widespread phenomenon in Europe. However, the anti-legalist measures were linked to particular political situations and did not last. The 1930 Danish Criminal Code accepted the use of analogies by the judges.²⁸² However, it was in National Socialist Germany where the proposals confronting legality found more doctrinal and political support, and experienced a significant codification development.²⁸³ German Criminal Code was modified in 1935 to increase judicial *arbitrium*, allowing for instance the use of analogy, since judges were considered capable to recognize and apply the authentic

²⁸⁰ Bertrand De Lamy, ‘Dérives et Évolution Du Principe de La Légalité En Droit Pénal Français’, *Les Cahiers de Droit* 50, no. 3 and 4 (2009): 590. French Criminal Code, 22 February 1810, Art. 4, available at: <https://shorturl.at/mvw45>; French Criminal Code, 1 March 1994, Art. 111-3, available at: https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006070719/.

²⁸¹ For an analysis of Soviet criminal law, with further references, see Ferrajoli, *Derecho y Razón. Teoría Del Garantismo Penal*, 384; Harold J. Berman, Susan Cohen, and Malcolm Russell, ‘A Comparison of the Chinese and Soviet Codes of Criminal Law and Procedure’, *Journal of Criminal Law and Criminology* 73, no. 1 (1982): 238–58; Lamarca Pérez, ‘Formación Histórica y Significado Político de La Legalidad Penal’, 66; Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’, 15.

²⁸² Lamarca Pérez, ‘Formación Histórica y Significado Político de La Legalidad Penal’, 67.

²⁸³ Ferrajoli, *Derecho y Razón. Teoría Del Garantismo Penal*, 376.

national legal sentiment.²⁸⁴ Law N° 11 of the Allied Control Council restored the prohibition of analogy in Germany in 1946.²⁸⁵

The Franco regime in Spain was not alien to this trend contrary to some legality postulates. For instance, the 1939 Law of Political Responsibilities retroactively extended its legal effects back to 1934. Similarly, the so-called Law for the Repression of Freemasonry and Communism of 1941 had as well retroactive effects.²⁸⁶ It is worth noting as well that in China analogy was an ancient legal institution and was only forbidden in 1997.²⁸⁷ Until that moment, a person could be punished for a socially dangerous conduct in application of Criminal Code provisions prohibiting “analogous” crimes.²⁸⁸

Encouraged by the experience of the harmful effects derived from the inobservance of legality in certain countries, the principle of legality was fully recognised by the majority of States after World War II.²⁸⁹ At the same time international criminal law emerged to provide adequate responses to the atrocities committed, and the consolidation and development process of the international principle of legality began.

1.3 The principle of legality nowadays

The principle of legality enjoys nowadays general and widespread acceptance among most legal systems of the world, both at national and international level. However, its specific rationales, meanings and requirements vary substantially depending on a wide range of factors. Hereinafter, it will be analysed how the legality principle is understood and articulated in the main domestic legal systems, adhering to the civil law, common law or Islamic law tradition. The understanding of the domestic

²⁸⁴ Ferrajoli, 384; Lamarca Pérez, ‘Formación Histórica y Significado Político de La Legalidad Penal’, 67; Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’, 15.

²⁸⁵ Mezger, *Derecho Penal: Libro de Estudio*, 64.

²⁸⁶ As explained, with further examples in Ignacio Berdugo Gómez de la Torre, ‘Derecho Represivo En España Durante Los Periodos de La Guerra y La Posguerra (1936-1945)’, *Revista de La Facultad de Derecho de La Universidad Complutense de Madrid* 3 (1981): 99.

²⁸⁷ Jianfu Chen, *Chinese Law: Context and Transformation* (Leiden - Boston: Martinus Nijhoff, 2008), 267.

²⁸⁸ Berman, Cohen, and Russell, ‘A Comparison of the Chinese and Soviet Codes of Criminal Law and Procedure’, 249.

²⁸⁹ Ferrajoli, *Derecho y Razón. Teoría Del Garantismo Penal*, 385; Lamarca Pérez, ‘Formación Histórica y Significado Político de La Legalidad Penal’, 69.

legality versions will be useful to later understand and identify the similarities and differences with the principle in international law.

1.3.1 Civil law systems

The principle of criminal legality is considered in civil law systems as a fundamental right closely related to the idea of human dignity, and it is conceived as a guarantee of legal certainty and individual freedom.²⁹⁰ When it concerns criminal matters, most democratic civil law countries articulate the principle as strict legality, based in four basic notions that could be expressed with the Latin formula *nullum crimen sine lege scripta, stricta, proevia et certa*.²⁹¹ However, the rationales, meaning and content of the legality principle significantly vary depending on the country, but as well on the different doctrinal opinions.

Regarding the general meaning of the principle an appropriate distinction can be made between a political and a legal or criminal connotation.²⁹² In relation to its political meaning, the principle requires all individuals and all public powers to be subject to the law. In this vein, a fundamental requirement is that the law, and in particular criminal provisions, should be issued from a democratically elected parliament.²⁹³ Therefore, the principle of legality comprises the political guarantee that the State will not impose on any citizen penalties that are not acceptable to the people.²⁹⁴ Therefore, the principle of legality comprises the political guarantee that the State will not condemn any one for a conduct that is not considered reprehensible by

²⁹⁰ Luis María Díez-Picazo, *Sistema de Derechos Fundamentales*, 3ª (Pamplona (Navarra): Civitas, 2008), 463.

²⁹¹ Cassese, *International Criminal Law*, 23.

²⁹² Following the division proposed in Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional', 17–26.

²⁹³ Carmen Lamarca Pérez, 'Principio de Legalidad Penal', *Eunomía. Revista En Cultura de La Legalidad*, no. 1 (2011): 157–58; Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional', 20–21; De Lamy, 'Dérives et Évolution Du Principe de La Légalité En Droit Pénal Français', 586–87; Thomas Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege* (Cham: Springer International Publishing, 2017), 22; Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes against Humanity, War Crimes*, 83. For a comprehensive analysis of the political meaning of the principle of legality and its historical evolution, see Lamarca Pérez, 'Formación Histórica y Significado Político de La Legalidad Penal'.

²⁹⁴ Mir Puig, *Derecho Penal*, 106; Vicente Martínez, *El Principio de Legalidad Penal*, 26; Gonzalo Rodríguez Mourullo, 'Legalidad (Principio De)', in *Nueva Enciclopedia Jurídica* (Barcelona: Seix, 1978), 886. For further references, see Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional', 21.

society, or impose penalties that are not acceptable to the people.²⁹⁵ This political meaning distinguishes the principle of legality in civil law domestic system from the principle in international law. Since the international community does not have an unified legislative body with the capacity to enact international criminal norms, this political meaning of legality is not comprised by the international principle that, as will be explained, is more flexible regarding the admissible sources of criminalization. Regarding the legal or criminal meaning, the principle of legality intends to ensure that individuals are able to know in advance, and as accurately as possible, which conducts are prohibited and entail legal consequences, so they can adapt their behaviour accordingly.²⁹⁶

The legal literature has grounded the principle of legality and its associated requirements on a rich variety of values, finalities, rationales, principles or foundations, also combined in various different manners.²⁹⁷ In fact, none of these theoretical or philosophical foundations can ground by itself the four requirements or guarantee of the legality principle (*lex scripta, praevia, stricta, and certa*). Therefore, in order to cover the full meaning of the principle and to reach all its different aspects and requirements, most scholars ground the *nullum crimen* principle on a combination of different rationales.²⁹⁸

Among them, the prevention of crime has historically taken an important place, and even today some authors consider it as the only foundation of a specifically criminal nature.²⁹⁹ Particularly present in general deterrence theories, the argument is that if criminal law aims to prevent crime, it is only possible if citizens are able to

²⁹⁵ Mir Puig, *Derecho Penal*, 106; Vicente Martínez, *El Principio de Legalidad Penal*, 26; Rodríguez Mourullo, 'Legalidad (Principio De)', 886. For further references, see Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional', 21.

²⁹⁶ For a comprehensive analysis of the legal or criminal meaning (*significado jurídico penal*) see, with various references, Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional', 17–25.

²⁹⁷ See the different terms and notions used in the legal literature, in Lledó, 29–30.

²⁹⁸ For a comprehensive and systematic overview of the different rationales or foundations of the legality principle, their various combinations, and they way they can ground with each of the legality requirements (*lex scripta, stricta, certa y praevia*), see with different approaches, Lledó, 29–57; Claus Kress, 'Nulla Poena Nullum Crimen Sine Lege', in *Max Planck Encyclopedia of Public International Law* (Heidelberg and Oxford University Press, 2010), paras 3–6; Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 21–23.

²⁹⁹ Vicente Martínez, *El Principio de Legalidad Penal*, 30–31; Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 23. As explained, with further references in Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional', 30–32.

know which conducts are considered criminal and what are the legal consequences.³⁰⁰ Therefore, criminal laws should predate the moment of commission and define as clearly as possible the criminal conducts and the associated punishments.

Other authors consider legal certainty as the basis of the principle of legality. In this vein, individuals should know, or be able to know, the precise conducts considered criminal, and the associated legal consequences.³⁰¹ Similarly, in order to ensure legal certainty, the reaction of the State should be foreseeable. In this sense, some authors consider that the principle of legality can be grounded on the general prohibition of arbitrariness of public authorities.³⁰² Other writers consider that allowing individuals to know beforehand if their conducts entail criminal liability is an essential requirement of substantial fairness. Therefore, the principle of legality constitutes a relevant legitimacy element of a criminal law system.³⁰³

Some scholarly opinions also underpin the principle of legality on the protection of citizens' trust.³⁰⁴ In other words, individuals can only trust and therefore, fully adhere to a criminal law system, if they are assured that if they adjust their conducts to current legality, their behaviour will not be subsequently considered criminal. For this to be true, crimes and punishments should be clearly defined in written statutes and predate the moment of commission.³⁰⁵ The principle of legality can also be grounded on the principle of individual guilt, since criminal responsibility is based on the intentional or careless character of a behaviour. Therefore, the imputation of the guilt assumes that the individual knew or could have known that his behaviour was prohibited.³⁰⁶

According to some authors, the State's respect and subjection to the law guarantees the objectivity of its actions, and in turn, this objectivity provides the

³⁰⁰ This line of reasoning has been further explained above, in Section 1.2.2. Also see an analysis of this legality rationale, with further references, in Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional', 30–32.

³⁰¹ Lamarca Pérez, 'Principio de Legalidad Penal', 157. For an overview of the scholarly opinions grounding the legality principle on legal certainty, see Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional', 35–36.

³⁰² Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional', 36–39.

³⁰³ Kress, 'Nulla Poena Nullum Crimen Sine Lege', 2010, para. 4.

³⁰⁴ See, with further references, Günther Jakobs, *Derecho penal. Parte general: fundamentos y teoría de la imputación*, 2^a ed. corr. (Madrid: Marcial Pons, 1997), 81–83; Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional', 40–42.

³⁰⁵ Jakobs, *Derecho penal. Parte general*, 81.

³⁰⁶ Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 21–22; Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional', 32–35.

grounds for the *nullum crimen* principle.³⁰⁷ In other words, the requirement of crimes and punishments to be established by prior, general and precise written laws is the consequence of the State's objectivity, derived from its subjection to the law. Accordingly, if the laws grounding a conviction did not respect these requirements, the State's action would not be objective.

The principle of legality is also construed as a guarantee to protect the rights of the individuals against the State's *ius puniendi*.³⁰⁸ To enjoy their individual liberties, citizens need to know in advance their boundaries and the consequences for surpassing them. In the same vein, the principle becomes a safeguard for individuals against State's abuses and arbitrariness, and provides individuals with legal certainty in the exercise of their rights.³⁰⁹ From this perspective the principle safeguards the rule of law's fundamental idea of expanding as much as possible individuals rights and liberties, that regarding criminal law, becomes the principle of minimum intervention also grounding its *ultima ratio* nature.³¹⁰

Most democratic civil law countries articulate the principle as strict legality, based in four basic requirements that could be expressed with the Latin formula *nullum crimen sine lege scripta, praevia, stricta, et certa*.³¹¹

(i) Criminal offences and punishments can only be established by laws issued from a democratically elected parliament, and therefore, they are necessarily written (*lex scripta*).³¹² This way, customary law, general principles of law and jurisprudence are excluded as direct sources of criminal law since a democratic assembly did not issue them, and they are also considered to be less certain, clear and stable.³¹³ Secondary legislation, or rules emanating from other institutions than the parliament, as governmental decrees, are as well excluded as direct sources of criminal law.³¹⁴ This

³⁰⁷ Jakobs, *Derecho penal. Parte general*, 82.

³⁰⁸ Kress, 'Nulla Poena Nullum Crimen Sine Lege', 2010, para. 3; Vicente Martínez, *El Principio de Legalidad Penal*, 31–32.

³⁰⁹ Kress, 'Nulla Poena Nullum Crimen Sine Lege', 2010, para. 3.

³¹⁰ Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*; Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional', 48–50.

³¹¹ Cassese, *International Criminal Law*, 23.

³¹² Cassese, 23; Lamarca Pérez, 'Principio de Legalidad Penal', 156–60; Mir Puig, *Derecho Penal*, 107; Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional', 61.

³¹³ Mir Puig, *Derecho Penal*, 107; Muñoz Conde and García Arán, *Derecho Penal, Parte General*, 100–101, 113; Díez-Picazo, *Sistema de Derechos Fundamentales*, 465–67.

³¹⁴ Ana Messuti, *Un Deber Ineludible: La Obligación Del Estado de Perseguir Penalmente Los Crímenes Internacionales*, 1^a (Buenos Aires, Argentina: Ediar, 2013), 673.

does not imply that these sources have no value for criminal law, it just means that they cannot directly establish offences and punishments. Nonetheless, they are indirect sources of criminal law, as means of interpretation, development and supplementation of the law.³¹⁵ In fact, the decisions of supreme and constitutional courts, as well as those of international courts tribunals, have a significant impact on the implementation and even the formation of criminal law.

(ii) Criminal laws cannot be retroactive (*lex praevia*) except when the new legal provision is more lenient to the accused (*lex mitior*).³¹⁶ Therefore, no one should be punished for a behaviour that at the time of commission was not considered criminal, and *ex post facto* crime or punishment creation is forbidden. In order to grant legal certainty, criminal laws establishing crimes or punishments can only be prospective and hence, individuals can be sure that if they adapt their behaviour to currently legality, their acts will not entail legal responsibility in the future.

(iii) The laws establishing criminal conducts should be as specific and clear as possible (*lex certa*). According to this requirement addressed to the legislative, and in order to allow individuals to adapt their actions to the law, criminal conducts should be described in a clear and well-defined manner, following the principle of specificity, and avoiding excessively vague terms or indeterminate and general clauses.³¹⁷ Likewise, if criminal laws are clear and precise they leave a narrow margin of discretion to the judge and prevents judicial arbitrariness and activism.³¹⁸ This satisfies the democratic requirement of crimes and punishments being defined by a parliament, but at the same time it fosters an equal application of the law.³¹⁹

³¹⁵ Díez-Picazo, *Sistema de Derechos Fundamentales*, 466; Muñoz Conde and García Arán, *Derecho Penal, Parte General*, 113; Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes against Humanity, War Crimes*, 124–25.

³¹⁶ Cassese, *International Criminal Law*, 23; Muñoz Conde and García Arán, *Derecho Penal, Parte General*, 105; Mir Puig, *Derecho Penal*, 107; Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’, 63.

³¹⁷ Mir Puig, *Derecho Penal*, 107; Muñoz Conde and García Arán, *Derecho Penal, Parte General*, 271; Díez-Picazo, *Sistema de Derechos Fundamentales*, 471; Cassese, *International Criminal Law*, 23.

³¹⁸ Kress, ‘Nulla Poena Nullum Crimen Sine Lege’, 2010, para. 5.

³¹⁹ Díez-Picazo, *Sistema de Derechos Fundamentales*, 471.

(iv) Criminal laws should be strictly interpreted and applied by the judges (*lex stricta*). This requirement includes the prohibition of analogies *in malam partem* since otherwise the judges would have the capacity to create crimes and punishments.³²⁰

1.3.2 Common law systems

The notion, content and scope of the legality principle in common law countries is rather limited compared to civil law systems, though it seems that the gap is progressively closing.³²¹ The most evident distinction is that, by nature, the Anglo-Saxon legal systems do not include the *lex scripta* requirement. However, the differences do not end there. Some fundamental elements included in civil law's principle of legality are not embraced by the principle under common law. However, it does not mean that they do not exist or are not relevant for common law systems. In most cases, these elements and characteristics are independent features of the wider concept of rule of law.³²² Therefore, the following section will cover the elements traditionally included in the civil law principle of legality, even if under common law they are not conceptually comprised under the principle.

1.3.2.1 Basic content of the common law principle of legality

The importance and the content of the principle of legality in common law system significantly varies depending on the country. Similarly, there are relevant differences in legal literature regarding the role and meaning of the common law principle. However, it is interpreted in a rather flexible manner, admitting in certain cases judge-made law, analogy or retroactive application of criminal rules. According to some opinions, the principle only implies the mere formal compliance of State bodies

³²⁰ Cassese, *International Criminal Law*, 24; Muñoz Conde and García Arán, *Derecho Penal, Parte General*, 120; Mir Puig, *Derecho Penal*, 107. For further information on the different sorts of analogy, see Section 4.2.2.4 and Section 6.3.1.2.

³²¹ For a comparative analysis of the *nullum crimen* principle in common law and civil law countries, demonstrating that the ideas underpinning the principle are similarly conceived and taken Germany and the United States as examples, see Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes against Humanity, War Crimes*, 83–126. More generally, see Elisabeth Grande, 'Droit pénal et principe de légalité: la perspective du comparatiste', *Revue internationale de droit comparé* 56, no. 1 (2004): 122–29.

³²² Shahram Dana, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing', *Journal of Criminal Law and Criminology* 99 (2009): 863–64.

with the rules of the legal system.³²³ Other authors consider that, lacking statutory regulation in many countries, and missing meaningful judicial development, the content and application of the principle remain unclear.³²⁴

In the United Kingdom the principle of legality is understood as an interpretative principle governing the relationship between the Parliament, the government and the courts. That means that the legislative power of Parliament is not directly limited by the principle of legality. Similarly, Lord Hoffman, in one of the most famous contemporary judicial interpretations of the principle of legality, established that the principle of parliamentary sovereignty includes Parliament's capacity to legislate against fundamental liberties or human rights.³²⁵ He claimed that the constraints of such legislative decision could not be legal but political. The principle of legality forces the Parliament, in case it wants to legislate against fundamental rights, to do so in a clear and express manner and therefore, to do not go unnoticed in the democratic process. On the contrary, if the Parliament enacts vague and unclear laws, the legality principle would compel the courts to interpret the law in a manner consistent with the protection of fundamental rights.³²⁶

This way, legality is understood as a common law interpretative principle based on the idea that Parliament would not interfere with fundamental common law rights and freedoms of citizens except by clear and unambiguous language.³²⁷ Therefore, in case of ambiguity, the courts should interpret the laws based on the presumption that the legislature did not intent to interfere with such fundamental common law rights.³²⁸ For example, it is understood that the Parliament has the capacity to enact retroactive statutes.³²⁹ However, for centuries judges have set that no legislation should be

³²³ Turpin and Tomkins, *British Government and the Constitution*, 99.

³²⁴ Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights', *Melbourne University Law Review* 2, no. 35 (2011): 209; Bruce Chen, 'The Principle of Legality: Issues of Rationale and Application', *Monash University Law Review* 41, no. 2 (2015): 329; Turpin and Tomkins, *British Government and the Constitution*, 99.

³²⁵ House of Lords, *R v Secretary of State for the Home Department, ex parte Simms*, Opinions of the Lords of Appeal for Judgement in the Cause, UKHL 33, 8 July 1999, para. 131, available at: <http://www.bailii.org/uk/cases/UKHL/1999/33.html>.

³²⁶ Ibid.

³²⁷ Chen, 'The Principle of Legality: Issues of Rationale and Application', 330.

³²⁸ Ibid., 341.

³²⁹ Hans Kelsen, 'The Rule against Ex Post Facto Laws and the Prosecution of the Axis War Criminals', *The Judge Advocated Journal* II, no. 3 (1945). Analysed in Mokhtar, 'Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects', 45.

interpreted retroactively unless the Parliament had established so in a clear, plain and unambiguous manner.³³⁰

The principle of legality is considered an evolving common law principle, and therefore the list of fundamental common law rights protected by the principle of legality, and thus, subject to a favourable interpretation, is not closed or well defined, what has activated rich doctrinal and jurisprudential debates.³³¹ However, as a result of the last decades' evolution, and in some cases due to the incorporation of international instruments into domestic law, nowadays it is generally accepted that human rights are part of the fundamental rights protected by the principle of legality.³³²

Certain elements and characteristics of the principle of legality are not theoretically construed as belonging to the principle, but in common law systems they exist as part of the rule of law.³³³ In a wide sense, not yet unanimously accepted by the doctrine, the rule of law would require laws to be general, prospective, open, clear and stable.³³⁴ This way, it seems that the basic four elements of the civil law principle of legality, *lex praevia*, *scripta*, *stricta* and *certa*, are not unknown for common law countries. However, the content and interpretation of these elements is not necessarily the same than in civil law legal systems.

1.3.2.2 Lex praevia and scripta: written and prospective laws

Among countries adhering to the common law tradition there are different approaches regarding the requirement of laws and punishments established in written statutes. Historically, Anglo-Saxon systems accepted offences and penalties to be set by customary and judge-made law, but in past decades there is a general trend towards a

³³⁰ Mokhtar, 'Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects', 45.

³³¹ As explained, with further references in Chen, 'The Principle of Legality: Issues of Rationale and Application', 345; Meagher, 'The Common Law Principle of Legality in the Age of Rights', 209.

³³² Meagher, 'The Common Law Principle of Legality in the Age of Rights', 209–12.

³³³ Dana, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing', 871.

³³⁴ Turpin and Tomkins, *British Government and the Constitution*, 99. The authors consider Joseph Raz as the main representative of this wide conception of the rule of law, as explained in Joseph Raz, 'The Rule of Law and Its Virtue', in *The Authority of Law: Essays on Law and Morality*, 2nd. ed. (Oxford: Oxford University Press, 2009), 210–32.

complete codification of criminal law.³³⁵ In fact, the current practice in most common law countries is to strictly articulate crimes and penalties in written statutes.³³⁶ However, some relevant exceptions remain, and some concepts and elements of crimes might continue to evolve based on case law.³³⁷

Crimes created by judge-made law, known as common law offences, are still applicable in certain countries. In Canada, the 1953 Criminal Code abolished common law offences, except contempt of court and contempt of Parliament.³³⁸ Similarly, although the Australian 1995 Criminal Code Act eliminated common law offences at the federal level, regionally, even if a codification effort is visible, some common law offences are still applicable.³³⁹ In the United Kingdom, it was only in 1973 when judges' discretion to create common law crimes was abolished by the House of Lords.³⁴⁰ In the last years, influenced by the European Court of Human Rights (ECtHR), a tendency towards stricter interpretations of the principle of legality is noticeable.³⁴¹ In fact, in a country lacking a written constitution, the domestic incorporation of the European Convention on Human Rights (ECHR) by the 1998 Human Rights Act, has had significant importance.³⁴² In the same vein the Law Commission in England and Wales is aiming to abolish the remaining common law offences and some years ago already proposed a Draft Criminal Code, but it has not yet been adopted by the Parliament.³⁴³

³³⁵ Dana, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing', 865; Kress, 'Nulla Poena Nullum Crimen Sine Lege', 2010, para. 10.

³³⁶ Dana, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing', 871; Kress, 'Nulla Poena Nullum Crimen Sine Lege', 2010, para. 10.

³³⁷ Kress, 'Nulla Poena Nullum Crimen Sine Lege', 2010, para. 10.

³³⁸ As explained with further references in Department of Justice Canada, 'The Federal Prosecution Service Deskbook', 2008, pt. 1.1.2, <https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/fpd/ch01.html>.

³³⁹ As explained with further references in Parliament of Australia, 'History of Criminal Law', https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Browse_by_Topic/Crimlaw/Historycrimallaw.

³⁴⁰ See, with reference to the most relevant case-law in Kress, 'Nulla Poena Nullum Crimen Sine Lege', 2010, para. 10.

³⁴¹ Cassese, *International Criminal Law*, 24.

³⁴² Chen, 'The Principle of Legality: Issues of Rationale and Application', 373.

³⁴³ Law Commission, *A Criminal Code for England and Wales*, 17 April 1989, available at: <https://www.lawcom.gov.uk/project/criminal-law-a-criminal-code/>.

This way, some common law offences are still in force while judge-made law remains firmly rooted in the legal system.³⁴⁴

Contrary to other common law countries, the United States follows a civil law approach to *lex scripta*.³⁴⁵ The Constitution specifies that federal offences should be set in written laws, and similarly, in most States, offences are exclusively established in statutes.³⁴⁶ Regarding penalties, practice shows that only those established in statutory regulations are effectively applied.³⁴⁷

Countries adhering to the common law tradition generally forbid the retroactive application of criminal laws.³⁴⁸ However, in certain legal systems the interpretation and practical implementation of this rule is rather flexible if compared with civil law countries. In the United States, for instance, the Constitution bans *ex post facto* laws, and judges require previous and clearly established crimes and penalties.³⁴⁹ Nonetheless, while the non-retroactivity rule fully applies to substantive law, the retrospective application of certain rules of procedure and evidence is permitted.³⁵⁰

The requirement of prospective laws is generally accepted in the United Kingdom, but some exceptions are still contemplated. Retroactive legislation is sometimes justified in order to avoid “practical public inconvenience and wrong”.³⁵¹ However, when it concerns criminal matters the respect of the non-retroactivity rule is reinforced and the threshold to except the principle is higher. Courts would never apply retroactively criminal laws unless an unequivocal statutory provision requires holding

³⁴⁴ Cassese, *International Criminal Law*, 24; Grande, ‘Droit pénal et principe de légalité’, 122–23.

³⁴⁵ Dana, ‘Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing’, 865. For a study on the *nullum crimen* principle in the United States, see Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes against Humanity, War Crimes*, 109–26.

³⁴⁶ Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’, 80; Dana, ‘Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing’, 865, 871.

³⁴⁷ Dana, ‘Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing’, 865.

³⁴⁸ *Ibid.*, 881.

³⁴⁹ Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’, 81; Dana, ‘Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing’, 881.

³⁵⁰ Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’, 81.

³⁵¹ *Phillips v Eyre* (1870) LR 6 QB 1, as cited in Turpin and Tomkins, *British Government and the Constitution*, 99.

otherwise.³⁵² Anyhow, the decisions of the ECtHR in the last decades are forcing the United Kingdom to adopt a stricter approach regarding non-retroactivity to ensure the full respect of the principle. In this vein, the European Court has condemned the United Kingdom in several occasions for breaching ECHR Article 7, enshrining the legality principle.³⁵³

However, despite this recent trend towards a stronger version of the non-retroactivity rule, there are still some exceptions or dubious situation. In some contemporary decisions British judges interpreted the non-retroactivity rule in a flexible manner excluding, for instance, the applicability of some traditionally valid criminal law defences. In this sense, the so-called marital rape cases were a paradigmatic example, subsequently reaching the ECtHR. The fact of being married was a traditional common law defence to a husband's rape of his wife. However, the judges considered that such defence was no longer valid since, according to current social values, it was not longer acceptable that a husband could rape his wife without any legal consequences. Even if the result could be considered morally desirable, according to some opinions this amounted to a violation of the non-retroactivity rule since the accused were convicted for rape and attempted rape within marriage despite a criminal defence for rape in marriage was applicable at the moment of the facts.³⁵⁴ The convicted challenged the decision before the ECtHR arguing a violation of the principle of legality (ECHR Art. 7). However, the European Court rejected the claim considering that the decision of the British courts followed a foreseeable legal evolution and therefore, the applicants should have predicted that such criminal exception was about to be overruled.³⁵⁵

³⁵² Turpin and Tomkins, 99.

³⁵³ Ibid. See below, Section 5.1.4.

³⁵⁴ See, with further references in Cassese, *International Criminal Law*, 24; Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 219; Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes against Humanity, War Crimes*, 156–57.

³⁵⁵ See below a detailed analysis of the “marital rape cases”, in Section 5.1.4.3.

1.3.2.3 Lex certa and stricta: clear and well-defined laws and strict interpretation

Common law countries uphold as well the requirement of clear and well-defined laws (*lex certa*), considered as a prerequisite of legal certainty.³⁵⁶ Regarding the *lex stricta* requirement, while in civil law systems it is mainly understood as prohibiting analogy, common law jurists interpret it in a more general manner. *Lex stricta* is contemplated as a general requirement of strict interpretation addressed to the judges, including the general prohibition of extending criminal statutes to the detriment of the accused.³⁵⁷ However, analogy is permissible in Anglo-Saxon countries, though with important limitations and constraints, and it allegedly conforms the grounds for common law developments and evolution.³⁵⁸ For example, in the United Kingdom analogy is only accepted if the legal extension could have been foreseen by the accused.³⁵⁹ In the United States, analogy is as well permitted, but its application is significantly limited by the general prohibition of ambiguity and vagueness.³⁶⁰ In fact, the courts avoid imposing criminal penalties if they are not clearly defined by law, and reject applying them by analogy.³⁶¹

1.3.3 Islamic law

For centuries the principle of legality has been implicit in the practical implementation of Islamic criminal justice systems.³⁶² The arbitrary rule by a single individual or a group is not permitted, and the foreseeability of criminal conducts is a

³⁵⁶ Turpin and Tomkins, *British Government and the Constitution*, 100; Dana, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing', 881.

³⁵⁷ Dana, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing', 866.

³⁵⁸ Mahmoud Cherif Bassiouni, *International Criminal Law*, 3rd ed., vol. I (Martinus Nijhoff, 2008), 82.

³⁵⁹ Dana, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing', 881.

³⁶⁰ Referring to the 5th and 14th amendment to the US Constitution, as explained in Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional', 81.

³⁶¹ Dana, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing', 881.

³⁶² Muhammad Munir, 'The Principle of Legality in Islamic Criminal Justice System', *Hazara Islamicus* 7, no. 1 (2018): 334.

requirement intrinsically included in Islamic law.³⁶³ In fact, according to the Koran, God does not punish humans before having sent a Messenger to warn them.³⁶⁴ In this vein, the Koran and the Sunnah, the body of traditional social and legal custom and practice of the Islamic community,³⁶⁵ include the definition of certain crimes and punishments (*hudud*, *qesas*, *diyya*).³⁶⁶

The *Sharia* (Islamic law) includes some rules that can be directly associated with the principle of legality. A relevant maxim establishes that “the conduct of reasonable men (or the dictate of reason) alone is of no consequence without the support of a legal text”,³⁶⁷ meaning that conducts can only be prohibited (*hara⁻m*) based on a legal text.³⁶⁸ Likewise, the *Sharia* declares that “permissibility is the original norm” (*al-asl, fi'l-ashya' al-iba⁻hah*),³⁶⁹ meaning that if not forbidden by the law, all conducts are permissible.³⁷⁰

The non-retroactivity rule is generally recognized as well in Islamic law, with the exception of the retroactive application of norms in favour of the accused.³⁷¹ According to the general scheme of the Koran, the majority of offences only have prospective effects and it is established that those committing a criminal conduct before it was considered a crime, would be pardoned.³⁷² The Sunnah endorses this non-retroactivity principle. As an example, when embracing Islam, Amr ibs al-As, the commander who led the Muslim conquest of Egypt, asked the Prophet whether he would be held accountable for his previous transgressions. The Prophet replied that

³⁶³ Kress, «Nulla poena nullum crimen sine lege», 2010, para. 11; Mohamed Badar, «Islamic law (Sharia) and the jurisdiction of the International Criminal Court», *Leiden Journal of International Law* 24, n.º 2 (2011): 423.

³⁶⁴ Munir, ‘The Principle of Legality in Islamic Criminal Justice System’, 109.

³⁶⁵ Asma Afsaruddin, ‘Sunnah’, in *Encyclopædia Britannica* (Encyclopædia Britannica, inc., 2018).

³⁶⁶ Kress, ‘Nulla Poena Nullum Crimen Sine Lege’, 2010, para. 11.

³⁶⁷ As cited in Badar, ‘Islamic Law (Sharia) and the Jurisdiction of the International Criminal Court’, 423.

³⁶⁸ Badar, 423; Munir, ‘The Principle of Legality in Islamic Criminal Justice System’, 3–4.

³⁶⁹ As cited in Badar, ‘Islamic Law (Sharia) and the Jurisdiction of the International Criminal Court’, 423.

³⁷⁰ Badar, 423.

³⁷¹ Ibid.

³⁷² Munir, ‘The Principle of Legality in Islamic Criminal Justice System’, 110.

Islam obliterates what took place before its establishment. Similarly, the Prophet refused to punish crimes occurred prior to Islam.³⁷³

Therefore, Islamic law would be consistent with legality premise *nullum crimen, nulla poena sine lege*. Nevertheless, the general adherence to legality is challenged by some particularities. Even though retroactivity is generally forbidden, some exceptions are recognized. Retroactive application of the law is accepted when required by the interest of the community or when needed to guarantee peace and security of the Muslim community.³⁷⁴ The acceptance of analogy in certain circumstances seems problematic for the principle of legality under Islamic law. According to the majority of Muslim jurists, it is acceptable to expand the scope of some crimes by analogy, as it is the case of the *hadd* or *zina* crimes (adultery/fornication), extended to cover homosexuality.³⁷⁵

However, the *ta'azir* crimes constitute the most challenging case for the *nullum crimen* principle. Islamic criminal law can be divided into two general categories: fixed law (*hadd* or *hudûd*) and flexible law (*ta'azir*).³⁷⁶ When a criminal conduct does not fall under the first category, it is judged as a *ta'azir*, as is the case of criminal assault, kidnapping, abduction, forced labour or lesbianism.³⁷⁷ The punishments for these crimes are not fixed, and depend on the discretion of the judge (*qadi*).³⁷⁸ The objective of these penalties is to re-educate the criminal and prevent the commission of other crimes. Therefore, the punishment is individualized, and can substantially vary depending on the circumstances and the character of the offender.³⁷⁹ Western scholars consider this a clear violation of the legality principle.³⁸⁰ On the contrary, most Muslim writers argue that the broad discretion given to the judges works as a safeguard and balance to the

³⁷³ Badar, 'Islamic Law (Sharia) and the Jurisdiction of the International Criminal Court', 424.

³⁷⁴ Munir, 'The Principle of Legality in Islamic Criminal Justice System', 117.

³⁷⁵ As explained, with further references in Munir, 110.

³⁷⁶ Marli Chandra, 'The Penology of Islamic Criminal Law: Reintroduction of Islamic Penology', *Al-'Adalah* 15, no. 2 (2018): 349.

³⁷⁷ Mamman Lawan, Ibrahim N. Sada, and Shaheen Sardar Ali, *An Introduction to Islamic Criminal Justice* (UK Center for Legal Education, 2011), 63, https://www.heacademy.ac.uk/system/files/Introduction_to_Islamic_Criminal_Justice.pdf.

³⁷⁸ Ibid.

³⁷⁹ Chandra, 'The Penology of Islamic Criminal Law: Reintroduction of Islamic Penology', 362.

³⁸⁰ See, with further references Kress, 'Nulla Poena Nullum Crimen Sine Lege', 2010, para. 11; Badar, 'Islamic Law (Sharia) and the Jurisdiction of the International Criminal Court', 424.

principle of legality, preventing potential problems arising from its inflexibility.³⁸¹ Nevertheless, there are also opinions defending that primary sources of Islamic law do not allow *ta'azir* crimes to be exempt from the legality principle requirements, and that a correct interpretation of these sort of crimes would be respectful with this principle.³⁸²

It should be noted that this debate between Muslim and western scholars falls within the wider discussion on whether Islamic criminal laws respect or not democracy and human rights. Even among Islamic scholars it exists a broad variety of views and opinions depending on different definitions and understandings of Islamic laws. Traditional interpretations consider human rights incompatible with Islamic law, and even deny the need of such compatibility.³⁸³ On the contrary, modern interpretations tend to find common ideas and values, considering possible a harmony.³⁸⁴ From the other side, the ECtHR has declared that a regime based on the *Sharia* does not respect human rights, particularly regarding criminal law and criminal procedure.³⁸⁵ However, experts on Islamic law and human rights specialist have strongly criticized this opinion.³⁸⁶

Anyhow, it should be noted that the principle of legality, introduced by colonial powers, have been incorporated in most Islamic legal systems, and nowadays traditional *Sharia* is only applied in very few Islamic States.³⁸⁷ Even in those States, an effort is being made to codify criminal conducts and maximum punishments in order to limit the discretionary powers of judges, especially regarding *ta'azir* crimes.³⁸⁸

³⁸¹ For an overview of these opinions see, with various references, Badar, 'Islamic Law (Sharia) and the Jurisdiction of the International Criminal Court', 423.

³⁸² See, with further references Munir, 'The Principle of Legality in Islamic Criminal Justice System', 116; Badar, 'Islamic Law (Sharia) and the Jurisdiction of the International Criminal Court', 424.

³⁸³ As explained, with further references in Said Mahmoudi, 'Islamic Approach to International Law', *Max Planck Encyclopedia of Public International Law*, 2019, para. 58.

³⁸⁴ Mahmoudi, para. 58.

³⁸⁵ *Refah Partisi (The Welfare Party) and Others v Turkey*, Apps N° 41340/98, 41342/98, 41343/98 and 41344/98, ECtHR, 31 July 2001, para. 72, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-59617%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-59617%22]}).

³⁸⁶ As explained in Mahmoudi, 'Islamic Approach to International Law', para. 64.

³⁸⁷ Mahmoudi, para. 105.

³⁸⁸ Kress, 'Nulla Poena Nullum Crimen Sine Lege', 2010, para. 11. For further information on Islamic law and the *Sharia*, their complex relationship with human rights or on the Islamic criminal justice system see, among others M. Cherif Bassiouni, *The Shari'a and Islamic Criminal Justice in Time of War and Peace* (Cambridge: Cambridge University Press, 2013).

1.3.4 The principle of legality around the world: a general overview

The principle of legality is currently well established in the majority of legal systems of the world, often enshrined in constitutional texts. Despite the substantial differences between countries regarding its specific rationales, meanings and requirements, the adherence to the legality principle is widespread and consistent in state practice around the world. A comprehensive study of 192 national constitutions and domestic legal systems conducted by Gallant in 2008 demonstrated that all but two UN member States adhered to the non-retroactivity rule, either by constitution, statute or through treaty obligations.³⁸⁹ In the same vein, a study published by professor Bassiouni on 139 national constitutions, showed that 96 of them included a formulation of the principle of legality, in particular the protection from *ex post facto* laws.³⁹⁰ The practice and case law of many other countries show as well observance to the principle.³⁹¹ To prove its customary nature, the International Committee of the Red Cross established as well that the principle of legality is “set forth in several military manuals and is part of most, if not all, national legal systems.”³⁹²

The general adherence to the principle of legality is also evidenced by the works of the United Nations Human Rights Committee, a body of independent experts that regularly monitors the implementation of the International Covenant on Civil and Political Rights by its 173 State parties. Compliance with the principle of legality, enshrined in Article 15 of the Covenant, is one of the issues examined. Observations issued by the Committee have not often included recommendations concerning the principle of legality, what shows a generalized acceptance and implementation of the principle by all State parties.³⁹³

³⁸⁹ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 353.

³⁹⁰ Mahmoud Cherif Bassiouni, ‘Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions’, *Duke Journal of Comparative and International Law* 3, no. 2 (1993): 291. On the contrary, after a rather limited comparative study, Donde Matute concludes that the application of the principle of criminal legality is erratic and inconsistent. Javier Dondé Matute, *Principio de legalidad penal: perspectivas del derecho nacional e internacional*, Colección Cicerón 1 (México: Barcelona: Editorial México Universitario; Bosch, 2007), 316.

³⁹¹ Dana, ‘Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing’, 881.

³⁹² International Committee of the Red Cross (ICRC), *Customary International Humanitarian Law*, Vol. I, Rules, 2005, Rule 101, 371-72. available at: <https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>. For further information on the international customary nature, and even the *ius cogens* status of the principle of legality, see below, Chapter 6.

³⁹³ The database of the UNHRC is available at: <https://juris.ohchr.org/>.

However, during the last decades, the Committee has observed in some occasions infringements of the legality principle, particularly in relation to the fight against terrorism. Definitions of the crime have been one of the most controversial issues, and it has been noted that the codification and prosecution of this crime represents a significant threat to rights and guarantees protected by the principle of legality. Several domestic definitions of terrorism have been criticized by the Committee for being too vague to fulfil legality requirements and to ensure the protection of individuals against *ex post facto* laws and punishments.³⁹⁴ Moreover, the situation has deteriorated after the terrorist attacks of 11 September 2001 and it has been denounced that the international community has become rather indifferent to the abuse of the concept of terrorism.³⁹⁵ In fact, States often employ definitions of the crime that do not fully respect the *nullum crimen* principle.³⁹⁶ Anyhow, aside from cases regarding terrorism the Human Rights Committee has observed very few infringements of the principle of legality over recent decades, and those exceptions concerned particularly retroactive application of laws.³⁹⁷

³⁹⁴ UN Human Rights Committee, Concluding Observations: United States of America (18 December 2006) UN Doc. CCPR/C/USA/CO/Rev.1, para. 11, available at: <https://shorturl.at/gQUW2>; Democratic Peoples' Republic of Korea (27 August 2001) UN Doc. CCPR/CO/72/PRK, para. 14, available at: <https://shorturl.at/djrGM>; Portugal (Macao) (4 November 1999) UN Doc. CCPR/C/79/Add.115, para. 12, available at: <https://shorturl.at/jxDS8>; Algeria (18 August 1998) UN Doc. CCPR/C/79/Add.95, para. 11, <https://shorturl.at/rwVWY>; Peru (25 July 1996) UN Doc. CCPR/C/79/Add.67 para. 12, available at: <https://shorturl.at/eovCI>; Egypt (9 August 1993) UN Doc. CCPR/C/79/Add.23, para. 8, available at: <https://shorturl.at/achJM>; The Human Rights Committee has also determined that Art. 15 had been infringed when prosecutions for terrorist offences were grounded on legal provisions not yet in force at the time of commission. See *Gomez Casafranca v Peru* (Comm. N° 981/2001), Views of 19 September 2003, UN Doc. CCPR/C/78/D/981/2001, para. 7.4, available at: <https://shorturl.at/vEW45>.

³⁹⁵ Report of the Special Rapporteur (Martin Scheinin) on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 28 December 2005, UN Doc. E/CN.4/2006/98 para. 56(a), available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/168/84/PDF/G0516884.pdf?OpenElement>.

³⁹⁶ *Ibid.*, para. 62.

³⁹⁷ UN Human Rights Committee, Concluding Observations: Chile (30 Mars 1999) UN Doc. CCPR/C/79/Add.104, para. 206, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/093/65/PDF/N9909365.pdf?OpenElement>; Peru (25 September 1992) UN Doc. CCPR/C/79/Add.8, para. 9, available at: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Download.aspx?symbolno=CCPR%2FC%2F79%2FAdd.8&Lang=en; Sri Lanka (1 December 2003) UN Doc. CCPR/CO/79/LKA, para. 8, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G03/456/23/PDF/G0345623.pdf?OpenElement>.

Regarding the principle of legality of penalties, the above-mentioned study conducted by Gallant verified that more than three quarters of the 192 national constitutions analysed, included the *nulla poena sine lege* principle.³⁹⁸ Some other countries also adhere to the principle by statute or through treaty obligations.³⁹⁹ States recognizing the principle include Islamic, Asian, civil law, and common law countries. In fact, widespread uniformity exists in state practice establishing specific maximum penalties for each category of crime.⁴⁰⁰ In the same way, the prohibition of retroactive penalties is accepted as an essential characteristic of any criminal law system as evidenced by the practice of the majority of States.⁴⁰¹ Based on the its widespread adherence, the *nulla poena* principle can be considered a general principle of law, according to the meaning of Article 38(I)(c) of the Statute of the International Court of Justice.⁴⁰² Furthermore, it seems that the *nullum crimen, nulla poena sine iure* principle has become a rule of customary international law and even an *ius cogens* norm.⁴⁰³

In conclusion, as further analysed in Chapter 6, the adoption of the legality principle in domestic legal systems seems sufficiently general, consistent, widespread and representative to suggest that it has become a rule of general international law.⁴⁰⁴ Similarly, the principle of legality has been enshrined in various international instruments, as humanitarian and human rights treaties and conventions, on the statutes of different international tribunals. However, as analysed hereinafter, the rationales, content and requirements of the international legality principle significantly differ from the principle in domestic legal systems.

³⁹⁸ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 237–89.

³⁹⁹ Ibid.

⁴⁰⁰ Dana, ‘Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing’, 865, 872.

⁴⁰¹ Ibid., 866, 873.

⁴⁰² Ibid., 881.

⁴⁰³ See below, Chapter 6.

⁴⁰⁴ In this work the terms “general international law” and “customary international law” are used as synonyms. It should be noted that some authors include in the notion of general international law both customary international law and general principles of law. See, among others, De Souza Dias, «Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law», 39; Lledó, «El Principio de legalidad en el derecho penal internacional», 318. However, in the interest of clarity, when referring to general principles of law in this work, an explicit mention is made.

CHAPTER 2: THE PRINCIPLE OF LEGALITY IN INTERNATIONAL LAW

The origins of international criminal law can be traced back to the post-World War II trials, and in particular to the international military tribunals of Nuremberg and Tokyo. Similarly, the first relevant implementations of the principle of legality at the international level can be found linked to these proceedings. However, to fully understand the emergence of the international criminal justice system and the important role played by the legality principle, some relevant precedents should be identified and examined. Therefore, these antecedents are first analysed hereinafter. Then, the Nuremberg Trials, the Tokyo Trials and the most significant post-World War II domestic prosecutions will be studied.

2.1 Antecedents

After the First World War the notion of individual criminal responsibility for breaches of international law emerged, and even though it was not successfully implemented, it sets the foundations for the future development of international criminal law. The new legal, social, moral and political concerns about the impunity of the atrocities committed during the Great War, were gradually consolidated during the interwar period, giving rise to different experiences and proposals to establish an international justice system.⁴⁰⁵

The principle of legality had been generally accepted and implemented in domestic legal systems since the 19th century. However, the first concerns about legality at the international level only appeared at the beginning of the 20th century. The first attempts to implement international criminal justice came along with disagreements about the notion, scope and interpretations of the *nullum crimen* principle in international law. This way, the first relevant debates about international legality can be traced back to the aftermath of the First World War, regarding the prosecution of the German Emperor Wilhelm II and other leading figures accused of committing war crimes.

⁴⁰⁵ Mark Lewis, *The Birth of the New Justice: The Internationalization of Crime and Punishment, 1919-1950* (Oxford: Oxford University Press, 2014), 63.

2.1.1 The Treaty of Versailles

The Treaty of Versailles constitutes a relevant precedent for international criminal law, setting individual criminal responsibility under international law and laying down the foundations of international criminal justice. The establishment of the Nuremberg and Tokyo Tribunals after World War II cannot be explained without the example, the experience and the lessons learnt from the achievements and failures of the Versailles prosecution.⁴⁰⁶

The First World War ended with the signature of different peace treaties between the Allied Powers and the different vanquished countries. Among them, the Treaty of Versailles, signed with Germany on 28 June 1919, was particularly relevant.⁴⁰⁷ Aiming the punishment of those responsible for the atrocities committed during the war, the Treaty established, among other provisions, the international prosecution of the German Emperor Wilhelm II. This way, an international criminal jurisdiction was set for the first time.

However, the Versailles prosecution has been harshly criticised for being guided by the Allied Powers' great sense of injury, their quest for retribution, the social demands for punishments, and their wish to set an example for the future.⁴⁰⁸ The prosecution designed in the Treaty was considered an imposition on Germany of impartial victor's justice, and important legal flaws were identified. Anyhow, the attempt to establish international prosecutions ended in failure, weakening the Treaty's moral authority, and demonstrating the possibility for Germany to evade without harm impositions constituting limitations on its sovereignty.⁴⁰⁹

2.1.1.1 The emergence of the idea of an international prosecution

Already during the war lawyers and scholars from all countries debated about whether the atrocities being committed could be internationally prosecute and whether

⁴⁰⁶ Didier Rebut, *Droit Pénal International*, 2nd ed. (Paris: Dalloz, 2015), 531; Alfredo Liñán Lafuente, 'Origen y Evolución Del Derecho Penal Internacional (I)', in *Derecho Penal Internacional*, ed. Alicia Gil Gil and Elena Maculán (Madrid, Spain: Dykinson, 2016), 55.

⁴⁰⁷ Paris Peace Conference, *Treaty of Peace with Germany (Treaty of Versailles)*, XIII, 28 June 1919, available at: https://www.census.gov/history/pdf/treaty_of_versailles-112018.pdf.

⁴⁰⁸ Antonio Cassese, *International Criminal Law*, 3rd ed. (Oxford: Oxford University Press, 2013), 253; Lewis, *The Birth of the New Justice*, 33, 41–42; Vittorio Emanuele Orlando, 'On the Aborted Decision to Bring the German Emperor to Trial', *Journal of International Criminal Justice* 5, no. 4 (2007): 1015–19.

⁴⁰⁹ Orlando, 'On the Aborted Decision to Bring the German Emperor to Trial', 1026.

violations of the Hague and Geneva Conventions could entail individual criminal responsibility.⁴¹⁰ At the end of the war, at the Paris Peace Conferences, a special Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties was established to determine if the “authors” of the war could be held legally responsible. The Commission recommended the creation of an international tribunal to establish legal responsibilities of all those involved in the commission of crimes, explicitly including heads of States. It was held that Germany had intentionally violated the Hague and Geneva Conventions and that the only manner to re-establish the validity of international standards was to punish those responsible.⁴¹¹ The Commission, embracing the so-called Martens clause, referred to “laws of humanity” and formally applied them for the first time to civilian population trapped in an armed conflict.⁴¹²

⁴¹⁰ For a comprehensive analysis of these debates and propositions, see Lewis, *The Birth of the New Justice*, 34–36. International Conferences, *Hague Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, 29 July 1899, available at: <https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-ii-1899>; *Hague Convention (IV) Respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, 19 October 1907, available at: <https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-iv-1907?activeTab=default>; ICRC, *Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field*, 22 August 1864, available at: <https://ihl-databases.icrc.org/en/ihl-treaties/gc-1864>.

⁴¹¹ See the Report of the Commission, in Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, ‘Report Presented to the Preliminary Peace Conference’, *American Journal of International Law* 14, no. 1/2 (29 March 1919): 95–154. For further information on the composition, functioning, debates and proposals see Lewis, 36; Liñán Lafuente, ‘Origen y Evolución Del Derecho Penal Internacional (I)’, 54–55.

⁴¹² Vahakn N. Dadrian and Taner Akçam, *Judgement at Istanbul: The Armenian Genocide Trials* (New York; Oxford: Berghahn Books, 2011), 17. The Martens clause has been part of the laws of armed conflict since its first appearance in the preamble to the 1899 Hague Convention (II):

"Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience."

The clause was named after Professor von Martens, the Russian delegate at the 1899 Hague Peace Conferences. Following the delegates failure to agree on the status of civilians taking arms against occupying forces, the provisions was introduced to provide general protection. The clause was subsequently adopted in similar versions in later international instruments regulating armed conflicts, as the 1907 Hague Convention IV. During the Nuremberg Trials the clause was considered a norm of customary international law. Ana Messuti, *Derecho Como Memoria y Justicia* (Madrid: Postmetropolis, 2020), 123–24. For further information on the Martens clause

The recommendations of the Commission were later reflected in the Peace Treaty of Versailles. In fact, to prosecute the crimes committed during the war, the Allies opted for international rather than domestic trials, as it had been done until then. The reasons behind this shift are of different nature. European Powers had agreed through international law to protect civilians and prisoners, refraining from certain cruel war practices, and had created the expectation that such rules had to be followed.⁴¹³ At the end of the war, the Allies believed that they had respected such norms, while Germany had intentionally violated them and therefore, international justice had to be implemented. Political leaders and jurists also argued that international trials would have superior symbolic value, more political impact and would carry greater cultural weight.⁴¹⁴

The preference for an international prosecution responded as well to the desire of trying German Emperor Wilhelm II, and the need to avoid conflict with the principle of States sovereign equality that prevented heads of State to be the subject of criminal proceedings before the courts of a foreign nation. The Treaty of Versailles was, from this point of view, the origin of contemporary international rules preventing heads of State to enjoy immunity before international criminal courts.⁴¹⁵

2.1.1.2 The prosecution of German Emperor Wilhelm II and the principle of legality

Questions related to the principle of legality were at the centre of the debates when negotiating the Treaty of Versailles and one of the reasons explaining the failure of its implementation. The establishment of a tribunal and the prosecution of the Kaiser were harshly criticized for different reasons, and not only from the defenders' side. V.E. Orlando, an eminent jurist and the Italian Prime Minister at the time, identified three main flaws concerning the principle of legality in the attempt to criminally prosecute Wilhelm II: there was no previous international rule criminalizing his actions, no previous penalty had been established, and no pre-established tribunal existed.⁴¹⁶

see Rupert Ticehurst, 'The Martens Clause and the Laws of Armed Conflict', *International Review of the Red Cross* 37, no. 317 (1997): 125–34.

⁴¹³ Among others, the *Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field*, 22 August 1864 (revised in 1906), the 1899 Hague Convention (II) and 1907 Hague Convention (IV).

⁴¹⁴ Lewis, *The Birth of the New Justice*, 36.

⁴¹⁵ Rebut, *Droit Pénal International*, 527 and 536.

⁴¹⁶ Orlando, 'On the Aborted Decision to Bring the German Emperor to Trial', 1016. The

Regarding the first flaw, according to the League of Nations, in 1920 no international criminal law had been established or recognized by all nations, and individual criminal liability was not contemplated at the time under international law.⁴¹⁷ The breach of an international treaty, even if grave, did not necessarily entail that the act itself constituted a crime.⁴¹⁸ The infringement of an international instrument could carry the international responsibility of the State, but did not involve individual criminal liability. In fact, the charges on the Kaiser were not based on any particular law, but on morality and policy reasons, as expressed in Article 227 of the Versailles Treaty:

“The Allied and Associated Powers publicly arraign William R of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.

(...) the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality.”⁴¹⁹

The German delegation in the Peace Conference claimed that the prosecution of the ex-Emperor was based on *ex post facto* laws. It was argued that the Kaiser could not “be brought before a foreign special tribunal in virtue of a special law enacted by foreign Powers to apply to him alone and framed not on principles of right but on those of politics, and that he should be punished for an act which, when it was committed, was not subject to any penalty.”⁴²⁰

The second legal flaw in the attempt to prosecute the former German Emperor was directly related to the first one: at the time of commission international law did not provide for any particular penalty. Article 227 of the Treaty established that the tribunal shall “fix the punishment which it considers should be imposed.”⁴²¹

criminal clauses in the Versailles Treaty were the object of further criticism. Among other reproaches they were considered as missteps lacking a coherent planning or sufficient legal safeguards for the accused, as explained in Lewis, *The Birth of the New Justice*, 60–61.

⁴¹⁷ Report approved by the League of Nations the 18 December 1920, as cited in Orlando, ‘On the Aborted Decision to Bring the German Emperor to Trial’, 1025.

⁴¹⁸ Orlando, 1017.

⁴¹⁹ Treaty of Versailles, Art. 227.

⁴²⁰ Observations of the German Delegation on the Conditions of Peace, the President of the German Delegation (Brockdorff-Rantzau) to the President of the Peace Conference (Clemenceau), 29 May 1919, as cited in Lewis, *The Birth of the New Justice*, 60.

⁴²¹ Ibid.

Finally, it was also alleged that the establishment of the tribunal would be *ex post facto*. This issue accompanied the development of international criminal law for many years as until 1998 the international community did not establish a permanent international court to prosecute international crimes. Therefore, before that moment international courts, as the *ad hoc* international criminal tribunals, were established after the commission of the crimes they were intended to prosecute.⁴²² However, the problematic behind the critics to the tribunal established by the Versailles Treaty was rather related to its lack of neutrality. For instance, five judges appointed by each of the victorious Powers composed the tribunal.⁴²³ The Allies did not allow neutral States to take part on the trials because, as expressed by French Prime Minister Clemenceau, they had not “sacrificed” anything in the war.⁴²⁴

Anyhow, the tribunal was never constituted and the Kaiser Wilhelm II was never judged. The Netherlands, where the former Emperor sought refuge, refused to extradite him. The respect of the principle of legality outstands among the reasons grounding the refusal.⁴²⁵ The Netherlands argued that the Kaiser was accused of a “supreme offence against international morality and the sanctity of treaties”, but in fact he was not charged with any particular and concrete crime.⁴²⁶ Moreover, even if acting against the morality and sanctity of treaties was considered a crime, the principle of double incrimination required for extradition would not be fulfilled since this offence did not exist under Dutch laws.⁴²⁷

⁴²² As discussed below, in Section 4.1.2.9 regarding the *ad hoc* international criminal tribunals, and more generally in Section 6.4.3.

⁴²³ As established in Art. 227 of the Treaty.

⁴²⁴ Lewis, *The Birth of the New Justice*, 60.

⁴²⁵ Rodrigo Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’ (Madrid, Spain, Universidad Carlos III de Madrid, 2015), 134.

⁴²⁶ Reply of the Government of the Netherlands, 21 January 1920, as cited in Lewis, *The Birth of the New Justice*, 61.

⁴²⁷ Other grounds for the extradition refusal were the lack of procedural guarantees or the disagreement among the Allied Powers regarding the implementation of this part of the Versailles Treaty, as explained in Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’, 134. For a comprehensive description and analysis of the extradition process, the diplomatic disputes and their legal grounds, see Lewis, *The Birth of the New Justice*, 55–61; Rebut, *Droit Pénal International*, 533–39. For further arguments explaining the failure to prosecute the crimes committed during the First World War, see Thomas Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege* (Cham: Springer International Publishing, 2017), 5–7.

2.1.1.3 The Leipzig Trials

Together with the establishment of an international jurisdiction to try Wilhelm II, Articles 228 to 230 of the Versailles Treaty contemplated as well domestic prosecutions of German citizens that had allegedly committed war crimes. The Allies delivered an extradition list containing the names of more than 900 German nationals, including the Crown Prince, the former German Chancellor, and top military leaders. Germany considered the list an affront to “national honour” and denied extraditions triggering a diplomatic crisis only solved when the Allies accepted the German proposal to conduct its own trials. Finally, the German Supreme Court, located in Leipzig, tried from 1921 to 1927 twelve accused, mainly lower-ranking officers. Half of them were acquitted and the rest did not spent more than two years in prison.⁴²⁸

The Leipzig trials are one of the first examples showing how difficult is that a State prosecutes, in an effective and honest manner, its own citizens accused of international crimes.⁴²⁹ In fact, the experience of Leipzig later determined the creation of the Nuremberg tribunal since after the Second World War the Allies understood that the punishment of war criminals was not to be left to domestic courts.⁴³⁰ At the moment, the Leipzig trials were seen as a legal farce, and France and Belgium decided to hold their own courts-martial, prosecuting the defendants *in absentia*.⁴³¹ However, the Leipzig trials are seen nowadays as a significant step towards the creation of a comprehensive international system for the prosecution of international crimes, and some of the judgements are regarded as significant precedents, mainly due to their high legal quality.⁴³² For the first time notions as “obedience to superior orders”, “necessity of war” or the new definition of “war crimes” were addressed and discussed by a court of justice.⁴³³ In the same vein, the respect of the legality principle was assessed when determining the applicable law and while some cases were grounded on international law, in others only German laws were employed.⁴³⁴ However, the courts often used the

⁴²⁸ Liñán Lafuente, ‘Origen y Evolución Del Derecho Penal Internacional (I)’, 56.

⁴²⁹ Rebut, *Droit Pénal International*, 537.

⁴³⁰ Gerd Hankel, ‘Leipzig War Crimes Trials’, in *1914-1918-Online. International Encyclopedia of the First World War* (Berlin: Freie Universität Berlin, 2016); Rebut, *Droit Pénal International*, 537.

⁴³¹ Lewis, *The Birth of the New Justice*, 59.

⁴³² Cassese, *International Criminal Law*, 254.

⁴³³ Liñán Lafuente, ‘Origen y Evolución Del Derecho Penal Internacional (I)’, 56–57; Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’, 135; Hankel, ‘Leipzig War Crimes Trials’.

⁴³⁴ Hankel, ‘Leipzig War Crimes Trials’.

principle of legality as a last resort reason to grant acquittals when no other legal argument could be applied. In this sense, it was generally claimed that the accused lacked awareness of the illegality of their acts.⁴³⁵

2.1.2 The Treaty of Sevres and the Istanbul Trials

The Treaty of Sevres signed in 1920 by the Allied Powers and the defeated Ottoman Empire contemplated the prosecution of the atrocities committed by the Turkish from 1914 to 1918, mainly referring to war crimes and the deportation and extermination of Armenians. The subsequent trials, held in Istanbul, had significant relevance for the development of international criminal law.⁴³⁶ These prosecutions are considered an important precedent for the emergence of individual criminal responsibility under international law.⁴³⁷

Regarding the principle of legality, questions concerning its compatibility with the prosecutions were present during the Treaty negotiations and throughout the trials. In fact, the Treaty of Sevres and the Istanbul Trials, as well as the arguments raised during the negotiations and the criminal proceedings, were often cited legal examples in post-World War II trials when discussing the how to conciliate the *nullum crimen* principle with individual responsibility for international crimes, or regarding the existence and applicability of *ex post facto* laws.

On 24 May 1915, Great Britain, France and Russia, issued a Joint Declaration warning the Ottoman Empire about the criminal consequences of the ongoing massacres against Armenians. This Declaration later constituted a significant legal precedent for the Nuremberg and Tokyo Charters.⁴³⁸ In this vein, the Declaration employed for the first time the term “crimes against humanity”.⁴³⁹

⁴³⁵ Alan Kramer, ‘The First Wave of International War Crimes Trials: Istanbul and Leipzig’, *European Review* 14, no. 4 (October 2006): 449.

⁴³⁶ For a comprehensive analysis of the trials and their legal and political context and consequences, see Dadrian and Akçam, *Judgement at Istanbul: The Armenian Genocide Trials*. Also see, with further references, Cassese, *International Criminal Law*, 253–55.

⁴³⁷ Dadrian and Akçam, *Judgement at Istanbul: The Armenian Genocide Trials*, 17.

⁴³⁸ *Ibid.*, 2, 17.

⁴³⁹ For a review of the diplomatic discussions resulting in the use of this expression, see Cassese, *International Criminal Law*, 84. For further information on the origins of the crimes against humanity, see, among others Antonio Cassese, ‘Crimes Against Humanity: Comments on Some Problematical Aspects’, in *The Human Dimension of International Law: Selected Papers of Antonio Cassese*, ed. Antonio Cassese, Paola Gaeta, and Salvatore Zappalà (Oxford University Press, 2008), 458–59.

“In view of these new crimes of Turkey against humanity and civilisation, the Allied governments announce publicly (...) that they will hold personally responsible (...) all members of Ottoman Government and those of their agents who are implicated in such massacres.”⁴⁴⁰

On 10 August 1920 the Allied Powers and the Turkish government signed the Treaty of Sevres, establishing the partition of the Ottoman Empire and the transfer to Allied administration of all non-Turkish territories. Similarly, Article 230 of the Treaty provided for the surrender to the Allies of those responsible for the massacres committed by the Ottoman Empire since 1914, referring to war crimes and the deportation and extermination of Armenians.

The trials took place in Istanbul before the Ottoman Extraordinary Courts Martial. Since the provisions of the Treaty did not refer to any particular pre-existing national or international law, and Article 15 of the Ottoman Penal Code forbade retroactivity, the trials were grounded on the Ottoman laws already applicable when the crimes were committed.⁴⁴¹ Nevertheless, allusions to international law and international crimes were frequent during the trials, including express mentions to crimes against humanity, even by the Sultan, the supreme Ottoman Turkish authority.⁴⁴²

Between 1919 and mid-1922 up to sixty-three Court Martial trials were held to prosecute among others, senior officials as the War Minister.⁴⁴³ Death penalties were imposed to eighteen “Young Turks” for crimes against the Armenian people and prison sentences were issued against those responsible for war crimes.⁴⁴⁴ However, the trials were considered a partial failure since all major defendants were judge *in absentia*, only

⁴⁴⁰ France, Great Britain and Russia Joint Declaration, 24 May 1915, available at: https://www.armenian-genocide.org/Affirmation.160/current_category.7/affirmation_detail.html. For further information on the Declaration, see Sévane Garibian, ‘From the 1915 Allied Joint Declaration to the 1920 Treaty of Sèvres: Back to an International Criminal Law in Progress’, *Armenian Review* 52, no. 1–2 (2010): 97.

⁴⁴¹ Dadrian and Akçam, *Judgement at Istanbul: The Armenian Genocide Trials*, 105. For a detailed account of the particular legal provisions applied during the trials, see Cassese, *International Criminal Law*, 85.

⁴⁴² Dadrian and Akçam, *Judgement at Istanbul: The Armenian Genocide Trials*, 4, 17.

⁴⁴³ Liñán Lafuente, ‘Origen y Evolución Del Derecho Penal Internacional (I)’, 57. In some of his works T. Akçam refers to sixty-three while in others twenty-eight Court Martial Trials, as explained in Cassese, *International Criminal Law*, 85,

⁴⁴⁴ Dadrian and Akçam, *Judgement at Istanbul: The Armenian Genocide Trials*, 195–96.

three out of the eighteen death sentences were executed, and only few minor accused were brought to trial.⁴⁴⁵

The opposition to the conditions imposed by the Treaty of Sèvres, including the Istanbul trials, were led by the Turkish National Movement of Kemal Atatürk, and resulted in the so-called Turkish War of Independence against some of the Allied countries. The war ended with the 1923 Treaty of Lausanne that defined the borders of the modern Turkish Republic, and included an amnesty declaration for all crimes committed between 1914 and 1922. The Extraordinary Courts Martial ended their activities and those who were still serving their sentences were released from prison.

2.1.3 The Danzig case

The Permanent Court of International Justice (PCIJ), predecessor of the current International Court of Justice (ICJ), was established in 1920 to deal with contentious cases between States. However, despite not being a criminal court, it set an important precedent regarding the principle of legality. An advisory opinion of the Court in 1935 regarding the *Danzig* case is considered by some authors as the first relevant antecedent dealing expressly with the *nullum crimen* principle.⁴⁴⁶ The Court was asked to decide whether the new Criminal Code of the Free City of Danzig, that admitted the use of analogy, was in conformity with its Constitution.⁴⁴⁷ The international Court established:

“It is true that a criminal law does not always regulate all details. By employing a system of general definition, it sometimes leaves the judge not only to interpret it, but also to determine how to apply it. The question as to the point beyond which this method comes in conflict with the principle that fundamental

⁴⁴⁵ See full text of the Indictments and Verdicts in Dadrian and Akçam, 471–73.

⁴⁴⁶ Ward Ferdinandusse, ‘Direct Application of International Criminal Law in National Courts’ (Amsterdam, University of Amsterdam, 2005), 226; Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’, 89.

⁴⁴⁷ Criminal Code of the Free City of Danzig, Art. 1:

“Any person who commits an act which the law declares to be punishable or which is deserving of penalty according to the fundamental conceptions of a penal law and sound popular feeling, shall be punished. If there is no penal law directly covering an act, it shall be punished under the law of which the fundamental conception applies most nearly to the said act.”

The representative of the city of Danzig argued that what was intended was to replace formal justice with real justice, and that the maximum *nullum crimen sine lege*, *nulla poena sine lege*, should be reformulated as *nullum crimen sine poena*. As explained in Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’, 89.

rights may not be restricted except by law may not be easy to solve. But there are some cases in which the discretionary power left to the judge is too wide to allow of any doubt but that it exceeds these limits.”⁴⁴⁸

This decision should be understood in the context of the existing intense doctrinal debates between traditional legalism, and the new specific deterrence and social defence theories, already explained in Chapter 1.⁴⁴⁹ The Court continued its reasoning acknowledging the debate and considering that the issue of crime repression could be tackled from two perspectives: that of the individual and that of the community. Accordingly, the PICJ considered that “from the former standpoint, the object is to protect the individual against the State: this object finds its expression in the maxim *nulla poena sine lege*. From the second standpoint, the object is to protect the community against the criminal, the basic principle being the notion *nullum crimen sine poena*.”⁴⁵⁰

The Court found that the new criminal provisions, based on the second conception, were not consistent with the Constitution that was articulated based on the fundamental rights of the individual. Accordingly, such rights could be limited, but “(...) only in virtue of a law which must itself specify the conditions of such restriction, and, in particular, determine the limit beyond which an act can no longer be justified as an exercise of a fundamental liberty and becomes a punishable offence.”⁴⁵¹ Even if the Court did not precisely define the content of the principle of legality, a minimum general standard was established: “It must be possible for the individual to know, beforehand, whether his acts are lawful or liable to punishment.”⁴⁵²

⁴⁴⁸ PCIJ, *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, Advisory Opinion, Series A/B, No. 65, 4 December 1935, at 51, available at: https://www.icj-cij.org/public/files/permanent-court-of-international-justice/serie_AB/AB_65/01_Decrets-lois_dantzikois_Avis_consultatif.pdf

⁴⁴⁹ See above, Section 1.2.3.

⁴⁵⁰ PCIJ, *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, 56-57.

⁴⁵¹ Ibid., 57.

⁴⁵² Ibid., 57.

2.1.4 Further early attempts to establish international criminal justice

In the aftermath of the First World War, the Versailles and Sèvres criminal clauses did not constitute the only attempts to create some sort of international criminal justice system. Numerous efforts were made to establish international criminal institutions, though they all ended in failure. In 1920 the Advisory Committee of Jurists proposed to the League of Nations the creation of a Permanent Court of International Justice competent to judge crimes constituting a breach of international public order or going against the universal laws of nations.⁴⁵³ However, the Assembly of the League of Nations considered the proposal “premature” and rejected it.⁴⁵⁴ Subsequently, non-governmental organizations as the Inter-Parliamentary Union, or academic bodies as the International Law Association presented in 1925 and 1926 different drafts of statutes of international criminal courts.⁴⁵⁵ Similarly, the eminent scholars Quintiliano Saldaña and Vespasian V. Pella, considered by some as the founding fathers of international criminal law, presented in 1925 two drafts of international criminal codes that contemplated individual and State criminal responsibility, and the establishment of an international court.⁴⁵⁶

Another significant attempt to create a system of international criminal justice was directly motivated by the terrorist attack against Alexander, King of Yugoslavia, and the French Foreign Minister Louis Barthou in 1934 in Marseille. The League of Nations adopted three years later a Convention intending to unify legislations regarding terrorist offences, and to create an international criminal court to try such crimes.⁴⁵⁷ However, the Convention never entered into force due to the lack of ratifications and the outbreak of the Second World War.

Aware of the limitations of the League of Nations to prevent a new global armed conflict, France and the United States signed in 1928 the General Treaty of Paris for the Renunciation of War (better known as the Kellogg-Briand Pact).⁴⁵⁸

⁴⁵³ Cassese, *International Criminal Law*, 254.

⁴⁵⁴ As explained, with further references in Cassese, 255; Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’, 137.

⁴⁵⁵ See the text of the drafts statutes in Benjamin B. Ferencz, *An International Criminal Court. A Step Towards World Peace. A Documentary History and Analysis*, vol. 1 (London, Rome, New York: Oceana, 1980), 244, 252. Cited in Cassese, *International Criminal Law*, 255.

⁴⁵⁶ Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’, 136.

⁴⁵⁷ Cassese, *International Criminal Law*, 255; Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’, 137–38.

⁴⁵⁸ General Treaty for the Renunciation of War as an Instrument of national Policy (Kellogg-

Numerous States, including Germany, signed as well the Treaty. Its first article condemned “recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another”.⁴⁵⁹ Similarly, Article 2 established that the settlement of all disputes or conflicts among States “shall never be sought except by pacific means”.⁴⁶⁰ In brief, the Treaty prohibited illegal large-scale attacks carried out as an instrument of national policy, considering them as criminal acts of aggression.⁴⁶¹ The Pact did not prevent the rise of militarism and the Second World War but, as it will be analysed hereinafter, served as a legal basis for the Nuremberg and Tokyo Trials, mainly regarding crimes against peace.

Even if these attempts did not generally come to fruition, they showed an emerging social demand for an international justice system and for new ideas, principles and values transcending narrow nationalistic concerns.⁴⁶² However, the prevalence of State sovereignty concerns in the international community before World War II hindered their concrete materialization. In international law of the time individuals were not considered yet as right holders, but only as protected subjects based on their belonging to a certain minority or a vulnerable group.⁴⁶³ As it will be further explained, the progressive shift towards the recognitions of individuals as subjects of international law had significant and varied consequences, affecting as well the meaning and application of the principle of legality. Considered at the time as a principle of justice and a prerogative offered by the State to individuals, it has become today an individual right, limiting State sovereignty.⁴⁶⁴

Briand Pact), Paris, 27 August 1928, 94 LNTS 54, available at: <https://www.dipublico.org/100860/general-treaty-for-the-renunciation-of-war-kellogg-briand-pact/>.

⁴⁵⁹ Ibid., Art. 1.

⁴⁶⁰ Ibid., Art. 2.

⁴⁶¹ Cassese, *International Criminal Law*, 142. For a contrary opinion see Elena Maculán, ‘El Crimen de Agresión’, in *Derecho Penal Internacional*, ed. Alicia Gil Gil and Elena Maculan (Madrid, Spain: Dykinson, 2016), 418.

⁴⁶² Cassese, *International Criminal Law*, 255.

⁴⁶³ Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’, 138.

⁴⁶⁴ Héctor Olásolo, ‘El Principio Nullum Crimen Sine Iure En El Derecho Internacional Contemporáneo’, *Anuario Iberoamericano de Derecho Internacional Penal I* (2013): 22.

2.2 The post-World War II trials

After World War II the Allied Powers wanted to punish those responsible of the dreadful atrocities committed during the war, setting an example that would prevent their repetition in the future.⁴⁶⁵ International Military Tribunals were established in Nuremberg and Tokyo, and different domestic courts initiated as well multiple criminal proceedings. These post-war trials set the foundations of international criminal law, and their study is fundamental to understand the development and the actual rationales, content and scope of the principle of legality in international law.

2.2.1 Overview of the post-World War II trials

The Nuremberg Trials, together with the Tokyo Trials, constitute a landmark in the development of international criminal law, and they still greatly influence contemporary international criminal justice due to their legal, symbolic and moral legacy.⁴⁶⁶ The post-World War II trials consolidated the notion of individual criminal responsibility and overcame the previous exclusivity of collective liability for breaches of international law.⁴⁶⁷ This paradigm shift was expressed by the IMT establishing that “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.”⁴⁶⁸ For the first time international courts were effectively established with the aim of prosecuting international crimes committed by military leaders, prominent politicians and other civilians.⁴⁶⁹ The proceedings showed how effective international criminal justice can be when supported by political will and

⁴⁶⁵ As explained, together with the analysis of other explicit and implicit objectives, in Luc Reydam, Jed Odermatt, and Cedric Ryngaert, *International Prosecutors* (Oxford: Oxford University Press, 2012), 84–85.

⁴⁶⁶ Didier Rebut, *Droit Pénal International*, 2nd ed. (Paris: Dalloz, 2015), 539; Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge University Press, 2008), 152; Bert V. A. Röling, ‘The Nuremberg and the Tokyo Trials in Retrospect’, in *Perspectives on the Nuremberg Trial*, ed. Guénaél Mettraux (Oxford University Press, 2013), 467; Antonio Cassese, *International Criminal Law*, 3rd ed. (Oxford: Oxford University Press, 2013), 258.

⁴⁶⁷ Hans Kelsen, ‘Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?’, *The International Law Quarterly* 1, no. 2 (1947): 165; Rebut, *Droit Pénal International*, 539; Cassese, *International Criminal Law*, 258; M. Cherif Bassiouni, *Introduction Au Droit Pénal International* (Bruxelles: Bruylant, 2002), 42.

⁴⁶⁸ Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945–1 October 1946 (hereinafter IMT, Trial), vol.1, 223.

⁴⁶⁹ Cassese, *International Criminal Law*, 258.

enough resources, especially if compared with the failure of the international criminal proceedings after the First World War.⁴⁷⁰

The punishment of actions perpetrated in accordance with domestic law showed the rise of certain limits to the previous omnipotence of the State.⁴⁷¹ As well, it revealed the emergence of individual rights in the international arena beyond the limits of State sovereignty.⁴⁷² The Nuremberg and Tokyo trials confirmed the peculiarities of international prosecutions, which follow rules that may differ from those of domestic criminal law. This was particularly evident regarding the principle of legality. However, as it will be further analysed, such differences are progressively fading and a significant rapprochement between contemporary international criminal law and domestic criminal law can be observed.⁴⁷³

The post-World War II trials were, and still are, the object of many critics that could be summed up in two. Firstly, it is argued that the courts and the proceedings were not impartial, being in reality a sort of victor's justice.⁴⁷⁴ Secondly, it is claimed that the principle of legality was not respected, particularly regarding the non-retroactivity requirement.⁴⁷⁵ The London Agreement codified and made punishable for the first time the crimes against humanity and the crimes against peace.⁴⁷⁶ Whether such codification respected the principle of legality, crystalizing pre-existent international law or, on the contrary, created new law, is still a matter of debates and will be analysed hereinafter. However, the world public perception, then and now, is that the proceedings were "substantially fair and the outcome substantially just."⁴⁷⁷

2.2.1.1 The post-World War II trials and the principle of legality

The *nullum crimen* principle has evolved in international law from the doctrine of *substantive justice* that considered that the principle did not give rise to individual

⁴⁷⁰ Ibid., 257.

⁴⁷¹ Christian Tomuschat, 'The Legacy of Nuremberg', *Journal of International Criminal Justice* 4, no. 4 (1 September 2006): 838–40.

⁴⁷² Cassese, *International Criminal Law*, 87.

⁴⁷³ Rebut, *Droit Pénal International*, 525.

⁴⁷⁴ Tomuschat, 'The Legacy of Nuremberg', 832.

⁴⁷⁵ Cassese, *International Criminal Law*, 257; Rodrigo Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional' (Madrid, Spain, Universidad Carlos III de Madrid, 2015), 145.

⁴⁷⁶ Cassese, *International Criminal Law*, 258.

⁴⁷⁷ M. Cherif Bassiouni, 'The "Nuremberg Legacy"', in *Perspectives on the Nuremberg Trial*, ed. Guénaél Mettraux (Oxford: Oxford University Press, 2013), 586.

subjective rights nor could limit state sovereignty, to the doctrine of *strict legality*, though with some important qualifications.⁴⁷⁸ The trials in the aftermath of World War II are the best example of this initial conception of the legality principle. At the time it was understood as a prerogative offered by the State to individuals, bowing when in conflict with other principles, and therefore, it was not considered a principle that should always be respected in international law.

However, the visions on the principle were not unanimous and vigorous debates on the subject were reflected through the entire Nuremberg and Tokyo trials, from the London Conference until the reading of the judgements. In fact, claims based on the respect of the legality principle could be considered as the main defence of the accused, and subsequent critics of the trials are often related to the non-retroactivity rule. Some voices claimed for a stronger concept of legality, but in general post-war tribunals adopted a flexible interpretation of the principle. Anyhow, it should be noted that if a *strict* concept of legality had been applied, trials would have never been possible.

This way, post-war trials showed the debate between two conflicting positions regarding the principle of legality. On one hand, those who maintained that the trials respected the principle, either because the law applied already existed at the time of commission, or because the principle had to be reinterpreted in international law, having a different content than in domestic legal systems. On the other hand, those who considered that the trials infringed the principle, but justified that breach with different arguments, such as the inapplicability of the principle in international law or the prevalence of other interests over legality.⁴⁷⁹ This chapter will analyse the debates on legality assessing the different arguments and ideas raised at the different stages of the post-war trials.

2.2.1.2 Implementation: trials or summary executions

Already during World War II, the Allies publicly expressed their intention to punish those responsible of war crimes and any other atrocities committed by the Axis Powers. In fact, the punishment of Nazi war criminals became a major war objective, as reflected in several joint declarations issued throughout the conflict, as the 1942 St.

⁴⁷⁸ Héctor Olásolo, 'El Principio Nullum Crimen Sine Iure En El Derecho Internacional Contemporáneo', *Anuario Iberoamericano de Derecho Internacional Penal* I (2013): 22; Cassese, *International Criminal Law*, 24–25.

⁴⁷⁹ Manuel Ollé Sesé, 'Principios Generales Del Derecho Penal Internacional', in *Derecho Penal Internacional*, ed. Alicia Gil Gil and Elena Maculan (Madrid, Spain: Dykinson, 2016), 160; Reinhard Merkel, 'The Law of the Nuremberg Trial', in *Perspectives on the Nuremberg Trial*, ed. Guénaél Mettraux (Oxford: Oxford University Press, 2013), 568–69.

James Declaration, or the 1943 Moscow Declaration.⁴⁸⁰ Similarly, in the 1943 Cairo declaration, the governments of the United States, Great Britain and China expressed their intention to punish war crimes committed by Japan.⁴⁸¹

However, not everyone agreed on the way criminals should be punished, and some Allied leaders thought summary executions were the best solution. British Prime Minister Churchill supported the convenience of shooting main German leaders without trials.⁴⁸² Similarly, United States President Roosevelt shared this view, at least until September 1944.⁴⁸³ This option implied that war victors could freely deal with leaders of vanquished nations, placing little value to international laws and its constraints to state sovereignty. If no trial was to be set, no crimes had to be defined or proved, and of course no questions about the respect of the principle of legality had to be solved.

At the time many held that extrajudicial executions limited to top enemy leaders, and not to low-ranking officials, were legal under current international law. The issue was discussed at the International Military Tribunal for the Far East (hereinafter IMTFE or Tokyo Tribunal), and was used as an argument to justify the prosecution of Japanese leaders for crimes against peace, if it was to be considered that such crime was created *ex post facto*.⁴⁸⁴ Similarly, a IMTFE judge considered that any

⁴⁸⁰ Inter-Allied Declaration, *Punishment for War Crimes*, St. James Palace, London, 13 January 1942, available at: <https://nla.gov.au/nla.obj-648522340/view?partId=nla.obj-648522340#page/n2/mode/1up>; The United Kingdom, the United States and the Soviet Union, *Moscow Declaration on Atrocities*, 1 November 1943, available at: <https://www.docsteach.org/documents/document/moscow-declaration-atrocities>. For a summary of the St. James and the Moscow Declarations, as well as the St. Francisco Memorandum (*Memorandum of Proposals for the Prosecution and Punishment of Certain War Criminals and Other Offences*, 30 April 1945) as precursors of the London Conference, see Alfredo Liñán Lafuente, ‘Origen y Evolución Del Derecho Penal Internacional (I)’, in *Derecho Penal Internacional*, ed. Alicia Gil Gil and Elena Maculán (Madrid, Spain: Dykinson, 2016), 58–59; Thomas Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege* (Cham: Springer International Publishing, 2017), 7.

⁴⁸¹ The United States, the United Kingdom, and the Republic of China, *The Cairo Declaration*, 27 November 1943, available at: <https://digitalarchive.wilsoncenter.org/document/cairo-declaration>. As explained in Liñán Lafuente, ‘Origen y Evolución Del Derecho Penal Internacional (I)’, 63.

⁴⁸² In fact, Churchill had designed in 1943 a plan to create a list of about 50 to 100 leaders of Germany, Italy and Japan who, if captured by any member of the United Nations, could be summarily executed. As explained in Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 73.

⁴⁸³ Gallant, 73. For an analysis and explanation of the arguments raised by the different nations supporting trials or executions, see Bassiouni, ‘The “Nuremberg Legacy”’, 584–85.

⁴⁸⁴ *United States v. Araki*, Separate Opinion of Justice Bernard Victor Aloysius Röling, 12 November 1948, *The Tokyo Major War Crimes Trial: The Judgment, Separate Opinions*,

defendant's allegation regarding the lack of fairness of their trial could be overcome taking into account that providing a trial to the accused rather than opting for summary executions was "sufficient proof of the good will of the Allies".⁴⁸⁵ On the contrary, the IMTFE President seemed to consider that even before World War II executions without trials were contrary to international law.⁴⁸⁶

As war was approaching to an end, the desirability of trials progressively prevailed over summary executions. Opposition within his cabinet forced Roosevelt to support trials, as subsequently did as well the new president Truman. At a War Cabinet meeting on 3 May 1945 Churchill finally accepted American viewpoint. This change, together with the unmodified Soviet position favourable to the trials, made possible the International Conference on Military Trials, so-called the London Conference.⁴⁸⁷ In view of the alternative, the establishment of an international tribunal to prosecute war criminals can be considered itself as a victory of international criminal law and legality.

2.2.2 The Nuremberg Trial

The international proceedings set up to investigate and prosecute the atrocities committed by the Nazis constitute a landmark in the development of international criminal law, but as well of the international principle of legality. Different notions, conceptions and interpretations of the *nullum crimen* principle were confronted throughout the entire process, from the negotiations in the London Conference to the final judgment. Many debated issues have not found yet consensus solutions in current international doctrine, and some notions and arguments raised today in international tribunals echo those used in Nuremberg.⁴⁸⁸ Therefore, the different arguments and

Proceedings in Chambers, Appeals and Reviews of the International Military Tribunal for the Far East, 1948, Robert M.W. Kemper Collegium and Edwin Mellen Press 1998, (hereinafter IMTFE Records), vol. 109, 4, as analysed in Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 76.

⁴⁸⁵ Separate Opinion of Justice Henri Bernard, 12 November 1948, IMTFE Records, vol. 105, 2–3.

⁴⁸⁶ Separate Opinion of William Webb, President, 1 November 1948, IMTFE Records, vol. 109, 14.

⁴⁸⁷ For a detailed account on the evolution and diverse grounds of Allied evolving positions, see Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 73–87; Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 23–25.

⁴⁸⁸ Among others, see *Prosecutor v. Mitar Vasiljevic*, Judgment, ICTY Trial Ch. II, IT-98-32-T, 29 November 2002, para. 202, available at:

claims regarding legality employed in the different phases of the proceedings by the different parties will be carefully explained and analysed hereunder.⁴⁸⁹

2.2.2.1 The London Conference

Between June 26 and August 1 1945 the four legal teams representing the victorious Powers of Second World War (the United Kingdom, France, the United States and the Soviet Union) met in London to adopt an agreement that would establish the International Military Tribunal (IMT) for the prosecution of the main crimes committed during the war.⁴⁹⁰ The disappointment of the trials carried out after the First World War was very present for the delegations in London.⁴⁹¹ As expressed by Justice Jackson, head of the American negotiators and subsequently chief United States prosecutor, “(E)ither the victors must judge the vanquished or we must leave the defeated to judge themselves. After the first World War, we learned the futility of the latter course.”⁴⁹²

Questions regarding the principle of legality and non-retroactivity were at the centre of disagreements, debates and negotiations at the London Conferences. While France was particularly worried about the issue of *ex post facto* law creation, the United States, Great Britain and the Soviet Union did not show much concern about

<https://www.icty.org/x/cases/vasiljevic/tjug/en/vas021129.pdf>. Also see, the ECtHR’s *Kononov* case, analysed below, in Section 5.1.4.5. Concerning the codification of the Nuremberg Principles and their subsequent impact, see below, Section 3.2.1. For further information on the influence of the Nuremberg trials on the establishment of other international criminal courts, as well as on the development of the crime of aggression, with various references and examples, see Tomuschat, ‘The Legacy of Nuremberg’, 841–44.

⁴⁸⁹ The general term “Nuremberg Trials” refers to the proceedings brought before the IMT but as well some less known prosecutions under Control Council Law N° 10 carried out by each occupying Power in Germany against Nazi criminals. In this Section we refer exclusively to the proceedings before the IMT, and Section 2.2.4.1 will address the trials under Control Council Law N° 10.

⁴⁹⁰ The United Kingdom, France, the United States and the Soviet Union, *Agreement for the prosecution and punishment of the major war criminals of the European Axis* (“London Agreement”), 8 August 1945, 82 U.N.T.C. 280, available at: <https://ihl-databases.icrc.org/assets/treaties/350-IHL-49-EN.pdf>. The Charter of the International Military Tribunal (IMT) was included as an Annex to the Agreement.

⁴⁹¹ Liñán Lafuente, ‘Origen y Evolución Del Derecho Penal Internacional (I)’, 60.

⁴⁹² Robert H. Jackson, Chief of Counsel for the United States, *Opening statement to the International Military Tribunal*, 21 November 1945, available at: <https://www.roberthjackson.org/speech-and-writing/opening-statement-before-the-international-military-tribunal/>.

retroactivity.⁴⁹³ Different conceptions of the principle were reflected during the discussions regarding the problematic of *ex post facto* crime creation or definition, and about the nature and scope of legality at the international level. It was not settled if state sovereignty could be limited by the *nullum crimen* principle and therefore, the prohibition of retroactive laws should always be respected with no exceptions. Or, on the contrary, if the non-retroactivity rule was just a prerogative of the State that could be unapplied under certain circumstances or when in conflict with other principles.

It was also discussed whether the Powers participating in the Conference had the capacity to create or determine the content of international law, or if, on the contrary, it had to be left to the judges the identification of the international norms applicable and their content. Conversely, all negotiators agreed on their authority to create an international criminal tribunal and, contrary to the American position at the end of First World War, no one challenged the legality of an *ex post facto* tribunal with a new jurisdiction.⁴⁹⁴

A. General positions of the negotiating Powers

Hosting the Conference, the United Kingdom delegation chaired the negotiations and tried to narrow differences among the other three delegations facilitating agreements.⁴⁹⁵ However, the British representatives held their own positions regarding controversial issues as those related to the principle of legality. They supported American and Soviet views regarding the inclusion of crime definitions in the Statute, and the authority of negotiating Powers to determine the crimes to be prosecuted by the Court. Significantly, the British representative expressed: “I don’t want it to be left to the Tribunal to interpret what are the principles of international law that it should apply (...) It should not be left to the Tribunal to say what is or is not a violation of international law.”⁴⁹⁶

⁴⁹³ Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 23.

⁴⁹⁴ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 77.

⁴⁹⁵ For a detailed account of the views, discussions and drafts presented by the four delegations, see Gallant, 76–91.

⁴⁹⁶ Comment of Sir David Maxwell Fyfe, 23 July 1945, in Report of Robert H. Jackson United States Representative to the International Conference on Military Trials, (hereinafter Report of Jackson), London, 1945, U.S. Govt. Print. Off., 1949, 328, available at: <https://babel.hathitrust.org/cgi/pt?id=mdp.39015012136308&view=1up&seq=5>. Analysed in Gallant, 86–87.

The United States delegation considered essential to include in the Charter crime definitions binding the Tribunal. Particular importance was placed on the inclusion of a general characterization of crimes against peace reflecting a general prohibition of aggressive war. For Justice Jackson the respect of legality had more to do with the generality of criminal prohibitions than issues concerning retroactive laws.⁴⁹⁷ Moreover, the declaration of aggressive war as a crime was key since the illegality of the German aggression was the political and legal basis for the American entry into the war.⁴⁹⁸

The Soviet delegation had no problem with *ex post facto* rules, and considered that victorious nations had the power to create law, criminalize previous conducts and punish individuals from defeated countries. Law was understood as a tool serving political power. However, they did not agree on establishing a general definition of the crime of aggressive war. It has been argued that this position responded to the will to avoid reproaches for having invaded Poland and Finland.⁴⁹⁹

The French delegation defended a notion of legality much stricter than the other negotiators. As a fundamental principle of civil law countries, the principle of legality was deeply rooted in the French legal system and this was reflected in the legal approaches of French jurists. As it will be further analysed, the French Judge H. Donnedieu de Vabres was particularly sensitive to the defence objections grounded on alleged violations of the *nullum crimen* principle.⁵⁰⁰

However, even if being a civil law country upholding strict legality, the French delegation accepted during the negotiations a modulation of the principle in the international arena. For example, Professor André Gros, their spokesperson, recognized customary international law as a valid legal ground for criminal prosecutions despite in domestic law only statutory provisions were accepted. On the contrary, he refused establishing individual criminal responsibility for new crimes as aggression or conspiracy to commit aggressive war, since it would be based on *ex post facto* legislation.⁵⁰¹ In his view, before World War II aggressive war could only carry State

⁴⁹⁷ Gallant, 79.

⁴⁹⁸ Ibid., 78-79. For further information on the American position during the London Conference, see Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 23-24.

⁴⁹⁹ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 80.

⁵⁰⁰ Cassese, *International Criminal Law*, 25.

⁵⁰¹ Comments of Gros, in Report of Jackson, 295. As analysed in Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 82; Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 23-24.

responsibility, and even if it would be morally and politically desirable, establishing individual responsibility would not be consistent with current international law.⁵⁰² As well, the French delegation considered that it was up to the judges, and not to the negotiating delegations, to determine the relevant international law to be applied, to decide if the atrocities committed by the Axis countries were already criminal under the laws of the time, and if they could carry individual criminal responsibility.⁵⁰³

B. Crime definitions and *ex post facto* law creation

The decision of the negotiating Powers to include in the Statute of the Tribunal the definition of the crimes to be applied by the judges was considered by some as a violation of the principle of legality. It was argued that the Statute created new law, including definitions of crimes that did not exist in international law when the Second World War started. The discussion focused on whether war crimes, crimes against peace and crimes against humanity were punishable according to existing customary international law at the time of their commission.⁵⁰⁴

Regarding traditional war crimes (violations of the laws and customs of war), it was discussed if at the time of commission the 1907 Hague Convention and the 1929 Geneva Convention provided enough legal basis for the implementation of criminal prosecutions.⁵⁰⁵ Despite not all countries participating in World War II were part of these treaties, the Allies understood that the prohibition of war crimes was already an international customary law and therefore, their criminalization in the London Charter was not *ex post facto*.⁵⁰⁶

The definition of crimes against peace was one of the major issues of disagreement among the negotiating delegations for reasons that, as explained, went beyond strictly legal concerns. As explained, the prohibition of illegal large-scale attacks carried out as an instrument of national policy crystallized in the 1928 Kellogg-Briand Pact. However, neither the Pact nor other international instruments established

⁵⁰² Comments of Gros, in Report of Jackson, 297.

⁵⁰³ As comprehensively analysed, with further references, in Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 23–25; Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 82–83.

⁵⁰⁴ Ollé Sesé, ‘Principios Generales Del Derecho Penal Internacional’, 159–60.

⁵⁰⁵ 1907 Hague Convention (IV); ICRC, *Convention relative to the Treatment of Prisoners of War*, 27 July 1929, available at: <https://ihl-databases.icrc.org/en/ihl-treaties/gc-pow-1929>.

⁵⁰⁶ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 77–78.

a clear definition of the crime of aggression or considered recourse to war as a crime carrying individual responsibility.⁵⁰⁷ The French delegation argued that considering aggressive war as a crime carrying individual responsibility would be *ex post facto* legislation. On the contrary, the other delegations found that when World War II started international law already prohibited aggressive war, and therefore those responsible could be legally punished.⁵⁰⁸

Another important legal question was raised by the fact that many of the atrocities committed during the war could hardly be classified as traditional war crimes since some fundamental requirements of this crime were not met. War crimes were violations of the laws of war committed against the enemy's population. However, an important number of Nazis' victims were German citizens or stateless people.⁵⁰⁹ The possibility of applying a broad non-technical concept of war crimes was then considered, but some States opposed to such extension since it was not contemplated under international laws of the time.⁵¹⁰ Finally, the solution adopted in the Nuremberg Charter was the creation of a new category of crimes defined as crimes against humanity, using the terminology of the "Martens clause", included in the above-mentioned 1907 Hague Convention.⁵¹¹

⁵⁰⁷ Elena Maculán, 'El Crimen de Agresión', in *Derecho Penal Internacional*, ed. Alicia Gil Gil and Elena Maculan (Madrid, Spain: Dykinson, 2016), 417–18. However, the Article 113 of the Polish Criminal Code (1932) criminalized incitement to aggressive war under certain circumstances, as explained in Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 68.

⁵⁰⁸ The character of the prohibition of war in international law at the time is still not settled in legal literature. Some authors consider that recourse to war as an instrument of national policy could be considered as a criminal act of aggression. Cassese, *International Criminal Law*, 142. Others scholars maintain that at the time international law did not specifically refer to aggression nor considered it as a crime. Maculán, 'El Crimen de Agresión', 418. Despite being the international crime *par excellence*, implying a necessary violation of international peace, and being intrinsically linked to an inter-State conflict, the crime of aggression is the international crime that has found more difficulties to be consolidated as an autonomous criminal category. Only recently, a general agreement on its definition has been reached in the 2010 Kampala Review Conference on the Rome Statute. Maculán, 417–18. For further general information on the crime of aggression see Cassese, *International Criminal Law*, 136–46; Marko Milanovic, 'Aggression and Legality: Custom in Kampala', *Journal of International Criminal Justice* 10, no. 1 (2012): 165–88; Maculán, 'El Crimen de Agresión'.

⁵⁰⁹ For further elements hindering the classification of Nazis atrocities as war crimes, see Cassese, *International Criminal Law*, 86.

⁵¹⁰ Alicia Gil Gil, 'Los Crímenes Contra La Humanidad', in *Derecho Penal Internacional*, ed. Alicia Gil Gil and Elena Maculán (Madrid, Spain: Dykinson, 2016), 369–70.

⁵¹¹ See footnote 412. For an analysis of the origins and evolution of the crimes against humanity see, among others, Antonio Cassese, *International Criminal Law*, 3rd ed. (Oxford: Oxford

It is significant that none of the negotiators raised concerns about the prosecution of inhuman acts not fitting into the category of war crimes. Even the French delegation, the most concerned about the principle of legality, considered undeniable that the atrocities committed by a State against its own citizens were criminal violations of international law.⁵¹² It was argued as well that most of the individual acts underlying the crimes against humanity, as murders or tortures, were generally forbidden at the time of commission by domestic criminal laws. This previous criminalization of the conducts would render prosecutions compatible with non-retroactivity rule.⁵¹³ While French and British prosecutors argued that the punishability of crimes against humanity was a general principle of law, some authors considered it an example of *ex post facto* law application.⁵¹⁴ The text of the Statute finally included the crimes against humanity but it required a connection with the crimes against peace or war crimes.⁵¹⁵

C. A statute to define jurisdiction or substantive applicable law

Disagreement also emerged regarding the role and the competences of the London Conference itself, and whether the negotiating Powers had the authority to determine the content of international law. It was not settled if the Statute should merely determine the subject matter under the jurisdiction of the Tribunal, or if it should include the definition of the crimes to be prosecuted. In particular, it was debated if the Conference could establish that aggressive war and conspiracy to wage

University Press, 2013), 84–90; Capellà, *La tipificación internacional de los crímenes contra la humanidad*; Bassiouni, *Crimes Against Humanity in International Criminal Law*.

⁵¹² The French position was somehow contradictory since it considered aggressive war as *ex post facto*, but at the same time it accepted without hesitation the prosecution of conducts not fitting the category of war crimes and that sometimes were not even criminal under the laws of the place of commission. Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 86. Comment of Gros, Minutes of Conference Session, 23 and 24 July 1945, in Report of Jackson, 328, 334–35 and 360.

⁵¹³ This argument has been subsequently used by some domestic and international courts to try to reconcile the conflicting demands of justice and the requirements associated to the legality principle, as explained above, in Section 7.1.4.

⁵¹⁴ Cassese, *International Criminal Law*, 87; Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 126.

⁵¹⁵ The connection of crimes against humanity with a war-like situation has progressively disappeared and today it constitutes an independent criminal offence. For a comprehensive analysis of the origins, evolution and the actual notion of the crimes against humanity, see Cassese, *International Criminal Law*, 84–108; Gil Gil, ‘Los Crímenes Contra La Humanidad’, 369–88.

aggressive war was a crime under international law, or on the contrary, it was up to the future Tribunal to decide.

While the American, Soviet, and British delegations defended their plenary powers to create or define crimes, the French delegation considered that it was not up to the negotiators but to impartial judges to determine the content of international law.⁵¹⁶ Professor Gros believed that the Charter should only define the subject matter under the jurisdiction of the Tribunal, but not the definitions of the crimes, assuring this way the respect of the legality principle. In other words, according to the French representative, it should be left to the judges to decide the substantive laws to be applied and to determine if the conducts were criminal at the time they were committed.⁵¹⁷ This idea was used as well by some judges at the Tokyo Tribunal, understanding the IMTFE Charter as merely jurisdictional.⁵¹⁸ The French position, restricting the substantive law to be applied by the Tribunal to pre-existing international norms, reappeared many years later in the International Criminal Tribunals for the Former Yugoslavia and Rwanda, and has become the rule in modern international courts.⁵¹⁹ The French delegation also argued that if the determination of the applicable law was left to the judges, in the future the outcomes of the trial would not be challenged, or considered biased or predetermined.⁵²⁰

D. Individual criminal responsibility

As already examined, the notion of individual criminal responsibility for breaches of international law was not unknown at the time in the international community. Violations of the laws and customs of war committed during the First World War had been already tried in domestic military and civil courts, resulting in some convictions.⁵²¹ As well, during World War II the United Kingdom, the Soviet Union and the United States accepted that individuals could be prosecuted and

⁵¹⁶ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 76–87.

⁵¹⁷ Comments of Gros, Minutes of Conference Session 25 July 1945, in Report of Jackson, 377–78.

⁵¹⁸ See Separate Opinion of Bernard Victor Aloysius Röling, IMTFE Records, vol. 109, 5; Dissenting Opinion of Henri Bernard, IMTFE Records, vol. 105, 9-10; Dissenting Opinion of Radhabinod Pal, IMTFE Records, vol. 105, 33-34, all interpreting IMTFE Charter Art. 5. Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 89.

⁵¹⁹ Gallant, 84. Also see below, Section 4.1.2 and Section 6.3.1.

⁵²⁰ Analysed in Gallant, 88.

⁵²¹ See above, Section 2.1.

punished if they had committed war crimes, and in fact, some domestic trials were held during the conflict to try enemies for violations of the international laws and customs of war.⁵²²

Before and during World War II, practice and *opinio iuris* showed that, individual criminal responsibility could arise, at least from violations of the laws and customs of war. In fact, war crimes had been considered customary international law entailing both national and international individual criminal liability.⁵²³ In this vein, for the delegations in the London Conference the prosecution of individuals accused of war crimes did not raise any issue regarding the legality principle. However, the questions appeared regarding crimes against humanity and the crime of aggression or conspiracy to wage aggressive war since it was uncertain if before World War II these crimes could already entail individual responsibility.

2.2.2.2 The London Charter

On 8 August 1945 the United Kingdom, France, the United States and the Soviet Union signed the “Agreement for the prosecution and punishment of the major war criminals of the European Axis”, also known as the London Agreement. The Charter of the IMT was included as an Annex to the Agreement, and it regulated the Tribunal’s functioning and jurisdiction, and determined that one judge from each negotiating Power would compose it.⁵²⁴ The deep disagreements regarding the principle of legality among the negotiating delegations at the London Conference was reflected in the Charter. As an agreement could not be reached the wording of the IMT Statue was deliberately ambiguous regarding certain issues, as the status, nature and scope of the *nullum crimen* principle.⁵²⁵

⁵²² For further information on these domestic prosecutions during World War II, see Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 69–72.

⁵²³ In order to investigate the atrocities committed by the Axis powers, the Allies established during the war the United Nations War Crimes Commission (UNWCC). The Commission recognised individual criminal responsibility for war crimes. However, the possibility to extend such responsibility to other international crimes remained extremely controversial. Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 7; Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge: Cambridge University Press, 2008), 70. For further information on the UNWCC, see Leo Gross, ‘History of the United Nations War Crimes Commission and the Development of the Laws of War’, *American Journal of International Law* 44, no. 2 (1950): 431–34.

⁵²⁴ IMT Charter, Art. 2.

⁵²⁵ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 91.

A. The crimes

The IMT Charter did not only indicate the subject matter of jurisdiction of the Court, but as well it established a definition of the crimes. This way, the views of the United States, the Soviet Union and the United Kingdom finally prevailed over French arguments. In addition to the numerical minority, the French delegation was in a weak position during the negotiations in London since it was the only government that did not remain in power during the war. However, the final text was ambiguous enough to allow different interpretations and to be accepted by all delegations.⁵²⁶ This way, Article 6 of the Charter established that the Tribunal had the power to try and punish those who committed any of the following crimes:

“(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 labour or for any other purpose of civilian population 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.”⁵²⁷

B. Jurisdiction or substantive applicable law

However, the definition of the crimes was preceded by an ambiguous *chapeau* or introductory paragraph that could leave space for different interpretations.

⁵²⁶ For an analysis of the negotiations of the wording of Art. 6, the different previous drafts and possible interpretations of the final text, see Gallant, 87–91.

⁵²⁷ IMT Charter, Art. 6.

“The Tribunal (...) shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes. The following acts, or any of them are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:”⁵²⁸

This paragraph could be interpreted as binding the Court to consider the defined crimes as punishable and carrying individual criminal responsibility. Nevertheless, this *chapeau* left as well place for an interpretation in line with the French position, considering that the Article defines the crimes within the jurisdiction of the Tribunal, but leaves the judges decide the substantive international criminal laws to be applied, and which conducts were already punishable under the international law of the time. In fact, this interpretative option was later upheld by some judges at the Tokyo Trial when interpreting an almost identical Article of the IMTFE Charter and considered it as merely jurisdictional.⁵²⁹

The ambiguity of this paragraph reflects a compromise solution to the deep disagreements among the delegations in London. The ambivalence of the text allowed different interpretations, as it was subsequently seen during the proceedings, but also enable the defence to build powerful arguments on it.

2.2.2.3 The trial

The trial took place in Nuremberg (Germany) and lasted nearly one year, between 20 November 1945 and 1 October 1946. The diverse notions of the legality principle underpinned the main arguments raised during the proceedings. In fact, the disagreements expressed at the London Conference continued during the trial, but the defence counsels and the prosecutors presented as well some new ideas and arguments.

A. The arguments of the prosecutors

The prosecutors, representing the Powers present at the London Conference, did not vary much the arguments raised during the negotiations of the Statute, but it is worth mentioning some new contributions that significantly enriched the discussions.

⁵²⁸ Ibid.

⁵²⁹ See Separate Opinion of Bernard Victor Aloysius Röling, IMTFE Records, vol. 109, 5; Dissenting Opinion of Henri Bernard, IMTFE Records, vol. 105, 9-10; Dissenting Opinion of Radhabinod Pal, IMTFE Records, vol. 105, 33-34, all interpreting IMTFE Charter Art. 5, as explained in Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 89.

The arguments of the United States prosecutor Justice Jackson on the binding nature of the Charter and on the status of the crimes were particularly influential for the final judgment. He considered that the Charter was not merely jurisdictional but that it constituted the substantive law to be applied by the Court, particularly regarding the crimes defined on it. As well, Justice Jackson defended that before being committed by the Nazis, such crimes already existed in international law carrying individual responsibility.⁵³⁰ While the British prosecutor upheld Jackson's views, the French prosecutor, François de Menthon, raised significantly different arguments.

Concerned about the possibility of the defences raising arguments on the *ex post facto* nature of the crimes against humanity, he tried to prove that all conducts underlying this legal classification were already considered criminal at the time of commission, either under international or domestic laws. Therefore, he tried to demonstrate that the accused's behaviours either fitted the already existent definition of war crimes or any criminal definition provided in the domestic laws of place of commission, including those in German domestic legislation.⁵³¹ Regarding the binding nature of the Charter, the French prosecutor argued that the text only established the matters under the jurisdiction of the Court, and that it was up to the judges to determine the applicable law and to decide which conducts were already criminal under international law.⁵³²

For its part, the Soviet prosecutor argued that the Charter was the substantive law to be applied by the Court, and since the principle of legality and non-retroactivity was not included in the text, it should not be a concern or a limitation for the Tribunal.⁵³³

Significantly, the British prosecutor added an argument that will reappear later on, considering the re-characterization as international crimes of offences already existent in domestic laws at the time of commission.⁵³⁴ To support the prosecutability of aggressive war he argued as well that, when violating a treaty, there was “no difference between illegality and criminality in a breach of law involving the deaths of millions and a direct attack on the very foundations of civilized life.”⁵³⁵

⁵³⁰ Jackson, Opening, IMT, Trial, vol. 2, 143–47.

⁵³¹ De Menthon, Opening, IMT, Trial, vol. 3, 128.

⁵³² Ibid., vol. 5, 370.

⁵³³ Roman Andreevich Rudenko, Opening, IMT, Trial, vol. 7, 147–48.

⁵³⁴ Shawcross, Closing, IMT, Trial, vol. 19, 448.

⁵³⁵ Ibid., 460.

B. The defence arguments

The above-mentioned ambiguities of the Charter, open to diverse interpretations, did not go unnoticed by the defence counsels. The respect of the principle of legality and its guarantees framed the main arguments of many accused. However, the claims were adapted to the specific circumstances of each defendant, resulting in some matching legal views, but as well in disagreements and contradictions among the defences. Hereinafter, a short summary of the main arguments related to principle of legality is provided.⁵³⁶ Anyhow, it was somehow ironic that Nazi criminals used the *nullum crimen sine lege* principle as a defence when it was widely known that the Nazi regime had rejected such principle, replacing it by the notion *nullum crimen sine poena* (no crime without punishment).⁵³⁷

a. Applicability of *nullum crimen* and the Charter as merely jurisdictional

The above-mentioned ambiguous Article 6 of the Charter could be interpreted as providing the substantive law to be applied by the Court, or as merely jurisdictional, and therefore leaving to the judges the power to determine the relevant applicable law. The defence based on this later interpretative option many of their claims, arguing that only the crimes established in the Charter that already existed in international law could be applied to the defendants.⁵³⁸ Since Article 6 could be consistently interpreted in two different manners it was argued that the Tribunal should take into account the principle *in dubio pro reo*, and embrace the less prejudicial option for the defendant. This interpretative preference was supported as well by the fact that, even if both interpretations were possible, only one was consistent with a general principle of law as the *nullum crimen* rule.⁵³⁹

Some defences claimed that even if the principle of legality was not included in the Charter, the prohibition of retroactive application of criminal laws was at the time both a customary international law and a general principle of law. Therefore, the Court was bound to the principle and had to accept it as an individual right of the

⁵³⁶ The defense counsels raised numerous claims, but only those related to the principle of legality will be analyzed here. Among other arguments it can be highlighted the defense challenge of the trials' legitimacy, considering that they constituted victor's justice since the Tribunal was exclusively composed by jurists from the Allied Powers. Motion adopted by All Defense Counsel, 19 November 1945, IMT, Trial, vol. 1, 169–70.

⁵³⁷ Cassese, *International Criminal Law*, 54.

⁵³⁸ Otto Stahmer, Argument, IMT, Trial, vol. 17, 498, 507.

⁵³⁹ *Ibid.*, 507, 512.

defendants.⁵⁴⁰ It seems that the judges partially accepted this claim since, even if not included in the Charter as a right of the accused, they accepted hearing arguments based on the *nullum crimen* principle. This represented a breakthrough to recognize the principle as a substantive individual right in international law and showed the importance already granted to the principle.⁵⁴¹

A defence counsel raised as well an argument on foreseeability arguing that the Court should evaluate if at the time of commission, the defendants could have been aware of the illegality of their acts and the criminal consequences they could carry. Awareness, or at least the possibility to know the illegality and consequences of an act, was a basic principle of criminal law that could not be ignored by the Court, and given the characteristics of international law at the time, a requirement that could hardly be met, particularly regarding some crimes under the jurisdiction of the Court.⁵⁴²

b. Individual criminal responsibility, lex praevia, lex certa and nulla poena

Arguments regarding the principle of legality were mainly raised concerning crimes against peace. The defences claimed that when World War II started, aggressive war and conspiracy to wage could be considered internationally illegal but not criminal and therefore, it could not entail individual criminal responsibility. A treaty violation could not *ipso iure* be a crime. Consequently, it was argued that the London Conference had created an *ex post facto* crime.⁵⁴³ Surprisingly, very few counsels raised similar arguments regarding war crimes and crimes against humanity, and in fact, many seemed to tacitly accept the legality of prosecuting such crimes.⁵⁴⁴ This probably

⁵⁴⁰ As explained in Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 24; Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 101.

⁵⁴¹ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 100.

⁵⁴² Hermann Jahrreiss, Legal Argument, IMT, Trial, vol. 17, 460; Horn, Argument, IMT, Trial, vol. 17, 600–03. As analysed in Gallant, 102, 108.

⁵⁴³ Motion Adopted by All Defense Counsel, 19 November 1945, IMT, Trial, vol. 1, 168–70; Walter Siemers, Argument, IMT, Trial, vol. 18, 372 and 375.

⁵⁴⁴ Otto Nelte, Argument for Keitel, IMT, Trial, vol. 18, 3–5, 15–23, 31–33, 38–40; Kurt Kauffmann, Argument for Kaltenbrunner, IMT, Trial, vol. 18, 40, 68; Siemers, Argument for Raeder, IMT, Trial, vol. 18, 424; Sauter, for von Schirach, IMT, Trial, vol. 18, 450–51; Martin Horn, Argument for von Ribbentrop, IMT, Trial, vol. 17 555, 588–89. As analyse, referring to particular crimes in Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 105.

happened because the defendants felt that the offences underlying crimes against humanity were already prohibited by national criminal laws.⁵⁴⁵

In addition to the argument that international instruments did not bind individuals but States, some defences claimed that the principle of legality was infringed since such instruments did not provide a sufficient general, clear and specific definition of the crimes.⁵⁴⁶ In the same vein, refuting the French prosecutor argument based on the pre-existent prohibition of the conducts in domestic laws, some defence counsels claimed that the accused were tried based on international and not national laws. They claimed that even if a conduct was illegal under domestic laws, if someone was to be condemned based on international law, the behaviour had to be considered criminal as well in the international legal system at the moment of commission. Accordingly, it was argued the principle of legality requires the pre-existence of the specific norm grounding the conviction.⁵⁴⁷

The defence raised as well arguments regarding the *nulla poena* principle. They claimed that a basic element of legality was that punishments should be established and defined by the relevant applicable law at the time of commission. Therefore, the Tribunal should only apply penalties provided by international law when the crimes were committed.⁵⁴⁸ Obviously, before World War II international criminal law was an embryonic legal system lacking precise punishments associated to criminal conducts.

2.2.2.4 The judgment of the International Military Tribunal

The sentences issued by the Nuremberg Tribunal constitute one of the most relevant legal documents of modern history. The judgment of the Court was read on 1 October 1946. Out of the twenty-two accused, twelve were sentenced to death by hanging, and seven were condemned to different sentences of deprivation of liberty ranging from ten to twenty years. The remaining three accused were acquitted. Despite the main issues concerning the principle of legality were ruled by unanimity, behind the sometimes-ambiguous wording of the sentences deep theoretical disagreements can be

⁵⁴⁵ Cassese, *International Criminal Law*, 87; Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 24.

⁵⁴⁶ Alfred Seidl, Argument IMT, Trial, vol. 18, 144, relying on the Hague Convention (N° IV) Art. 3, as explained in Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 106.

⁵⁴⁷ Otto Kranzbuhler, Argument, IMT, Trial, vol. 18, 346.

⁵⁴⁸ Stahmer, Argument, IMT, Trial, vol. 17, 496 and 505; Servatius, Argument, IMT, Trial, vol. 18, 469–70.

noticed.⁵⁴⁹ The debates and different views present at the London Conference reappeared during the deliberations of the Tribunal and despite reaching a general agreement for the main text, the four judges hold significantly different positions regarding legality and never found a true theoretical consensus.⁵⁵⁰

This way, the position of the Tribunal regarding the principle of legality and *ex post facto* laws was rather unclear and vague. The Tribunal expressed a twofold reasoning, maintaining as the main argument that the victorious Powers had the authority to establish a tribunal and to create substantive criminal law without limitations, but at the same time claiming that the Charter did not create new law since the codified crimes already existed in international law.⁵⁵¹ While maintaining that the *nullum crimen* principle could not be considered a restraint of state sovereignty in international law, the judges also tried to demonstrate that the judgments were not based on crimes created *ex post facto*. Thus, the sentences were legally grounded on both the Charter and customary international law.⁵⁵²

A. The legality principle as a principle of justice

The Tribunal adopted the American, British and Soviet arguments on the authority of victors to define crimes as a matter of national sovereignty, without relying on customary international law:

“The making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world.”⁵⁵³

⁵⁴⁹ The Soviet judge issued dissenting opinions regarding the three acquittals, the imposition of prison and not death sentence to Rudolf Hess, and the failure to consider the criminal nature of three Nazi organizations. Dissenting Opinions available at: <http://www.derechos.org/nizkor/nuremberg/judgment/>. As Analysed in Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 7; Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 111, 126.

⁵⁵⁰ An account of the internal debates of the Tribunal and the opinions and arguments raised by the judges, in Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 126–29.

⁵⁵¹ See Nuremberg Judgment, IMT, Trial, vol. 1, 218, as analysed in Gallant, 111; Olásolo, ‘El Principio Nullum Crimen Sine Iure En El Derecho Internacional Contemporáneo’, 22; Ollé Sesé, ‘Principios Generales Del Derecho Penal Internacional’, 160.

⁵⁵² Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 126.

⁵⁵³ Nuremberg Judgment, IMT, Trial, vol. 1, 218.

“The Charter makes the planning or waging of a war of aggression or a war in violation of international treaties a crime; and it therefore not strictly necessary to consider whether and to what extent aggressive war was a crime before the execution of the London Agreement.”⁵⁵⁴

In this context, the *nullum crimen* principle could not be understood as limiting the legislative rights of the victorious countries, but as a principle of justice that could be legitimately ignored by the sovereign will of States.⁵⁵⁵ However, the position of the Tribunal regarding the nature of the principle of legality was unclear and even caused some discrepancies between the English and the French text of the judgement. In the English version, it is stated that “the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but in general a principle of justice”, while the French text established that “Nullum crimen sine lege *ne limite pas la souveraineté des États; elle ne formule qu’une règle généralement suivie*”.⁵⁵⁶ Moreover, French text does not include the following phrase that can be found in the English version: “On this view of the case alone, it would appear that the maxim has no application to the present facts.”⁵⁵⁷

The Tribunal considered that the principle of legality should be understood as a “principle of justice” because conducts contrary to international law, due to its gravity, could not go unpunished.⁵⁵⁸ The IMT defined as well the content of the principle considering that it did not require precise legal definitions of the crimes, but only that the perpetrators knew their existence and were aware that the conducts were prohibited. The Judge Donnadiu de Vabres made this position of the Tribunal explicit on several occasions arguing that the application of the *nullum crimen* rule in international law had a flexible nature due to its customary character.⁵⁵⁹ Once this set, the Tribunal proceeded to prove that the crimes defined in the Charter were already

⁵⁵⁴ Ibid., 219.

⁵⁵⁵ Olásolo, ‘El Principio Nullum Crimen Sine Iure En El Derecho Internacional Contemporáneo’, 22.

⁵⁵⁶ Nuremberg Judgment, IMT, Trial, vol. 1, 231 (French version). Cited and explained in H. Donnadiu de Vabres, ‘Le Procès de Nuremberg Devant Les Principes Modernes Du Droit Pénal International (Volume 70)’, *Collected Courses of the Hague Academy of International Law* 70 (5 January 1947): 503.

⁵⁵⁷ Nuremberg Judgment, IMT, Trial, vol. 1, 219, in the English text, as compared in Antonio Cassese, ‘Crimes Against Humanity: Comments on Some Problematical Aspects’, in *The Human Dimension of International Law: Selected Papers of Antonio Cassese*, ed. Antonio Cassese, Paola Gaeta, and Salvatore Zappalà (Oxford University Press, 2008), 461.

⁵⁵⁸ Ollé Sesé, ‘Principios Generales Del Derecho Penal Internacional’, 160.

⁵⁵⁹ Rebut, *Droit Pénal International*, 557.

prohibited by existing international law, and that the accused were aware of this prohibition.

B. Individual criminal responsibility and *ex post facto* laws

Despite accepting that the authority of victorious Powers could not be restrained by the principle of legality, the Tribunal addressed the defence objections regarding *ex post facto* laws. The judges argued that the Charter only incorporated crimes already existent in international law before World War II.⁵⁶⁰

“The Charter is not an arbitrary exercise of power on the part of the victorious Nations, but (...) the expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law.”⁵⁶¹

The Tribunal only addressed the problematic of establishing individual criminal responsibility and the *ex post facto* issue regarding war crimes and crimes against peace, but not concerning crimes against humanity.

The IMT considered that before War World II the laws of nations and customary international law contemplated individual criminal responsibility for war crimes. The judges relied on international instruments as the Treaty of Versailles that contemplated the prosecution of individuals who had violated the laws and customs of war.⁵⁶² The Tribunal also referred domestic legislations as that of the United States providing for individual duties and obligations under international laws of warfare.⁵⁶³

Individual responsibility for crimes against peace was one of the most controversial issues regarding legality. The Tribunal maintained that aggressive war was a crime before World War II, relying on different international instruments as the Treaty of Versailles or the Kellogg-Briand Pact.⁵⁶⁴ Referring to the later, and to justify the establishment of individual responsibility for such crimes, the Tribunal argued:

⁵⁶⁰ The references in the judgements to the pre-existence of the crimes in international law may have been the minimum requirement of the French judge Gros to condemn defendants, as explained in Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 125.

⁵⁶¹ Nuremberg Judgment, IMT, Trial, vol. 1, 218.

⁵⁶² Treaty of Versailles, Art. 228, discussed in Nuremberg Judgment, IMT, Trial, vol. 1, 222–23.

⁵⁶³ Nuremberg Judgment, IMT, Trial, vol. 1, 223.

⁵⁶⁴ Ibid., 216–18, 219–23, 238–39, 253. As Gallant points out, the Treaty of Versailles was the only one really contemplating individual criminal responsibility for planning or waging aggressive war. Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 115.

“(...) the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing.”⁵⁶⁵

At the same time, the Tribunal controversially accepted the transformation of wrongful acts into crimes. It was argued that since the accused knew that crimes against peace were morally wrong, it was not unjust to condemn them, not relying on the criminal nature of the conducts but on their wrongfulness. The Tribunal established regarding a Nazi criminal that “far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.”⁵⁶⁶

Despite conviction for crimes against humanity was one of the most challenging issues regarding legality, the Tribunal did not examine it in detail. It has been argued that this lack of consideration was due to the little attention paid to the question by the defence counsels, but as well due to the uncertain existence of crimes against humanity before World War II. For crimes not fitting into the classical category of war crimes, the IMT applied the classification of crimes against humanity. However, no previous source of law was cited nor it was affirmed that it existed as an independent crime before the war.⁵⁶⁷ The Tribunal only affirmed that the inhumane acts violated Article 6 of the Charter in connection with war crimes or the crime of aggression.⁵⁶⁸

This way, and due to the discussed existence of crimes against humanity before World War II, the Tribunal tried to avoid convictions solely grounded on such offense. In fact, most of the condemned for crimes against humanity were as well convicted for war crimes. There were only two exceptions, but the Tribunal considered that the conducts were also connected with war crimes.⁵⁶⁹

The IMT did not state that the crimes against humanity existed as an independent crime before the war, nor tried to justify that convictions for such crime respected the *nullum crimen* principle.⁵⁷⁰ The Tribunal did not make any comments

⁵⁶⁵ Nuremberg Judgment, IMT, Trial, vol. 1, 221.

⁵⁶⁶ Ibid., 219.

⁵⁶⁷ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 121.

⁵⁶⁸ See Nuremberg Judgment, IMT, Trial, vol. 1, 254-55 and 304.

⁵⁶⁹ Ibid., 304.

⁵⁷⁰ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 125.

either regarding the fact that the individual conducts were already considered criminal under the domestic laws of the place of commission.

2.2.2.5 General comments and critics to the Nuremberg Trial

The Nuremberg Trials are probably one of the most commented and analysed events in modern history, and the principle of legality is at the centre of most debates. The discussions and discrepancies regarding the *nullum crimen* principle among the representatives at the London Conference and between the IMT judges were also present in the academia. Scholars of then and now have expressed different opinions on the issue, providing additional arguments to the debate that would be explained hereinafter.

Two general conflicting positions can be distinguished. On one hand, those who considered that the principle of legality was violated, and among them, those who justified this violation with different arguments, such as the inapplicability of the principle in international criminal law or the preference of other prevailing interests over the principle of legality. On the other hand, those who argued that the legality principle was not infringed, either because the conducts were already criminalized at the time of the facts, or because the principle had to be reinterpreted in international law.⁵⁷¹

A. The judgment violated the principle of legality

Some scholars as Hans Kelsen recognised that the principle of legality had not always been respected by the IMT, especially concerning the non-retroactivity rule. Regarding individual criminal responsibility for crimes against peace, he affirmed that “the rules created by this Treaty and applied by the Nuremberg Tribunal (...) represent certainly a new law”.⁵⁷² This way, he considered, contrary to the opinion of the IMT, that starting World War II was an illegal conduct according to international law of the time, but that it did not constitute a crime.⁵⁷³ Cassese, Bassiouni or Gallant, among other scholars, agree with Kelsen and consider uncertain that aggressive war or war in

⁵⁷¹ Ollé Sesé, ‘Principios Generales Del Derecho Penal Internacional’, 160; Merkel, ‘The Law of the Nuremberg Trial’, 568–69.

⁵⁷² Kelsen, ‘Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?’, 155.

⁵⁷³ Ibid., 157–61.

breach of treaties could constitute before World War II an international crime carrying individual criminal responsibility.⁵⁷⁴

Similarly, regarding crimes against humanity, some commentators consider that Article 6 of the IMT Charter created new law.⁵⁷⁵ It can be argued that convictions for crimes against humanity respected the principle of legality since the atrocities committed outside Germany, or against non-Germans in Germany, constituted war crimes in international law before World War II. However, it is more difficult to reach the same conclusion regarding facts strictly internal to Germany, as the crimes committed by the Nazis against German citizens.⁵⁷⁶ According to Cassese, the novelty of this crime could explain its limitations, requiring a connection with war crimes or crimes against peace, but as well it would justify the reticence of the IMT to apply this offence.⁵⁷⁷

B. The violation of the principle of legality was justified

Certain writers reproach the Nuremberg Tribunal the lack of clarity and courage to openly acknowledge and to justify the breach of the non-retroactivity rule, and consider that there were enough reasons and legal arguments to do so.⁵⁷⁸

⁵⁷⁴ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 115; Bassiouni, 'The "Nuremberg Legacy"', 588; Antonio Cassese et al., *International Criminal Law: Cases and Commentary* (Oxford: Oxford University Press, 2011), 54; Maculán, 'El Crimen de Agresión', 418; Tomuschat, 'The Legacy of Nuremberg', 832.

⁵⁷⁵ Cassese, *International Criminal Law*, 87; Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 126; Rebut, *Droit Pénal International*, 550; Sévane Garibian, 'Crimes against Humanity and International Legality in Legal Theory after Nuremberg', *Journal of Genocide Research* 9, no. 1 (2007): 94.

⁵⁷⁶ Rebut, *Droit Pénal International*, 550; Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 131.

⁵⁷⁷ As explained, the *ex post facto* issue was addressed by the Tribunal only regarding crimes against peace, but not crimes against humanity, and the Court tried to avoid convictions grounded solely on such offense, linking it always to other crimes. The German defence counsel, when arguing against the retroactive application of the law, did not refer to crimes against humanity, what could explain as well the silence of the Tribunal on the issue. Cassese, *International Criminal Law*, 87.

⁵⁷⁸ Merkel, 'The Law of the Nuremberg Trial', 568–69.

a. *The principle of legality did not exist in international law at the time*

Kelsen, among other commentators, justified the application of *ex post facto* laws arguing that at the time no rule of international customary law prohibited retroactive international laws.⁵⁷⁹ Regarding the crime of aggression, Kelsen considered that according to international law of the time triggering World War II was illegal but not criminal.⁵⁸⁰ He believed that the non-retroactivity rule exclusively existed in domestic legal systems, but not in international law. Therefore, an international treaty could retroactively establish individual criminal responsibility for conducts that at the time of commission were illegal or morally wrong, but that did not constitute a crime.⁵⁸¹

b. *Legality in conflict with other principles*

It was also claimed that the principle of legality, as any other legal principle, is not absolute and can be modulated or even waived in certain and exceptional circumstances. Consequently, when in conflict with other fundamental rules, the *nullum crimen* principle, can be tempered, if necessary, after assessing the consequences of the concrete decision.⁵⁸²

In this sense, Kelsen considered *nullum crimen* as a principle of justice, but at the same time he claimed that the punishment of the Nazi criminals was as well a requirement of justice. Therefore, “in case two postulates of justice are in conflict with each other, the higher one prevails; and to punish those who were morally responsible for the international crime of the second World War may certainly be considered as more important than to comply with the rather relative rule against *ex post facto* laws, open to so many exceptions.”⁵⁸³

However, according to Kelsen, a significant difference exists between a retroactive law criminalizing a conduct that at the time of commission was

⁵⁷⁹ Hans Kelsen, *La Paz Por Medio Del Derecho*, 2ª (Madrid: Trotta, 2008), 103. For an overview of the scholarly opinions of the time considering that the principle of legality, a principle of national law, did not apply in international law, see Garibian, ‘Crimes against Humanity and International Legality in Legal Theory after Nuremberg’, 95.

⁵⁸⁰ Kelsen, ‘Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?’, 157–61.

⁵⁸¹ Kelsen, *La Paz Por Medio Del Derecho*, 103–4.

⁵⁸² Merkel, ‘The Law of the Nuremberg Trial’, 568–69.

⁵⁸³ Kelsen, ‘Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?’, 165.

“indifferent” or “innocent”, and a retroactive law making punishable an act that when committed was immoral or in conflict with a higher norm.⁵⁸⁴ The author only considered justified the second category of *ex post facto* laws. In this vein, he claimed that starting World War II was wrongful enough to justify the transformation of the moral wrong into a crime, and to accept an exception to the non-retroactivity rule.⁵⁸⁵ Accordingly, Kelsen argued that “the rule against retroactive legislation is a principle of justice (...) and since the persons who committed these acts were certainly aware of their immoral character, the retroactivity of the law applied to them can hardly be considered as absolutely incompatible with justice.”⁵⁸⁶

Other scholars of the time shared Kelsen’s views and considered that in some cases the principle of legality can be limited when in conflict with general principles as justice or equity.⁵⁸⁷ These authors recognised the importance of the *nullum crimen* principle, but they believed that in some limit and extreme cases the application of the positive law in force at the moment of commission might have morally unacceptable consequences. In such infrequent cases, the creation of retroactive laws is preferable than accepting the impunity of immoral and abhorrent acts. In other words, they considered justified choosing “the lesser of two evils”.⁵⁸⁸ In the same vein, modern authors as Bassiouni consider that the non-retroactivity rule could be understood as a procedural guarantee that could be restrained if required by substantive justice.⁵⁸⁹

c. Reduction ratione materiae of the scope of the legality principle

According to certain scholars, the principle of legality could never hinder the prosecution of atrocities as those committed during World War II. This idea could be articulated as a limitation *ratione materiae* of the legality principle, but as well based

⁵⁸⁴ Hans Kelsen, ‘The Rule against Ex Post Facto Laws and the Prosecution of the Axis War Criminals’, *The Judge Advocated Journal* II, no. 3 (1945): 5.

⁵⁸⁵ Kelsen, ‘Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?’, 163–65.

⁵⁸⁶ *Ibid.*, 165.

⁵⁸⁷ For an overview of the legal literature of the time holding this position, see Garibian, ‘Crimes against Humanity and International Legality in Legal Theory after Nuremberg’, 100.

⁵⁸⁸ Garibian, 100. These ideas will be further analysed in Section 5.1.4.4 when discussing the Radbruch formula, and in Section 7.1.4 when analysing other intermediate solutions to reconcile justice and legality.

⁵⁸⁹ M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, 2^a (Transnational Publishers, 1999), 125. Further proposals to reconcile legality with other conflicting principles are assessed in Section 7.1.4.

on an ius-naturalist approach.⁵⁹⁰ Accordingly, the most serious crimes, as those committed by the Nazis, infringe the supreme principles shared by humanity. They were so abhorrent, and their illegal character was so evident that no one could reasonably believe that such conducts were lawful at the time of commission. Therefore, their punishments would be in conformity with the basic rationales of the legality principle. The consequence of this reasoning is to claim that, if it prevents their prosecution, the *nullum crimen* principle should not be applied to the most serious crimes, unequivocally condemned by the international community. This would mean a reduction *ratione materiae* of the scope of the legality principle. In fact, it is argued that such limitation was a central idea of the Nuremberg philosophy and that it was subsequently codified in international law by Article 15(2) of the ICCPR and Article 7(2) of the ECHR.⁵⁹¹

d. Acceptable use of analogy

Finally, some authors defend the pertinence of qualifying as crimes against humanity the crimes committed by the Nazis against German nationals even if they did not fit within the pre-existent definition of war crimes. In this situation Bassiouni justifies the use of analogy based on the *ejusdem generis* principle (things of the same kind to be treated similarly), and reminds that broad applications of analogies were permitted by German laws after 1935 as well as by the Japanese Constitution.⁵⁹² Moreover, the use of analogy was not forbidden by international law of the time. Bassiouni argues that the Nazis overturned the principle of legality and that it would have not been equitable that the principle prevented the prosecution of their crimes few years later.⁵⁹³

C. The judgment respected the principle of legality

The conformity of war crimes prosecutions with the principle of legality was generally accepted by the doctrine at the time.⁵⁹⁴ On the contrary, serious doubts

⁵⁹⁰ Tomuschat, 'The Legacy of Nuremberg', 835–37.

⁵⁹¹ Tomuschat, 836. See below, Section 3.1.1.3, Section 3.1.2.2 and Section 3.1.4.1.

⁵⁹² Bassiouni, *Crimes Against Humanity in International Criminal Law*, 1999, 158–66.

⁵⁹³ Bassiouni, 'The "Nuremberg Legacy"', 590.

⁵⁹⁴ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 69; Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 7. The Grand Chamber of the European Court of Human Rights established in this sense: "(T)here was agreement in contemporary doctrine that international law had already defined

aroused regarding convictions for crimes against peace or crimes against humanity. However, one part of the doctrine, examining the Nuremberg judgment from the angle of international law, consider that the sentences respected the principle of legality as it was understood at the time in international law.⁵⁹⁵

a. The principle of international legality as a sui generis principle

Since the Nuremberg Trials were grounded on international law and applied international rules, it was argued that the prosecutions had to comply with the legality principle as it existed in the international legal system, and not as it was understood in domestic legislations. As evidenced throughout this work, the *nullum crimen* version applicable in international law significantly differs from the strong notion adopted in civil law domestic systems. In general, the legality principle evolves together with the development of a legal system, and when the laws become more structured, comprehensive, clear and specific, the legality requirements can become as well more exigent. Therefore, the stronger *nullum crimen* versions correspond to mature and fully developed legal systems.

This parallel evolution has been particularly evident regarding international criminal law and its general development has been followed by the adoption of stronger versions of legality. However, in the aftermath of World War II the international criminal law system was in an embryonic state and hence, it was argued that the application of strong legality requirements would be inconsistent with such stage of development.⁵⁹⁶ On the contrary, the international *nullum crimen* principle at the time was rather flexible and their requirements were far from being as strict and rigid as those applicable in domestic legal systems.⁵⁹⁷ It was grounded on the fundamental idea

war crimes and required individuals to be prosecuted. In consequence, the Charter of the IMT Nuremberg was not *ex post facto* criminal legislation.” *Kononov v. Latvia*, App. No. 36376/04, 24 July 2008, para. 207, Analysed in Marko Milanovic, ‘Was Nuremberg a Violation of the Principle of Legality?’, *EJIL: Blog of the European Journal of International Law* (blog), 18 May 2010, <https://www.ejiltalk.org/was-nuremberg-a-violation-of-the-principle-of-legality/>.

⁵⁹⁵ See, with further references, Rebut, *Droit Pénal International*, 558–59.

⁵⁹⁶ Rebut, 558–59; Henri Donnedieu de Vabres, ‘The Nuremberg Trial Before Modern Principles of International Criminal Law’, in *Perspectives on the Nuremberg Trial*, ed. Guénaél Mettraux (Oxford University Press, 2013), 226. For further references, see Garibian, ‘Crimes against Humanity and International Legality in Legal Theory after Nuremberg’, 99.

⁵⁹⁷ As analysed, with further reference of scholarly opinions of the time, in Vabres, ‘The Nuremberg Trial Before Modern Principles of International Criminal Law’, 226; Garibian, ‘Crimes against Humanity and International Legality in Legal Theory after Nuremberg’, 99; Rebut, *Droit Pénal International*, 558–59; Damien Scalia, *Du Principe de Légalité Des Peines En Droit International Pénal* (Bruxelles: Bruylant, 2011), 156.

of justice requiring that “an individual must not be punished for a conduct that he could not suspect to be criminal when committed”.⁵⁹⁸ This way, the principle demanded knowledge of the illegal nature of the conduct, but it did not required a rigorous definition of the crime or the possible punishments.⁵⁹⁹ Similarly, the international principle of legality only required that at the moment of commission the prosecuted conducts were already considered criminal by any applicable law, either domestic or international.⁶⁰⁰ In the years following the end of World War II different international instruments enshrined the principle of legality, and they reflected this flexible or limited version of the principle.⁶⁰¹ Based on this understanding of the principle, it was argued that the Nuremberg prosecutions respected current legality. For instance, regarding convictions for crimes against humanity, as long as the underlying conducts fitted the definition of any ordinary domestic crime when they were committed, their prosecution was compatible with the international legality principle.⁶⁰²

b. The rationales of legality were respected

It was also argued that if domestic and international law did not include criminal classification corresponding to some atrocities committed during World War II, it was just because legislators did not foresee that such abhorrent crimes could be committed. The Nazis’ criminal creative capacity exceeded the imagination of the legislators. Criminal law protects certain fundamental values as life, physical integrity or freedom, but it had not foreseen some new and more brutal forms of violating these principles. The prosecution of such atrocities would respect the rationales of legality since the perpetrators could not ignore that the violation of such values would be punished.⁶⁰³ It cannot be argued that the perpetrators, being aware of the existence of ordinary crimes as murder or torture, would ignore that much graver crimes, even if not specifically contemplated by the law, could go unpunished. The fundamental rationale of the legality principle is to prevent the punishment of conducts that were legal at the time of commission. The purpose of the principle was never to leave

⁵⁹⁸ Vabres, ‘The Nuremberg Trial Before Modern Principles of International Criminal Law’, 244.

⁵⁹⁹ Ibid., 271.

⁶⁰⁰ M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, 2nd Revised edition (The Hague ; Boston: Kluwer Law International, 1999), 158.

⁶⁰¹ See below, Chapter 3.

⁶⁰² Bassiouni, *Crimes Against Humanity in International Criminal Law*, 1999, 158.

⁶⁰³ Tomuschat, ‘The Legacy of Nuremberg’, 835.

unpunished the most serious forms of commission of existent crimes just because the lawmaker did not foresee them.⁶⁰⁴

c. The re-characterization method

The compatibility of new criminal definitions as crimes against humanity with the legality principle can be grounded on the retroactive re-characterization of the crimes.⁶⁰⁵ Accordingly, since the acts underlying the crimes against humanity were already criminal, either as ordinary crimes under domestic legislations or as war crimes, their prosecution under a different criminal name would respect the main rationale of the principle of legality. No one would be prosecuted or punished for conducts that were not criminal at the time of commission. This reasoning was defended by the French judge and the French chief prosecutor, but was not directly reflected by the Nuremberg judgment.⁶⁰⁶ This formula, rejected by the supporters of a strict concept of legality, was subsequently applied by tribunals under Control Council Law N° 10 and by other post-World War II courts, as well as by some modern international criminal tribunals.⁶⁰⁷

d. The Nuremberg Charter reflected natural law

A significant part of the legal literature considered that the Nuremberg Trials respected the principle of legality based on the idea that the IMT Charter did not create *ex post facto* crimes and only codified pre-existent natural law.⁶⁰⁸ It was claimed that the abhorrent crimes committed during World War II were already prohibited by the “laws of humanity and the dictates of the public conscience”, as expressed by the

⁶⁰⁴ Stefan Glaser, ‘The Charter of the Nuremberg Tribunal and New Principles of International Law’, in *Perspectives on the Nuremberg Trial*, ed. Guénael Mattraux (Oxford: Oxford University Press, 1947), 64.

⁶⁰⁵ Retroactive re-characterization technique is further analysed in Section 4.1.2.7, Section 5.1.6 and Section 7.1.4.

⁶⁰⁶ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 123.

⁶⁰⁷ See above, Section 2.2.4.

⁶⁰⁸ For an overview of the scholarly opinions of the time arguing that the IMT Charter was a codification of superior natural law, see Garibian, ‘Crimes against Humanity and International Legality in Legal Theory after Nuremberg’, 95. As it will be further analysed in Section 2.2.3.4, Judge Bernard, in his dissenting opinion to the IMTFE majority judgement, used this same argument and claimed that the prosecution of the crime of aggression respected the *nullum crimen* principle since such crime was an expression of natural law.

Martens clause.⁶⁰⁹ Therefore, since at the moment of commission such conducts were already prohibited, their prosecution respected the non-retroactivity rule. In this vein, the barbaric conducts that could be described as crimes against humanity violated the supreme principles shared by humankind, and their punishment was foreseeable for the criminals. They were so abhorrent, and their illegal nature was so obvious, that the criminals could not reasonably believe that their actions were lawful. Therefore, their punishments would be in conformity with the basic rationales of the legality principle.⁶¹⁰

D. The principle of legality as an individual right

It should not pass unnoticed that when the IMT repeatedly tried to prove the pre-existence of the crimes defined in the Charter and addressed the defendants' *ex post facto* arguments, the Tribunal proceeded as if the principle of legality was an individual right granted to the defendants that could be raised as a defence.⁶¹¹ This has been understood as the emergence of the international legal personality of individuals.⁶¹² Historically, only States were recognised as legal actors in the international arena. However, during the 20th century the role of individuals in international law progressively increased mainly, but not exclusively, due to the emergence of human rights law.⁶¹³ Individuals acquired legal personality in international law, holding international rights and duties and being able to act by themselves to ensure the protection of their rights without the intermediation of States. Therefore, individuals progressively gained the right to have direct access to international courts and tribunal,

⁶⁰⁹ Preamble of the *Geneva Convention (IV) Respecting the Laws and Customs of War on Land*, 18 October 1907. See above, footnote 412.

⁶¹⁰ It was also argued that the most serious crimes, violating the basic principles shared by humanity should be punished in order to maintain a peaceful social coexistence Tomuschat, 'The Legacy of Nuremberg', 835.

⁶¹¹ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 114.

⁶¹² Glaser, 'The Charter of the Nuremberg Tribunal and New Principles of International Law', 55; Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 114.

⁶¹³ For an analysis of the emergence and development of the international legal personality of individuals, see Malcolm N. Shaw, *International Law*, 5th edition (Cambridge New York: Cambridge university press, 2003), 232–33. For a recent and comprehensive study on the international legal personality of individuals, see Astrid Kjeldgaard-Pedersen, *The International Legal Personality of the Individual* (Oxford: Oxford University Press, 2018); Anne Peters, *Beyond Human Rights: The Legal Status of the Individual in International Law*, trans. Jonathan Huston, 1st ed. (Cambridge: Cambridge University Press, 2016).

and among others, they were allowed to raise claims based on the principle of legality.⁶¹⁴

2.2.3 The Tokyo Trial

Well advanced the Nuremberg process, the Allied Powers decided to establish another international tribunal, this time for the prosecution of the crimes committed by the main Japanese leaders.⁶¹⁵ On 19 January 1946, by special proclamation of the Supreme Allied Commander for the Far East General Douglas MacArthur, the International Military Tribunal for the Far East (IMTFE) was established in Tokyo.

The Tribunal had much less influence than the Nuremberg Trial in the global political imaginary and in the development of international criminal law.⁶¹⁶ However, the discussions and opinions raised regarding the principle of legality greatly enriched the debate on its nature, scope and application. They also had a significant impact on further discussions in international criminal tribunals and doctrine regarding different legality issues. While the judges in the Nuremberg Tribunal managed to circumvent the confronting views on the principle and reached a consensus sentence, the divisions among jurist of the time were openly revealed by the judgment and separate opinions of the Tokyo Tribunal.⁶¹⁷ In fact, the IMTFE Justices did come to a compromise regarding legality and the existing deep disagreements were expressed in several separate opinions.

Despite its undeniable influence in the development of international criminal law, the Tokyo Trial has been the target of much criticism. Gallant considers that while “the Nuremberg proceedings were, despite problems, essentially fair (...) the Tokyo proceedings, despite some virtues, were essentially unfair.”⁶¹⁸ Indeed, it is worth

⁶¹⁴ For further information on how the different international criminal courts and tribunals have allowed individuals to raise claims on the legality principle and how it has arguably become a rule of international customary law, see Kenneth S. Gallant, ‘Criminal Defence and the International Legal Personality of the Individual’, *Revue Québécoise de Droit International* 1, no. 1 (2010): 75–90; Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 397–98.

⁶¹⁵ For an analysis of the objectives pursued with the establishment of the IMTFE, see Reydam, Odermatt, and Ryngaert, *International Prosecutors*, 87–88.

⁶¹⁶ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 139.

⁶¹⁷ Olásolo, ‘El Principio Nullum Crimen Sine Iure En El Derecho Internacional Contemporáneo’, 23.

⁶¹⁸ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 139.

noting that two IMTFE judges (Pal and Bernard) claimed against the conviction of the accused.⁶¹⁹ Similarly, some decisions taken by MacArthur's supreme authority were highly controversial as, among others, the exoneration of Emperor Hiro-Hito from all kinds of responsibility, or the incorporation of new judges during the process.⁶²⁰ The legitimacy of the Tribunal was also questioned. It was claimed that the IMTFE was a way for the Americans to obtain revenge for the Pearl Harbour attack, and a way of easing American national guilt after the use of atomic bombs in Japan.⁶²¹

2.2.3.1 *The IMTFE Charter*

Contrary to the Nuremberg Tribunal, the IMTFE was not created by a negotiated international agreement, but by a special proclamation of the American General MacArthur implementing the terms of surrender accepted by Japan.⁶²² Nine Allied Powers signed the instrument of surrender. However, the Tribunal's Charter was designed by the Americans, and in particular by Joseph B. Keenan, who later was designated chief prosecutor. Only after the document had been approved the other States were consulted.⁶²³

The IMTFE Charter was very similar to the Nuremberg Charter, but some corrections were incorporated to improve in clarity and precision and to avoid certain controversies.⁶²⁴ Nonetheless the text remained ambiguous regarding legality. In particular it was unclear whether the Charter merely determined the subject matter under the jurisdiction of the Tribunal, leaving for the judges the determination of the applicable law, or if it constituted as well the substantive law to be applied by the Tribunal.⁶²⁵ The crimes included in the IMTFE Charter were the same and were defined in a similar manner than in the Nuremberg Charter.⁶²⁶

⁶¹⁹ See the dissenting opinions of Judges Pal and Bernard, explained above, in Section 2.2.3.4

⁶²⁰ Liñán Lafuente, 'Origen y Evolución Del Derecho Penal Internacional (I)', 64.

⁶²¹ Cassese, *International Criminal Law*, 257.

⁶²² Japan Empire, *Instrument of Surrender*, 2 September 1945, available at: <https://www.archives.gov/milestone-documents/surrender-of-japan>.

⁶²³ Liñán Lafuente, 'Origen y Evolución Del Derecho Penal Internacional (I)', 63; Cassese, *International Criminal Law*, 257. Supreme Commander for the Allied Powers, *International Military Tribunal for the Far East Charter*, 19 January 1946, available at: <https://www.jus.uio.no/english/services/library/treaties/04/4-06/military-tribunal-far-east.xml>.

⁶²⁴ For example, the concept of *conspiracy*, that had caused significant disagreements in Nuremberg, was eliminated. Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional', 149.

⁶²⁵ Compare the *chapeau* of the Nuremberg Charter Art. 6 (quoted in Section 2.2.2.2.B) with

The composition of the IMTFE constituted an improvement in comparison with the IMT. Trying to correct the Nuremberg alleged flaws of one-sidedness and partiality, eleven judges were designated, representing the following Allied countries: Australia, Canada, China, France, Great Britain, India, the Netherlands, New Zealand, the Philippines, the Soviet Union and the United States. The designated President Justice was William Webb, from Australia.⁶²⁷ However, the composition of the Tribunal was as well criticized since no judges from vanquished or neutral countries were included.⁶²⁸

2.2.3.2 *The trial*

The Tokyo Tribunal convened the 29 April 1946 and was adjourned the 12 November 1948, when the sentences were published. Twenty-eight military and political leaders were prosecuted, including former prime ministers and foreign ministers. The IMTFE Charter did not specify the Tribunal's temporal jurisdiction, which permitted the prosecution of crimes committed from 1928, including the Japanese invasion of Manchuria, to 1945.⁶²⁹ The defence counsels raised practically the same arguments that were used in Nuremberg. Among them, it stands out the alleged lack of jurisdiction of the Court and the violation of the legality principle based on the claim that the prosecuted crimes did not exist in international law at the time of commission.⁶³⁰

The process concluded with the conviction of all the accused. The Tribunal issued seven death sentences, sixteen life sentences, a twenty-year prison sentence and a seven-year prison sentence.⁶³¹ Unlike in Nuremberg, the IMTFE did not hand out any

IMTFE Charter Art. 5:

“Jurisdiction Over Persons and Offenses. The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offenses which include Crimes against Peace. The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: (..)”

⁶²⁶ IMTFE Charter, Art. 5.

⁶²⁷ Ibid., Art. 2.

⁶²⁸ Röling, ‘The Nuremberg and the Tokyo Trials in Retrospect’, 464.

⁶²⁹ Reydam, Odermatt, and Ryngaert, *International Prosecutors*, 88–89.

⁶³⁰ Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’, 151; Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 28–29.

⁶³¹ Liñán Lafuente, ‘Origen y Evolución Del Derecho Penal Internacional (I)’, 64. Military Tribunal for the Far East, Judgment, 12 November 1948, available at: <http://werle.rewi.hu-berlin.de/tokio.pdf>.

acquittals, but the final judgment was not unanimous regarding any defendant or any crime, and together with the majority judgment five judges issued separate opinions.

2.2.3.3 The majority IMTFE judgment

The majority IMTFE judgment followed a similar reasoning than the Nuremberg Tribunal regarding the *nullum crimen* issue. This way the Tokyo Tribunal expressed a twofold argument, accepting being bound by Charter and the crimes included in it, but at the same time arguing that the Charter did not create new law since the codified crimes already existed in international law. However, the judgment rejected an extensive view on the binding nature of the Charter, and denied that victorious Powers had unlimited authority to create substantive criminal law.⁶³² At moments the judgment seemed to require the pre-existence of substantive criminal law and the Tribunal tried to prove that the prosecuted crimes already existed at the beginning of World War II, but this conclusion has been questioned.⁶³³ Even some IMTFE judges claimed that the crimes of aggression and the crimes against humanity had been created *ex post facto*. Despite some Justices considered justified the prosecution of these allegedly new created crimes, the IMTFE, just as the Nuremberg Tribunal had done before, decided to not issue death sentences for these crimes.⁶³⁴

2.2.3.4 The separate IMTFE opinions

Five separate opinions were issued together with the main judgement.⁶³⁵ They represented some competing views on the status and content of the principle of legality in international law at the time, and advanced some ideas and arguments that later would be developed by international jurisprudence and doctrine.

There were deep and fundamental divisions among the Tribunal members on different issues, as the binding nature of the IMTFE Charter and whether it was merely jurisdictional or determined the substantive applicable law. The judges also

⁶³² IMTFE Records, vol. 101, 48436, as explained in Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 142–43; Röling, ‘The Nuremberg and the Tokyo Trials in Retrospect’, 465.

⁶³³ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 143.

⁶³⁴ Röling, ‘The Nuremberg and the Tokyo Trials in Retrospect’, 466; Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 147.

⁶³⁵ For a detailed analysis of the separate opinions, see Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 143–55.

expressed their views on whether the crimes defined in the Charter were *ex post facto* and if so, if their application was justified.⁶³⁶ Some Justices, as Jaranilla or Röling, thought that at the time the principle of legality was not applicable in international law. Other judges claimed that the IMTFE had violated the *nullum crimen* principle, and it was discussed if such violation was tolerable.⁶³⁷ Justices Rolling, Bernard and Pal rejected the consideration of legality as a principle of justice and its flexible application subject to the will of States. They considered legality as an individual subjective right that all States had to respect, hence limiting State sovereignty.⁶³⁸

President Webb indirectly accepted retroactivity in certain cases. The Australian Justice considered that aggressive war did not constitute a crime carrying individual responsibility before the beginning of World War II.⁶³⁹ However, he accepted retroactive application of this crime as long as death penalty was excluded as a punishment. He implied that the Nuremberg judges had this same vision since five Nazis convicted for crimes against peace spared the death penalty.⁶⁴⁰

Justice Jaranilla openly defended that when the Pacific War started international law did not contemplate a principle of legality protecting individuals from *ex post facto* crimes and punishments. The Philippines Justice argued that non-retroactivity was a general principle of criminal law in domestic systems, but at the time such norm did not exist in the international arena and therefore, retroactivity was permissible in international law.⁶⁴¹

Justice Röling rejected the notion of *nullum crimen* as a principle of justice and considered it a rule of policy that would only be valid and applicable if expressly adopted in positive law.⁶⁴² As well, after examining existing international law, Röling considered that the Nuremberg and Tokyo Charters had created the crimes against peace *ex post facto*. However, the Dutch Justice argued that such creation was

⁶³⁶ President Webb and Justices Pal, Röling and Bernard agreed on the jurisdictional nature of the Charter, and that the substantive applicable law was to be defined by the Tribunal. Gallant, 151.

⁶³⁷ Cassese et al., *International Criminal Law: Cases and Commentary*, 60; Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 143.

⁶³⁸ Olásolo, 'El Principio Nullum Crimen Sine Iure En El Derecho Internacional Contemporáneo', 23.

⁶³⁹ Separate Opinion of Webb, President, IMTFE Records, vol. 109, 17.

⁶⁴⁰ Ibid., 16.

⁶⁴¹ Separate Opinion of Jaranilla, IMTFE Records, vol. 105, 18–19, as analysed in Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 143–44.

⁶⁴² Separate Opinion of Röling, IMTFE Records, vol. 109, 44–45.

compatible with international law. According to his reasoning, after a war, victorious countries had the right under international law to remove from society war leaders that would be dangerous for the newly established order. Doing so through a judicial proceeding, even if based on newly created crimes, would not be contrary to the principle of legality since such judicial proceeding would offer more guarantees to the vanquished than any other non-judicial process.⁶⁴³

Justice Bernard employed an internationalist approach emphasizing the role of international law and raising the issue of pre-existing natural law as the basis for international criminal proceedings. The French Justice considered that the crimes “committed against the peoples of a particular nation are also crimes committed against members of the universal community (...). The law to be applied in such cases, however will not then be of a particular nation, the victor or the defeated, but will be that of all nations.”⁶⁴⁴ Bernard claimed as well that the IMTFE Charter did not create new crimes since they existed already in international law, referring in particular to natural law. Regarding the crime of aggression, he considered that the *nullum crimen* principle was respected since aggressive war “is and always has been a crime in the eyes of reason and universal conscience, - expressions of natural law upon which an international tribunal can and must base itself to judge the conduct of the accused tendered to it.”⁶⁴⁵

Finally, Justice Pal fiercely attacked the majority IMTFE judgment and considered that none of the accused should have been found guilty and they should have been acquitted. He accepted the authority of victor nations to establish a tribunal, but considered that it was up to the judges to determine the content of international law at the time the alleged crimes were committed.⁶⁴⁶ The Indian Justice questioned as well the legitimacy of the Tribunal denying its impartial nature and considering it as victor’s justice. He criticized the absence of judges from vanquished nations and the exclusion from the jurisdiction of the IMTFE of the crimes committed by western countries, as the use of the atomic bomb.⁶⁴⁷

⁶⁴³ Ibid., 46.

⁶⁴⁴ Dissenting Opinion of Bernard, IMTFE Records, vol. 105, 2.

⁶⁴⁵ Ibid., 10.

⁶⁴⁶ Dissenting Opinion of Pal, IMTFE Records, vol. 105, 33-34 and 56. Analysed in Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 150–51.

⁶⁴⁷ Dissenting Opinion of Pal, IMTFE Records, vol. 105, 66.

2.2.4 Domestic post-war cases

The International Military Tribunals were not the only courts that prosecuted the crimes committed during the Second World War. In the years following the war, domestic courts from several countries launched criminal proceedings. Despite their uneven results, the reasoning and arguments raised regarding the principle of legality deserve an attentive analysis.

2.2.4.1 *Trials under Control Council Law N° 10*

The Allied Control Council, the governing body of the occupied zones in Germany composed by the Soviet Union, the United Kingdom, the United States and France, issued the 20 December 1945 the Law N° 10, authorizing each occupying Power to create independent courts to prosecute Nazi criminals.⁶⁴⁸ Only the American courts condemned 142 defendants but the fulfilment of the sentences has been considered a failure due to the new political interests in Germany at the dawn of the Cold War.⁶⁴⁹ However, the outcomes were quite positive regarding retributive justice and the creation of an historical record of Nazi atrocities, but as well regarding their contribution to the development of international criminal law. It has been said that the trials under Control Council Law N° 10 “might not have given birth to international criminal law, but they clearly nurtured it into adolescence.”⁶⁵⁰

Based on the raw legal materials available at the time, courts under Control Council Law N° 10 managed to create a coherent system of criminal law clearly defining crime elements, modes of participation, or defences.⁶⁵¹ Regarding the principle of legality the courts generally endorsed the reasoning of the IMT.⁶⁵² However, they

⁶⁴⁸ Allied Control Council, *Punishment of persons guilty of War Crimes, Crimes Against Peace and Against Humanity*, Law N° 10, 20 December 1945, available at: <https://avalon.law.yale.edu/imt/imt10.asp>. As the IMT, the courts were established in Nuremberg and therefore, the general term “Nuremberg Trials” refers to the proceedings brought before the IMT but as well to the prosecutions under Control Council Law N° 10.

⁶⁴⁹ Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford: Oxford University Press, 2012), 400.

⁶⁵⁰ Ibid., 401.

⁶⁵¹ Ibid.

⁶⁵² See in particular the *Justice case*, United States Military Tribunal at Nuremberg, *Law Reports of Trials of War Criminals*, UN War Crimes Commission, Volume VI, 1948, 548-9; *Trial of Wilhelm List and Others* (‘*The Hostages Case*’), United States Military Tribunal at Nuremberg, *Law Reports of Trials of War Criminals*, UN War Crimes Commission, Volume VIII, 8 July 1947 to 19 February 1948, 1238; *United States v. Otto Ohlendorf et al* (Case No 9) (‘*The Einsatzgruppen Case*’), United States Military Tribunal II, *Trials of War Criminals*

also provided some new approaches, being the first courts to openly affirm that the principle of non-retroactivity was a limit to State sovereignty and not only a principle of justice.⁶⁵³

The arguments raised in such proceedings, and particularly those defending the retroactive re-characterization formula, are of significant importance and were subsequently used as precedents by some modern domestic and international criminal tribunals as a precedent. As explained above, the compatibility of new criminal definitions with the legality principle can be grounded on the retroactive re-characterization of the crimes. This formula was mainly used to endorse the legality of convictions for crimes against humanity, disputably existent as an independent legal category before World War II. Accordingly, since the conducts underlying the crimes against humanity were already considered criminal, either by domestic laws as ordinary crimes or by international law as war crimes, their prosecution under a different legal classification would respect the main rationale of the principle of legality. In other words, no one would be prosecuted or punished for conducts that were not criminal at the time of commission. This formula was considered compatible with the international principle of legality of the time that only required that the relevant conduct was already criminal under some law, national or international, applicable to the actor at the time of commission.

This reasoning, defended by the French judge and the French chief prosecutor in the Nuremberg proceedings, was not reflected in the final judgment, but was subsequently adopted by some tribunals under Control Council Law N° 10.⁶⁵⁴ For instance, it was established that the “rule against retrospective legislation, as a rule of

Before the Nuremberg Military Tribunals Under Control Council Law No 10, Volume IV, 458-9. Cited, together with further references in Cassese, *International Criminal Law*, 30. For a comment on these and other relevant cases, see the relevant entries of Antonio Cassese et al., *The Oxford Companion to International Criminal Justice* (Oxford, New York: Oxford University Press, 2009); Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law*.

⁶⁵³ As explained in Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law*, 126 and 377. The ICTY in *Vasiljevic* (ICTY Trial Chamber) and in *Milutinovic* (ICTY Appeals Chambers) cited the *Justice* case as a precedent for this notion. However, according to Heller, they did so incorrectly since the *Justice* tribunal was the only court that considered non-retroactivity as a principle of justice and fair play.

⁶⁵⁴ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 123, 130-34.

justice and fair play, should be no defense if the act which he committed (...) was also known to him to be a punishable crime under his own domestic law.”⁶⁵⁵

The United States Military Court re-characterized pre-existent national crimes, as murder, torture or enslavement, into international crimes against humanity. Of course, not all murders became crimes against humanity. Additional elements were needed but the Court argued that “murder becomes no less murder because directed against a whole race instead of a single person”.⁶⁵⁶ To comply with the legality principle the Court required that when committed, the conducts were already considered crimes under domestic German criminal laws. Following this line of reasoning, the *nullum crimen* principle requires that the actor could have recognized the criminality of the act, and for that to happen the material element of the original crime cannot be tempered. In other words, the material elements of the new crime cannot be less serious than the original.

Not all courts under Control Council Law N° 10 accepted the retroactive re-characterization of domestic crimes into international crimes. This was the case of the British Tribunal that only prosecuted Nazi criminals for war crimes, but not for crimes against humanity.⁶⁵⁷ However, the concern about retroactivity did not prevent the British prosecutor at the IMT, as well as some courts in the British Zone of Occupation, to retroactively transform moral wrongs into crimes. In other words, they retroactively applied newly created crimes under the condition that at the time of commission the conducts were considered morally wrong.⁶⁵⁸ However, the incompatibility of this reasoning with the basic rationale of the principle of legality, requiring the previous criminalization of a conduct, explains that most modern domestic and international tribunals have never invoked it.⁶⁵⁹

On the contrary, some national courts subsequently applied the re-characterization theory. This was the case of French courts that prosecuted German nationals based on *ex post facto* laws, under the condition that when committed the conducts were already considered criminal under pre-existing laws of war.⁶⁶⁰ Similarly,

⁶⁵⁵ *Justice Case*, 3 T.W.C. 954, 977, as cited in Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 132.

⁶⁵⁶ *Einsatzgruppen Case*, 4 T.W.C. 411,497, as cited in Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008.

⁶⁵⁷ Gallant, 134.

⁶⁵⁸ *Ibid.*, 135.

⁶⁵⁹ *Ibid.*

⁶⁶⁰ For an overview of domestic courts practice regarding retroactive re-characterization of ordinary crimes into international crimes, but as well of international crimes into domestic

some modern international criminal courts, as the ICTY or SCSL have used the re-characterization theory, accepting its compatibility with the principle of legality.⁶⁶¹

2.2.4.2 Other national post-war cases and retroactive jurisdiction

In the years following World War II several countries interpreted their domestic laws, or enacted new regulations, to expand the jurisdiction of their courts to enable them to prosecute crimes committed during the war. However, in order to respect the legality principle it was generally required that at the time of commission the alleged offences were already criminal under domestic or international law. This happened, among others, in France, Norway, United States, Canada, Australia, and later on in Israel.⁶⁶² The compatibility of these trials with the non-retroactive rule depends on the assumption that war crimes and crimes against humanity committed by the Nazis were already prohibited at the time of commission. As explained, this was controversial regarding crimes against humanity, but could be justified if the arguments used by the international military tribunals are accepted, or alternatively, if we consider tolerable the re-characterization of war crimes or national offences as crimes against humanity, as previously discussed.⁶⁶³

offences, see with further references Gallant, 130.

⁶⁶¹ *Prosecutor v. Delalić et.al.*, Judgment, ICTY Appeals Ch. IT-96-21-A, 20 February 2001, paras 178-80, available at: <https://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf>; *Prosecutor v. Furundžija*, Judgment, ICTY Trial Ch., IT-95-17/1-T, 10 December 1998, paras 165-69, available at: <https://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>. See below, Section 4.1.2.7.

⁶⁶² As explained, together with an overview of this state practice in Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 2008, 136.

⁶⁶³ For further information on post-war domestic prosecutions see, with further references Gallant, 129-36; Ward Ferdinandusse, 'Direct Application of International Criminal Law in National Courts' (Amsterdam, University of Amsterdam, 2005), 47-95.

PART II:
THE EVOLUTION OF THE PRINCIPLE OF
LEGALITY IN INTERNATIONAL LAW

CHAPTER 3: CODIFICATION OF THE PRINCIPLE OF LEGALITY IN INTERNATIONAL LAW

The notion of legality as a principle of justice adopted by the post-World War II tribunals gradually gave way to stricter approaches. The doctrine of substantive justice was progressively replaced by that of strict legality, though with some specificities.⁶⁶⁴ This evolution was directly linked to two developments: the recognition of the *nullum crimen* principle as a human right in various international instruments, becoming a legal standard for national courts and not only a prerogative of the State; and the development of international criminal law through the progressive codification of international crimes in international treaties and the case law of international courts.⁶⁶⁵ All these developments will be separately analysed in the next chapters. First, Chapter 3 addresses the recognition of the legality principle in international human rights law, and the progressive codification and development of international criminal law. Then, Chapters 4 and 5 will analyse how the principle has been interpreted and applied by modern international criminal tribunals and human rights courts.

3.1 The principle of legality and international human rights law

In the years following World War II the principle of legality was recognized as a human right in various international and regional treaties, and over the years the principle eventually became a rule of customary international law.⁶⁶⁶ This early recognition of the *nullum crimen* principle as a human right was driven by different factors as the revulsion against the Nazi's rejection of legality, or the doubts about the respect of the non-retroactivity rule in Nuremberg and Tokyo, in particular regarding the crime of aggression.⁶⁶⁷ The recognition of the legality principle in international instruments was not without controversy. Different views of the principle were confronted and its notion, scope and requirements significantly vary depending on the treaty.

⁶⁶⁴ Antonio Cassese, *International Criminal Law*, 3rd ed. (Oxford: Oxford University Press, 2013), 22–27; Antonio Cassese et al., *The Oxford Companion to International Criminal Justice* (Oxford, New York: Oxford University Press, 2009), 439; Héctor Olásolo, 'El Principio Nullum Crimen Sine Iure En El Derecho Internacional Contemporáneo', *Anuario Iberoamericano de Derecho Internacional Penal* I (2013): 29.

⁶⁶⁵ Cassese, *International Criminal Law*, 23–24.

⁶⁶⁶ See Chapter 6. The *nullum crimen* principle is also specifically described as non-derogable even in times of emergency in the ICCPR, the ECHR and the ACHR among other international instruments.

⁶⁶⁷ Gallant, 156.

3.1.1 The Universal Declaration of Human Rights

In the aftermath of World War II, when the atrocities committed by Nazis became public, the international community agreed on the need of adopting an international instrument to define and protect the rights and freedoms of all human beings. The Universal Declaration of Human Rights (UDHR) was approved by the United Nations General Assembly on 10 December 1948, becoming the foundational document in the history of international human rights law.⁶⁶⁸

The origins of the UDHR and the International Covenant on Civil and Political Rights (ICCPR) are closely linked. At the beginning of 1946 the UN Economic and Social Council (ECOSOC) asked the Commission on Human Rights to prepare an international bill of rights and an international declaration or convention on civil liberties.⁶⁶⁹ The works on the UDHR and the ICCPR advanced in parallel and, as will be seen hereinafter, the debates and agreements on the provisions of one draft text would greatly influence the other.⁶⁷⁰

Among many other human rights, the Declaration enshrines in Article 11 the right to a fair criminal process, including the *nullum crimen* and the *nulla poena* principles:

⁶⁶⁸ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III). For further information on the drafting, interpretation, relevance and legal status of the UDHR, see Global Citizenship Commission, *The Universal Declaration of Human Rights in the 21st Century*, ed. Gordon Brown, 1st ed., vol. 2, A Living Document in a Changing World (Open Book Publishers, 2016); Jenna Reinbold, ‘Political Myth and the Sacred Center of Human Rights: The Universal Declaration and the Narrative of “Inherent Human Dignity”’, *Human Rights Review* 12, no. 2 (1 June 2011): 147–71; Jie Liu, ‘On the Making and Significance of the Universal Declaration of Human Rights Focus’, *Journal of Human Rights* 17, no. 5 (2018): 480–98; Thomas George Weiss and Sam Daws, *The Oxford Handbook on the United Nations*, 2nd edition (Oxford: Oxford University Press, 2018), 545–48; Département de l’information des Nations Unies, ed., *Our Rights as Human Beings: A Discussion Guide on the Universal Declaration of Human Rights* (New York: United Nations, 1947).

⁶⁶⁹ ECOSOC Res. 1/5, 16 February 1946, as cited in Weiss and Daws, *The Oxford Handbook on the United Nations*, 545; Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 161.

⁶⁷⁰ For a detailed account on the history and *travaux préparatoires* of the UDHR and the ICCPR non-retroactivity provisions, see David Weissbrodt and Mattias Hallendorff, ‘Travaux Préparatoires of the Fair Trial Provisions - Art.s 8 to 11 - of the Universal Declaration of Human Rights’, *Human Rights Quarterly* 21, no. 4 (1999): 1074–83; David S. Weissbrodt, *The Right to a Fair Trial under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights: Art.s 8, 10 and 11 of the Universal Declaration of Human Rights*, The Universal Declaration of Human Rights, v. 1 (The Hague Boston: Martinus Nijhoff Publishers, 2001); Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 160–75.

“1. Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

2. No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.”⁶⁷¹

This Article 11 of the UDHR set the framework for the treatment of the legality principle in future international instruments.⁶⁷² Despite the UDHR is not an international treaty or convention,⁶⁷³ the binding nature of the legality provision is no longer discussed since it has been subsequently replicated in numerous conventions and accepted as customary international law.⁶⁷⁴

Article 11 reveals an internationalist approach of the principle and a specific understanding of the content of legality. The drafting and voting process was not exempt of long and numerous debates and confrontations among very different notions of legality that will be explained hereinafter.⁶⁷⁵ The final text was the result of numerous choices to include or exclude different notions and elements of the principle. The following are the main features of the principle of legality enshrined in the UDHR and will be individually analysed in this section: (i) Either national or international law can ground a criminal prosecution if it was already applicable at the moment of commission. (ii) The legal provision criminalizing the conduct should not necessarily be a statutory text enacted by a legislature (*lege scripta*). Therefore, common law and non-codified international law are accepted as grounds for criminal prosecutions, as statutes and treaties are. (iii) The UDHR lays down both *nullum crimen* and *nulla poena*. (iv) The non-retroactivity rule is only established regarding criminal law. (v)

⁶⁷¹ UDHR, Art. 11.

⁶⁷² Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 159.

⁶⁷³ It was only in 1947 when the Commission on Human Rights decided to draft a declaration rather than a convention. A declaration voted by the General Assembly could be adopted more rapidly than a Convention needing the States' ratifications. Gallant, 162. Commission on Human Rights Official Records, 27 January-10 February 1947, UN Docs. E/259 para. 12, p. 3, available at: [https://undocs.org/en/E/259%20\(supp\)](https://undocs.org/en/E/259%20(supp)).

⁶⁷⁴ Gallant, 159.

⁶⁷⁵ For a detailed account on the *travaux préparatoires* of the UDHR legality provision, see Weissbrodt and Hallendorff, 'Travaux Preparatoires of the Fair Trial Provisions - Arts 8 to 11 - of the Universal Declaration of Human Rights', 1074–83.

The UDHR does not include a clause on general principles of law, as some subsequent international treaties will do.

3.1.1.1 International law as a source of criminal law

The first drafts of Article 11 reflected a more restricted notion of legality than that of the final text. It required the previous criminalization of a conduct by a *law in effect*, and in the French-language version by *une loi en vigueur*.⁶⁷⁶ This seemed to require the pre-existence of a written statute defining the conduct as a crime. No reference to international law was made, though the expression *law in effect* could be interpreted as including international law.⁶⁷⁷

Following a British proposal to eliminate the requirement of *praevia lege scripta*, the Commission on Human Rights on its second session adopted a text stating that no person shall be convicted for an act that “did not constitute such an offence when it was committed.”⁶⁷⁸ Further on, at its third session, the Commission included express reference to both national and international law as sources of criminal law:

“2. No one shall be held guilty of any offence on account of any act or omission which did not constitute an offence, under national or international law, at the time when it was committed.”⁶⁷⁹

Similarly, in the French version international law was expressly included: *une infraction aux termes du droit national ou international*.⁶⁸⁰ The reference to both national and international law would be kept in the final text.

⁶⁷⁶ “(...) Nor shall anyone be convicted of crime unless he has violated some law in effect at the time of the act charged as an offense, nor be subjected to a penalty greater than that applicable at the time of the commission of the offense.” Draft Outline of an International Bill of Rights Art. 26, UN Doc. E/CN.4/21 Annex A, p. 17 (1 July 1947), available at: <https://undocs.org/en/E/CN.4/21>.

“(…) Nul ne peut être condamné pénalement à moins qu’il n’ait violé une loi en vigueur au moment où il a commis l’acte qui lui est reproché, ni être condamné à une peine plus grave que celle applicable au dit moment.” Commission on Human Rights, *Draft Outline of an International Bill of Rights*, Art. 26, 1 July 1947, UN Doc. E/CN.4/21 Annex A, p. 17, available at: <https://undocs.org/en/E/CN.4/21>.

⁶⁷⁷ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 165.

⁶⁷⁸ Commission on Human Rights, *Draft International Declaration on Human Rights*, Art. 7, 17 December 1947, UN Doc. E/600 Annex A, p. 18, available at: <https://undocs.org/E/600>.

⁶⁷⁹ Ibid., Art. 9, p.11.

⁶⁸⁰ Ibid., Art. 9, p.12.

3.1.1.2 *No statutory law required*

Contrary to the *nullum crimen* version in domestic civil law systems, the notion of legality enshrined in the UDHR does not contain the obligation of a *praevia lege scripta*. In other words, no previous statutory text enacted by a legislature was required. When express reference to international law was included in the above-mentioned version of Article 11, the Belgian representative expressed his concerns about what could be understood as “international law”. He feared a narrow interpretation only including treaty law, and proposed to replace it with the expression “general principles of international law”.⁶⁸¹ The British delegate answered that international law was to be understood according to the recently approved Statute of the International Court of Justice. That is to say, including conventions, international custom, general principles of law or judicial decisions.⁶⁸² This way, the amendment that finally included the expression “international law” in UDHR Article 11 was only approved after the Belgium (and the Soviet) delegations had indicated that it should be understood according to Article 38 of the ICJ Statute.⁶⁸³

It is relevant to note as well that in the first French versions of Article 11 the delinquent conduct had to be considered a crime by the *loi*. However, after negotiations and different votes, this term was replaced by the broader expression *aux termes du droit*, what appears to show the acceptance of non-statutory law as source of criminalization.⁶⁸⁴

3.1.1.3 *The Nuremberg clause*

The so-called “Nuremberg clause” is perhaps the most controversial issue regarding the codification of the legality principle. Initially intended to reinforce the legitimacy of post-World War II trials, it has been latter interpreted and applied in very different manners. As it will be hereinafter explained, this clause has been considered both an exception to the *nullum crimen* principle or, on the contrary, as

⁶⁸¹ Summary record of the 56th Human Rights Commission meeting, 4 June 1948, UN Doc. E/CN.4/SR.56, p. 4, available at: <https://undocs.org/E/CN.4/SR.56>.

⁶⁸² ICJ Statute, Art. 38. The Statute was approved as an Annex to the United Nations Charter, which Chapter XIV establishes the International Court of Justice United Nations. United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, available at: <https://www.un.org/en/about-us/un-charter>.

⁶⁸³ Summary record of the 56th Human Rights Commission meeting, p. 6-7.

⁶⁸⁴ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 171; Weissbrodt, *The Right to a Fair Trial under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights*, 23.

being redundant and superfluous, not adding anything to the general description of the legality principle. As well the provision has been interpreted as easing the requirements linked to legality and enabling a flexible interpretation of the principle. The Nuremberg clause was finally discarded from the UDHR, but it was later included in other international conventions as the ICCPR or the ECHR.

During the second session of the Commission on Human Rights, when the express reference to international law had not been added yet to the draft of the legality Article, Belgium and the Philippines jointly proposed the addition of a new paragraph:

“2. Nothing in this article shall prejudice the trial and punishment of any person for the commission of any act which, at the time it was committed, was criminal according to the general principles of law recognized by civilized nations.”⁶⁸⁵

This paragraph, known as the Nuremberg clause or the Belgian amendment,⁶⁸⁶ intended to protect the legitimacy of post-World War II prosecutions.⁶⁸⁷ The respect of the *nullum crimen* principle in those trials had been questioned and, according to the Belgian representative, the new paragraph would both reinforce their legitimacy and prevent the use of the Article to contest the legality of prosecutions.⁶⁸⁸ However, the inclusion of the new paragraph proved to be highly controversial and a subcommittee had to be created to discuss the issue.⁶⁸⁹

⁶⁸⁵ Draft International Declaration on Human Rights, Art. 7, p. 18. A similar paragraph was added in the Draft International Covenant on Human Rights at the same session of the Commission on Human Rights, and would later become Art. 15(2) of the ICCPR, as explained in Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 168. Three years later the ECHR was approved including a similar provision in Article 7(2).

⁶⁸⁶ Gallant, 169; Rodrigo Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’ (Madrid, Spain, Universidad Carlos III de Madrid, 2015), 94.

⁶⁸⁷ The concerns of Belgium and the Philippines to ensure a notion of legality compatible with the prosecutions of the crimes committed during the Second World War could be partly explained by the fact that they were two of the countries more affected by the aggressive war conducted by Germany and Japan. As analysed above, in Section 2.2, the most controversial prosecutions in the Nuremberg and Tokyo trials were those regarding crimes against peace (aggression), and its compatibility with the non-retroactivity rule was severely questioned. Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 168.

⁶⁸⁸ Summary record of the 36th Human Rights Commission meeting, 13 December 1947, UN Doc. E/CN.VSR.36, p. 13, available at: <https://undocs.org/E/CN.4/SR.36>.

⁶⁸⁹ In the heat of the debates, René Cassin, vice-chair of the Commission, even suggested the derogation of the non-retroactivity rule for the prosecution of war criminals. Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 171.

The United States, Brazil and Egypt argued that accepting this paragraph would mean the overruling of the traditional *nullum crimen* principle.⁶⁹⁰ On the contrary, the World Jewish Congress defended the Belgian amendment arguing that all countries should respect international law and that such due respect grounded the post-war trials.⁶⁹¹ Therefore, the elimination of the paragraph would be contrary to the recently adopted UN General Assembly resolution approving the “Principles of International Law recognized by the Charter of the Nuremberg Tribunal”.⁶⁹² Similarly, the World Jewish Congress representative argued that removing the Belgian amendment could prevent the prosecution of international crimes in the future.⁶⁹³

The United Kingdom and India proposed a more simplified text for the legality Article, not including the Belgian amendment, but adding an express mention to international law. According to the British representative the new wording of the Article, prohibiting punishments of acts that at the time of commission did not constitute offences either under national or international law, would make the Belgian amendment redundant and unnecessary.⁶⁹⁴ With few minor modifications this new wording of the Article was finally adopted.

3.1.1.4 Nulla poena

The United Kingdom proposed during the negotiations to drop from Article 11 the prohibition of retroactive increase of penalties (*nulla poena*). The British delegation argued that the UDHR should not guarantee the right of criminals to calculate the potential benefits of a crime against the punishments to be imposed for it. This way, they considered that the *nulla poena* principle was not a fundamental human right.⁶⁹⁵ Despite non-retroactivity of punishments disappeared in some draft versions, the Third

⁶⁹⁰ However, more than ten years later, the United States voted for the inclusion of this paragraph in the ICCPR, as explained in Gallant, 169.

⁶⁹¹ At that time the State of Israel did not exist yet, so it could not take part in the negotiations. However, the Jewish World Congress was invited to speak to the Drafting Committee on 17 May 1948.

⁶⁹² UN General Assembly, *Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal*, 11 December 1946, A/RES/95. Further analyzed in Chapter 4.

⁶⁹³ Summary record of the 2nd Session of Drafting Committee, 9 May 1948, UN Doc. E/CN.4/AC.1/SR.36, p. 2, available at: <https://undocs.org/E/CN.4/AC.1/SR.36>.

⁶⁹⁴ Summary record of the 54th Human Rights Commission meeting, 10 June 1948, UN Doc. E/CN.4/SR.54, p. 14, available at <https://undocs.org/E/CN.4/SR.54>.

⁶⁹⁵ Ibid., 13-14.

Committee of the General Assembly decided in a controversial vote to include the *nulla poena* rule in the final wording of Article 11.⁶⁹⁶

3.1.2 The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) is probably the most important human rights treaty and, together with the UDHR and the International Covenant on Economic, Social and Cultural Rights (ICESCR), they conform what is known as the International Bill of Human Rights.⁶⁹⁷ Most of the rights enshrined in the UDHR were later incorporated into binding treaty form by the two International Covenants: the ICCPR and the ICESCR. Despite the UN rhetoric maintained that the two sets of rights, the civil and political rights, and the economic, social and cultural rights, were interdependent and indivisible, they were finally split in two Covenants.⁶⁹⁸

The preparatory works on the UDHR, the ICCPR and the ECHR advanced in parallel and the debates and agreements on the provisions of one draft text would greatly influence the others.⁶⁹⁹ While the Council of Europe approved the ECHR in

⁶⁹⁶ For further explanations regarding the British position on *nulla poena*, the negotiation on this issue, and the different draft versions, see Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional', 98–99; Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 166–73; Weissbrodt and Hallendorff, 'Travaux Préparatoires of the Fair Trial Provisions - Articles 8 to 11 - of the Universal Declaration of Human Rights', 1079.

⁶⁹⁷ The ICCPR could be considered the most important human rights treaty since it has universal coverage (unlike e.g., the ECHR), contains a large number of rights (unlike single-issue treaties) and it intends to apply to all classes of persons (unlike e.g., the Convention on the Rights of the Child). See Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 3rd ed (Oxford New York: Oxford University Press, 2013), 3–4.

⁶⁹⁸ The division of the UDHR rights into two different Covenants responded to the situation of political polarization during the Cold War. The Western governments, following orthodox natural rights theories, considered both sets of rights as fundamentally different and advocated for a separation in two different treaties. On the contrary, the Eastern block feared that such division would create a hierarchy between the two sets of rights, as it was finally the case. For further information on this codification process and the reasons behind the UDHR rights division into the ICCPR and the ICESCR, see Joseph and Castan, 7; Ludovic Hennebel and Hélène Tigroudja, *Traité de droit international des droits de l'homme* (Paris: Editions Pedone, 2016), 90.

⁶⁹⁹ For a detailed account on the history and *travaux préparatoires* of the ICCPR non-retroactivity provision, see Weissbrodt, *The Right to a Fair Trial under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights*, 75–90; Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 175–200.

1950, the UN Commission on Human Rights gave priority to the adoption of the UDHR (1948), and the works on the Covenant were left aside for some time. Finally, the ICCPR was adopted by the UN General Assembly in 1966, coming into force the 23 March 1976.⁷⁰⁰

The principle of legality and the consequent protection against retroactive crimes and punishments is enshrined as one of the most fundamental rights in the ICCPR, being included among those not subject to derogation under any circumstance.⁷⁰¹ Thereby, Article 15 establishes:

“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 when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”⁷⁰²

This Article shares with UDHR Article 11 some fundamental elements, being the wording of the first two sentences almost identical.⁷⁰³ (i) Both national and international law are considered as valid sources of criminal law. (ii) Non-codified international law is accepted as grounds for criminal prosecutions. (iii) Both *nullum*

⁷⁰⁰ UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, Res. 2200A (XXI). Because the ICCPR is a treaty, no State is bound by it until having signed and ratified it. To date, 20 April 2021, 173 States are parties of the ICCPR. The most prominent holdout is China that has already signed the treaty, but not yet ratified it.

⁷⁰¹ ICCPR, Art. 4(2).

⁷⁰² Ibid., Art. 15.

⁷⁰³ In December 1947 the second session of the UN Commission on Human Rights passed identical non-retroactivity provisions for the Draft Declaration and the Draft Covenant (Draft International Declaration on Human Rights, Art. 7, p. 18; Draft International Covenant on Human Rights, Art. 14, p. 30). Later on both texts were amended and modified. For a detailed account of the evolution and different versions of the UDHR, see Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 160–75; Weissbrodt and Hallendorff, ‘Travaux Préparatoires of the Fair Trial Provisions - Articles 8 to 11 - of the Universal Declaration of Human Rights’, 1074–83.

crimen and *nulla poena* are included in the Article. (iv) The non-retroactivity rule only concerns criminal law.

Notwithstanding these similarities, the ICCPR incorporates two major changes: the so-called Nuremberg paragraph, and the rule stating that if the penalty for an offence changes between the moment of commission and the judgement, the lighter penalty is to be applied (*lex mitior*). Despite most of the debates and the arguments raised in the *travaux préparatoires* have been already examined regarding the UDHR, some new elements and proposal were raised and will be analysed hereinafter.

3.1.2.1 International law as a source of criminal law: no statutory law required

According to ICCPR Article 15 a criminal prosecution respects the principle of legality if at the time of commission the act was already criminal either under national or international law. That is to say that international law was recognised as a source of criminal law. The acceptance of international law as a source of criminal law compatible with the *nullum crimen* principle was a debated and conscious choice. Following the incorporation of the express reference to international law, mirroring the wording of the Draft UDHR, the provision was debated. An amendment was submitted to change the phrase “under national or international law” to “under the applicable law”.⁷⁰⁴ This would have made the Article sceptical about whether international law can be a source of criminalization. However, the amendment was rejected.⁷⁰⁵

Regarding the content of the notion “international law”, the position of the delegations did not vary much from what has been explained regarding the UDHR. International law was to be understood not only as international treaties and conventions, but also including non-statutory law as international custom or general principles of law.⁷⁰⁶ The defeat of an amendment to limit the application of non-retroactivity to codified law indirectly reaffirmed the choice to do not require a

⁷⁰⁴ Official Records of the 15th UN General Assembly, 2 November 1960, UN Doc. A/C.3/L.865, p. 140, para. 8, available at: <https://digitallibrary.un.org/record/862977?ln=fr>.

⁷⁰⁵ Official Records of the 15th UN General Assembly 4 November 1960, UN Doc. A/C.3/SR.1013, para. 44, pp. 159, 162–63, cited in Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 190.

⁷⁰⁶ Thomas Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege* (Cham: Springer International Publishing, 2017), 32, 48.

statutory law to define crimes (*praevia lege scripta*), accepting therefore, common law or customary crimes.⁷⁰⁷

3.1.2.2 *The Nuremberg clause: an exception to non-retroactivity?*

The ICCPR comprises in its Article 15(2) the so-called Nuremberg provision.⁷⁰⁸ The inclusion of this second paragraph to the Article was one of the most debated issues, being dropped and reinstated at different negotiation phases.⁷⁰⁹ Still today the scope, meaning and possible interpretations of this provisions are the object of academic debates.

As it has been explained, during the second session of the Commission on Human Rights Belgium and the Philippines jointly proposed the addition of a new paragraph to the Declaration Draft, the so-called Nuremberg provision or the Belgian amendment.⁷¹⁰ In the same session of the Commission a parallel paragraph was added to the non-retroactivity Article of the Covenant Draft.⁷¹¹ While the paragraph was finally dropped from the UDHR, in the ICCPR, approved almost twenty years later, the provision was embraced.

As analysed above, various reasons, for and against the provision, were raised during the *travaux préparatoires* and various different understandings of the clause among the delegations were revealed.⁷¹² It was argued that the Nuremberg clause intended to protect the legitimacy of post-World War II prosecutions preventing the use of the non-retroactivity provision to question the legality of the trials.⁷¹³ Similarly, it was claimed that the Belgian amendment enshrined the obligation of all countries to

⁷⁰⁷ Joseph and Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 529; Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 183.

⁷⁰⁸ ICCPR, Art. 15(2):

“2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”

⁷⁰⁹ For an overview of negotiations and the votes on the Nuremberg clause, see Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 33.

⁷¹⁰ Draft International Declaration on Human Rights, Art. 7, p. 18.

⁷¹¹ Ibid., Art. 14, p. 30.

⁷¹² Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 33.

⁷¹³ Belgium and the Philippines, Summary record of the 36th Human Rights Commission meeting, p. 13.

respect international law, being such respect the basis for the post-war trials, and that removing the paragraph could prevent the prosecution of international crimes in the future.⁷¹⁴ On the contrary, some other delegations feared that the inclusion of the clause could question the post-war trials as needing specific retroactive justification.⁷¹⁵ Likewise, it was argued that accepting the Nuremberg provision would mean the overruling of the traditional *nullum crimen sine lege* principle.⁷¹⁶

The Nuremberg clause was understood as well by some delegations as a manner to secure the prosecution of future atrocities, ensuring the application of the Nuremberg principles and preventing that strict positivistic approaches of the legality principle could hinder forthcoming trials.⁷¹⁷ The Yugoslavian representative claimed that paragraph 2 should “deprive war criminals of any opportunity of escaping justice on the ground that their offences were not provided for under the laws of their country or under international law.”⁷¹⁸ Some delegations considered the Nuremberg provision as a saving clause enabling States to prosecute international crimes “despite” paragraph 1.⁷¹⁹ However, not all delegations accepted the possibility of the Nuremberg provision being interpreted as an exception of the non-retroactivity rule and it seems that many representatives did not intend to create such a waiver. At best, they feared that the

⁷¹⁴ The World Jewish Congress, Summary record of the 2nd Session of Drafting Committee, 2. The inclusion of the paragraph in the ICCPR was defended on similar grounds by the United Kingdom, even though it had previously advocated against the inclusion of the paragraph in the UDHR. UN Doc. E/CN.4/365, 42, as cited in Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 186.

⁷¹⁵ UN Doc. E/CN.4/SR.159 p. 13 (United States); *id.*, p. 15 (Denmark); *id.*, p. 16: Belgium – U.K. amendment “defeated its own purpose by implying that the defendants at Nurnberg and Tokyo had not been condemned under international law but in virtue of principles of less certain authority”, as cited in Gallant, 192.

⁷¹⁶ For example, United States, Brazil and Egypt. However, more than ten years later, the United States voted for the inclusion of this paragraph in the ICCPR, as explained in Gallant, 169.

⁷¹⁷ While Gallant sees little support during the *travaux préparatoires* for either supporters or opponents of this understanding of the Nuremberg clause, other scholars, as Boot, think otherwise. Gallant, 199; Machteld Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes against Humanity, War Crimes* (Antwerpen: Intersentia, 2002), 140. As explained in Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 34.

⁷¹⁸ Official Records of the 15th UN General Assembly, 4 November 1960, UN Doc. A/C.3/SR.1008, para. 135.

⁷¹⁹ Ghana, Czechoslovakia, Afghanistan and Romania. Official Records of the 15th UN General Assembly, 4 November 1960, UN Doc. A/C.3/SR.1010, paras 17, 146 and 147.

text could open a breach in the system of protection against retroactive law, and they clarified that it should not be understood as an exception.⁷²⁰

Anyhow, the Nuremberg clause would not be necessary to allow the prosecution of a person accused of criminal violations of international law, regardless of the consideration of such conducts in the State's domestic laws. In fact, Article 15(1) allows the trial and punishment in these circumstances since it only forbids prosecutions of acts or omissions that at the relevant time did not constitute a criminal offence either under *national or international law*. As explained above, the reference to international law should be interpreted as including statutory and customary law, and this means that in fact Article 15(1) would go further than the exception in Article 15(2).⁷²¹

The Nuremberg clause has found diverging interpretations and applications in both national and international courts. While some courts have opted for strict versions of legality, others have chosen to apply two distinct *nullum crimen* standards, differentiating between situations concerning "ordinary" domestic offences and international crimes. Such differentiated legality versions regarding conducts prohibited by international law have often been grounded on the Nuremberg provision.⁷²² Similarly, some countries have included in their domestic formulation of the legality principle a differentiated treatment for international crimes, following the wording of the ICCPR and ECHR Nuremberg clause.⁷²³

After the inclusion in Article 15 of an express mention to international law as a source of criminal law the question about the utility of the Nuremberg provision was raised. For some, the clause was only a way to reinforce the post-World War II trials' case law. For others, since international law was accepted as grounds for criminal prosecution, the Belgian amendment was redundant and unnecessary, not adding anything to the Article.⁷²⁴ However, it has been argued that the paragraph would

⁷²⁰ For the comments on the issue of the delegations of Chile, Belgium, Argentina, Saudi Arabia, Brazil, Peru, Japan, Haiti, Paraguay, Uruguay, Cambodia and Canada, see Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 192–93.

⁷²¹ Joseph and Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 529.

⁷²² It has been the case of the Argentinean, German and French courts, the Indonesian *Ad Hoc* Human Rights Tribunal, the Colombian Constitutional Court, the Slovenian Constitutional Court or the Hungarian Constitutional Court. See the reference and an analysis of the cases in Ward Ferdinandusse, 'Direct Application of International Criminal Law in National Courts' (Amsterdam, University of Amsterdam, 2005), 230–31.

⁷²³ It is the case of the 1997 Polish Constitution, the Criminal Code of Bosnia and Herzegovina or the Canadian Constitution, analyzed in Ferdinandusse, 231.

⁷²⁴ Summary record of the 54th Human Rights Commission meeting, p. 14.

accept further means of crime creation, in particular the general principles of law, or even that it could be interpreted as an exception to the non-retroactivity rule.

In fact, the delegations during the debates to adopt this Article, but as well some scholarly literature and international case law, have discussed if the paragraph was to be interpreted as broadening the sources of criminal law compatible with the principle of legality.⁷²⁵ It has been argued that the expression “according to generally recognized principles of law” was larger than “international law”.⁷²⁶ However, according to Gallant, no one has specified what, outside of international law, could be added by this expression.⁷²⁷ Indeed, only if international law was to be interpreted as a synonym of treaty law, the general principles of law would be a broader notion. However, the delegations established that “international law” was to be interpreted in accordance with Article 38 of the ICJ Statute, including non-statutory law, customary international law, or general principles of law.⁷²⁸ Therefore, taking international law in that sense, and considering the general principles of law as a subset of international law, the second paragraph of Article 15 could not be considered as broadening and expanding the sources of criminal law compatible with the principle of legality.

⁷²⁵ Gallant refers to the following: Public Prosecutor v. Sarmento, Decision on the Defense (Domingos Mendonca) Motion for the Court to Order the Public Prosecutor to Amend the Indictment, Case No. 18a/2001, para. 20 (Timor-Leste, Dili District Special Court for Serious Crimes, 24 July 2003) (“general principles of law recognized by the community of nations” treated as a subset of the rules of customary international law, and must have been applicable at time crime committed); Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes against Humanity, War Crimes*, 137–40, 158–61, 628; Ferdinandusse, ‘Direct Application of International Criminal Law in National Courts’, 233–36. As cited in Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 177.

⁷²⁶ Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes against Humanity, War Crimes*, 137–38. Citing UN Docs. E/CN.4/SR. 112, 159 and 324, including the views of France, the Soviet Union, the United Kingdom, and Yugoslavia. However, several States (Australia, Belgium, China, Denmark, Philippines, the United States, Uruguay) believed that general principles of law was a subset of international law in the draft ICCPR. Boot, 137.

⁷²⁷ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 195.

⁷²⁸ Summary record of the 159th Human Rights Commission meeting, 18 April 1950, E/CN.4/SR.159 para. 49 (U.S.), para. 51 (China), para. 53 (India), para. 68 and 80 (Denmark), available at: http://uvallsc.s3.amazonaws.com/travaux/s3fs-public/E-CN_4-SR_159.pdf?null.

3.1.2.3 Nulla poena and lex mitior

Together with the Nuremberg provision, *lex mitior* was the other main novelty in the ICCPR non-retroactivity Article with respect to the UDHR.⁷²⁹ As it did as well during the UDHR' negotiations, the United Kingdom proposed to exclude *nulla poena* from the legality provision.⁷³⁰ France leded the predominant opposition to exclude protection against retroactive increase of punishments, and finally UK dropped its proposal.⁷³¹

Later on, Chile and Egypt proposed to complement the prohibition of retroactive increase with the right to a lower sentence if the legal punishment has been reduced after the moment of commission (*lex mitior*). The proposal was accepted and included in the first paragraph of Article 15: "(...) If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby".

3.1.2.4 Further changes and proposals

In the *travaux préparatoires* of the ICCPR non-retroactivity provision, some interesting debates about different issues should be commented. The initial wording of the Article included the expression "the commission of any act", but it was amended and changed to "any act or omission".⁷³² This modification responded to the debate about the liability of military and civilian superior in international law for the actions of their subordinates when not taking measures to stop atrocities they knew or had reason to know were occurring.⁷³³

The initial draft of the Nuremberg provision referred to the "general principles of law recognised by civilised nations", mirroring the wording of the ICJ Statute, and

⁷²⁹ An analysis of the application of the ICCPR *lex mitior* rule in Aly Mokhtar, 'Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects', *Statute Law Review* 26, no. 1 (2005): 49.

⁷³⁰ Commission on Human Rights, *Draft International Covenant on Human Rights*, Art. 14, 24 May 1949, UN Doc. E/CN.4/253, p. 3, available at: <https://digitallibrary.un.org/record/567110>.

⁷³¹ Cassin expressed that "France, which during the war had seen men executed for crimes which, when committed, had been considered relatively minor, could not accept retroactive increases of penalty", E/CN.4/SR.112, p. 8, as cited in Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 181.

⁷³² Official Records of the 18th Commission on Human Rights, 14 April 1952, UN Doc. E/2256 para. 228, adopting the U.K. amendment (UN Doc. E/1992, Annex III A, Art. 11), available at: [https://undocs.org/E/2256\(supp\)](https://undocs.org/E/2256(supp)).

⁷³³ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 188.

the European Convention on Human Rights.⁷³⁴ However, many communist countries, among others, opposed the use of the concept “civilized nations” since it suggested that some countries, especially former colonies, were not civilized. After vibrant debates with more political than legal implications, the expression “community of nations” was finally adopted.⁷³⁵

It is also interesting to mention the United States’ proposal to limit the prohibition of retroactivity to legislative changes but not to the judicial interpretation of such laws.⁷³⁶ Different countries opposed this proposal arguing that the non-retroactivity rule should apply to both criminal law creation and application. Similarly, it was claimed that the legality provision should be constructed based on the right of the individuals to be free from retroactive crimes and punishments, and not on the obligation of States to not create retroactive laws.⁷³⁷

3.1.2.5 ICCPR Article 15 applied by the Human Rights Committee

To complete the study of the legality principle in the ICCPR it is relevant to comment on how the Human Rights Committee (HRC) has interpreted and applied Article 15.⁷³⁸ In fact, the Committee has implemented ICCPR Article 15 in different situations, but it was in the *Baumgarten* case where it had the opportunity to develop and argue its position.⁷³⁹

⁷³⁴ United Nations, *Statute of the International Court of Justice*, Art. 38(1), 18 April 1946; Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, Art. 7(2), 4 November 1950, ETS 5.

⁷³⁵ Summary record of the 324th Human Rights Commission meeting, 27 June 1952, UN Doc. E/CN.4/SR.324, p. 17, available at: <https://undocs.org/E/CN.4/SR.324>.

⁷³⁶ UN Docs. E/CN.4/170, 6 May 1949 and E/CN.4/253, 24 May 1949, p.3, as cited in Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 180.

⁷³⁷ UN Doc. E/CN.4/SR.112, at 4–5 (Guatemala) and 7 (United Kingdom) as cited in Gallant, 181.

⁷³⁸ The HRC is the body of independent experts that monitors implementation of the ICCPR by its States parties, and it has competence to examine individual complaints regarding alleged violation of the Covenant. For more information on the HRC, see Human Rights Committee, *Civil and Political Rights: The Human Rights Committee*, Fact Sheet No. 15 (Rev.1), available at: <https://www.ohchr.org/Documents/Publications/FactSheet15rev.1en.pdf>. The interpretation and application of the *nulla poena* principle by the HRC in *Teófila Casafranca de Gómez v. Peru*, UNHRC Comm. N° 981/2001, U.N.Doc. CCPR/C/78/D/981/2001, 19 September 2003, available at: <https://www.refworld.org/cases,HRC,4282299bc.html>.

⁷³⁹ *Klaus Dieter Baumgarten v. Germany*, UNHRC Comm. N° 960/2000, U.N. Doc. CCPR/C/78/D/960/2000, 31 July 2003, 261 available at: http://www.worldcourts.com/hrc/eng/decisions/2003.07.31_Baumgarten_v_Germany.htm.

The HRC addressed the prosecution by united Germany of East German border guards for the killing of citizens when trying to cross the border. Baumgarten had been Deputy Minister of Defence and head of Border Troops of the former German Democratic Republic (GDR) from 1979 to 1990. In 1996, after the fall of the Berlin Wall and the reunification, German courts convicted him for the deaths of people who had attempted to escape from the GDR to the Federal Republic of Germany and were shot by GDR border guards between 1980 and 1989.

The author alleged that GDR law in force at the time of the facts exempted him from prosecution. He claimed that the German courts had violated Article 15 of the Covenant since at the relevant time “the acts committed did not constitute a criminal offence under GDR law or under international law.”⁷⁴⁰ However, the HRC upheld German courts and found no violation of ICCPR Article 15. The Committee examined if at the time of commission, the author’s act “constituted sufficiently defined criminal offences under the criminal law of the GDR or under international law.”⁷⁴¹ The HRC acknowledged that the “killings took place in the context of a system which effectively denied to the population of the GDR the right freely to leave one's own country. The authorities and individuals enforcing this system were prepared to use lethal force to prevent individuals from non-violently exercising their right to leave their own country.”⁷⁴²

The HRC recalled that according to the Covenant, lethal force might only be used to meet a proportionate threat. And that “the disproportionate use of lethal force was criminal according to the general principles of law recognized by the community of nations already at the time when the author committed his acts.”⁷⁴³ The Committee endorsed the German courts that had considered the killings as violations of the GDR’s international obligations, and condemned Baumgarten interpreting and applying GDR law according to international human rights law, and excluding statutory defences in the case of human rights violations.⁷⁴⁴ Therefore, the Committee concluded that it

This situation is closely linked to the “German border guard cases” before the ECHR that will be comprehensively analyzed below, in Section 5.1.4.4.

⁷⁴⁰ *Baumgarten v. Germany*, para. 5.1. An analysis of the GDR laws in force between 1979 and 1990 in Joseph and Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 530.

⁷⁴¹ *Baumgarten v. Germany*, para. 9(3).

⁷⁴² *Ibid.*, para. 9(4).

⁷⁴³ *Ibid.*

⁷⁴⁴ *Ibid.*, para. 9(5).

“cannot find this interpretation of the law and the conviction of the author based on it to be incompatible with Article 15 of the Covenant.”⁷⁴⁵

The HRC considered Baumgarten’s conduct as “criminal according to the general principles of law recognized by the community of nations already at the time when the author committed his acts” and therefore, no issue regarding Article 15 arose. However, even if the Committee had concluded that GDR law did indeed exempt the author of criminal responsibility, the HRC would have presumably found its conviction compatible with the Covenant since the conduct was already criminal under international law.⁷⁴⁶

3.1.3 The universality of the legality principle

It is worth noting that no state has made reservations to the ICCPR in the sense of limiting or rejecting the non-retroactivity principle. However, a few have limited or rejected the *lex mitior* doctrine.⁷⁴⁷ To prove the universal acceptance of the *nullum crimen* principle, Gallant connect the ICCPR with the Convention on the Rights of the Child (CRC).⁷⁴⁸ The later forbids the retroactive application of criminal laws and requires for the prosecution of a conduct its previous criminalization by national or international law.⁷⁴⁹ The CRC has been ratified by all UN member States except the United States and Somalia. However, these two states have ratified the ICCPR. Therefore, as a matter of fact, every state has accepted the international obligation of applying the *nullum crimen* principle in its criminal law, at least for children and in most States for everyone.

Taking this reasoning further, we can deduce that even the countries that have not yet ratified the ICCPR accept as well a general application of the non-retroactivity rule. As Gallant points out, it would not make sense that a country accepts the

⁷⁴⁵ Ibid.

⁷⁴⁶ Joseph and Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary*, 532.

⁷⁴⁷ The Declarations and Reservation to the ICCPR are available at: https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=en&mtdsg_no=IV-4&src=IND.

⁷⁴⁸ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 201.

⁷⁴⁹ “No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed.” UN General Assembly, *Convention on the Rights of the Child*, Art. 40(2)(a), 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3

international obligation to apply *nullum crimen* for children but not for adults, since juvenile justice is generally much more flexible than adult criminal law.⁷⁵⁰

3.1.4 Regional human rights instruments

The most prominent regional human rights treaties comprise the principle of legality. However, the provisions establishing *nullum crimen* significantly vary responding to regional specificities and depending on the moment of adoption, reflecting the progressive evolution of the principle in the international arena from the end of World War II to nowadays. An analysis of the elements of the legality principle enshrined in the regional human rights treaties is provided in this section. The interpretation and application of these provisions by the regional human rights courts will be studied below in Chapter 5.

3.1.4.1 European Convention on Human Rights

In the aftermath of the Second World War, and deeply influenced by the atrocities committed during the conflict and by the new international context of the Cold War, some European countries agreed to create in 1949 the Council of Europe.⁷⁵¹ According to its Statute, the main objectives of the organization are the pursuit of peace through international cooperation and the promotion of the principles grounding a "genuine" democracy, as individual freedom, political liberty and the rule of law.⁷⁵² The ECHR was enacted to make effective and to give a concrete content to the obligations assumed by the member States regarding the protection of human rights.⁷⁵³ The prohibition of retroactive crimes and punishments is included in Article 7, entitled "No punishment without law". The Article contains the Nuremberg provision, an express reference to international law as a source of criminalization and the *nulla poena* principle, but it remains silent regarding *lex mitior*.

⁷⁵⁰ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 202.

⁷⁵¹ Originally founded by ten States (Belgium, Denmark, France, Ireland, Italy, Luxemburg, the Netherlands, Norway, Sweden and the United Kingdom), the Council of Europe is currently composed by forty-seven member States.

⁷⁵² Council of Europe, *Statute of the Council of Europe*, Preamble and Art. 15, May 1949, ETS 1.

⁷⁵³ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5. The Convention came into force the 3 September 1953. Currently, the Convention has been ratified by the forty-seven member States of the Council of Europe have ratified the Convention. In addition, the European Union, as an international organization, is negotiating its accession to the Convention, what would be an interesting novelty in international 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 civilised nations.”⁷⁵⁴

The negotiations and the final text of the Convention were deeply influenced by the recently approved UDHR and by the ICCPR Draft.⁷⁵⁵ This was especially true regarding the principle of legality since in the first ECHR drafts the non-retroactivity provision was just an express reference to UDHR Article 11.⁷⁵⁶ Even though the final version of the Convention incorporates a separate *nullum crimen* article, its wording is almost identical to the corresponding provision in the Draft International Covenant at the time the ECHR was adopted.⁷⁵⁷

Article 7 of the ECHR includes an express reference to international law as source of criminalization, considering that the *nullum crimen* rule would be respected if the punishable action was prohibited at the time of commission by either national, or international law. However, it is interesting to mention that the Swedish delegation forced the inclusion of the following phrase in the statements of reason of the Report of the Committee of Experts: “(...) the Convention does not compel Member States to apply, as a criminal measure, a rule of international law which is not incorporated in the national law.”⁷⁵⁸

⁷⁵⁴ ECHR, Art. 7.

⁷⁵⁵ In fact, the Committee of Ministers of the Council of Europe opposed at first the drafting of an European Convention to avoid duplicating and interfering with the United Nations works for the International Covenants. For a detailed analysis of the negotiations and the preparatory works for the ECHR, see Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’, 101–10.

⁷⁵⁶ Council of Europe, ‘Preparatory Work on Article 7 of the European Convention on Human Rights’ (Strasbourg, 21 May 1957), 2, [https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART7-DH\(57\)6-BIL1674978.pdf](https://www.echr.coe.int/LibraryDocs/Travaux/ECHRTravaux-ART7-DH(57)6-BIL1674978.pdf).

⁷⁵⁷ Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’, 104; Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 187.

⁷⁵⁸ Council of Europe, ‘Preparatory Work on Article 7 of the European Convention on Human Rights’, 6.

As mentioned above, Article 7 of the ECHR includes the so-called Nuremberg clause.⁷⁵⁹ The United Kingdom proposed the addition of this second paragraph claiming that without it, the “article might be thought to impugn the validity of the judgements of the Nuremberg Tribunal.”⁷⁶⁰ Despite the provision was only incorporated to the text in the final stages of the negotiations, the concern about the effect of the legality Article on the post-World War II trials was very present throughout the *travaux préparatoires*.

In this respect, it is interesting to comment the amendment presented by Luxemburg arguing that the provision prohibiting retroactivity “appears to be too absolute.”⁷⁶¹ It was claimed that, “in international law, the principle that penal law cannot be retrospective does not apply.”⁷⁶² Similarly, the delegation of Luxemburg argued that in the aftermath of World War II many national and international laws were passed rejecting both the *nullum crimen* and the *nulla poena* rules. While the prohibition of retroactive laws was a general principle shared by all nations, it was not “universally admitted that there are no possible exceptions to this rule.”⁷⁶³

Indeed, it was claimed that under certain circumstances States are forced to have recourse to retroactive criminal laws, as it was the case after Second World War. Accordingly, Luxemburg considered that the incorporation in the ECHR of an article on retroactivity in the same terms than the UDHR Article 11 “could be considered as a moral condemnation of those laws.”⁷⁶⁴ Thereby, the delegate proposed an “attenuated” version of the Article, with a “more supple phraseology”, and referring as sources of criminalization to national and international law, and to the general principles of law as recognised by civilised nations.⁷⁶⁵

⁷⁵⁹ ECHR, Art. 7(2). A similar paragraph was finally discarded from the UDHR, but less than two years latter it was incorporated to the ICCPR Draft. Draft First International Covenant on Human Rights, Art. 11, E/1681, Annex I, p.17, as cited in Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 187. In fact, at the time the ECHR was approved, the ICCPR Draft already included the Nuremberg clause.

⁷⁶⁰ Council of Europe, ‘Preparatory Work on Article 7 of the European Convention on Human Rights’, 4.

⁷⁶¹ Ibid., 5.

⁷⁶² Ibid.

⁷⁶³ Ibid.

⁷⁶⁴ Ibid.

⁷⁶⁵ “No one shall be held guilty of any act or omission which, at the time when it was committed, did not constitute a delinquent act, either under national or international law, nor according to the general principles of law as recognised by civilised nations.” As cited in Council of Europe, 6.

The concerns of Luxemburg were clearly reflected in the Report of the Committee of Experts on Human Rights to the Committee of Ministers: “(...) the Committee stressed that this text did not affect laws which, under the very exceptional circumstances at the end of the second world war, were passed in order to suppress war-crimes, treasons and collaboration with the enemy, and did not aim at any legal or moral condemnation of these laws.”⁷⁶⁶

Together with the amendment to incorporate the Nuremberg provision to the legality Article, the United Kingdom proposed as well the removal of the *nulla poena* rule.⁷⁶⁷ Not considering the protection against retroactive increased punishments a fundamental human right, the British delegation had proposed as well the suppression of *nulla poena* from the UDHR and the ICCPR. The amendment was finally rejected, and Article 7 of the ECHR was adopted including *nulla poena*.

3.1.4.2 *The American Convention on Human Rights*

The American Convention on Human Rights (ACHR), also known as the Pact of San José, was adopted on 22 November 1969 and came into force in 1978.⁷⁶⁸ An Article establishing the traditional legality principle was present since the Convention's first discussions and negotiations, but it was not the object of much debate or dispute during any of the drafting phases of the treaty.⁷⁶⁹ Finally, three separated Articles of the Convention (Articles 7, 8 and 9) contained different aspect of the legality principle. Article 9, entitled “Freedom from Ex Post Facto Laws”, establishes the usual *nullum crimen, nulla poena* rule:

“No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the

⁷⁶⁶ Council of Europe, 10.

⁷⁶⁷ Ibid., 8.

⁷⁶⁸ Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica, 22 November 1969, 1114 UNTS 123, available at: <https://bit.ly/3hkLjaf>.

⁷⁶⁹ Federico Andreu Guzmán, *Retroactividad Penal de Crímenes Internacionales*, ed. Comisión Colombiana de Juristas (Bogotá, Colombia: Opciones Gráficas Editores Ltda., 2012), 24. See, Organization of American States (OAS), *Actas y Documentos de la Conferencia Especializada Interamericana sobre Derechos Humanos*, San José, Costa Rica, 7-22 November 1969, OEA/Ser.K/XVI/1.2, p. 206, available at: <https://www.oas.org/es/cidh/mandato/basicos/actas-conferencia-interamericana-derechos-humanos-1969.pdf>.

law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.”⁷⁷⁰

Article 7, on the right to personal liberty, establishes a broader and more procedural version of the legality principle. The provision can be interpreted as extending the prohibition of retroactivity to non-criminal reasons for imprisonment, as could be mental incompetence.⁷⁷¹

“No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.”⁷⁷²

As it will be closely examined in Chapter 5, the Inter-American Court of Human Rights (IACtHR) has interpreted the ACHR legality provisions in a rather expansive manner, broadening the scope of the principle further than required by the wording of the Convention.⁷⁷³ Contrary to the ECHR or the international criminal tribunals other than the ICC, the IACHR has interpreted the legality principle as including the *lex praevia, scripta, certa* and *stricta* requirements.⁷⁷⁴ It is also worth noting that the ACHR grants special protection to the legality principle considering it as a non-derogable human right.⁷⁷⁵

ACHR Article 9 establishes that no one should be condemned for a conduct that at the moment of commission was not considered criminal under “the applicable law”. Contrary to the legality provisions in the treaties and conventions studied above, ACHR Article 9 does not refer to crimes under national or international law, but to the applicable law. The Article does not mention neither the crimes under the general principles of law.

To clarify the scope of the expression “the applicable law” we should refer to the ACHR’s *travaux préparatoires*. Despite Article 9 was not the object of much debate or dispute during the drafting and negotiating phases of the treaty, some statements of

⁷⁷⁰ ACHR, Art. 9. In the Spanish version Article 9 is entitled *Principio de Legalidad y de Retroactividad* (Principle of Legality and Retroactivity).

⁷⁷¹ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 204.

⁷⁷² ACHR, Art. 7(2).

⁷⁷³ Héctor Olásolo, ‘El Principio Nullum Crimen Sine Iure y El Elemento Contextual Del Delito de Genocidio’, in *La Evolución de La Definición y La Aplicación Del Delito de Genocidio. La Contribución Iberoamericana y El Legado Del Tribunal Penal Internacional Para La Ex-Yugoslavia*, vol. 9 (Valencia, Spain: Tirant lo Blanch, 2019), 440; Olásolo, ‘El Principio Nullum Crimen Sine Iure En El Derecho Internacional Contemporáneo’, 20.

⁷⁷⁴ For an analysis of the case law of the international criminal tribunals, see below, Chapter 4.

⁷⁷⁵ ACHR, Art. 27.

the Ambassador Gonzalo García Bustillos, Chairman of the negotiating Commission I, are of significant relevance.⁷⁷⁶ Responding to an amendment aiming to clarify the scope of the notion “applicable law”, García Bustillos expressed that it was not necessary to specify “national or international law” since the expression “applicable law” included both.⁷⁷⁷ Likewise, the doctrine considers that international law is to be accepted as a source of criminalization.⁷⁷⁸ Thus, the prosecution of conducts that at the time of commission were considered criminal under international law but not under domestic legislation, would respect the legality principle as established in Article 9.⁷⁷⁹

The ACHR establishes in its Article 8, on the right to a fair trial, the prohibition of *ex post facto* created courts. Responding to an historical experience of retroactively created courts in many American States, the ACHR contains the stronger protection against *ex post facto* jurisdiction of all human rights treaties.⁷⁸⁰ This way, Article 8 establishes that:

“Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law (...).”⁷⁸¹

⁷⁷⁶ Andreu Guzmán, *Retroactividad Penal de Crímenes Internacionales*, 24.

⁷⁷⁷ Organization of American States (OAS), *Records and Documents of the Inter-American Specialized Conference on Human Rights*, Records of the 8th Session of Commission I, Costa Rica, 13 November 1969, OEA/Ser.K/XVI/1.2, p. 206, available at: <https://www.oas.org/es/cidh/mandato/basicos/actas-conferencia-interamericana-derechos-humanos-1969.pdf>.

⁷⁷⁸ Among others, Héctor Faúnez Ledesma, *Administración de Justicia y Derecho Internacional de los Derechos Humanos (El Derecho a un juicio Justo)* (Caracas: Ed. Universidad Central de Venezuela – Facultad de Ciencias Jurídicas y Políticas, 1992), 361; Daniel O’Donnell, *Protección internacional de los derechos humanos*, 2a ed. (Lima: Comisión Andina de Juristas, 1989), 131, as cited in Andreu Guzmán, *Retroactividad Penal de Crímenes Internacionales*, 24. According to Gallant nothing indicates that international law should be excluded as a source of criminalization. Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 204.

⁷⁷⁹ Sergio García Ramírez and Julieta Morales Sánchez, ‘Consideraciones sobre el principio de legalidad penal en la jurisprudencia de la Corte Interamericana de Derechos Humanos’, *Cuestiones constitucionales*, no. 24 (2011): 221.

⁷⁸⁰ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 205. Scholars as De Souza Dias consider this as part of a trend towards an expansion of the scope of the legality principle to cover certain procedural human rights. Despite admitting that this approach is not yet widespread the author claims that, as international criminal law develops, it becomes less and less justifiable to apply procedural rules retrospectively. Talita De Souza Dias, ‘Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law’ (University of Oxford, 2019), 80.

⁷⁸¹ ACHR, Art. 8(1).

This general prohibition of retroactively created courts faces a rather complex situation when a tribunal prosecutes permanent or continuous crimes, as enforced disappearances, very frequent in the American experience.⁷⁸² The IACHR has faced this problem regarding its own competence *ratione temporis* when addressing permanent crimes originated before its establishment or before the relevant Member State granted competence to the Court. The IACHR has considered that its jurisdiction *ratione temporis* over these continuous or permanent crimes is consistent with Article 8 if the crimes persisted after the State's recognition of the Court's jurisdiction.⁷⁸³

The second part of ACHR Article 9 establishes, in a similar language to that used in other human right treaties, the prohibition of imposing a heavier penalty “that the one that was applicable at the time the criminal offense was committed”.⁷⁸⁴ It should be noted that contrary to the ECHR and the UDHR, and following the novelty introduced by the ICCPR adopted only three years before, ACHR Article 9 includes the mandatory retroactivity of lighter penalties (*lex mitior*). Thus, it establishes that “If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.”⁷⁸⁵

3.1.4.3 The African Charter on Human and Peoples' Rights

The African Charter on Human and Peoples' Rights (ACHPR), also known as the Banjul Charter, was adopted on 27 June 1981 and came into force in 1986.⁷⁸⁶ Its

⁷⁸² The compatibility of ACHR Article 8 and the prosecution of continuous crimes as enforced disappearance is analysed in García Ramírez and Morales Sánchez, ‘Consideraciones sobre el principio de legalidad penal en la jurisprudencia de la Corte Interamericana de Derechos Humanos’, 223–24.

⁷⁸³ *Heliodoro Portugal v. Panama*, Preliminary Objection, Merits, Reparations and Costs, 12 August 2008, para. 25, available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_186_ing.pdf; *Ticona Estrada et al. v. Bolivia*, Merits, Reparations and Costs, 27 November 2008, paras 29-30, available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_191_ing.pdf. As analysed in García Ramírez and Morales Sánchez, 224.

⁷⁸⁴ ACHR, Art. 9. Shahram Dana, ‘Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing’, *Journal of Criminal Law and Criminology* 99 (2009): 867; De Souza Dias, ‘Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law’, 60.

⁷⁸⁵ ACHR, Art. 9. An analysis of the application of the ACHR *lex mitior* rule in Mokhtar, ‘Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects’, 49.

⁷⁸⁶ Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights* (“*Banjul Charter*”), 27 June 1981, CAB/LEG/67/3 rev.5, 21 I.L.M. 58 (1982), available at: <https://www.achpr.org/legalinstruments/detail?id=49>.

Article 7(2) contains the *nullum crimen, nulla poena* principle, but the wording is significantly different compared to the legality provisions of other human rights instruments. Anyhow, despite *lex mitior* is not included, the non-retroactivity rule in the ACHPR is at least as broad as in the UDHR or the ICCPR.⁷⁸⁷

“No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender.”⁷⁸⁸

The drafters of the Charter were concerned about putting an end to existing abuses of certain authoritarian States. Article 7(2) was an instrument to that end, forbidding for example the use of analogies, except when it is to the benefit of the accused (analogy *in favorem*).⁷⁸⁹ It should be noted that despite a rather different wording, ACHPR Article 7(2), as ACHR Article 9, does not contain a specific reference to national or international law as acceptable sources of criminalization.

A novelty in the ACHPR legality provision compared to other human rights instruments is the express recognition of the principle of the individual nature of penalties, establishing that “(...) Punishment is personal and can be imposed only on the offender.”⁷⁹⁰ While collective, communal or family punishments are explicitly prohibited in some humanitarian law treaties, it is not the case in human rights instruments.⁷⁹¹ This particularity of the African Charter has been explained based on

⁷⁸⁷ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 205.

⁷⁸⁸ ACHPR, Art. 7(2). In the same sense, ACHPR Article 6 also includes the non-retroactivity rule:

“Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained.”

⁷⁸⁹ Solange Ngono, ‘Article 7.2’, in *La Charte Africaine Des Droits de l’homme et Des Peuples et Le Protocole y Relatif Portant Création de La Cour Africaine Des Droits de l’homme: Commentaire Article Par Article*, by Maurice Kamto, Collection de Droit International 67 (Bruxelles: Editions Bruylant Editions de l’Université de Bruxelles, 2011), 197.

⁷⁹⁰ ACHPR, Art. 7(2).

⁷⁹¹ ICRC, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287, Art. 33; ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (GC Additional Protocol I), 8 June 1977, 1125 UNTS 3, Art. 75(2)(d); ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* (GC Additional Protocol II), 8 June 1977, 1125 UNTS 609, Art. 4(2)(b). The express recognition of the principle of the individual nature of penalties in the ACHPR has been considered as a positive

the existence of rooted traditions in some African States admitting collective responsibility for the acts of an individual. The ACHPR drafters aimed to emphasize the notion of individual responsibility as opposed to collective punishment. They opted to include an express reference to the individual nature of penalties taking into account the existence at the time of States where a person could go to prison for the crimes committed by other family or community member.⁷⁹²

3.1.4.4 The Arab Charter on Human Rights

A first version of the Arab Charter on Human Rights (ArCHR) was approved in 1994 but lacking ratifications it never came into force. A revised version of the Charter was adopted on 22 May 2004 by the Council of the League of Arab States and came into force in 2008.⁷⁹³ Its Article 15 succinctly establishes the legality principle:

“No crime and no penalty can be established without a prior provision of the law. In all circumstances, the law most favourable to the defendant shall be applied.”⁷⁹⁴

It seems that this formulation embraces a strong version of legality, requiring written laws as source of criminalization (*lex scripta*).⁷⁹⁵ The right to a lower sentence if the legal punishment has been reduced after the moment of commission (*lex mitior*), appears as well to be included. Like other human rights instruments, the Arab Charter permits member States to temporarily suspend part of their obligations under certain conditions as exceptional situations of emergency. However, no derogation of Article 15 is allowed under any circumstance.⁷⁹⁶ Regarding the principle of the individual nature

development of human rights law. Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 205.

⁷⁹² Ngono, ‘Article 7.2’, 199. Despite the explicit prohibition of collective punishments in the ACHPR, the African Commission on Human and People’s Rights has been criticized for not ruling on the issue when having the opportunity. In *Alhassan Abubakar v. Ghana* it addressed the situation of an individual that had been detained for over 7 years without trial until his escape. However, the Commission ignored the fact that his wife and sister who visited him in prison were arrested for several weeks to make them confess where his whereabouts. (*Alhassan Abubakar v. Ghana*, Com. N° 103/93, ACmHPR, 31 October 1996. Also see, *Monja Jaona v. Madagascar*, Com. N° 108/93, ACmHPR, 31 October 1996). For an analysis of these and further related cases, see Ngono, 199–200.

⁷⁹³ League of Arab States, *Arab Charter on Human Rights*, 22 May 2004, CHR/NONE/2004/40/Rev.1, available at <https://digitallibrary.un.org/record/551368>.

⁷⁹⁴ ArCHR, Art. 15.

⁷⁹⁵ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 205.

⁷⁹⁶ ArCHR, Art. 4(2).

of penalties, explicitly recognised in the ACHPR, it was contemplated in the first drafts of ArCHR Article 15, but was subsequently eliminated against the criteria of some delegations.⁷⁹⁷ The compatibility of Article 15 with of some domestic criminal laws inspired or explicitly based on the *Sharia* is uncertain, and it remains to be seen how the inconsistency is addressed.⁷⁹⁸

3.1.4.5 The ASEAN Human Rights Declaration

In 2012 the Association of Southeast Asian Nations (ASEAN) adopted by unanimity a Human Rights Declaration that includes the principle of legality in its Article 20(2).⁷⁹⁹ The wording of the provision is almost identical to UDHR Art. 11(2), or to ICCPR Art. 15(1):

“No person 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 and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.”⁸⁰⁰

The provision includes *nullum crimen* and *nulla poena* and refers to both national and international law as valid sources of criminalization. Since the drafters opted for a wording virtually identical to the legality provisions in the UDHR and ICCPR, reflecting the legality version that has become customary international law, it seems logical to interpret the main features of ASEAN Declaration Art. 20(2) in the

⁷⁹⁷ Delegation of Iraq, memorandum N° c/3/5/85, 18 January 2004. Cited in Wael Allam, ‘The Arab Charter on Human Rights: Main Features’, *Arab Law Quarterly* 28, no. 1 (2014): 45. The ArCHR is rather unknown worldwide, and the scarce academic literature has focused on other issues than the *nullum crimen* principle. Mervat Rishmawi, ‘The Arab Charter on Human Rights and the League of Arab States: An Update’, *Human Rights Law Review* 10, no. 1 (1 March 2010): 169.

⁷⁹⁸ Dina Melhem, ‘La problématique d’une Charte arabe des droits de l’homme’ (Aix-en-Provence, Paul Cézanne, Aix-Marseille III, 2008), 246.

⁷⁹⁹ ASEAN, *Human Rights Declaration*, 18 November 2012, Art. 20(2), available at: <https://asean.org/asean-human-rights-declaration/>. For further general information on the ASEAN Declaration see Catherine Shanahan Renshaw, ‘The ASEAN Human Rights Declaration 2012 Recent Developments’, *Human Rights Law Review* 13, no. 3 (2013): 557–79; Gino J. Naldi and Konstantinos D. Magliveras, ‘The ASEAN Human Rights Declaration’, *International Human Rights Law Review* 3, no. 2 (2014): 183–208; Gerard Clarke, ‘The Evolving ASEAN Human Rights System: The ASEAN Human Rights Declaration of 2012’, *Northwestern University Journal of International Human Rights* 11, no. 1 (2013): 1–27.

⁸⁰⁰ ASEAN, *Human Rights Declaration*, Art. 20(2).

same vein. Therefore, the notion “law” is to be understood as comprising both statutory and non-statutory law.

3.2 Codification and development of modern international criminal law

The trials after the World War II revealed the shortcomings and flaws of an international justice system that at the time was at an early stage of development. To respond to the critics and to solve some of the problems faced by the post-war prosecutions, the development of the different elements of international criminal law was necessary. Most of the criticism concerned the way the courts were established and the alleged infringement of the principle of criminal legality. Therefore, in order to prevent future problems regarding the non-retroactivity rule a series of initiatives were developed aiming to eventually establish an international criminal code and the creation of a permanent international criminal court.⁸⁰¹

However, these initiatives found numerous obstacles, mainly related to the international situation of political polarization during the Cold War, and had to wait fifty years to come to fruition. However, international crimes were progressively codified in specific or sectorial treaties and conventions covering specific crimes or legal issues. This codification process of international crimes will be analysed in this chapter, and the long and complicated path that led to the creation of the International Criminal Court and the adoption of its Statute will be analysed in Chapter 4.

The progressive codification of international crimes had a direct impact on the notion of legality in international law. As explained above, stricter or more exigent versions of the legality principle are only possible in mature legal systems. The codification of international crimes was a significant step towards the establishment of a comprehensive and fully developed international criminal justice system. Thereby, clear definitions of the acts and omissions carrying individual criminal responsibility allowed prosecutions respecting stricter, or more exigent notions of the *nullum crimen* principle. Given its direct influence in the notions of legality, this chapter will succinctly analyse the codification process of international crimes.

3.2.1 The Nuremberg principles

On 11 December 1946, only one month after the reading of the International Military Tribunal’s judgment, the UN General Assembly adopted a resolution declaring

⁸⁰¹ Rodrigo Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’ (Madrid, Spain, Universidad Carlos III de Madrid, 2015), 151.

the norms set in the London Charter and in the IMT sentences, as principles of international law.⁸⁰² The resolution was interpreted as an endorsement by the international community of the general concepts and legal constructs of criminal law enunciated in the Statue and the judgement of the Nuremberg Tribunal.⁸⁰³ The principles affirmed by the General Assembly have significantly influenced the development of international criminal law, and numerous international instruments and national and international courts' case law have embraced them.⁸⁰⁴

The doctrine is not unanimous about the character of the principles when the UN General Assembly affirmed them in 1946. It is claimed that the resolution acknowledged that the principles established in the IMT Charter and judgment were already principles of customary international law.⁸⁰⁵ On the contrary, it is argued that the General Assembly resolution strongly contributed to turn the Nuremberg principles into general principles of customary law. Anyhow, its customary nature is currently unquestionable.⁸⁰⁶

In 1947 the UN General Assembly created the International Law Commission (ILC) establishing among its objectives the promotion of the codification process of international crimes.⁸⁰⁷ The General Assembly commissioned the ILC to formulate the principles of international law recognized in the Charter and in the IMT's judgment, as well as to prepare a draft code of offences against the peace and security of mankind.⁸⁰⁸

⁸⁰² UN General Assembly, *Affirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal*, 11 December 1946, Res. A/RES/95(I), available at: [https://undocs.org/pdf?symbol=en/A/RES/96\(I\)](https://undocs.org/pdf?symbol=en/A/RES/96(I)).

⁸⁰³ Alfredo Liñán Lafuente, 'Origen y Evolución Del Derecho Penal Internacional (II)', in *Derecho Penal Internacional*, ed. Alicia Gil Gil and Elena Maculán (Madrid, Spain: Dykinson, 2016), 65; Antonio Cassese, 'Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal', *United Nations Audiovisual Library of International Law*, 2009, 1.

⁸⁰⁴ Cassese, 'Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal', 4.

⁸⁰⁵ H.H. Jescheck, *The Development of International Criminal Law after Nuremberg*, in Guénaél Mettraux (ed.), *Perspectives on the Nuremberg Trial*, 411, as cited in Cassese, 6.

⁸⁰⁶ Cassese, 6–7.

⁸⁰⁷ UN General Assembly, *Establishment of an International Law Commission*, 21 November 1947, Res. A/RES/174(II), available at: [https://undocs.org/pdf?symbol=fr/A/RES/174\(II\)](https://undocs.org/pdf?symbol=fr/A/RES/174(II)). The UN Charter establishes in its Article 13 the competence of the General Assembly to initiate studies and make recommendations aiming, among other objectives, to "encourage the progressive development of international law and its codification". UN Charter, Art. 13.

⁸⁰⁸ UN General Assembly, *Formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal*, 21 November 1947, A/RES/177, available at: <https://www.refworld.org/docid/3b00f08e34.html>.

The ILC presented in 1950 the result of its works, comprising the formulation of seven “Principles of International Law recognized in the Charter of the Nurnberg Tribunal and in the Judgement of the Tribunal”.⁸⁰⁹ Individual responsibility for the commission of crimes under international law was reaffirmed (Principle I), and it was specified that such criminal liability exists under international law even if the conduct was not considered punishable by domestic laws (Principle II). The crimes defined as punishable under international law were the crimes against peace, war crimes and the crimes against humanity (Principle VI).⁸¹⁰

3.2.2 Draft Code of Offences against the Peace and Security of Mankind

The General Assembly commissioned simultaneously the ILC to formulate the Nuremberg principles, and to prepare a draft code of offences against the peace and security of mankind.⁸¹¹ However, the inability of States to agree on the definition of crime of aggression and the political polarization of the Western world into two groups of influence slowed down and hindered during four decades the preparatory works.⁸¹²

Two draft Codes were presented in 1951 and 1954, but neither of them included a provision on the *nullum crimen* principle. The *nulla poena* rule was contemplated in the 1951 version, but subsequently omitted in the 1954 Code. It has been alleged that the issue was carefully eluded in view of the Nuremberg and Tokyo Judgements.⁸¹³ The ILC presented in 1954 the Draft Code to the UN General Assembly, but it was refused

⁸⁰⁹ International Law Commission, ‘Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, with Commentaries’, *Yearbook of the International Law Commission* II (1950): 374–78, https://legal.un.org/ilc/texts/instruments/english/commentaries/7_1_1950.pdf.

⁸¹⁰ For further information on the Nuremberg Principles, see Machteld Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes against Humanity, War Crimes* (Antwerpen: Intersentia, 2002), 313–15; Héctor Olásolo, ‘El Principio Nullum Crimen Sine Iure En El Derecho Internacional Contemporáneo’, *Anuario Iberoamericano de Derecho Internacional Penal* I (2013): 27.

⁸¹¹ UN General Assembly, *Formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal*.

⁸¹² For an analysis of the influence of the Cold War in the development of the Draft Code, see Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’, 159; Liñán Lafuente, ‘Origen y Evolución Del Derecho Penal Internacional (II)’, 67; Jessica Lynn Corsi, ‘An Argument for Strict Legality in International Criminal Law’, *Georgetown Journal of International Law* 49, no. 4 (2018 2017): 1380.

⁸¹³ Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes against Humanity, War Crimes*, 319.

alleging problems related to the definition of the crime of aggression. It was decided to postpone further considerations of the Draft Code until an agreement was reached regarding the definition of aggression.

Twenty years later, in 1974, the General Assembly finally approved a definition, but the ILC only resumed its works on the Draft Code in 1982.⁸¹⁴ However, no significant advances were made until the end of the Cold War. Two new Draft Code were approved in 1991 and 1996, and two years later the Statute of the International Criminal Court was adopted.⁸¹⁵ Contrary to the previous versions, the 1991 and 1996 Draft Codes incorporated an article on the principle of legality, being the object of many debates within the ILC. A comprehensive analysis of the legality provisions in the different Draft Codes is provided in Chapter 4.

3.2.3 Codification of crimes in international instruments

While the more comprehensive and ambitious projects on the international criminal code and the permanent international criminal court experienced almost no progress, it was a little easier for States to reach agreements about specific crimes or legal issues. In this way, various treaties and conventions were adopted, contributing to the progressive codification of international criminal law.⁸¹⁶

In the aftermath of the World War II, the Convention on the Prevention and Punishment of the Crime of Genocide was adopted in 1948.⁸¹⁷ A definition of the crime was established as well as the obligation to prevent and punish it, either by domestic or international courts. One year later the four Geneva Conventions were approved. They defined different acts or omissions constituting war crimes, and updated and expanded the scope of humanitarian law, covering now non-international armed conflicts and the protection of the civilian population in times of war. In 1977 the Additional Protocols were adopted, updating and extending the protection provided by the 1949 Conventions.⁸¹⁸

⁸¹⁴ Ibid.

⁸¹⁵ For a detailed analysis of the works and evolution of the Draft Code, see Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional', 157–60; Liñán Lafuente, 'Origen y Evolución Del Derecho Penal Internacional (II)', 67–68.

⁸¹⁶ Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional', 163.

⁸¹⁷ UN General Assembly, *Convention on the Prevention and punishment of the crime of genocide*, 9 December 1948, 78 UNTS 277, A/RES/260, available at: <https://www.ohchr.org/en/professionalinterest/pages/crimeofgenocide.aspx>.

⁸¹⁸ See below, Section 3.2.4.

Regarding the crimes against humanity, no specific convention was ever adopted, but the underlying offences were criminalized in different international instruments. Enslavement was covered by the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.⁸¹⁹ Human trafficking was defined and prohibited in different international instruments, as the International Labour Organization (ILO) conventions on forced labour,⁸²⁰ or the 1957 UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.⁸²¹ Similarly, the ICCPR prohibited a number of related practices as slavery, the slave trade, servitude and forced labour.⁸²² Similarly, the prohibition of torture was enshrined in numerous universal and regional human rights instruments and in international humanitarian law as the UDHR, ICCPR, the four 1949 Geneva Conventions, the 1984 Convention against Torture, or the 1989 Convention on the Rights of the Child.⁸²³

⁸¹⁹ UN Economic and Social Council (ECOSOC), *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery*, 7 September 1956, Res. 608(XXI), available at: <https://www.refworld.org/docid/58c156dc4.html>; also see League of Nations, *Convention to Suppress the Slave Trade and Slavery*, 25 September 1926, 60 LNTS 253, Registered N° 1414, available at: <https://www.ohchr.org/en/professionalinterest/pages/slaveryconvention.aspx>.

⁸²⁰ International Labour Organization (ILO), *Forced Labour Convention*, C29, 28 June 1930, N° 29, available at: <https://www.refworld.org/docid/3ddb621f2a.html>; International Labour Organization (ILO), *Abolition of Forced Labour Convention*, C105, 25 June 1957, N1 105, available at <https://www.refworld.org/docid/43fdeb602.html>.

⁸²¹ UN General Assembly, *Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*, 2 December 1949, A/RES/317, available at: <https://www.ohchr.org/en/professionalinterest/pages/traffickingpersons.aspx>. Also see UN General Assembly, *United Nations Convention against Transnational Organized Crime*, 8 January 2001, A/RES/55/25, available at: <https://www.unodc.org/unodc/en/organized-crime/intro/UNTOC.html>.

⁸²² ICCPR, Art. 8.

⁸²³ UDHR, Art. 5; ICCPR, Art. 7; Geneva Convention (GC) I, Art. 12; GC II, Art. 12; GC III Arts. 13, 17 and 87; GC IV Arts. 27 and 32; UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, Res. 39/46, 1465 UNTS 85, available at: <https://www.ohchr.org/en/professionalinterest/pages/cat.aspx>; UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, UNTS vol. 1577, p. 3, Art. 37 (a), available at: <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>. Also see, among others the 1977 GC Additional Protocol I, Art. 75(2)(a)(ii); 1977 GC Additional Protocol II Art. 4(2)(a); ECHR, Art. 3; ACHR, Art. 5(2); ACHPR, Art. 5.

In 1968 it was adopted the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.⁸²⁴ For the definition of crimes against humanity and war crimes, the Convention refers to the IMT Charter and to the UN General Assembly resolution adopting the Nuremberg Principles.⁸²⁵ The crime of apartheid was defined and expressly declared as a crime against humanity in the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid.⁸²⁶

3.2.4 The principle of legality and international humanitarian law

In the aftermath of World War II the international community, outraged by the atrocities committed, decided to update and improve the international standards for humanitarian treatment in war. This way, a series of agreements were reached in 1949 adopting or updating the four Geneva Conventions.⁸²⁷ Following the contemporary trend to internationally recognise the right of individuals against retroactive laws and punishments, the Third and the Fourth Geneva Conventions included provisions enshrining the principle of legality. Article 99 of the Third Geneva Convention relative to the Treatment of Prisoners of War established that:

⁸²⁴ UN General Assembly, *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, 26 November 1968, A/RES/2391(XXIII).

⁸²⁵ *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, Art. 1.

⁸²⁶ UN General Assembly, *International Convention on the Suppression and Punishment of the Crime of Apartheid*, 30 November 1973, A/RES/3068(XXVIII), Art. I. For further information on the codification process of international crimes, see with various further references M. Cherif Bassiouni, «Codification of International Criminal Law», *Denver Journal of International Law and Policy* 45, n.º 3 (2017): 333-64; Boot, *Nullum crimen sine lege and the subject matter jurisdiction of the International Criminal Court: genocide, crimes against humanity, war crimes*, 401-608; Cassese, «Crimes Against Humanity»; Bassiouni, *Crimes Against Humanity in International Criminal Law*. Margalida Capellà, *La tipificación internacional de los crímenes contra la humanidad*, 359 (Valencia: Tirant lo Blanch, 2005).

⁸²⁷ ICRC, *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, 12 August 1949, 75 UNTS 31; ICRC, *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention)*, 12 August 1949, 75 UNTS 85; ICRC, *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135; ICRC, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287.

“No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed (...).”⁸²⁸

The Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War included as well the protection against *ex post facto* laws and the prohibition of retroactive application of laws against a civilian population by an occupying power. Thus, Article 65 establishes:

“The penal provisions enacted by the Occupying Power shall not come into force before they have been published and (...) (t)he effect of these penal provisions shall not be retroactive.”⁸²⁹

Accordingly, Article 67 determines:

“The courts shall apply only those provisions of law which were applicable prior to the offence, and which are in accordance with general principles of law, in particular the principle that the penalty shall be proportionate to the offence (...).”⁸³⁰

Additional Protocols I and II to the Geneva Conventions, approved in 1977, relating to the protection of victims of international and non-international armed conflicts, also incorporate the non-retroactive rule. Article 75(4)(c) of Protocol I determines that:

“No one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.”⁸³¹

⁸²⁸ Third Geneva Convention, Art. 99.

⁸²⁹ Fourth Geneva Convention, Art. 65.

⁸³⁰ Ibid., Art. 67.

⁸³¹ GC Additional Protocol I, Art. 75(4)(c). Similarly, GC Additional Protocol II Art. 6 (c):

“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 the law, at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.”

To better understand the scope and meaning of this provision it is relevant to examine the ICRC comments on this Article. First, the Committee recognised that the provision was directly inspired by ICCPR Article 15 and ECHR Article 7.⁸³² Then, the ICRC acknowledged that regarding criminal law, domestic courts firstly apply their own national legislation and that in some countries international law provisions could only be applied if they have been previously incorporated in the national legislation. The Committee recalled that in numerous European States the punishment of international crimes has, since the Second World War, frequently encountered “obstacles which could only be overcome by invoking the need to repress crimes rightly condemned by all nations, even in the absence of rules of application. This reference to international law has often been called the “Nuremberg clause”.⁸³³

The ICRC continued explaining that even though the principle of legality is fundamental in domestic criminal law “the *lex* should be understood in the international context as comprising not only written law, but also unwritten law, since international law is in part customary law”.⁸³⁴ The Committee concluded stating that governments should adopt the necessary legislation for the repression of international crimes, and in this way “they can avoid the criticism of acting arbitrarily by promulgating retroactive penal laws, even though international law may authorize them to do so.”⁸³⁵

The *nullum crimen* provision of the Additional Protocols I and II are significantly more complete than those of the Third and Fourth Geneva Convention. In fact, Protocol I provision is almost identical to the one in the ICCPR, and except for the Nuremberg clause, it incorporates most of its elements, as the express reference to international law as a source of criminalization, *nulla poena* or *lex mitior*. Both Protocols clearly prohibit retroactive crime creation and retroactively increased penalties. And they required that the law grounding a criminal prosecution had to be applicable to the actor at the moment he committed the crime.

The inclusion of the non-retroactivity rule in the Additional Protocol II is of particular significance since it applies to internal armed conflicts. Generally, these

⁸³² ICRC, *Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 1987, Geneva, para. 3101, available at: <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=E46340B132AC1B86C12563CD004367BF>.

⁸³³ Ibid, para. 3103.

⁸³⁴ Ibid, para. 3104.

⁸³⁵ Ibid, para. 3105.

situations represent a serious danger for the rule of law and fundamental principles as non-retroactivity could easily be ignored. However, 169 States have already adhered to the Protocol, and therefore, have accepted the international obligation to respect in their domestic legal systems the principle of non-retroactivity of crimes and punishments even in the extreme circumstances of a civil war. The widespread adoption of this Protocol is very strong evidence of the prominence of the *nullum crimen, nulla poena* rule in the international community.⁸³⁶ Moreover, the International Committee of the Red Cross has found that the prohibition of retroactive crimes and punishments has become “a norm of customary international law applicable in both international and non-international armed conflicts.”⁸³⁷

In conclusion, international humanitarian law enshrines a version of the legality principle that recognises international law as a valid source of criminalization. The non-retroactivity provisions do not require the previous law criminalising the conduct to be a written statute, and therefore customary international law is accepted as a valid legal ground for prosecutions.⁸³⁸ Similarly, States should in all circumstances respect the prohibition of retroactive crimes and punishments that is understood as a non-derogable obligation.

⁸³⁶ Olásolo, ‘El Principio Nullum Crimen Sine Iure En El Derecho Internacional Contemporáneo’, 24; Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge: Cambridge University Press, 2008), 208.

⁸³⁷ Federico Andreu Guzmán, *Retroactividad Penal de Crímenes Internacionales*, ed. Comisión Colombiana de Juristas (Bogotá, Colombia: Opciones Gráficas Editores Ltda., 2012), 39.

⁸³⁸ Kai Ambos, *La Parte General Del Derecho Penal Internacional*, trans. Ezequiel Malarino (Montivideo, Uruguay: Konrad-Adenauer-Stiftung e. V., 2005), 104. For further information on the principle of legality in the international humanitarian law system, see Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 207–13.

CHAPTER 4: THE PRINCIPLE OF LEGALITY APPLIED BY MODERN INTERNATIONAL CRIMINAL TRIBUNALS

The statutes and case law of modern international criminal tribunals significantly contributed to the development and consolidation of the international justice system, and to shape the actual international principle of legality. The *ad hoc* tribunals played an important role in the development and systematization of different areas of international criminal law, and made a significant effort to comply with the *nullum crimen* principle, providing different interpretations and legal formulas to compatibilize prosecutions with the fundamental guarantees of legality. The adoption of the Rome Statute and the establishment of the International Criminal Court (ICC) constituted a decisive step in the evolution of international criminal law, crystalizing the long-term projects of creating an international criminal code and a permanent international criminal court. The Rome Statute is considered as the first serious attempt to overcome the dichotomy between domestic criminal law systems and international criminal law, particularly regarding the concept and requirements derived from the principle of legality. The establishment of detailed legal definitions, and a jurisdiction limited to crimes committed after the entry into force of the Statute, permitted the adoption of a strong legality principle including the *lex scripta*, *praevia*, *certa* and *stricta* requirements. In this chapter, an analysis of the case law of the *ad hoc* international criminal tribunal, focused on their implementation of the *nullum crimen* principle, is first provided. Then, the legality provisions of the Rome Statute are assessed, together with an examination of how the ICC has interpreted and applied the legality principle.

4.1 The *ad hoc* international criminal tribunals

The post-World War II trials constituted a substantial step towards an effective international justice system, setting the foundations of international criminal law, consolidating the notion of individual criminal responsibility and confirming the emergence of individual rights in the international arena beyond the limits of State sovereignty.⁸³⁹ For the first time international courts were effectively established with the aim of prosecuting international crimes committed by military leaders, prominent

⁸³⁹ Hans Kelsen, 'Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?', *The International Law Quarterly* 1, no. 2 (1947): 165; Didier Rebut, *Droit Pénal International*, 2nd ed. (Paris: Dalloz, 2015), 539; Antonio Cassese, *International Criminal Law*, 3rd ed. (Oxford: Oxford University Press, 2013), 258; M. Cherif Bassiouni, *Introduction Au Droit Pénal International* (Bruxelles: Bruylant, 2002), 42.

politicians and other civilians.⁸⁴⁰ The proceedings showed how effective international criminal justice can be, when supported by political will and enough resources.⁸⁴¹ However, the subsequent international situation of political polarization caused an important slowdown of this tendency.

Only at the beginning of the 90's, almost fifty years after the IMT, the global political situation had changed enough to enable the establishment of new international criminal courts.⁸⁴² The creation of the International Criminal Tribunals for the former Yugoslavia and Rwanda led few years later to the establishment of the ICC and inspired the creation of various internationalized and mixed or hybrid courts.

The statutes and case law of the *ad hoc* tribunals played a fundamental role in the development and consolidation of international criminal law. The maturity of this body of law, reached with the establishment of the ICC Statute, cannot be understood without the ICTY and ICTR's contribution. The work carried out by these tribunals was essential to define and systematize the elements and characteristics of international crimes, advancing towards a clear description of the objective and subjective elements of the crimes, the defences or the forms of liability.⁸⁴³

While the doubts about the respect of *nullum crimen* overshadowed the post-World War II trials, the modern international criminal courts were determined to prevent it from tainting their work.⁸⁴⁴ Unlike the Nuremberg and Tokyo tribunals, the modern international criminal tribunals did not question the applicability of the legality principle despite it was not explicitly recognized in their statutes.⁸⁴⁵ However, they were confronted with difficult issues regarding the legality principle as its

⁸⁴⁰ Cassese, *International Criminal Law*, 258.

⁸⁴¹ *Ibid.*, 257.

⁸⁴² See an analysis of the factors leading to the establishment of the *ad hoc* tribunals in Cassese, 258. For a study about the influence of the IMT in the modern international criminal tribunals, see Christian Tomuschat, 'The Legacy of Nuremberg', *Journal of International Criminal Justice* 4, no. 4 (1 September 2006): 843.

⁸⁴³ Alfredo Liñán Lafuente, 'Origen y Evolución Del Derecho Penal Internacional (II)', in *Derecho Penal Internacional*, ed. Alicia Gil Gil and Elena Maculán (Madrid, Spain: Dykinson, 2016), 73.

⁸⁴⁴ Claus Kress, 'Nulla Poena Nullum Crimen Sine Lege', *Max Planck Encyclopedia of Public International Law*, 2010, para. 17.

⁸⁴⁵ Kress, para. 17; Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge: Cambridge University Press, 2008), 303.

compatibility with prosecutions based on customary international law, or with the *ex post facto* character of most of the international courts.⁸⁴⁶

The notion of legality as a principle of justice adopted by the post-World War II tribunals gave way to a stricter approach. The doctrine of substantive justice was replaced by that of strict legality, though with some specificities with respect to the rigid understanding of legality in some domestic systems. As an example, the most obvious difference is the acceptance of international customary law as a source of international criminal law enabling criminal prosecutions.⁸⁴⁷

In this section a brief overview of modern international criminal tribunals is provided, followed by a detailed explanation and analysis of their case law regarding different elements of the legality principle. Even if references are made to various tribunals, the ICTY and ICTR's case law are particularly examined due to their prominent role and influence.

4.1.1 Overview of the *ad hoc* international criminal tribunals

The establishment of the International Criminal Tribunals for the former Yugoslavia (ICTY) in 1993, followed by the International Criminal Tribunal for Rwanda (ICTR) one year later, inspired the creation of different internationalized and mixed or hybrid courts. A brief overview of these tribunals is provided hereunder, together with an analysis of the legal grounds for their establishment.

Established the 22 February 1993 by the UN Security Council, the ICTY was the first modern international criminal tribunal and marked a turning point in the development of international criminal justice. The ICTY was “a pioneer in creating the contemporary architecture of international criminal justice”, facilitating the emergence of other international tribunals, particularly the International Criminal Court, and inspiring prosecutions and trials for international crimes also at the domestic level.⁸⁴⁸ During its mandate, which lasted from 1993 to 2017, ninety individuals were sentenced for crimes including genocide, war crimes and crimes against humanity.

⁸⁴⁶ Hernán Hormazábal Malarée, ‘Crímenes Internacionales, Jurisdicción y Principio de Legalidad Penal’, in *Derecho Penal, Constitución y Derechos*, ed. Rafael Rebollo Vargas and Fernando Tenorio Tagle (Barcelona: Tirant lo Blanch, 2013), 258.

⁸⁴⁷ Cassese, *International Criminal Law*, 22–27; Antonio Cassese et al., *The Oxford Companion to International Criminal Justice* (Oxford, New York: Oxford University Press, 2009), 439; Héctor Olásolo, ‘El Principio Nullum Crimen Sine Iure En El Derecho Internacional Contemporáneo’, *Anuario Iberoamericano de Derecho Internacional Penal I* (2013): 29.

⁸⁴⁸ Guterres, A., UN Secretary General “Remarks at Closing Ceremony for the International Criminal Tribunal for the Former Yugoslavia (ICTY)”, 1 December 2017.

For its part, the ICTR was established the 8 November 1994 by the UN Security Council acting under Chapter VII of the UN Charter and following the request of the Government of Rwanda.⁸⁴⁹ Since its creation, the ICTR indicted 93 individuals, delivering its last judgment in 2012. The mandate of the tribunal ended as well that year, and since then the Mechanism for International Criminal Tribunals (MICT) has assumed the ICTR's residual functions.⁸⁵⁰

4.1.1.1 Antecedents

Following the collapse of the Soviet Union, the disintegration of the Socialist Federal Republic of Yugoslavia led to the last war of the 20th century in Europe. In June 1991 Croatia and Slovenia declared their independence, with the opposition of Serbia who wanted to create a united republic under its hegemony. Few months later these tensions led to an open war between Croatia and Serbia. The situation was further aggravated when in March 1992 the inhabitants of Bosnia-Herzegovina voted in favour of its independence. In April, the European Union and the United States recognized Bosnia-Herzegovina as an independent State, but simultaneously, the Serbs proclaimed the creation of the Serbian Republic of Bosnia-Herzegovina.⁸⁵¹

The UN Security Council initiated its intervention in the Yugoslav conflict in September 1991. Among other measures, a United Nations peacekeeping force was deployed in Croatia and Bosnia-Herzegovina (UNPROFOR), but it did not suffice to stop the war. Since the first mediation and pressure attempts were unsuccessful, in July 1992 the Security Council adopted a resolution affirming that international humanitarian law bound all parties to the conflict, and that all persons who violated

⁸⁴⁹ UN Security Council, *Security Council resolution 955 (1994) [International Criminal Tribunal Rwanda (ICTR)]*, 8 November 1994, available at: <https://digitallibrary.un.org/record/198038?ln=es>.

⁸⁵⁰ For further information on the ICTR's establishment, jurisdiction, organization or substantive and procedural aspects of prosecution, see William A. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (New York: Cambridge University Press, 2006); Ilias Bantekas, *International Criminal Law* (Oxford: Hart Publishing, 2010), 403–22; Antonio Cassese, 'The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice', *Leiden Journal of International Law*, no. 25 (2012): 491–501; Rodrigo Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional' (Madrid, Spain, Universidad Carlos III de Madrid, 2015), 177–87; Cassese, *International Criminal Law*, 258–61.

⁸⁵¹ Machteld Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes against Humanity, War Crimes* (Antwerpen: Intersentia, 2002), 223–25; Malcolm N. Shaw, *International Law*, 5th edition (Cambridge New York: Cambridge university press, 2003), 1139–42.

these rules would be individually responsible for the commission of war crimes.⁸⁵² During the year 1992 numerous reports informed about the serious violation of international law that were being carried out, as ethnic cleansing, among other criminal acts that could constitute crimes against humanity, war crimes and genocide.⁸⁵³

In February 1993 the UN Security Council affirmed in resolution 808 that the situation in the former Yugoslavia constituted a threat to international peace and security, and decided to establish an international tribunal “for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.”⁸⁵⁴ The UN Secretary General presented a report in May 1993 that included as an Annex the statute of the tribunal.⁸⁵⁵ This Report would have a significant influence in modern international criminal law since it framed the non-retroactivity issue for international criminal tribunals as well as many other legal subjects.⁸⁵⁶ Three weeks later the UN Security Council, invoking Chapter VII of the UN Charter, adopted the ICTY’s Statute.⁸⁵⁷

Not long after, during the year 1994, terrible atrocities were committed between the Hutu and Tutsi ethnic groups in Rwanda and its neighbouring countries. A commission of experts, appointed by the UN Security Council determined that genocide was being committed and recommended the creation of an impartial international criminal court as a necessary action to ensure the individual responsibility of criminals. The 8 November 1994 the UN Security Council acting under Chapter VII of the

⁸⁵² UN Security Council, *Security Council resolution 764 [Bosnia and Herzegovina]*, 13 July 1992, S/RES/764 (1992), available at: <https://digitallibrary.un.org/record/145727>.

⁸⁵³ See an explanation and analysis of these reports in Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’, 169; Liñán Lafuente, ‘Origen y Evolución Del Derecho Penal Internacional (II)’, 70–71; Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes against Humanity, War Crimes*, 223.

⁸⁵⁴ UN Security Council, *Security Council resolution 808 [International Criminal Tribunal for the former Yugoslavia (ICTY)]*, 22 February 1993, S/RES/808 (1993), available at: <https://digitallibrary.un.org/record/243008>.

⁸⁵⁵ UN Security Council, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, 3 May 1993, S/25704, available at: <https://digitallibrary.un.org/record/166504>.

⁸⁵⁶ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 305.

⁸⁵⁷ UN Security Council, *Security Council resolution 827 [International Criminal Tribunal for the former Yugoslavia (ICTY)]*, 25 May 1993, S/RES/827 (1993), available at: <https://digitallibrary.un.org/record/166567>.

Charter of the United Nations, and following the request of the Government of Rwanda, decided the creation of the ICTR.⁸⁵⁸

4.1.1.2 Establishment of the tribunals: legal grounds and discussions

The UN Security Council created the ICTY as a measure to “contribute to the restoration and maintenance of peace, (...) to put an end to the crimes and to bring to justice the persons who are responsible for them.”⁸⁵⁹ For the establishment of the tribunal, the Security Council acted under Chapter VII of the Charter of the United Nations, but at the moment there were reasonable doubts as to whether the Council had exceeded its powers.⁸⁶⁰ According to the UN Charter only the Security Council can determine the existence of a threat to the world peace and security, and decide the appropriate measures to take.⁸⁶¹ Regarding the measures not involving the use of force, the Charter establishes that the Security Council “may decide what measures (...) are to be employed to give effect to its decisions.”⁸⁶² Despite the broad terms in which the powers of the Security Council are expressed, some countries raised their concerns about whether the Council had the power of creating an international court, considering that this would stretch the limits of interpretation of Chapter VII.⁸⁶³

However, it was the UN Secretary General himself who proposed and endorsed this measure. Despite the validity of the concerns, the objections gave way before the absence of other alternatives for the establishment of a tribunal with binding authority

⁸⁵⁸ UN Security Council, *Security Council resolution 955 (1994) [International Criminal Tribunal Rwanda (ICTR)]*, 8 November 1994, available at: <https://digitallibrary.un.org/record/198038?ln=es>. Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes against Humanity, War Crimes*, 226–31; Michael J. Matheson and David Scheffer, ‘The Creation of the Tribunals’, *The American Journal of International Law* 110, no. 2 (2016): 176–77.

⁸⁵⁹ UN Security Council, *Security Council resolution 808*.

⁸⁶⁰ Similar doubts arose years later regarding the Special Tribunal for Lebanon. Cassese addresses the legality and legitimacy of international criminal tribunals in Cassese, ‘The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice’, 493.

⁸⁶¹ UN Charter, Art. 39.

⁸⁶² *Ibid.*, Art. 41.

⁸⁶³ Concerns expressed by the Governments of China, Brazil and Mexico. *Views of the Government of Mexico Supplied Pursuant to Paragraph 2 of Security Council resolution 808 (1993)*, UN Docs S/25417, 16 March 1993, as cited and commented in M. Cherif Bassiouni, ‘Former Yugoslavia: Investigating Violations of International Humanitarian Law and Establishing an International Criminal Tribunal’, *Security Dialogue* 25, no. 4 (1 December 1994): 414.

over all parties to the conflict.⁸⁶⁴ Given the extraordinary and urgent circumstances the UN Secretary General defended in his Report the establishment of the ICTY by the Security Council. He considered that the appropriate procedure to create an international tribunal would have been the conclusion of an international treaty, but this would have taken too much time, and the ratification of the State parties to the armed conflict was not assured.⁸⁶⁵ The UN Secretary General considered as well the possibility of the international tribunal being established by the UN General Assembly, as the most representative organ of the United Nations. However, he considered that the procedure required was not compatible with the urgency of the situation and the need of an effective and expeditious implementation of the decision to establish a tribunal.⁸⁶⁶ Such a fast implementation was only possible through the Security Council. Similarly, the Secretary General considered that an international tribunal created by the Council as a measure to maintain or restore international peace and security was legally justified and had the advantage of being immediately binding to all States.⁸⁶⁷

The legality of the ICTY was later challenged by one of the first defendants (Dusko Tadic) claiming that the Security Council lacked authority to create the international court. It was also claimed that tribunal did not comply with the general principle whereby courts must be “established by law”.⁸⁶⁸ In its first decision the ICTY Appeals Chamber upheld the legality of the tribunal considering that its establishment fully fell within the powers of the Security Council. In the same vein, the Chamber stated that the tribunal had “been established in accordance with the appropriate procedures under the United Nations Charter and provide all the necessary safeguards of a fair trial”.⁸⁶⁹

⁸⁶⁴ Bassiouni, 414; Matheson and Scheffer, ‘The Creation of the Tribunals’, 180.

⁸⁶⁵ Report of the UN Secretary-General, paras 19-20.

⁸⁶⁶ Ibid., 21-22.

⁸⁶⁷ Ibid., 23-24.

⁸⁶⁸ Cassese, ‘The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice’, 493.

⁸⁶⁹ *Prosecutor v. Tadic*, Decision on the Defense Motion on Interlocutory Appeal on Jurisdiction, ICTY App. Ch. IT-94-1, 2 October 1995, paras 37-40 and 47, available at: <https://www.icty.org/x/cases/tadic/acdec/en/51002.htm>. For a comprehensive analysis of this decision see, with further references Fernandez Liesa, «El Tribunal Para La Antigua Yugoslavia y El Desarrollo Del Derecho Internacional Seccion I». See a detailed study of the process leading to the establishment of the court in Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, 1-120; Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’, 180-84; Bassiouni, ‘Former Yugoslavia’, 409-15; Matheson and Scheffer, ‘The Creation of the Tribunals’, 174-82. Cassese, ‘The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice’, 493.

Despite the initial doubts, rapidly the Security Council's authority to establish criminal tribunals became generally accepted.⁸⁷⁰ By the time of the Rwanda genocide in 1994 there were no serious questions or challenges to the Council's capacity under UN Charter Chapter VII to create an *ad hoc* tribunal.⁸⁷¹

4.1.1.3 The ICTY and ICTR Statutes

The statutes of the ICTY and ICTR are quite brief and do not include explanatory memorandums or any interpretation guidance. Article 1 of the ICTY Statute, on the competence of the tribunal, established that the tribunal had “the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.”⁸⁷² In the following articles, the Statute set one by one the crimes under the jurisdiction of the Court. This way, Article 2 defined the “Grave breaches of the Geneva Conventions of 1949”, Article 3 the “Violations of the laws or customs of war”, Article 4 “Genocide”, and Article 5 the “Crimes against humanity”. Surprisingly, the war nexus was recovered for the crimes against humanity, but the case law of the ICTY overcame this setback.⁸⁷³

For its part, the ICTR was established with the purpose of prosecuting those responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and the neighbouring States between 1 January and 31 December 1994. The ICTR Statute was drafted following the model of the ICTY Statute, including however certain differences responding to the peculiarities of

⁸⁷⁰ Matheson and Scheffer, ‘The Creation of the Tribunals’, 180.

⁸⁷¹ Anyhow, Brazil and China continued expressing their reservation about the authority or appropriateness of such measure, as explained in Matheson and Scheffer, 181. The legal grounds for the establishment of the ICTR were fairly similar to those of the ICTY. See a comprehensive analysis of the process leading to the establishment of the ICTR in Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, 1–120; Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’, 180–84.

⁸⁷² UN Security Council, *Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 7 July 2009)*, 25 May 1993, Art. 1, available at: https://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

⁸⁷³ José Augusto Pacheco de Freitas, ‘La Relación Entre El Principio de Legalidad En Derecho Penal Internacional y La Tipificación Internacional de Los Crímenes de Lesa Humanidad: Una Perspectiva Histórica’, *Agenda Internacional* Año XXVI, no. 37 (2019): 201. See a comprehensive analysis of the debates and States proposals regarding the subject matter jurisdiction of the ICTY in Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes against Humanity, War Crimes*, 231–37.

the Rwandan conflict.⁸⁷⁴ The crimes within the jurisdiction of the Court were genocide (Art. 2), crimes against humanity (Art. 3) and war crimes (Art. 4).⁸⁷⁵

As it will be studied hereinafter, the crimes were mostly enunciated in a general manner in the statutes and lacked the clear descriptive definitions that exist in domestic criminal codes. Therefore, to assure the compatibility of the prosecutions and the exigencies of the *nullum crimen* principle, the tribunals adopted a rather flexible approach intending to respect at least the rationales of the principle.

Despite the concise nature of the statutes, the judges had to ground the prosecution on their provisions and therefore, interpret the Articles taking into account the Security Council's intent.⁸⁷⁶ With this in mind, the above-mentioned UN Secretary General Report was of great utility. It contained as an Annex the draft ICTY Statute, that later would be adopted by the Security Council, together with an analysis and comments on each Article. Similarly, the Rules of Procedure and Evidence adopted by the judges provided more detailed legal grounds, identifying, among others, the aggravating and mitigating factors to be taken into account by the tribunals.⁸⁷⁷ To maintain certain unity of criteria, the ICTY and ICTR shared the same prosecutor's office until 2003 and the appeals chambers were composed of judges from both courts.

Regarding the punishments, the statutes stated that the "penalty imposed by the Trial Chamber shall be limited to imprisonment".⁸⁷⁸ Therefore, death penalties were excluded. The statutes did not assign a defined penalty or a range of penalties to each

⁸⁷⁴ In the ICTR Statute the war nexus requirement for crimes against humanity disappeared, and as novelty, the requirement of "widespread or systematic attack" was incorporated. Pacheco de Freitas, 'La Relación Entre El Principio de Legalidad En Derecho Penal Internacional y La Tipificación Internacional de Los Crímenes de Lesa Humanidad: Una Perspectiva Histórica', 201; Liñán Lafuente, 'Origen y Evolución Del Derecho Penal Internacional (II)', 72; Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional', 184.

⁸⁷⁵ The ICTY Statute was adopted as an Annex to the UN Security Council, *Security Council resolution 955 (1994) [International Criminal Tribunal Rwanda (ICTR)]*, 8 November 1994, available at: <https://digitallibrary.un.org/record/198038?ln=es>.

⁸⁷⁶ William A. Schabas, 'Sentencing by International Tribunals: A Human Rights Approach', *Duke Journal of Comparative & International Law* 7, no. 2 (1997 1996): 465.

⁸⁷⁷ Schabas, 463. International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, *Rules of Procedure and Evidence*, 1994, UN. Doc. IT132; International Criminal Tribunal for Rwanda, *Rules of Procedure and Evidence*, 1995, UN. Doc. ITR/3/Rev.1. The ICTY and ICTR Rules have been repeatedly amended. The different versions are available at: <https://www.icty.org/en/documents/rules-procedure-evidence>, and <https://unictr.irmct.org/en/documents/rules-procedure-and-evidence>.

⁸⁷⁸ ICTY Statute Art. 24(1).

particular crime, and established that to determine punishments the Courts should “have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.”⁸⁷⁹

4.1.1.4 The Completion Strategy

The *ad hoc* international criminal tribunals were established as temporary institutions with the specific purpose of prosecuting international crimes committed in a particular territory and during a defined period of time. The mandates of the ICTR and the ICTY ended the 1 July 2012 and 2013 respectively. However, some cases were still pending (some defendants were on the run) and some judgments were waiting for an appeal decision. To ensure that the courts conclude their mission successfully, the UN Security Council approved in 2010 the Completion Strategy and created the International Residual Mechanism for Criminal Tribunals (IRMCT). This new and smaller *ad hoc* body should continue the essential functions of both international tribunals.⁸⁸⁰

4.1.1.5 The internationalized and mixed courts

To face emergency situations concerning large-scale atrocities some States have resorted to mixed or hybrid courts composed by both national and international components. Established in late 1990s and 2000s the most relevant internationalized or mixed courts are the Special Court for Sierra Leone (SCSL), Special Panels for Serious Crimes in East-Timor (ETSP), the Extraordinary Chambers in the Courts of Cambodia (ECCC), and the Special Tribunal for Lebanon (STL).

⁸⁷⁹ Ibid. Ibid. For further information on the ICTY and ICTR’s statutes regarding jurisdiction, organization or substantive and procedural aspects of prosecution, see Schabas, ‘Sentencing by International Tribunals’, 462–64; Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*; Bantekas, *International Criminal Law*, 403–22; Cassese, ‘The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice’; Cassese, *International Criminal Law*, 258–61; Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’, 177–87; Matheson and Scheffer, ‘The Creation of the Tribunals’, 182–90; Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes against Humanity, War Crimes*, 226. Section 4.1.2.10 of this chapter analyses the different understandings of the *nulla poena* principle confronted when drafting the ICTY and ICTR statutes, and the implementation of the principle by the *ad hoc* tribunals.

⁸⁸⁰ For further information on the Completion Strategy and the MICT, see the official IRMCT site: <https://www.irmct.org/en/about>.

For its part, the SCSL was established the 16 January 2002 following the request of the Government of Sierra Leone to the United Nations for a “special court” to address the serious crimes committed against civilians and UN peacekeepers during the civil war (1991-2002).⁸⁸¹ On 26 April 2021 the SCSL condemned former Liberian President Charles Taylor for war crimes, being the first time an international court convicted an African head of State.⁸⁸²

The Special Panels for Serious Crimes in East-Timor (ETSP), was an hybrid international-East Timorese tribunal, established in 2000 by the UN Transitional Administration in East Timor to prosecute serious violations of international and national law committed in East Timor in 1999.⁸⁸³ The ECCC is a hybrid court, established on 6 June 2003 by the Cambodian Government and the United Nations to try senior leaders for the serious crimes committed by the Khmer Rouge.⁸⁸⁴

The STL was established in 2007 by the UN Security Council acting under Chapter VII of the UN Charter and following a request of the government of Lebanon to the United Nations to prosecute those responsible of the attack of 14 February 2005 that killed 22 people, including the former Lebanese Prime Minister Rafik Hariri.⁸⁸⁵ The tribunal, composed by a combination of Lebanese and international judges appointed by the UN Secretary General, applies Lebanese criminal law and is the first tribunal of international character to prosecute terrorist crimes as a separate offense.

⁸⁸¹ UN Security Council and Government of Sierra Leone, *Agreement and Statute of the Special Court for Sierra Leone*, 16 January 2002, available at: <https://ihl-databases.icrc.org/ihl/INTRO/605?OpenDocument>.

⁸⁸² For information, references, cases and documents of the Special Court for Sierra Leone, and the Residual Special Court for Sierra Leone, see its official site: <http://www.rscsl.org/index.html>.

⁸⁸³ United Nations Transitional Administration in East Timor, *Regulation N° 2000/15 on the Establishment of Panels with exclusive jurisdiction over serious criminal offences*, UNTAET/REG/2000/15, 6 June 2000, available at: <https://exhibits.stanford.edu/virtual-tribunals/catalog/xh670tz7801>.

⁸⁸⁴ United Nations and the Royal Government of Cambodia, *Agreement between the United Nations and the Royal Government of Cambodia concerning the prosecution under Cambodian law of crimes committed during the period of Democratic Kampuchea*, N° 41723, Phnom Penh, 6 June 2003, available at: <https://treaties.un.org/doc/Publication/UNTS/Volume%202329/Part/volume-2329-I-41723.pdf>. For information, references, cases and documents of ECCC, see its official site: <https://www.eccc.gov.kh/en>.

⁸⁸⁵ UN Security Council, *Security Council resolution 1767(2007)*, 30 May 2007, S/RES/1757(2007), available at: [https://undocs.org/en/S/RES/1757\(2007\)](https://undocs.org/en/S/RES/1757(2007)). For information, references, cases and documents of STL, see its official site: <https://www.stl-tsl.org/en>.

Some other tribunals are also defined as mixed or internationalized courts as the Iraqi Special Tribunal for Crimes Against Humanity, created in 2003 by the US-appointed Iraqi government to address the crimes committed during the previous Saddam Hussein regime.⁸⁸⁶ As well, the Extraordinary African Chambers, established within the courts of Senegal by an agreement between the African Union and the government of this country to prosecute international crimes committed in Chad from 1982 to 1992 during the regime of Hissène Habré.⁸⁸⁷ For its part, the UN Interim Administration Mission in Kosovo (UNMIK) established in 2000 the so called “Regulation 64 Panels” conformed by domestic and international judges to deal with the crimes committed in Kosovo in 1999.⁸⁸⁸ Lastly, the Section for War Crimes in the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina (WCC) was created in July 2002 by the national parliament, and is composed by both domestic and international judges and prosecutors.⁸⁸⁹ The WCC was established to deal with the cases referred to it by the ICTY regarding serious violations of international humanitarian law committed by mid-level perpetrators in former Yugoslavia since 1991.

The internationalized courts intend to avoid the alleged flaws of the ICTY and ICTR as, among others, the high costs and excessive length of the proceedings and their remoteness from the place where the crimes have been perpetrated.⁸⁹⁰ The applicable laws, and the judges and staff composing the tribunals are of mixed nature, combining national and international elements, and varying on its proportion and characteristics in the different tribunals. The internationalized courts can be established as an organ of the concerned State, being part of its judiciary, or as an

⁸⁸⁶ Coalition Provisional Authority, *Iraq: Statute of the Special Tribunal for Human Rights*, 10 December 2003, available at: <https://www.legal-tools.org/doc/70f869/pdf/>. For further information on the tribunal see Ilias Bantekas, ‘The Iraqi Special Tribunal for Crimes against Humanity’, *The International and Comparative Law Quarterly* 54, no. 1 (2005): 237–53.

⁸⁸⁷ Government of the Republic of Senegal and the African Union, *Statute of the Extraordinary African Chambers*, annexed to the *Agreement on the establishment of the Extraordinary African Chambers within the Courts of Senegal*, 22 August 2012, available at: <https://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers>.

⁸⁸⁸ UNMIK Regulation 2000/64, *On the Assignment of International Judges/Prosecutors and/or/ Change of Venue*, 15 December 2000.

⁸⁸⁹ Parliament of Bosnia and Herzegovina, *Law on the Court of Bosnia and Herzegovina*, 3 July 2002, available https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.48_Law_on_Court_BiH_-_Consolidated_text_-_49_09.pdf.

⁸⁹⁰ Cassese, *International Criminal Law*, 265; Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’, 187.

international body, created by an international agreement, as the SCSL and the STL.⁸⁹¹ The former have been defined as hybrid or mixed tribunals, the latter as internationalised courts.⁸⁹²

4.1.2 The *ad hoc* international criminal tribunals and the principle of legality

The statutes of the international, internationalized or hybrid courts are generally quite brief and do not explicitly enshrine the legality principle. Only the most detailed and sophisticated statutes, including sections devoted to gather the general principles of criminal law, contain provisions on the legality principle. It is the case of the Rome Statute, and the Statute of the Special Panels for Serious Crimes in East-Timor (ETSP).⁸⁹³

⁸⁹¹ Cassese, *International Criminal Law*, 265.

⁸⁹² Alfredo Liñán Lafuente, ‘Los Tribunales Penales Híbridos e Internacionalizados’, in *Derecho Penal Internacional*, ed. Alicia Gil Gil and Elena Maculán (Madrid, Spain: Dykinson, 2016), 105.) For a comprehensive analysis of the mixed and internationalized tribunals see among others Liñán Lafuente, 105–27; Cassese, *International Criminal Law*, 263–67; Bantekas, *International Criminal Law*, 444–70; Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 325–30; David Crane, ‘Hybrid Tribunals - Internationalized National Prosecutions’, *Penn State International Law Review* 25, no. 4 (2007 2006): 803–18; Sarah M. H. Nouwen, “Hybrid Courts” The Hybrid Category of a New Type of International Crimes Courts’, *Utrecht Law Review* 2, no. 2 (2006): 190–214; Gianluca Serra, ‘Special Tribunal for Lebanon: A Commentary on Its Major Legal Aspects’, *International Criminal Justice Review* 18, no. 3 (1 September 2008): 344–55.

⁸⁹³ The abovementioned agreement for the establishment of the Extraordinary Chambers in the Courts of Cambodia contain references to ICCPR Article 15 in its Articles 12, “Procedure” and Article 13 “Rights of the accused”. For its part, the Statute of the Special Panels for Serious Crimes in East-Timor (ETSP) includes the following Section 12 (*Nullum crimen sine lege*):

- “1. A person shall not be criminally responsible under the present regulation unless the conduct in question constitutes, at the time it takes place, a crime under international law or the laws of East Timor.
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. The present Section shall not affect the characterization of any conduct as criminal under principles and rules of international law independently of the present regulation.”

Section 13 (*Nulla poena sine lege*):

“A person convicted by a panel may be punished only in accordance with the present regulation.”

According to Boot, in the case of the ICTY, the UN Security Council members agreed to limit

However, this has not prevented the courts to adopt and apply it as rule of law and part of the applicable international or domestic law.⁸⁹⁴ In fact, the case law of the international tribunals significantly contributes to the development of the international principle of legality, defining its content, scope and applications. Indeed, the *nullum crimen* principle plays a central role in the proceedings and has been discussed in numerous occasions. The defences raised arguments based on legality, not only with respect to the definition of the crimes themselves, but also in the context of forms of participation, allowing the judges to elaborate on different elements of the principle.

If compared with the strict notion of legality in domestic systems, the international courts have adopted a rather flexible approach of the principle. As will be further analysed, this responded to different factors as the particular nature of international customary law or the developing situation of the international criminal justice system. Some authors consider that the notion of legality adopted by the *ad hoc* tribunals followed the spirit of their predecessors at Nuremberg, treating it as a principle of interpretation.⁸⁹⁵ Other scholars have specified that even if modern tribunals did not apply a strict notion of legality, they are not suspected of having permitted retroactive crime creation, as was allegedly the case of the IMT regarding in particular the crime of aggressive war.⁸⁹⁶ What is certain is that the *ad hoc* tribunals were greatly influenced by the liberal application of the *nullum crimen* maxim in the contemporary case law of the European Court of Human Rights.⁸⁹⁷

In this section different issues concerning the principle of legality addressed by the modern international criminal tribunals will be analysed and discussed. Special

the subject matter jurisdiction of the tribunal to international norms that “are beyond any doubt part of customary law”, implicitly deciding that the jurisdiction of the court would not violate the *nullum crimen* rule. Thus, further debates about the prohibition of retroactive law creation became unnecessary, and issues regarding other requirements of the legality principle were left to the Court to decide. Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes against Humanity, War Crimes*, 248.

⁸⁹⁴ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 304; Thomas Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege* (Cham: Springer International Publishing, 2017), 37–38.

⁸⁹⁵ Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, 63.

⁸⁹⁶ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 308.

⁸⁹⁷ The ECHR’s case law is discussed in detail in Chapter 6.

attention will be paid to the case law of the ICTY and ICTR, but references to the internationalized and mixed tribunals will be made when pertinent.⁸⁹⁸

4.1.2.1 The UN Secretary General Report

The respect of the principle of legality in the nascent ICTY was one of the most important concerns of the UN Secretary General. The last international criminal justice experiences, in the aftermath of World War II, had been fiercely criticised by the alleged violation of the *nullum crimen* principle. The UN Secretary General did not want the legitimacy of the ICTY to be undermined by the same critics. In his Report to the UN Security Council for the creation of the ICTY, special attention was paid to the legality issue, trying to avoid in particular the application of *ex post facto* laws:

“(...) in assigning to the International Tribunal the task of prosecuting persons responsible for serious violations of international humanitarian law, the Security Council would not be creating or purporting to "legislate" that law. Rather, the International Tribunal would have the task of applying existing international humanitarian law.”⁸⁹⁹

The Secretary General considered that the ICTY should exclusively apply international laws already existent and applicable to the alleged criminals at the moment of commission. He reminded that the subject matter jurisdiction of the Tribunal would be the serious violations of international humanitarian law, a body of law existent in the form of both conventional and customary law. Significantly, the Secretary General established that while most of the conventional humanitarian laws had become customary international law, certain parts of humanitarian customary law had not been codified in international instruments.⁹⁰⁰

In order to avoid legality problems related to the lack of adherence of some States to certain international conventions, the Report specified that the tribunal should apply “rules of international humanitarian law which are beyond any doubt part

⁸⁹⁸ Some authors have interpreted the ICTY conviction of individuals for contempt as a violation of the *nullum crimen* principle. The analysis of this issue exceeds the object of this work, but for a comprehensive explanation and analysis of this issue, see Gwendolyn Stamper, ‘Infusing Due Process and the Principle of Legality into Contempt Proceedings before the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda’, *Michigan Law Review* 109, no. 8 (2011): 1551–78; Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 309–11.

⁸⁹⁹ Report of the UN Secretary-General, para. 29.

⁹⁰⁰ *Ibid.*, 33.

of customary law”.⁹⁰¹ Since all States are bound by such customary rules, problems related to the lack of adherence of some States to certain international conventions would not appear.⁹⁰² It has been argued that the expression “beyond any doubt part of customary international law” was a compromise solution between grounding the ICTY subject matter jurisdiction exclusively on applicable treaties, and founding it on norms of customary international law or even on general principles of law.⁹⁰³

In his Report, the Secretary General addressed as well the question of whether the tribunal should apply domestic laws incorporating international humanitarian law. This would enforce a stronger version of the principle of legality since the applicable law would have been codified in the domestic legal system of the author before the time of commission. However, the Secretary General considered that this was not necessary since international humanitarian law provided “sufficient basis for subject-matter jurisdiction”.⁹⁰⁴ On the contrary, regarding penalties, he considered that reference to domestic practice would be required.⁹⁰⁵

It can be inferred from his Report that the Secretary General considered the definitions of international crimes existent in international customary criminal law sufficiently precise, accessible and foreseeable to comply with the requirements of the legality principle. On the contrary, since international criminal law had not developed a precise system of penalties, reference to the domestic legal system of the author was required to comply with the *nulla poena* rule.

⁹⁰¹ Ibid., para. 34. According to the Secretary General, “(T)he part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; 5/ and the Charter of the International Military Tribunal of 8 August 1945.” Report of the UN Secretary-General, para. 35. Subsequently, the UN Secretary-General explains the content and scope of “Grave breaches of the Geneva Convention of 1949” (Article 2), “Violations of the laws or customs of war” (Article 3), “Genocide”, (Article 4) and “Crimes against humanity” (Article 5). Report of the UN Secretary-General, paras 37-49.

⁹⁰² Report of the UN Secretary-General, paras 25, 35. See how the ICTY identified and applied customary norms in Section 2.2.

⁹⁰³ Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes against Humanity, War Crimes*, 247.

⁹⁰⁴ Report of the UN Secretary-General, para. 36.

⁹⁰⁵ Ibid.

4.1.2.2 *The applicable law: customary international law and the principle of legality*

One of the most complicated issues addressed by modern international criminal tribunals was to assure the respect of the legality principle in criminal prosecutions based on customary international law.⁹⁰⁶ The nature of this body of law, often non-written, make them hardly compatible with the requirements of a rigid notion of the legality principle as applied in some domestic legal system (*lex scripta, stricta, certa et praevia*). Since the crimes were mostly enunciated in a general manner and lacked the clear descriptive definitions that exist in domestic criminal codes, the international tribunals adopted a rather flexible approach that at the same time enabled international criminal prosecution, and respected the rationales of the *nullum crimen maxim*. This way, the *ad hoc* criminal tribunals recognized in different occasions the value of international custom as a source of criminal law and its compatibility with the requirements of the *nullum crimen* principle.⁹⁰⁷

As a starting point it should be noted that the ICTY repeatedly established that the commission of crimes under customary international law entails individual criminal responsibility.⁹⁰⁸ In a decision rejecting an argument based on non-retroactivity, the Court recalled that:

“The Accused’s argument that persons can only be held criminally responsible for international crimes if such crimes have been laid down in convention, ratified by a state, implemented in domestic law and made public, is without merit. The very concept of customary international law is that norms of customary international law are binding *per se* and do not need explicit adoption by states.”⁹⁰⁹

⁹⁰⁶ Federico Andreu Guzmán, *Retroactividad Penal de Crímenes Internacionales*, ed. Comisión Colombiana de Juristas (Bogotá, Colombia: Opciones Gráficas Editores Ltda., 2012), 51.

⁹⁰⁷ *Tadic*, Decision on Appeal on Jurisdiction, para. 143; *Prosecutor v. Milan Milutinović, Nikola Sainovic and Dragoljub Ojdanic*, Decision on Ojdanic’s Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, ICTY App. Ch., T- 99-37-AR72, 21 May 2003, para. 9, available at: <https://bit.ly/3zMbZHB>; *Prosecutor v. Jean Paul Akayesu*, Judgment, ICTR Trial Ch. II, ICTR-96-4-T, 2 September 1998, para. 617, available at: <https://www.refworld.org/cases,ICTR,40278fbb4.html>.

⁹⁰⁸ See, among others: *Prosecutor v. Vasiljevic*, Judgment, para. 193.

⁹⁰⁹ *Prosecutor v. Vojislav Seselj*, Decision on jurisdiction and form of indictment, ICTY Trial Ch. II, T-03-67-PT, 26 May 2005, para. 15, available at: <https://www.icty.org/x/cases/seselj/tdec/en/040526.pdf>.

On this basis, the international criminal tribunals had to face various complex issues that will be independently analysed hereinafter. First, they had to determine whether international customary international law was the only substantive law to be applied, or if they could resort as well to conventional law. Then, the tribunals had to identify the customary norms applicable to specific situations and to ensure that “the law which it applies to a given criminal offence is indeed customary.”⁹¹⁰ Moreover, customary international law lacked clear descriptive definitions of the objective and subjective elements of the crimes, the defences or the forms of liability.⁹¹¹ Therefore, when identifying and applying customary norms the tribunals had to be extremely careful to avoid crossing the slippery border between judicial clarification and retroactive expansion of criminal liability. Questions were raised regarding the power of the judges and its scope, as well as about the legality requirements of precision, clarity, accessibility and foreseeability.⁹¹²

A. Customary international law and conventional law

A very delicate issue faced by the international criminal tribunals regarding the *nullum crimen* principle was to determine the sources of international law that could be applied in order to comply with the requirements of legality.⁹¹³ In short, the tribunals had to decide whether the prosecutions had been grounded exclusively on international customary law, or if conventional law could be applied as well even when not reflecting customary international norms. The UN Secretary General and the States conforming the Security Council when the ICTY was created, agreed that the tribunal should only prosecute crimes under existing international law. However, it was not clear if this included international criminal law as a whole, or was limited to customary (but not

⁹¹⁰ *Prosecutor v. Vasiljevic*, Judgment, para. 198.

⁹¹¹ Elena C. Díaz Galán and Harold Bertot Triana, ‘La Protección de Los Derechos Humanos En La Justicia Penal Internacional: El Caso Particular Del Tribunal Penal Internacional Para La Ex-Yugoslavia En Relación Con El Derecho Consuetudinario y El Principio de Legalidad’, *Universitas*, no. 29 (2019): 91.

⁹¹² Bantekas argues that the *ad hoc* tribunals’ mandate to apply customary law, despite intending to avoid concerns regarding retroactivity, in fact produced the opposite effect, particularly where customary norms were not incorporated in the concerned domestic legal systems. “The importation of customary law in criminal proceedings may sometimes concern a rule that is in practice unknown to some domestic jurisdiction” as “the articulation of the joint criminal enterprise doctrine, which is unknown in civil law systems” or certain subjective elements of the crime of genocide. Bantekas, *International Criminal Law*, 24–25.

⁹¹³ Héctor Olásolo, ‘A Note on the Evolution of the Principle of Legality in International Criminal Law’, *Criminal Law Forum* 18 (2007): 313.

conventional) international criminal law.⁹¹⁴ It is of specially interesting the evolution of the ICTY case law on this regard. During its first years, the ICTY accepted the application of both customary and conventional law, but this position experienced important changes through the years.

The reasons to use customary law as a source of criminalization and to limit the role of conventional norms to grant the respect of the *nullum crimen* principle can be summarised into the following two. (i) The lack of adherence to certain international conventions of some States directly related to the crimes may entail legality problems. (ii) Generally international instruments only provide for the prohibition but not the criminalization of conducts and therefore, grounding individual criminal responsibility on such provisions would not be compatible with the non-retroactivity rule.

a. Non-exclusivity of international customary law

It should be reminded that the UN Secretary-General Report established that the tribunal should apply “rules of international humanitarian law which are beyond any doubt part of customary law”.⁹¹⁵ This limited approach to the use of conventional law as legal grounds for prosecutions intended to avoid legality problems related to the lack of adherence of some States to certain international conventions following the dissolution of Yugoslavia. This way, since all States are bound by such customary rules, problems related to the lack of adherence to international conventions would not appear.⁹¹⁶

It has been argued that the UN Secretary General Report does not state that customary international law crimes are the only ones that could be prosecuting respecting the principle of legality.⁹¹⁷ In fact, this position was defended in the Security Council by the representatives of the United States, the United Kingdom and France, who claimed that the ICTY could not exclude the application of international treaties and conventions binding on the parties.⁹¹⁸

⁹¹⁴ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 305.

⁹¹⁵ Report of the UN Secretary-General, para. 34.

⁹¹⁶ Ibid., 25, 35. Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 53.

⁹¹⁷ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 305.

⁹¹⁸ *Prosecutor v. Tadic*, Decision on Appeal on Jurisdiction, para. 143. See a comprehensive analysis of the debates and State’s proposals regarding the subject matter jurisdiction of the ICTY in Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes against Humanity, War Crimes*, 231–37.

Given the lack of statutory definition, the ICTY Appeals Chamber defined for the first time the content of the principle *nullum crimen* in its decision on jurisdiction in 1995 the *Tadic* case.⁹¹⁹ The ICTY established that both international custom and conventional law are relevant sources of international criminal law and could be applied in conformity with the principle of legality:

“(...) the only reason behind the stated purpose of the drafters that the International Tribunal should apply customary international law was to avoid violating the principle of *nullum crimen sine lege* in the event that a party to the conflict did not adhere to a specific treaty. (...) It follows that the International Tribunal is authorised to apply, in addition to customary international law, any treaty which: (i) was unquestionably binding on the parties at the time of the alleged offence; and (ii) was not in conflict with or derogating from peremptory norms of international law, as are most customary rules of international humanitarian law.”⁹²⁰

Relying the *Tadic* case, the ICTY Appeals Chambers reinforced in 2004 the same idea declaring in the *Kordić and Čerkec* case:

“The maxim of *nullum crimen sine lege* is also satisfied where a State is already treaty-bound by a specific convention, and the International Tribunal applies a provision of that convention irrespective of whether it is part of customary international law”⁹²¹

In the same way, in *Galic*, the ICTY accepted the provisions of a Geneva Convention Additional Protocol regarding the crime of inflicting terror upon civilians as valid legal grounds for individual criminal responsibility. The Tribunal considered unnecessary to prove that the content of such provisions were as well customary international law.⁹²²

The same approach was taken when drafting the ICTR Statute. It establishes that the Court could prosecute treaty-based crimes, whether or not having reached the

⁹¹⁹ *Prosecutor v. Tadic*, Decision on Appeal on Jurisdiction, para. 143.

⁹²⁰ Ibid.

⁹²¹ *Prosecutor v. Dario Kordić and Mario Čerkec*, Appeal Judgment, ICTY App. Ch., IT-95-14/2-A, 17 December 2004, para. 44, available at: https://www.icty.org/x/cases/kordic_cerkez/acjug/en/cer-aj041217e.pdf.

⁹²² *Prosecutor v. Stanislav Galic*, Judgement and opinion, ICTY Trial. Ch. I, IT-98-29-T, 5 December 2003, para. 138, available at: <https://www.icty.org/x/cases/galic/tjug/en/gal-tj031205e.pdf>. Referring to GC Additional Protocol I, Art. 51(2) and GC Additional Protocol II, Art. 13(2). See an analysis of the case in Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 54.

status of customary international law, if such treaties had been ratified and implemented by Rwanda before the moment of commission.⁹²³ It has been noted that the Rwandan was only an inner-State conflict and therefore, the issues regarding the lack of adherence of some relevant States to international conventions could not appear here, as it did with the dissolution of Yugoslavia.⁹²⁴

b. Exclusivity of international customary law

From 2002 the position of the ICTY Appeals Chamber started a significant transformation. Despite in some occasions the line of case law remained coherent, as in the above-mentioned *Kordić and Čerkec* case, some pronouncements evolved towards a more restrictive interpretation of the legality principle that excluded the application of conventional law.⁹²⁵

This new interpretative line was based on the argument that the *nullum crimen* principle not only requires the previous prohibition of the conduct, but its

⁹²³ On this subject it is particularly clear the UN Secretary General's Report on the ICTR Statute: "(...) the Security Council has elected to take a more expansive approach to the choice of the applicable law than the one underlying the statute of the Yugoslav Tribunal, and included within the subject-matter jurisdiction of the Rwanda Tribunal international instruments regardless of whether they were considered part of customary international law or whether they have customarily entailed the individual criminal responsibility of the perpetrator of the crime. Article 4 of the statute, accordingly, includes violations of Additional Protocol II, which, as a whole, has not yet been universally recognized as part of customary international law, and for the first time criminalizes common Article 3 of the four Geneva Conventions." UN doc S/1995/134 (13 February 1995), para. 12, available at: <https://undocs.org/S/1995/134>. For further information, see Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 306; Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, 61–62.

⁹²⁴ The issue would not appear either before the ECCC since the Cambodian was as well only an inner-State conflict. Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 54.

⁹²⁵ For a detailed examination of the case law reflecting the evolving views of the ICTY Appeals Chamber, see Olásolo, 'A Note on the Evolution of the Principle of Legality in International Criminal Law', 315; Olásolo, 'El Principio Nullum Crimen Sine Iure En El Derecho Internacional Contemporáneo', 30–31. In the *Vasiljević* Case, the Trial Chamber acquitted the accused of the charge of "violence to life and person" as a violation of the laws or customs of wars. The ICTY was not convinced that such crime entailed individual criminal responsibility under customary law, and found that the definition of the crime should have been sufficiently foreseeable and accessible under customary international law at the time of commission. For a comprehensive analysis of the *Vasiljević* case, see Elena Martín Salgado, 'The Judgement of the International Criminal Tribunal for the Former Yugoslavia in the Vasiljević Case', *Leiden Journal of International Law*, no. 16 (2003): 321–30.

criminalization entailing individual criminal responsibility. As the ICTY argued, generally “treaty provisions will only provide for the prohibition of a certain conduct not its criminalization” and the breach of such prohibition will entail State responsibility but not necessarily individual criminal responsibility.⁹²⁶ Therefore, according to this reasoning, the respect of the non-retroactivity rule would not be compatible with prosecutions grounded on such conventional norms.⁹²⁷

Following this reasoning the *nullum crimen* principle would require prosecutions to be grounded on customary norms that establish the criminalization of the conducts. Therefore, references to conventional provisions are acceptable, but only if they reflect customary norms that entail individual criminal responsibility.⁹²⁸ This way, the ICTY Appeals Chamber established that:

“The fact that an offence is listed in the Statute does not therefore create new law and the Tribunal only has jurisdiction over a listed crime if that crime was recognised as such under customary international law at the time it was allegedly committed.”⁹²⁹

The Appeals Chamber declared that, due to the particular characteristics of the tribunal, customary international law was the only source of international law compatible with the requirements of the *nullum crimen* principle.⁹³⁰ Despite not all ICTY chambers excluded conventional norms to ground criminal prosecutions, in most cases they explained that such treaty provisions were as well considered as customary international law.⁹³¹ This new ICTY line of argument was subsequently followed by other international criminal tribunals that found that the respect of the legality

⁹²⁶ *Prosecutor v. Stanislav Galic*, Appeal Judgment, ICTY App. Ch., IT-98-29-A, 30 November 2006, para. 83, available at: <https://www.icty.org/x/cases/galic/acjug/en/gal-acjud061130.pdf>.

⁹²⁷ Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 55. See a comprehensive summary of the different positions and arguments on this issue in

⁹²⁸ Rauter, 57.

⁹²⁹ *Milutinović*, Decision on Ojdanic’s Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, para. 9. See as well, among others, *Prosecutor v. Enver Hadzihasanovic, Mehmed Alagic and Amir Kubura*, Decision on interlocutory appeal challenging jurisdiction in relation to command responsibility, ICTY App. Ch., IT-01-47-AR72, 16 July 2003, para. 35, available at: https://www.icty.org/x/cases/hadzihasanovic_kubura/acdec/en/030716.htm#40.

⁹³⁰ Olásolo, ‘El Principio Nullum Crimen Sine Iure En El Derecho Internacional Contemporáneo’, 30–31.

⁹³¹ For an analysis and reference of further cases, see Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 62–63.

principle would generally require prosecutions to be grounded on customary international law.⁹³²

This interpretation of the *nullum crimen* principle has been questioned by one part of the doctrine and the debate about which international instruments trigger individual criminal responsibility is still not resolved. While it is certain that some treaties, as the Genocide Convention, entail criminalization of conducts, some authors question the legality of prosecutions based on other international instruments.⁹³³

It has been argued that this new notion of legality increases the differences between domestic legal systems and international criminal law, at least regarding the requirements of legality and the system of sources of law.⁹³⁴ As above explained many domestic legal systems embrace a strong version of *nullum crimen*, and customary law is hardly compatible with the *lex scripta* requirement (written statutes) or with rigid notions of specificity and foreseeability. This new approach of the legality principle, embraced by the ICTY some years after the adoption of the ICC Statute, contradicts the effort of the international community to narrow the gap between the requirements derived from the legality principle in national and international legal systems.⁹³⁵

As it will be further analysed, the adoption of the Rome Statute allowed the application of a stronger version of legality in the international arena. The view of the ICTY, reflecting the opposition of certain sectors against the limitation of the role of international customary law, seems to ignore such developments.⁹³⁶ It is argued that the decreasing importance of custom is unavoidable since international criminal law is evolving towards a systematic codification that would grant stronger guarantees and the application of a stronger notion of legality. Similarly, it is argued that some ICTY decisions disregard the value of international treaties as a source of criminal law, even

⁹³² See for the ICTR: *Prosecutor v. Akayesu*, Judgement, paras 611-17. See for the SCSL: *Prosecutor v. Moinina Fofana, Allieu Kondewa*, Judgment, SCSL Trial Ch. SCSL-04-14-A, 2 August 2007, para. 94, available at: <http://www.rscsl.org/Documents/Decisions/CDF/785/SCSL-04-14-T-785.pdf>; *Prosecutor v. Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, Judgment, SCSL Trial Ch. II SCSL-04-16-T, 20 June 2007, paras 636-800, available at: <http://www.rscsl.org/Documents/Decisions/AFRC/613/SCSL-04-16-T-613s.pdf>.

⁹³³ See a comprehensive analysis of these debates in, In particular the discussions on Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 56-57.

⁹³⁴ Olásolo, 'A Note on the Evolution of the Principle of Legality in International Criminal Law', 318.

⁹³⁵ Ibid.

⁹³⁶ Ibid.

if binding to all parties to the conflict and in effect at the moment the crimes were committed.⁹³⁷

B. Identifying international customary law

The role of the courts in the international justice system has a weight unknown in civil law domestic system. This is due to different factors as the unwritten nature of customary international law, or the developing state of the international justice system.⁹³⁸ In the case of the *ad hoc* tribunals, this was aggravated by the fact that their statutes were quite brief and only provided broad and vague heads of jurisdiction. The courts had to identify customary norms, usually general and not very precise, and to apply them to specific and concrete situation. This circumstance afforded judges considerable room for judicial creativity, generating important tensions with various aspects of the *nullum crimen* principle.⁹³⁹

As a first step, the *ad hoc* tribunals established that those criminal prosecutions, grounded on international customary law, were compatible with the requirements of the principle of legality.⁹⁴⁰ From this starting point, the tribunals had to face the difficult and controversial task of identifying the international norms that at the time of commission of the alleged crimes had already reached the status of customary international law. The courts had to identify principles and rules in areas where international practice was scarce, and construct formulas to solve situations that had hardly been tackled in the past.⁹⁴¹ Moreover, the courts were forced to rely on customary law in areas unknown to state practice and *opinio juris*, as the modes of criminal responsibility or the application of defences within the framework of individual

⁹³⁷ Ibid., 316-17.

⁹³⁸ For an analysis of the role of judicial decisions in international criminal law, and the nature and problems of applicability of international customary law, see Cassese, *International Criminal Law*, 13, 18; Díaz Galán and Bertot Triana, 'La Protección de Los Derechos Humanos En La Justicia Penal Internacional: El Caso Particular Del Tribunal Penal Internacional Para La Ex-Yugoslavia En Relación Con El Derecho Consuetudinario y El Principio de Legalidad', 75-80.

⁹³⁹ Kress, 'Nulla Poena Nullum Crimen Sine Lege', para. 17.

⁹⁴⁰ *Prosecutor v. Tadić*, ICTY, Decision on Appeal on Jurisdiction, para. 143; *Prosecutor v. Milutinović*, ICTY, Decision on Ojdanic's Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, para. 9; *Prosecutor v. Akayesu*, ICTR, Judgement, para. 617.

⁹⁴¹ Díaz Galán and Bertot Triana, 'La Protección de Los Derechos Humanos En La Justicia Penal Internacional: El Caso Particular Del Tribunal Penal Internacional Para La Ex-Yugoslavia En Relación Con El Derecho Consuetudinario y El Principio de Legalidad', 92.

criminal responsibility.⁹⁴² Obviously, this situation granted a wide margin of decision for the courts that tried to combine prudent legal developments and the respect of the basic guarantees of the accused.⁹⁴³ In this regard, the ICTY declared:

“The principle of *nullum crimen sine lege* “does not prevent a court from interpreting and clarifying the elements of a particular crime”. (...) Nor does it preclude the progressive development of the law by the court. (...) But under no circumstances may the court create new criminal offences after the act charged against an accused either by giving a definition to a crime which had none so far, thereby rendering it prosecutable and punishable, or by criminalizing an act which had not until the present time been regarded as criminal.”⁹⁴⁴

Anyhow, the methodology used by the *ad hoc* tribunals to identify customary laws has been criticized by some scholars.⁹⁴⁵ They have been accused of “judicial creativity” or “judicial activism”.⁹⁴⁶ It has been claimed as well that the courts have identified customary law in an unstable and non-systematic manner, preventing certainty and predictability, and therefore, undermining the *nullum crimen* principle.⁹⁴⁷

⁹⁴² Díaz Galán and Bertot Triana, 79.

⁹⁴³ Ibid., 92.

⁹⁴⁴ *Prosecutor v. Vasiljevic*, Judgment 196.

⁹⁴⁵ For a detailed analysis of the methodology used by the international tribunals, see Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 307; Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 63–66.

⁹⁴⁶ See, with further references in Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 63.

⁹⁴⁷ As an example, the ICTY Appeals Chamber in one of its first decisions declared that war crimes committed in non-international armed conflicts were part of international customary law (*Tadic*, Decision on Appeal on Jurisdiction, paras 96–135). Some authors upheld the reasoning of the ICTY and consider them compatible with the *nullum crimen* principle as understood in international law. See Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes against Humanity, War Crimes*, 270–72; Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 64–65. Some writers consider that the State practice elements on which the Court relied were insufficient to identify an international customary norm. Carlos R. Fernandez Liesa, «El Tribunal Para La Antigua Yugoslavia y El Desarrollo Del Derecho Internacional Seccion I: Doctrina», *Revista Espanola de Derecho Internacional* 48, n.º 2 (1996): 44. Other scholars have found that the manner in which this customary norm was identified and held to exist as a creative precedent incompatible with a strict understanding of the non-retroactivity principle. See Kress, ‘Nulla Poena Nullum Crimen Sine Lege’, para. 17. For a summary of the debates on this issue and further references, see Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 64–65; Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes against Humanity, War Crimes*, 270–72. For an analysis of the alleged flaws of the ICTY’s methodology

One of the most discussed examples is the ICTY Appeals Chamber unanimous decision in *Tadic* declaring that war crimes committed in non-international armed conflicts were part of international customary law.⁹⁴⁸ Before the decision, the ICRC, States and many scholars considered violations of humanitarian law committed in the context of an internal conflict could not constitute war crimes since such category was reserved for international conflicts.⁹⁴⁹ However, the Appeals Chamber identified a set of international customary rules criminalizing such conducts committed in the internal conflict and therefore, considered according to the *nullum crimen* principle to classify them as war crimes. Since then, war crimes in non-international conflicts have generally been accepted. While some authors upheld the reasoning of the ICTY and consider them compatible with the *nullum crimen* principle as understood in international law,⁹⁵⁰ other scholars have found that the manner in which this customary norm was identified, and held to exist as a creative precedent, was incompatible with a strict understanding of the non-retroactivity principle.⁹⁵¹ In particular, some authors claim that the ICTY and ICTR did not prove the material and subjective elements of the customary laws applied.⁹⁵² In this regard, it is argued that the definition of international crimes by *ad hoc* tribunals was rather emotional and in practice created *ex post facto* laws.⁹⁵³

However, to determine if the international criminal tribunals effectively respected the legality principle when identifying and applying customary international

to identify customary international law, and its effects on the principle of legality, see Díaz Galán and Bertot Triana, 'La Protección de Los Derechos Humanos En La Justicia Penal Internacional: El Caso Particular Del Tribunal Penal Internacional Para La Ex-Yugoslavia En Relación Con El Derecho Consuetudinario y El Principio de Legalidad', 78–99.

⁹⁴⁸ *Prosecutor v. Tadic*, Decision on Appeal on Jurisdiction, paras 96–135.

⁹⁴⁹ Cassese, *International Criminal Law*, 32.

⁹⁵⁰ Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes against Humanity, War Crimes*, 270–72; Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 64–65; Cassese, *International Criminal Law*, 32.

⁹⁵¹ Kress, 'Nulla Poena Nullum Crimen Sine Lege', para. 17. For a summary of the debates on this issue and further references, see Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 64–65; Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes against Humanity, War Crimes*, 270–72.

⁹⁵² Freitas argues that the crimes against humanity did not reach the status of customary international law at least until the ICTY Statute was adopted, and therefore, the prosecution of such crimes based on customary law would violate the principle of legality. Pacheco de Freitas, 'La Relación Entre El Principio de Legalidad En Derecho Penal Internacional y La Tipificación Internacional de Los Crímenes de Lesa Humanidad: Una Perspectiva Histórica', 203.

⁹⁵³ Pacheco de Freitas, 204.

criminal law, it should be taken into account the scope and nature of the requirements imposed by the principle in the international arena. In fact, many of the above-mentioned critiques, when analysing the pronouncements of the international tribunals mistake the content of the international principle of legality with the much stricter requirements existing in domestic legal systems. It should be reminded that, due to the special characteristics and stage of development of international law, the *nullum crimen* principle applicable to international crimes is more flexible and limited, covering the core rationales of the principle. Being customary law a fundamental source of international law, not existing a generally accepted theory regarding its constituent elements or how to identify them, and lacking international criminal law complete codification, it would be unreasonable to apply a strict version of the principle as understood in some domestic legislation (*nullum crimen sine lege scripta, praevia, certa et stricta*). Anyhow, once established the previous existence of a customary crime, the non-retroactivity rule would be compatible with a process of interpretation and clarification of the elements of the crime. The *ad hoc* tribunals addressed the legality issue in numerous occasions and repeatedly expressed their concern about the respect of the *nullum crimen* principle, always trying to show the conformity of their decisions with the principle. Hereinafter it will be analysed how the combined prosecutions with the respect of the different elements of the legality.

4.1.2.3 *Clarity and specificity of the applicable norms*

Regarding the requirements of clarity and specificity of the applicable norms, the nature of international criminal law prevents their rigid application.⁹⁵⁴ However, the *ad hoc* tribunals paid special attention to respect the rationales of the legality principle and required a minimum of clarity and specificity of the applicable norms, rejecting those not complying with such requirements.

A. Judicial clarification or retroactive expansion of criminal liability

First, the tribunals identified the applicable customary norm and declared a specific conduct as a crime under customary international law. Then, they had to verify that at the time of commission the alleged crime was defined clearly enough under international customary law. However, the tribunals were not consistent regarding the degree of clarity and precision required. In occasions the ICTY considered that “if

⁹⁵⁴ Díaz Galán and Bertot Triana, ‘La Protección de Los Derechos Humanos En La Justicia Penal Internacional: El Caso Particular Del Tribunal Penal Internacional Para La Ex-Yugoslavia En Relación Con El Derecho Consuetudinario y El Principio de Legalidad’, 90.

customary international law does not provide for a sufficiently precise definition of a crime listed in the Statute, the Trial Chamber would have no choice but to refrain from exercising its jurisdiction over it, regardless of the fact that the crime is listed as a punishable offence in the Statute".⁹⁵⁵ To conclude this reasoning, the Court established that "anything contained in the statute of the court in excess of existing customary international law would be a utilization of power and not of law".⁹⁵⁶ However, in other cases the ICTY prosecuted crimes based on a general definition, but without identifying a specific description of the conducts prohibited under customary law.

To give some examples, in the *Kupreškić* case, the ICTY Trial Chamber recognized that the crime of persecution, as a form of crime against humanity, had never been clearly defined in international treaties or by national or international case law.⁹⁵⁷ However, the Chamber considered sufficient the general definition of the crimes and referred to the description of the specific criminal conducts previously provided by the same tribunal.⁹⁵⁸ Similarly, in the *Furundžija* case, the tribunal considered compatible with the *nullum crimen* principle a conviction for the crime of "rape" despite no definition of the specific prohibited conducts were provided in international criminal law at the time of commission.⁹⁵⁹

Anyhow, once proved the previous existence of the crime under customary law, the courts had a margin of interpretation that could be considered compatible with the requirements of the *nullum crimen* principle. As it seems obvious, the definition of a crime, either in national or in international law, cannot precisely describe every possible criminal act or omission. General definitions of the prohibited conducts are provided, but it will be the judge who would decide if the specific prosecuted act falls within the definition provided by the law.⁹⁶⁰ In this regard, the ICTY Appeals Chambers

⁹⁵⁵ *Prosecutor v. Vasiljević*, Judgment, para. 202.

⁹⁵⁶ Ibid. Díaz Galán and Bertot Triana, 'La Protección de Los Derechos Humanos En La Justicia Penal Internacional: El Caso Particular Del Tribunal Penal Internacional Para La Ex-Yugoslavia En Relación Con El Derecho Consuetudinario y El Principio de Legalidad', 92.

⁹⁵⁷ *Prosecutor v. Kupreškić et al.*, Judgment, ICTY Trial Ch., IT-95-16-T, 14 January 2000, para. 567, available at: <https://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf>. Analyzed in Díaz Galán and Bertot Triana, 92.

⁹⁵⁸ *Prosecutor v. Tadić*, Opinion and Judgment, ICTY Trial Ch., IT-94-1-T, 7 May 1997, paras 697 – 710, available at: <https://www.icty.org/x/cases/tadic/tjug/en/tad-ts70507JT2-e.pdf>.

⁹⁵⁹ *Prosecutor v. Furundžija*, para. 184. See other related cases in Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, 65.

⁹⁶⁰ For an analysis of the tensions arising between the specificity requirement and the progressive development of the law, see Mohamed Shahabuddeen, 'Does the Principle of Legality Stand in the Way of Progressive Development of Law', *Journal of International Criminal Justice* 2, no. 4 (2004): 1007–17.

established that the principle of legality

“(…) does not prevent a court, either at the national or international level, from determining an issue through a process of interpretation and clarification as to the elements of a particular crime; nor does it prevent a court from relying on previous decisions which reflect an interpretation as to the meaning to be ascribed to particular ingredients of a crime.”⁹⁶¹

B. Specificity and crime definitions: emphasis on the criminal conduct

In domestic legal systems the *nullum crimen* principle is interpreted as requiring clear and precise criminal laws. However, due to the special characteristics of international law and in particular of customary law, a rigid interpretation of the clarity and precision requirements could not be applicable in the international criminal justice system. Thus, a more flexible notion was adopted by the international tribunals requiring a crime to be “defined with sufficient clarity for it to have been foreseeable and accessible, taking into account the specificity of customary international law.”⁹⁶²

In this way, to ensure the respect of the *nullum crimen* principle, and to prevent the *ex post facto* definition of the crimes, the international tribunals focused on determining whether the conduct in question was punishable at the time of the events, rather than on the precise crime definition. An ICTY Trial Chamber was very clear establishing that

“In interpreting the principle *nullum crimen sine lege*, it is critical to determine whether the underlying conduct at the time of commission was punishable. The emphasis on conduct, rather than on the specific description of the offence in substantive criminal law, is of primary relevance.”⁹⁶³

The Chamber continued its reasoning reminding that the Rome Statute, when defining the *nullum crimen* principle, also places the emphasis on requiring previous criminalization of the conduct, rather than on a precise definition of the offence. Thereby, Article 22(1) establishes that: “A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place,

⁹⁶¹ *Prosecutor v. Zlatko Aleksovski*, Judgement, Appeals Ch., IT-95-14/1-A, 24 March 2000, para. 127, available at: <https://www.icty.org/x/cases/aleksovski/acjug/en/ale-asj000324e.pdf>. Also see *Prosecutor v. Delalić*, Appeal Judgment, para. 173.

⁹⁶² *Prosecutor v. Vasiljevic*, Judgment, para. 198.

⁹⁶³ *Prosecutor v. Enver Hadzihasanovic, Mehmed Alagic and Amir Kubura*, Decision on joint challenge to jurisdiction, ICTY Trial Ch., IT-01-47-PT, 12 November 2002, para. 62, available at: https://www.icty.org/x/cases/hadzihasanovic_kubura/acdec/en/030716.htm.

a crime within the jurisdiction of the Court.”⁹⁶⁴ To conclude its argument, the ICTY Chamber referred to the requirement of double criminality in extradition practice, acknowledging that, despite the differences, the underlying problem and legal guarantees are comparable.

“In order to determine whether the requirement of double criminality is fulfilled, the test to be applied is not so much whether a certain conduct is qualified in the respective national jurisdiction in the same way, but whether the conduct in itself is criminalized under those jurisdictions.”⁹⁶⁵

The SCSL adopted the same approach and considered that when interpreting the *nullum crimen* principle under international law the emphasis should be on the material conduct itself, rather than on specific and precise criminal definitions.⁹⁶⁶ The Court established that what should be foreseeable and accessible to a possible perpetrator is that his concrete conduct was punishable.

We see that the requirement of a previous precise definition of the crime, constituting one of the conditions derived from the legality principle in domestic legal systems, is not applicable in international law, or at least its application was not considered necessary by the international tribunals to fulfil the *nullum crimen* maxim.

4.1.2.4 Accessibility and foreseeability

During the 1990s the ECtHR elaborated the standards of *accessibility* and *foreseeability* to define the scope and limits of the principle of legality.⁹⁶⁷ The consolidation process of such criteria was quick and various international courts adopted them in the following years to define the content of the *nullum crimen* maxim.⁹⁶⁸ This way, the ICTY, ICTR and SCSL, following the ECHR’s doctrine, established that the respect of the principle of legality requires two elements: (i) the international customary law criminalizing the conduct should have been sufficiently accessible to the accused at the time of commission (accessibility), and (ii) the

⁹⁶⁴ ICC Statute Art. 22(1).

⁹⁶⁵ *Prosecutor v. Hadzihasanovic*, Decision on joint challenge to jurisdiction, para. 62.

⁹⁶⁶ *Prosecutor v. Sam Hinga Norman*, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), SCSL App. Ch., SCSL-04-14-AR72(E), 31 May 2004, para. 25, available at: <https://www.refworld.org/cases,SCSL,49abc0a22.html>.

⁹⁶⁷ See a comprehensive analysis of ECHR’s case law in this regard below, in Section 5.1.4.

⁹⁶⁸ Pacheco de Freitas, ‘La Relación Entre El Principio de Legalidad En Derecho Penal Internacional y La Tipificación Internacional de Los Crímenes de Lesa Humanidad: Una Perspectiva Histórica’, 192.

defendant should have been able to predict that his/her conduct would carry criminal responsibility (foreseeability).⁹⁶⁹

These requirements are quite general and vague, and further development and precision was needed when applied to specific situations. The international criminal courts have progressively elaborated on these requirements. However, the task was not easy since they had to combine the guarantees derived from the legality principle with the nature and the specific characteristic of international criminal prosecutions based on customary law.

In the *Vasiljevic* case the ICTY considered that before a conviction the Trial Chamber had to verify that the “offence with which the accused is charged was defined with sufficient clarity under customary international law for its general nature, its criminal character and its approximate gravity to have been sufficiently foreseeable and accessible.”⁹⁷⁰ However, it should be reminded that the ICTY borrowed its language from the jurisprudence of the ECHR, a tribunal addressing issues regarding trials in domestic legal systems.⁹⁷¹ Acknowledging this fact, the ICTY established that the particularities of the international criminal justice system should be taken into account.

The ICTY considered that since international customary law is not always reflected in written law, its accessibility cannot be as obvious as that of a national or an international criminal code. The Court recognized that “the principles of legality in international criminal law are different from their related national legal systems with respect to their application and standards.”⁹⁷² However it should be enough to predict the conducts that could carry individual criminal responsibility.⁹⁷³ Therefore, it would be wholly unacceptable

⁹⁶⁹ *Prosecutor v. Milutinović*, ICTY, Decision on Ojdanic’s Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, para. 10 and 21; *Prosecutor v. Hadzihasanovic*, ICTY, Decision on joint challenge to jurisdiction, paras 32-36; *Prosecutor v. Akayesu*, ICTR, Judgment, para. 617; *Prosecutor v. Norman*, SCSL, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), para. 25.

⁹⁷⁰ *Prosecutor v. Vasiljevic*, Judgment, para. 201.

⁹⁷¹ Martín Salgado, ‘The Judgement of the International Criminal Tribunal for the Former Yugoslavia in the Vasiljevic Case’, 325–26. Referring to *S.W. v. United Kingdom*, App. Nº 20166/92, ECtHR Ch. 22 November 1995, para. 35, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-57965%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57965%22]}).

⁹⁷² *Prosecutor v. Delalić et.al.*, Judgment, Trial Ch. IT-96-21-T, 16 November 1998, paras 402-13, available at: https://www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf, cited in Martín Salgado, 326.

⁹⁷³ Olásolo, ‘A Note on the Evolution of the Principle of Legality in International Criminal Law’, 317.

“to convict an accused person on the basis of a prohibition which, taking into account the specificity of customary international law and allowing for the gradual clarification of the rules of criminal law, is either insufficiently precise to determine conduct and distinguish the criminal from the permissible, or was not sufficiently accessible at the relevant time.”⁹⁷⁴

The requirements of accessibility and foreseeability should be combined with the “specificity of customary international law”,⁹⁷⁵ and with the evolving nature of international criminal law. Therefore, the principle *nullum crimen* “does not prevent a court from interpreting and clarifying the elements of a particular crime (...) or the progressive development of the law by the court.”⁹⁷⁶ Thereby, the accessibility and foreseeability requirements should be combined with the above-analysed requirements of clarity and specificity of the applicable norms.

Similarly, the question about the scope of the accessibility and foreseeability requirements merges with the issue of whether *nullum crimen* demands a precise crime definition or just that the conduct was considered punishable at the time of commission. The ICTY was rather clear on the matter establishing that:

“(I)n order to meet the principle of *nullum crimen sine lege*, it must only be foreseeable and accessible to a possible perpetrator that his concrete conduct was punishable at the time of commission. Whether his conduct was punishable as an act or an omission, or whether the conduct may lead to criminal responsibility, disciplinary responsibility or other sanction is no of material importance.”⁹⁷⁷

The requirements of accessibility and foreseeability have also been used by the tribunals to draw the line between judicial clarification and retroactive expansion of criminal liability. However, at times these requirements have proved to not be a very high standard. As the STL stated, international courts have occasionally found “that conduct previously considered legal can be construed as embraced within an existing offence” if it relates “an area where the law has been subject to progressive development and there are strong indications that still wider interpretation by the courts of the inroads on the immunity was probable.”⁹⁷⁸ That is to say, “as long as the

⁹⁷⁴ *Prosecutor v. Vasiljevic*, Judgment, para. 195.

⁹⁷⁵ *Ibid.*, para. 198.

⁹⁷⁶ *Ibid.*, para. 196.

⁹⁷⁷ *Prosecutor v. Hadzihasanovic*, Decision on joint challenge to jurisdiction, para. 62.

⁹⁷⁸ *Ayyash et al. Case*, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, STL App.Ch, 11-01/I/AC/R176bis, 16 February 2011, para. 135, available at: <https://www.legal-tools.org/doc/cee3c3/pdf/>. Referring to the

circumstances made this criminalisation foreseeable.”⁹⁷⁹ The STL continued its argument establishing that “(T)his principle would be better expressed by saying that the application of the law may be subject to development as social conditions change, as long as this application was foreseeable.”⁹⁸⁰ In conclusion, the tribunal considered that “(W)hat matters is that an accused must, at the time he committed the act, have been able to understand that what he did was criminal, even if “without reference to any specific provision”.⁹⁸¹

Despite the attempts of the international criminal tribunals, the question of what constitutes a *sufficiently* foreseeable and accessible crime definition under customary international law remains controversial.⁹⁸² Combining the characteristics of international criminal law with the “domestic” standards of foreseeability and accessibility entails great difficulties. This issue will be further discussed and analysed below in Section 5.1.4.

4.1.2.5 Substantive applicable law defined by the Statutes of the tribunals?

A recurring subject in the international justice system is the question of whether the international tribunals are bound by their statutes and have to apply the crimes defined without further consideration or, on the contrary, the courts should examine if at the time of commission the conducts were already criminalized by norms applicable to the defendants. This question already came up in the London Conference when negotiating the IMT Statute,⁹⁸³ and it aroused again in the modern international criminal tribunals.

Some scholars have reframed the American, British and Soviet views in the London Conference and claim that international courts should not question whether the crimes established in their statutes were applicable to the defendant at the time of commission. Schabas considers that the statutes should be interpreted according to the

ECtHR case law in the marital rape cases, analyzed below, Section 5.1.4.3, and in particular to *C. R. v. United Kingdom*, App. N° 20190/92, ECtHR, 22 November 1995, para 38, available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22%3A%5B%22001-57955%22%5D%7D>.

⁹⁷⁹ *Ayyash et al. Case*, Interlocutory Decision on the Applicable Law, para. 135.

⁹⁸⁰ *Ibid.*

⁹⁸¹ *Ibid.*, 136.

⁹⁸² Martín Salgado, ‘The Judgement of the International Criminal Tribunal for the Former Yugoslavia in the Vasiljevic Case’, 326.

⁹⁸³ See above, Section 2.2.2.1.

requirements of the legality principle. However, he argues that “it is not nearly so straightforward that the judges may in effect strike down provisions of the statutes that they deem to be retroactive, acting in effect as a kind of constitutional court.”⁹⁸⁴ In his view, international organizations can define crimes not yet considered customary international law, and in doing so they should only follow and respect peremptory norms of international law.⁹⁸⁵

Some scholars contest this position claiming that international courts can respect the legality principle and prosecute crimes that were not customary international law at the moment of commission, if they were crimes under other law applicable to the actor.⁹⁸⁶ Schabas’ view is also refuted by Gallant or Meron who claim that non-retroactivity of crimes and punishments has already become a *ius cogens* norm, according to the former, or at least that it is an emerging *ius cogens* norm, according to the later.⁹⁸⁷

The case law of the international criminal tribunals on this subject has not been steady. The SCSL Appeals Chambers established that it “cannot ignore whatever the Statute directs or permits or empowers it to do unless such provisions are void as being in conflict with a peremptory norm of general international law.”⁹⁸⁸ Similarly, the ICTY Appeals Chamber considered in *Tadic* that “it is open to the Security Council – subject to respect for peremptory norms of international law (*jus cogens*) – to adopt definitions of crimes in the Statute which deviate from customary international law.”⁹⁸⁹

In other occasions, and despite the statutes do not give such power to the courts, at least expressly, the judges of the *ad hoc* tribunals have declared provisions in their statutes to be inapplicable when in conflict with some legality requirements.⁹⁹⁰ In some cases the ICTY refrained from exercising its jurisdiction over a crime, even if

⁹⁸⁴ Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, 66.

⁹⁸⁵ *Ibid.*, 67.

⁹⁸⁶ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 315–16.

⁹⁸⁷ Theodore Meron, *War Crimes Law Comes of Age* (Oxford: Oxford University Press, 1998), 244. Cited and discussed, together with further arguments in Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 315–16.

⁹⁸⁸ *Prosecutor v. Charles Ghankay Taylor*, Decision on Immunity from Jurisdiction, SCSL App.Ch., SCSL-03-01-I, 31 May 2004, para. 43, available at: <http://www.rscsl.org/Documents/Decisions/Taylor/Appeal/059/SCSL-03-01-I-059.pdf>.

⁹⁸⁹ *Prosecutor v. Tadic*, Appeal Judgment, ICTY App. Ch., IT-94-1, 15 July 1999, para. 296, available at: <https://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>.

⁹⁹⁰ Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, 66.

described as a punishable offense in its Statute, claiming that the definition of the crime provided in customary international law was not sufficiently clear and precise. In *Vasiljevic*, the ICTY was categorical establishing: “(T)his is so because, to borrow the language of a US military tribunal in Nuremberg, anything contained in the statute of the court in excess of existing customary international law would be a utilisation of power and not of law.”⁹⁹¹ The SCSL Appeals Chamber, for example, has implicitly recognised its authority to reject provisions of its Statute if considered contrary to the *nullum crimen* maxim.⁹⁹²

4.1.2.6 *The principle of legality as an individual right*

The international criminal tribunals confirmed the *nullum crimen* principle as a subjective individual right. The violation of non-retroactivity has been considered as an issue individuals could raise and courts had to consider. They allowed defendants to raise numerous claims based on different elements of legality, and treated it as a principle of substantive criminal law on which individuals can rely.⁹⁹³ The courts allowed defendants to challenge their jurisdiction over the acts charged based on the legality principle, or to question the legality of the tribunals. This way, the courts accepted to study the claims and decided on their merits.⁹⁹⁴

The SCSL, for example, allowed a defendant to challenge the jurisdiction of the Court based on the *nullum crimen* argument that at the time of commission the crime of recruitment of child soldiers did not exist under customary international law. The Court rejected the claim on the merits considering that the crime already existed under

⁹⁹¹ *Prosecutor v. Vasiljevic*, Judgment, para. 202. For a detailed analysis of the ICTY case law on this issue, see Díaz Galán and Bertot Triana, ‘La Protección de Los Derechos Humanos En La Justicia Penal Internacional: El Caso Particular Del Tribunal Penal Internacional Para La Ex-Yugoslavia En Relación Con El Derecho Consuetudinario y El Principio de Legalidad’, 92; Martín Salgado, ‘The Judgement of the International Criminal Tribunal for the Former Yugoslavia in the Vasiljevic Case’.

⁹⁹² *Prosecutor v. Norman*, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), para. 25; *Prosecutor v. Kallon et al.*, Decision on challenge to jurisdiction, SCSL App. Ch. SCSL-04-15-AR72(E), 13 March 2004, paras 80-82, available at: <https://bit.ly/3wPYSTM>. Cited in Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, 67.

⁹⁹³ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 313.

⁹⁹⁴ See a comprehensive list of references and a study of the case law in Olásolo, ‘El Principio Nullum Crimen Sine Iure En El Derecho Internacional Contemporáneo’, 24; Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 312–13.

customary law at the time.⁹⁹⁵ Similarly, the ICTR permitted a defendant to challenge the jurisdiction of the Court over violations of Additional Protocol II of 1977 to the Geneva Conventions, since some of its provisions could not be considered as customary law. The ICTR allowed the defendant to raise the claim but subsequently rejected it on its merits. The Court argued that prior to the time of commission, Rwanda had adopted the Protocol and had incorporated in its domestic law the relevant conducts as crimes. Furthermore, the Court considered the conduct were in fact international customary crimes.⁹⁹⁶

4.1.2.7 Retroactive re-characterization

It seems that the notion of *nullum crimen* adopted by the *ad hoc* tribunals is compatible with the retroactive re-characterization technique. This means accepting to change the name of a crime within the international legal system, or to re-characterize as an international crime an offence already existent in domestic laws at the time of commission. The prosecution of an offence under a different criminal name would respect the main rationale of the principle of legality since no one would be prosecuted or punished for conducts that were not criminal at the time of commission.

The approaches of the ICTY and SCSL seem to consider consistent with the principle of legality the possibility of retroactive re-characterization if the relevant conduct already carried individual criminal responsibility under national or international law. It means excluding the retroactive criminalization of moral wrongs and of conducts only carrying state responsibility.⁹⁹⁷ As already explained, to ensure the respect of the *nullum crimen* maxim and its derived requirements the tribunals only required the previous criminalization of the conduct but not a specific crime definition.

In *Hadzihasanovic*, it seems clear that the ICTY Trial Chamber considers retroactive re-characterization compatible with the legality principle. In this case the appellants claimed that command responsibility for war crimes committed in an

⁹⁹⁵ *Prosecutor v. Norman*, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment).

⁹⁹⁶ *Prosecutor v. Akayesu*, Judgment, paras 611-17. Analyzed together with other related cases in Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 39–40. In the same vein, the ICTY has accepted in different occasions the *nullum crimen* principle as a subjective individual right. See among others, *Prosecutor v. Tadic*, Decision on Appeal on Jurisdiction, para. 143; *Prosecutor v. Hadzihasanovic*, Decision on challenge to jurisdiction in relation to command responsibility, App. Ch. paras 10-36; *Prosecutor v. Milutinović*, Decision on Ojdanic's Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, paras 9 and 21.

⁹⁹⁷ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 321.

internal armed conflict was not part of customary international law, and that in any case the principle of legality requires that at the time of commission it is foreseeable that the relevant conduct may be criminally sanctioned.⁹⁹⁸ The Trial Chamber rejected the claim arguing that when committed the conduct already constituted a customary crime and considered that when interpreting the *nullum crimen* principle “it is critical to determine whether the underlying conduct at the time of its commission was punishable”.⁹⁹⁹ The Chamber subsequently established that to respect the *nullum crimen* principle it only had to be foreseeable and accessible to the defendant that his conduct “was punishable at the time of commission. Whether his conduct was punishable as an act or an omission, or whether the conduct may lead to criminal responsibility, disciplinary responsibility or other sanction is no of material importance.”¹⁰⁰⁰ These flexible requirements visibly leave room for criminal re-characterization.

Later on, the Appeals Chamber upheld the reasoning of the Trial Chamber considering that to comply with the legality principle, the accused “must be able to appreciate that the conduct is criminal in the sense generally understood, without reference to any specific provision.”¹⁰⁰¹ Despite not in such an explicit manner, in other occasions ICTY Trial and Appeals Chambers appears to consider compatible with the *nullum crimen* principle the possibility of retroactively re-characterizing conducts.¹⁰⁰² Similarly, the SCSL in *Norman* explicitly subscribed the above-mentioned reasoning of the ICTY Trial Chamber in *Hadzihasanovic*.¹⁰⁰³

An analogous reasoning was used by the ICTY Appeals Chamber in *Galic* to uphold a conviction for “terror against a civilian population” as a separate war crime, instead of using a broader and well-established war crime classification as “attack on the civilian population”.¹⁰⁰⁴ It was the first time the offence was considered as a

⁹⁹⁸ *Prosecutor v. Hadzihasanovic*, Decision on challenge to jurisdiction in relation to command responsibility, para. 34.

⁹⁹⁹ *Prosecutor v. Hadzihasanovic*, Decision on joint challenge to jurisdiction, para. 62.

¹⁰⁰⁰ *Ibid.*

¹⁰⁰¹ *Prosecutor v. Hadzihasanovic*, Decision on challenge to jurisdiction in relation to command responsibility, para. 34.

¹⁰⁰² *Prosecutor v. Furundzija*, Judgement. para. 165-69; *Delalić*, Appeal Judgment, App. Ch. paras 178-80.

¹⁰⁰³ *Prosecutor v. Norman*, Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), para. 25.

¹⁰⁰⁴ Talita De Souza Dias, ‘Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law’ (University of Oxford, 2019), 87;

separate crime, but since the underlying offences were unquestionably criminal under conventional and customary international law, the Appeals Chamber found such new classification in conformity with the *nullum crimen* rule.¹⁰⁰⁵ However, the Judgment had a dissenting opinion of Judge Schombourg who found that such retroactive re-characterization was in violation of the *nullum crimen* principle since the crime of terrorizing civilians was too different from other pre-established war crimes.¹⁰⁰⁶

The international tribunals did not address situations where a conduct was clearly a crime only under national law at the time of commission and therefore, they did not explicitly use the re-characterization technique, nor tackled the issue directly in such context. The tribunals found in all the cases that the acts were also crimes under customary international law.

However, it has been argued that the ICTY has repeatedly used the re-characterization technique for the modes of liability, being the doctrine of joint criminal enterprise the clearest example. This mode of liability applies in cases where members of the group commit an additional crime that was not part of the initial common plan. However, to find each member guilty of this supplementary crime, it should have been foreseeable and all members should have accepted the risk that it happened. Therefore, the required mental element (*mens rea*) is *dolus eventualis* or advertent recklessness.¹⁰⁰⁷

In *Tadic* the Appeals Chamber relied on the joint criminal enterprise doctrine to convict the accused for murder as a war crime and a crime against humanity for his participation in the killing of five men.¹⁰⁰⁸ The defendant was found guilty since it was proved that he shared the group's common purpose and had accepted the risk that killings could be committed. The ICTY relabelled "criminal association", the mode of liability applicable under the domestic Yugoslavian laws, as "joint criminal enterprise" under customary international law.¹⁰⁰⁹

Nevertheless, the conformity of this mode of liability with the legality principle has been questioned since at the time of commission its existence in customary

Olásolo, 'A Note on the Evolution of the Principle of Legality in International Criminal Law', 316.

¹⁰⁰⁵ *Prosecutor v. Stanislav Galic*, Appeal Judgment, paras 86-98.

¹⁰⁰⁶ *Ibid.*, Separate and partially dissenting opinion of Judge Schomburg, paras 7, 17, 21-22.

¹⁰⁰⁷ *Prosecutor v. Tadic*, Appeal Judgment, paras 220, 228. For an analysis of the mental element in international crimes, see Cassese, *International Criminal Law*, 35-58.

¹⁰⁰⁸ *Prosecutor v. Tadic*, Appeal Judgment, paras 231-33.

¹⁰⁰⁹ Analysed in De Souza Dias, 'Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law', 17-18, 140-41.

international law was not clear, and in the Yugoslavian domestic legal system intent was required as *mens rea* for all modes of participation. In other words, it was questionable that the joint criminal enterprise doctrine was applicable to the accused under international law, and according to the relevant domestic laws a member of a group only could be found guilty of the crimes that were part of the initial plan, but not of those that were just foreseeable.¹⁰¹⁰ If it is true that joint criminal enterprise did not exist under customary law, the ICTY retroactively broadened the scope of the modes of liability. Therefore, the accused might have been convicted for conducts that at the time were not covered by any applicable mode of liability.¹⁰¹¹ However, the ICTY repeatedly considered that joint criminal enterprise already existed under customary international law, and therefore convictions were in conformity with the *nullum crimen* principle.¹⁰¹² As well, it has been argued that the joint criminal enterprise doctrine comprises the acts that for long had conformed criminal complicity in both international and national criminal systems.¹⁰¹³

Commentators have not often explicitly discussed retroactive re-characterization, but a recent study of De Souza Dias tackles the issue comprehensively.¹⁰¹⁴ The author considers that this technique could be compatible with the international legality principle if it does not involve the expansion of the material or mental elements of the crimes, the modes of liability or the applicable penalties, or if it does not remove the available defences.¹⁰¹⁵ Anyhow, taking into account the significant development of international criminal law and its increasing maturity, De Souza Dias considers that recourse to retroactive re-characterization will be no longer necessary.¹⁰¹⁶

¹⁰¹⁰ Criminal Code of the Socialist Federal Republic of Yugoslavia of 1977, Arts. 11 and 26.

¹⁰¹¹ De Souza Dias, 'Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law', 140–41.

¹⁰¹² *Prosecutor v. Milutinović*, 10, 40. *Prosecutor v. Tadić*, Appeal Judgment, ICTY App. Ch. IT-94-1-A, 15 July 1999, paras 195–220, 221–228, available at: <https://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>.

¹⁰¹³ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 324. The application of the joint criminal enterprise and its compatibility with the *nullum crimen* principle is comprehensively analysed in Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes against Humanity, War Crimes*, 288–303; De Souza Dias, 'Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law', 21–22, 97, 119–20.

¹⁰¹⁴ De Souza Dias, 'Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law'.

¹⁰¹⁵ *Ibid.*, 11–31, 273–74.

¹⁰¹⁶ *Ibid.*, 279.

Some other relevant authors have indirectly addressed the issue. According to Cassese, the principle of legality bans international courts to create new crimes, with new *actus reus* or new *mens rea*. However, they can adapt criminal provisions to changing social conditions. Based on a broad general criminal prohibition, and not a clear and explicit enumeration of the criminal conducts, the author considers acceptable to broaden the *actus reus* or to decrease the threshold of the *mens rea*, for example from intent to recklessness, if it is consistent with general principles.¹⁰¹⁷

Theodore Meron, who served as judge in the ICTY and ICTR, implicitly accepted the retroactive re-characterization technique as consistent with legality.¹⁰¹⁸ When tackling the criminalization of Common Article 3 of the Geneva Conventions and Additional Protocol II, he indicated that the provisions “are treaty obligations binding on Rwanda, that they clearly proscribe certain acts, and that those acts are also prohibited by the criminal law of Rwanda, albeit in different terms.”¹⁰¹⁹ M. Cherif Bassiouni also accepts re-characterization, but he treats it as an example of permitted analogy.¹⁰²⁰ Anyhow, as analysed hereinafter, it is commonly considered that to respect *nulla poena sine lege* the penalty imposed cannot be greater than that established by the law criminalizing the conduct at the time of commission.¹⁰²¹

4.1.2.8 Retroactive application of domestic law

In certain occasions the international criminal tribunals have considered consistent with the *nullum crimen* principle the retroactive application of domestic laws if at the moment of commission the acts were already criminal under international law. In *Ademi-Norac* the ICTY referred its jurisdiction to the Croatian courts to prosecute certain conducts that at the time of commission were considered criminal under

¹⁰¹⁷ Cassese, *International Criminal Law*, 32.

¹⁰¹⁸ Meron, *War Crimes Law Comes of Age*, 244-48.

¹⁰¹⁹ *Ibid.*, 245.

¹⁰²⁰ M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, 2nd Revised edition (The Hague ; Boston: Kluwer Law International, 1999), 158–59. Commented by Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 322. It should be reminded that the use of analogies to extend the scope and meaning of a criminal rule to a matter that is not covered by law (*analogia legis*) is prohibited in both domestic and international criminal law. However, other categories of analogy are permitted in domestic and international legal systems. See a detailed analysis of the issue in relation to the analogies prohibited in the Rome Statue, below in Section 4.2.2.4. Also see Section 6.3.1.2.

¹⁰²¹ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 323.

international law but that were not clearly criminalized by domestic laws.¹⁰²² In its referral decision the ICTY upheld the possibility of domestic courts retroactively applying two Croatian criminal laws passed in 1997 and 2004 to acts committed before their enactment.¹⁰²³

The STL accepted as well the retroactive application of domestic criminal laws if the conducts were already considered criminal under international law at the time of commission. The Tribunal recognized that in certain States international criminalization alone is not sufficient to prosecute a crime that has not been codified in the domestic legal order. However, once a domestic law has codified the international crime, the *nullum crimen* principle does not prevent this law to be applied to crimes committed before its adoption. The STL considered:

“Article 15 of the ICCPR allows at the very least that fresh national legislation (...) defining a crime that was already contemplated in international law may be applied to offences committed before its enactment without breaching *the nullum crimen* principle.”¹⁰²⁴

The retroactive application of domestic legislation could raise questions regarding the legality requirement of foreseeability. The STL addressed the issue and argued that “individuals are expected and required to know that a certain conduct is criminalised in international law (...) a person may thus be punished by domestic courts even for conduct predating the adoption of national legislation.”¹⁰²⁵

The Tribunal also tackled the issue of foreseeability when at the moment of commission the conduct was only criminalized under international customary law. In this regard, the STL referred to the ICTY case law and explained that non-codified international customary law can give an individual “reasonable notice” of conducts that could carry criminal responsibility.¹⁰²⁶ The Tribunal explained that “(T)his facet of the *nullum crimen* principle should not be surprising: international crimes are those offences that are considered so heinous and contrary to universal values that the whole community condemns them through customary rules.”¹⁰²⁷ Therefore, the STL concluded

¹⁰²² *Prosecutor v. Rahim Ademi and Mirko Norac*, Decision for referral to the authorities of the Republic of Croatia, ICTY Trial Ch. IT-04-78-PT, 14 September 2005, available at: <https://www.icty.org/x/cases/ademi/tdec/en/050914.htm>, commented in Andreu Guzmán, *Retroactividad Penal de Crímenes Internacionales*, 52.

¹⁰²³ *Prosecutor v. Ademi-Norac*, paras 38-46.

¹⁰²⁴ *Ayyash et al. Case*, STL, Interlocutory Decision on the Applicable Law, para. 133.

¹⁰²⁵ *Ibid.*

¹⁰²⁶ *Ibid.*, 134.

¹⁰²⁷ *Ibid.*

that individuals are “required and expected to know that, as soon as national authorities take all the necessary legislative (or judicial) measures necessary to punish those crimes at the national level, they may be brought to trial even if their breach is prior to national legislation (or judicial pronouncements).”¹⁰²⁸

4.1.2.9 *Legality of the tribunals*

Sometimes the legality principle is interpreted as requiring courts to be created before the commission of the prosecuted crimes. However, most international criminal tribunals were established to address crimes mainly perpetrated before their establishment.¹⁰²⁹ Even the ICC, which jurisdiction *ratione temporis* is limited to crimes committed after its establishment, might in some cases prosecute crimes committed by persons who at the moment of commission were outside the court’s jurisdiction.¹⁰³⁰

Consequently, international criminal courts had to address different claims challenging their legality based on the argument that creating new jurisdictions retrospectively was a violation of the legality principle. The claims were rejected on their merits by the *ad hoc* tribunals.¹⁰³¹ In *Tadic*, for example, the ICTY Appeals Chamber considered that there was no obligation under international law for courts to be established prior to the commission of the crimes. The Chamber recalled that according to ICCPR Article 14 tribunals have to be “established by law”, and not “pre-established” by law as it was unsuccessfully proposed during the drafting process. The Chamber stressed that what is relevant is that the court is created by a competent

¹⁰²⁸ Ibid.

¹⁰²⁹ The ICTR, (ICTR Statute Art. 1), SCSL (SCSL Statute Art. 1(1)), STL (UN Security Council, *Report of the Secretary-General on the establishment of a special tribunal for Lebanon*, 15 November 2006, UN Doc. S/2006/, paras 11-26, available at: <https://undocs.org/S/2006/893>), ETSP (Regulation N° 2000/15, Section 2), ECCC (Agreement N° 41723) or Iraqi Special Tribunal (Statute, Arts. 1 and 10). However, some crimes within the jurisdiction of the international criminal courts were committed after their establishment. For example, the crimes related to ethnic cleansing in Kosovo were perpetrated after the establishment of the ICTY. For an overview of the crimes prosecuted by each tribunal see in this Chapter Section 1.2.

¹⁰³⁰ See below, Section 4.2.3.2.

¹⁰³¹ *Prosecutor v. Tadic*, Decision on Appeal on Jurisdiction, paras 45-48, 61-64, analysed in Cassese, ‘The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice’, 494. Also see *Prosecutor v. Kanyabashi*, Decision on Defence Motion on Jurisdiction, Trial Ch. 2, ICTR-96-15-T, 18 June 1997, paras 33-36, available at: http://www.worldcourts.com/icty/eng/decisions/1997.06.18_Prosecutor_v_Kanyabashi.htm.

organ in respect of the procedures, and observing the necessary safeguards of a fair trial.¹⁰³²

The majority of the doctrine shares this view. Only some authors consider that the scope of the legality principle includes the requirement of pre-established courts, mainly referring to ACHR Article 8(1) where this obligation is contemplated.¹⁰³³ However, as analysed below in Section 6.4.3, this provision constitutes an exception among human rights treaties, and when the inclusion of such requirement was proposed during the drafting of other international instruments as the ICCPR, it was explicitly rejected.¹⁰³⁴

Despite the requirement of pre-established courts as a condition of the legality principle exists in one regional human right system and in some national systems, this view has generally been rejected. Most commentators consider that the scope of the legality principle does not include yet the condition of pre-existing courts. In fact, it is generally accepted that the requirement of a pre-existing tribunal is not applicable regarding the establishment of international criminal courts, and that the creation of new jurisdictions to prosecute previously defined crimes is now accepted in international criminal law.¹⁰³⁵ It has been noted that given the actual decentralized character of international law, the requirement of the pre-established courts would be impractical, preventing the establishment of *ad hoc* tribunals and, of course, it would have hindered the creation of most international criminal tribunals.¹⁰³⁶

Nevertheless, the dangers of retroactive court creation cannot be ignored. Exception tribunals, created *ad hoc* to prosecute specific cases, risk to be politically

¹⁰³² *Prosecutor v. Tadic*, Decision on Appeal of Jurisdiction, para. 45.

¹⁰³³ Christoph Safferling, *Towards an International Criminal Procedure* (Oxford: Oxford University Press, 2001), 88.

¹⁰³⁴ See a Chilean proposal to include this requirement in Summary record of the 110th Human Rights Commission meeting, 2 June 1949, UN Doc. E/CN.4/SR.110, p. 4, available at: <https://undocs.org/E/CN.4/SR.56>.

¹⁰³⁵ As explained, with further references, in Cassese, 'The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice', 494; De Souza Dias, 'Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law', 48; Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 319. Also see the above-cited charters and statutes of international tribunals, and the decision of the tribunals, e.g., *Prosecutor v. Tadic*, ICTY, Decision on Appeal on Jurisdiction, paras 45-48, 61-64; *Prosecutor v. Kanyabashi*, ICTR, Decision on Defence Motion on Jurisdiction, paras 33-36.

¹⁰³⁶ De Souza Dias, 'Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law', 48. Also see *Prosecutor v. Tadic*, Decision on Appeal of Jurisdiction, para. 45.

motivated, targeting specific individuals or groups, and basic individual rights may be jeopardized since the courts might lack enough independence and impartiality.¹⁰³⁷ Therefore, special attention should be paid to prevent possible abuses. In this context, the legality principle plays an essential role. Indeed, one of its fundamental rationales, both in the domestic and international systems, is the protection of individuals against abuses of state authority.¹⁰³⁸ This way, the acceptance of retroactive court creation makes the rule against *ex post facto* crime creation a key safeguard in international criminal justice, “both as a protection for potential accused persons and as a guarantee to the public that prosecutions will have a legal, rather than merely a political, basis.”¹⁰³⁹

Similarly, to hinder possible abuses, different international agreements require tribunals to be “established by law”, intending to protect individuals against courts created to prosecute specific cases.¹⁰⁴⁰ However, as above analysed, the requirement “established by law” has been interpreted as requiring the observation of all necessary safeguards of a fair trial, but not as requiring pre-established tribunals.¹⁰⁴¹ In the same vein, several international treaties regulate the scope of state jurisdiction in different areas. Despite the initial purpose of these instruments is not to grant safeguards to individuals against abuses of State’s power, in fact they prevent domestic courts from arbitrarily extending their jurisdictions.¹⁰⁴²

4.1.2.10 Nulla poena

Different visions of the *nulla poena* principle were confronted when drafting the ICTY and ICTR statutes, but a strict notion prevailed. Despite the statutes did not assign a defined penalty or a range of penalties to each particular crime, they indicated

¹⁰³⁷ Mahmoud Cherif Bassiouni, ‘Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions’, *Duke Journal of Comparative and International Law* 3, no. 2 (1993): 270–71.

¹⁰³⁸ Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes against Humanity, War Crimes*, 271–72.

¹⁰³⁹ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 320.

¹⁰⁴⁰ Among others, ICCPR, Art. 14(1) and ACHR, Art. 8(1). For a study and further references on the right to an impartial and independent tribunal, see Cherif Bassiouni, ‘Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions’, 270–71.

¹⁰⁴¹ *Prosecutor v. Tadic*, Decision on Appeal of Jurisdiction, para. 45.

¹⁰⁴² See, among others, the 1984 Convention against Torture, as explained in Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes against Humanity, War Crimes*, 271–72.

the courts to have recourse to the penalties established by the domestic law of the relevant country at the moment of commission. However, both *ad hoc* tribunals have interpreted such provisions considering that recourse to domestic sentencing practice was only a non-binding guideline.

A. *Nulla poena* in the Statutes of the tribunals

The drafters of the ICTY and ICTR statutes did not agree on the notion and scope of the *nulla poena* rule. While it was generally accepted that the principle prohibited the imposition of heavier penalties than the ones applicable at the time of commission, it was not settled the issue about the relevant applicable law.¹⁰⁴³ The question firstly arose since the domestic legislation of former Yugoslavia contemplated maximum penalties of 20 years, thus excluding life imprisonment as cruel and inhumane, while previous international tribunals had imposed more severe punishments for international crimes.¹⁰⁴⁴

Some States proposed a minimalist version of the *nulla poena* principle claiming that penalties should be based on general principles of law of the worlds' major legal systems.¹⁰⁴⁵ Similarly, it was defended that previous punishments provided in international law, or applied in the context of international prosecutions, should be as well taken into account.¹⁰⁴⁶

However, among the States submitting proposals on the issue, the majority considered that the *nulla poena* principle involved other requirements beyond the prohibition of retroactive punishment.¹⁰⁴⁷ Some countries proposed a strict version of the principle limiting the applicable penalties to those existing at the relevant time in the domestic legislation of the country where the crimes were committed.¹⁰⁴⁸ Even if

¹⁰⁴³ WN Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (Asser the Hague, 2006), 252.

¹⁰⁴⁴ Shahram Dana, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing', *Journal of Criminal Law and Criminology* 99 (2009): 874.

¹⁰⁴⁵ Ferdinandusse, *Direct Application of International Criminal Law in National Courts*, 258; Schabas, 'Sentencing by International Tribunals', 473.

¹⁰⁴⁶ Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, 473.

¹⁰⁴⁷ Dana, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing', 870.

¹⁰⁴⁸ Italy, Russia and the Netherlands among others as explained in Dana, 874; Schabas, 'Sentencing by International Tribunals', 469–82.

international crimes as genocide or crimes against humanity were not incorporated in the domestic legislation, a strict understanding of the *nulla poena* principle would require the application of the penalties provided for the underlying ordinary crimes in force at the time of commission. This way, at the moment of commission, the penalties would have been codified and clearly established in the domestic applicable law, and therefore the requirements of a strict version of legality would have been fulfilled.¹⁰⁴⁹

Finally, this last version of the *nulla poena* principle prevailed and the ICTY and ICTR statutes established that when determining the penalties the tribunals “should have recourse to the general practice regarding prison sentences in the courts” of the country concerned.¹⁰⁵⁰ Despite the language of the provision is not clear about whether this recourse to domestic penalties is binding or simply a policy choice, the previous debates show that the drafters’ intend was to comply with a strict version of the principle.¹⁰⁵¹ However, the subsequent decisions of both *ad hoc* tribunals on the issue have been controversial, and even considered contrary to the aim of the statutes’ drafters.¹⁰⁵²

B. *Nulla poena* applied by the *ad hoc* tribunals

The application of the *nulla poena* rule by the *ad hoc* tribunals has been rather controversial. Despite the ICTY and ICTR statutes established that when determining the penalties the tribunals “should have recourse to the general practice regarding prison sentences in the courts” of the country concerned, the judges have considered that they were not necessarily bound by the punishments established in domestic laws.

¹⁰⁴⁹ Ferdinandusse, *Direct Application of International Criminal Law in National Courts*, 253. For an comprehensive analysis of the proposals of the different countries, see Dana, ‘Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing’, 874; Schabas, ‘Sentencing by International Tribunals’, 469–82.

¹⁰⁵⁰ ICTY Statute Art. 24(1):

“The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.”

ICTR Statute Art. 23(1):

“The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda.”

¹⁰⁵¹ Ferdinandusse, *Direct Application of International Criminal Law in National Courts*, 253; Schabas, ‘Sentencing by International Tribunals’, 469–82.

¹⁰⁵² Dana, ‘Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing’, 870.

In fact, the ICTY has repeatedly considered that these statute's provisions referring to recourse to national legislation are rather guidance and not binding for the tribunal.¹⁰⁵³ This position has been consistently reiterated by the Appeals Chamber, the ICTR and other international tribunals.¹⁰⁵⁴

Some scholars have considered this position contrary to the aim of the statutes' drafters, and a violation of the *nulla poena* principle.¹⁰⁵⁵ On the contrary, other authors have argued that the wording of the Articles might admit questioning the binding force of domestic penalties on the discretion of the courts when determining punishments, and that grounding the determination of penalties in other legal sources than domestic law would not be contrary to the *nulla poena* rule.¹⁰⁵⁶

As explained above, the domestic legislation of Yugoslavia contemplated maximum penalties of 20 years. However, the ICTY not always respected such limit taking into account the IMT judgment and other sources of international law contemplating more severe punishments for international crimes.¹⁰⁵⁷ The ICTY even

¹⁰⁵³ As an example, the ICTY Appeals Chambers established that the "Trial Chamber's discretion in imposing sentence is not bound by any maximum term of imprisonment applied in a national system". *Prosecutor v. Tadic*, Judgment in Sentencing Appeals, ICTY App. Ch. IT-94-1-A and IT-94-1-Abis, 26 January 2000, para. 21, available at: <https://www.icty.org/x/cases/tadic/acjug/en/tad-asj000126e.pdf>; *Prosecutor v. Erdemovic*, Sentencing Judgment, ICTY Trial Ch. IT-96-22-T, 29 November 1996, paras 25-40, available at: <https://www.icty.org/x/cases/erdemovic/tjug/en/erd-ts961129e.pdf>.

¹⁰⁵⁴ See among others, *Prosecutor v. Hadzihasanovic and Kubura*, Judgment, ICTY App. Ch., IT-01-47-A, 22 April 2008, para. 335, available at: https://www.icty.org/en/case/hadzihasanovic_kubura. For other decisions in the same vein, see Dana, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing', 896. The ICTR and ETSP followed the ICTY position: e.g., *Prosecutor v. Nahimana et. al.*, Judgment, ICTR App. Ch., ICTR-99-52-A, 28 November 2007, para. 1038; *Prosecutor v. Kayishema and Ruzindana*, Judgment, Sentencing Order, Trial Ch. II, ICTR-95-1-T, 21 May 1999, para. 3. For further references in Dana, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing', 896.

¹⁰⁵⁵ Dana, «Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing», 870; M. Cherif Bassiouni y Peter Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Irvington on Hudson, New York: Transnational publishers, 1996), 70.

¹⁰⁵⁶ See, with further references, Ferdinandusse, *Direct Application of International Criminal Law in National Courts*, 253; Schabas, 'Sentencing by International Tribunals', 482; Cassese, 'The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice', 36.

¹⁰⁵⁷ Dana, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing', 874.

imposed life imprisonment penalties despite it was prohibited and considered as cruel and inhumane under Yugoslav laws.¹⁰⁵⁸ Notwithstanding declaring the non-binding force of national legislation regarding available punishments, the ICTY generally imposed penalties within the forfeits provided for under the domestic legislation. Only exceptionally the tribunal deviated from pre-established domestic penalties, notably in cases regarding particularly sadistic perpetrators, persons convicted of genocide or high-ranking officials.¹⁰⁵⁹

It has been argued that the tribunal understood the legality principle as only comprising the *nullum crimen* rule but not *nulla poena*.¹⁰⁶⁰ According to the ICTY, as long as the conduct is previously criminalized and a penalty is provided, the offender is put on notice that his conduct can be subject to prosecution and therefore the legality principle is respected even if the court later decides to substitute the punishment for a heavier one.¹⁰⁶¹ The Court has justified the compatibility of life imprisonment sentences with the *nulla poena* principle claiming that “the accused must have been aware” that his crimes were “punishable by the most severe penalties.”¹⁰⁶²

4.2 The International Criminal Court

The International Criminal Court (ICC) is the first international criminal tribunal created with universal and permanent vocation. The establishment of the ICC system meant a significant step in the evolution of international criminal law, crystalizing the long-term projects of establishing an international criminal code and a permanent international criminal court.

Established in 1998 and becoming operational in 2002 with the entry into force of the Rome Statute, the Court prosecutes individuals charged with the gravest international crimes: genocide, war crimes, crimes against humanity and the crime of aggression. However, the ICC is intended to be complementary to national judicial systems and its jurisdiction is limited to situations where domestic courts are unwilling

¹⁰⁵⁸ Ibid., 870.

¹⁰⁵⁹ See references and comments in Dana, 899.

¹⁰⁶⁰ Ibid., 902.

¹⁰⁶¹ *Prosecutor v. Delalić et.al.*, Trial Judgment, paras 1209-10.

¹⁰⁶² *Prosecutor v. Delalić et al.*, Appeal Judgment, para. 817, For further analysis, references and information on the *nulla poena* principle interpreted and applied by the *ad hoc* tribunals, see Dana, 887–905; Schabas, ‘Sentencing by International Tribunals’, 481–82; Ferdinandusse, *Direct Application of International Criminal Law in National Courts*, 253.

or unable to prosecute the crimes.¹⁰⁶³ Similarly, the Court may only investigate crimes committed in the territory or by nationals of a member State, crimes committed in the territory of a non-State party that has accepted the jurisdiction of the ICC, or situations referred by the UN Security Council.¹⁰⁶⁴ The ICC system is autonomous from national systems and from international criminal law in the way that the Statute would not limit or have negative impact on pre-existing international rules or on the development of international criminal law, including the criminalisation of conducts.¹⁰⁶⁵

The Rome Statute was a major step towards overcoming the main differences between domestic criminal law systems and international criminal law, especially regarding the notion and requirements associated to the legality principle.¹⁰⁶⁶ Contrary to previous *ad hoc* international tribunals statutes, the ICC Statute not only prescribe jurisdiction over pre-existing crimes, but includes as well an important number of substantive criminal provision. The Statute's drafters did an important effort to establish precise and comprehensive definitions of the different categories of crimes under the jurisdiction of the Court.¹⁰⁶⁷ Similarly, the Statute includes a systematically organized set of general criminal law principles. Those detailed provisions, together with a jurisdiction limited to crimes committed after the entry into force of the

¹⁰⁶³ The complementary principle is recognized in both the Preamble and Article 1 of the Rome Statute, establishing that the Court's jurisdiction shall be complementary to national criminal jurisdictions. The principle is implemented through Articles 17 ("Issues of admissibility") and 53 ("Initiation of an investigation"), which deal with the conditions for a specific case to be admissible before the ICC. For further information on the complementary principle, see Kai Ambos, 'El test de complementariedad de la Corte Penal Internacional (artículo 17 Estatuto de Roma)', *InDret*, no. 2 (2011); Hector Olásolo Alonso, 'El Principio de Complementariedad y Las Estrategias de Actuación de La Corte Penal Internacional En La Fase de Examen Preliminar', *Vía Inveniendi et Iudicandi* 7, no. 2 (2012): 79–102; *International Criminal Court's Complementarity Principle. A Policy-Oriented Approach* (Derecho Internacional: Lambert Academic Publishing, 2012); Machteld Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes against Humanity, War Crimes* (Antwerpen: Intersentia, 2002), 48–61.

¹⁰⁶⁴ Rome Statute, Arts. 12, 13, 14.

¹⁰⁶⁵ Ibid., Arts. 10, 22(3). Héctor Olásolo, 'A Note on the Evolution of the Principle of Legality in International Criminal Law', *Criminal Law Forum* 18 (2007): 303–4; James Crawford, 'The Drafting of the Rome Statute', in *From Nuremberg to the Hague: The Future of International Criminal Justice*, by Philippe Joseph Sands (Cambridge: Cambridge University Press, 2003), 137.

¹⁰⁶⁶ Olásolo, 'A Note on the Evolution of the Principle of Legality in International Criminal Law', 303.

¹⁰⁶⁷ William A. Schabas, 'General Principles of Criminal Law in the International Criminal Court Statute', *European Journal of Crime, Criminal Law and Criminal Justice* 6, no. 4 (1998): 90.

Statute, enabled the establishment of a strict principle of legality and the fulfilment of the strong requirements *lex scripta, praevia, certa* and *stricta*, that were only distinctive of some domestic legal systems.¹⁰⁶⁸ However, the practical application of such strict *nullum crimen* principle to certain subjects and situations remains uncertain, and more flexible interpretations might still be needed as proved by recent ICC's decisions.

4.2.1 Precedents

The post-World War II trials revealed the limitations and flaws of an international justice system that at the time was at an early stage of development. Most of the problems faced by the post-war prosecutions concerned the way the courts were established and the alleged infringement of the principle of criminal legality. Therefore, in order to prevent future problems regarding the non-retroactivity rule, a number of initiatives were developed aiming to establish an international criminal code and to create a permanent international criminal court.¹⁰⁶⁹ However, these initiatives found numerous obstacles, mainly related to the international situation of political polarization during the Cold War, and had to wait fifty years to come to fruition. Despite the projects of a permanent international criminal court and an international criminal code were developed separately, they finally joined in the Statute of the International Criminal Court.

4.2.1.1 Draft Codes of Crimes against the Peace and Security of Mankind

As previously explained, in 1947 the UN General Assembly created the International Law Commission (ILC) establishing among its objectives the promotion of the codification process of international crimes.¹⁰⁷⁰ The General Assembly simultaneously commissioned the ILC to formulate the Nuremberg principles, and to

¹⁰⁶⁸ Kai Ambos, 'General Principles of Criminal Law in the Rome Statute', *Criminal Law Forum* 10, no. 1 (1999): 4.

¹⁰⁶⁹ Rodrigo Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional' (Madrid, Spain, Universidad Carlos III de Madrid, 2015), 151.

¹⁰⁷⁰ UNGA, *Establishment of an International Law Commission*. Crawford considers that the elaboration process of an international criminal court already started when the UN General Assembly, in its resolution embracing the Nuremberg principles, considered the need of establishing more permanent arrangements. Later on, the 1948 Genocide Convention explicitly foresaw the establishment of a permanent court to prosecute the crime of genocide. Crawford, 'The Drafting of the Rome Statute', 112.

prepare a draft code of offences against the peace and security of mankind.¹⁰⁷¹ However, the inability of States to agree on the definition of crime of aggression and the political polarization of the Western world into two groups of influence slowed down and hindered during four decades the preparatory works.¹⁰⁷²

Two draft Codes were presented in 1951 and 1954, but neither of them included a provision on the *nullum crimen* principle. The *nulla poena* rule was contemplated in the 1951 version, but subsequently omitted in the 1954 Code.¹⁰⁷³ The ILC presented in 1954 the Draft Code to the UN General Assembly, but it was refused alleging problems related to the definition of the crime of aggression. It was decided to postpone further considerations of the Draft Code until an agreement was reached regarding the definition of aggression.

Twenty years later, in 1974, the General Assembly finally approved a definition of this crime, but the ILC only resumed its works on the Draft Code in 1982.¹⁰⁷⁴ However, no significant advances were made until the Cold War came to an end.¹⁰⁷⁵ Two new Draft Code were approved in 1991 and 1996, being relevant inputs used by the Preparatory Committee (PrepCom) for the Rome Conference where the ICC Statute would be subsequently adopted.

From 1991 to the final adoption of the Rome Statute the conception, role and competences of the projected international court experienced significant changes. One of the major evolutions concerned the substantive laws to be applied by the court.

¹⁰⁷¹ UN General Assembly, *Formulation of the principles recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal*, 21 November 1947, A/RES/177, available at: <https://www.refworld.org/docid/3b00f08e34.html>.

¹⁰⁷² See above, Section 3.2. For an analysis of the influence of the Cold War in the development of the Draft Code, see Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional', 159; Alfredo Liñán Lafuente, 'Origen y Evolución Del Derecho Penal Internacional (II)', in *Derecho Penal Internacional*, ed. Alicia Gil Gil and Elena Maculán (Madrid, Spain: Dykinson, 2016), 67; Jessica Lynn Corsi, 'An Argument for Strict Legality in International Criminal Law', *Georgetown Journal of International Law* 49, no. 4 (2018 2017): 1380.

¹⁰⁷³ It has been alleged that the legality issue was carefully eluded in view of the Nuremberg and Tokyo Judgements. See Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes against Humanity, War Crimes*, 319.

¹⁰⁷⁴ Boot, 319.

¹⁰⁷⁵ For a detailed analysis of the works and evolution of the Draft Code until 1991, see M. Cherif Bassiouni, 'The History of the Draft Code of Crimes Against the Peace and Security of Mankind', *Israel Law Review* 27, no. 1–2 (1993): 247–67; M. Cherif Bassiouni, *Introduction Au Droit Pénal International* (Bruxelles: Bruylant, 2002), 193–200; Liñán Lafuente, 'Origen y Evolución Del Derecho Penal Internacional (II)', 67–68; Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional', 157–60.

Initially it was prospected the creation of a court that would apply international law, together with applicable national law in the matters where international law was silent.¹⁰⁷⁶ However, this model gave way to a system where the ICC would only apply the crimes included in its statute, based on the definitions provided.

Another major change concerned the role of the Prosecutor, who originally did not have independent investigatory power.¹⁰⁷⁷ As well, the initial model was grounded on the consent of the States (*aut dedere aut judicare*).¹⁰⁷⁸ However, the experience of the contemporaneous *ad hoc* international criminal tribunals significantly influenced the adoption of a more ambitious system. These tribunals showed the efficacy of international criminal justice, and concerns arose about the possible proliferation of *ad hoc* criminal tribunals.¹⁰⁷⁹ Among other factors, the enormous support in the international community resulting from the experiences of the ICTY and the ICTR eased the adoption of a more ambitious international criminal court.¹⁰⁸⁰ This way, the Rome Statute finally established a separate international criminal justice system, granting an independent investigating role to the Prosecutor, abolishing the consent requirement, and establishing a set of exhaustively defined crimes under the jurisdiction of the Court.¹⁰⁸¹ However, those were not the only significant changes experienced during the years prior to the establishment of the ICC.

A. The *nullum crimen* provisions

Contrary to the previous versions, the 1991 Draft Code incorporated an article on the principle of legality, and its second paragraph included the so-called Nuremberg clause. In 1996 the ILC approved a definitive “Draft Code of Crimes against the Peace and Security of Mankind” that kept in its Article 13 a similar non-retroactivity provision:

“1. No one shall be convicted under the present Code for acts committed before its entry into force.

¹⁰⁷⁶ Crawford, ‘The Drafting of the Rome Statute’, 135–37.

¹⁰⁷⁷ Ibid., 143.

¹⁰⁷⁸ Ibid., 142.

¹⁰⁷⁹ Ibid., 145.

¹⁰⁸⁰ Ibid.

¹⁰⁸¹ Ibid., 150.

2. Nothing in this article precludes the trial of anyone for any act which, at the time when it was committed, was criminal in accordance with international law or national law.”¹⁰⁸²

Each Article of the 1996 Draft Code included a series of explanatory commentaries, and in those referring to Article 13, the ILC explained that criminal law “provides a standard of conduct to guide the subsequent behaviour of individuals”.¹⁰⁸³ Therefore, the “prosecution and punishment of an individual for an act or omission that was not prohibited when the individual decided to act or to refrain from acting would be manifestly unjust.”¹⁰⁸⁴ Hereafter, the ILC specified that Article 13 had to be understood as applicable only to proceedings “under the present Code”, but not precluding the prosecution of crimes “committed before the entry into force of the Code on a different legal basis” as would be “a pre-existing convention to which a State was a party, or again, under customary international law.”¹⁰⁸⁵

The second paragraph of the *nullum crimen* Article recognizes both national and international law as legal grounds of criminalization beyond the Code. The debates within the ILC on this provision show the relevance of the principle when defining the sources of the applicable law.¹⁰⁸⁶

B. International law as the applicable law

When drafting paragraph 2 of Article 13, the ILC was directed by two considerations. First, it did not want the non-retroactivity provision to hinder the possibility of prosecutions of crimes committed before the entry into force of the Code. Therefore, the Commission specified that Article 13 had to be understood as applicable only to proceedings “under the present Code”, but not precluding the prosecution of crimes “committed before the entry into force of the Code on a different legal basis” as would be “a pre-existing convention to which a State was a party, or again, under

¹⁰⁸² International Law Commission, *Draft Code of Crimes against the Peace and Security of Mankind with commentaries*, Yearbook of the International Law Commission, 1996, vol. II(2), Art. 13, available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/7_4_1996.pdf. Article 10 of the 1991 Draft Code included a similar provision.

¹⁰⁸³ ILC, *Draft Code of Crimes against the Peace and Security of Mankind with commentaries*, commentary (1) on Art. 13.

¹⁰⁸⁴ Ibid.

¹⁰⁸⁵ Ibid., commentary (3) and (5).

¹⁰⁸⁶ Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes against Humanity, War Crimes*, 319.

customary international law.”¹⁰⁸⁷ On the other hand, the ILC did not want “this wider possibility to be used with such flexibility that it might give rise to prosecution on legal grounds that are too vague.”¹⁰⁸⁸

The initial proposal of the ILC’s Special Rapporteur for the 1991 Draft included a version of the Nuremberg clause that adopted the wording of the ICCPR Article 15(2) and ECHR Article 7(2). It established that the legality provision would not prejudice the prosecution of any person for any conduct that at the time of commission “was criminal according to the general principles of law recognized by the community of nations”.¹⁰⁸⁹ However, some members of the Commission did not agree with the language of the Article, claiming that the expression “general principles of law” was too vague. After negotiations it was adopted the formula “in accordance with international law” that seems a compromise expression, being more concrete but including anyhow both conventional and customary international law.¹⁰⁹⁰

C. The *nulla poena* provisions

The *nulla poena* provision has been the object of numerous debates within the ILC, and its content has significantly changed in the different version of the Draft Codes.¹⁰⁹¹ However, the Commission has considered in general that the precise

¹⁰⁸⁷ ILC, *Draft Code of Crimes against the Peace and Security of Mankind with commentaries*, commentary (3) and (5) on Article 13.

¹⁰⁸⁸ Ibid., commentary (5).

¹⁰⁸⁹ Special Rapporteur Doudou Thiam, 5th *Report on the Draft Code of Offences against the Peace and Security of Mankind*, 17 March 1987, UN Doc. A/CN.4/404, Art. 8, available at: https://legal.un.org/ilc/documentation/english/a_cn4_404.pdf.

¹⁰⁹⁰ For further analysis on the discussions about the notion and scope of the different version of the article, see Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes against Humanity, War Crimes*, 321–25; Ambos, ‘General Principles of Criminal Law in the Rome Statute’, 5–6; Schabas, ‘General Principles of Criminal Law in the International Criminal Court Statute’; Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’, 191–92. The ILC’s rejection of the expression “general principles of law” considering it “too vague” has been used by some scholars to criticize the Nuremberg clause as established in the ICCPR Article 15(2) and ECHR, Article 7(2). See Alicia Gil Gil, ‘La Excepción al Principio de Legalidad Del Número 2 Del Art. 7 Del Convenio Europeo de Derechos Humanos’, *Anuario de Derecho Penal y Ciencias Penales*, no. 63 (2010): 142.

¹⁰⁹¹ See the discussions and arguments within the ILC in International Law Commission, *Report of the International Law Commission on the work of its forty-third session*, December 1996, pp. 203–13, available at: <https://www.un-ilibrary.org/content/books/9789210452571c007/read>. For an analysis of the evolution of the *nulla poena* provision in the different Draft Codes, see Shahram Dana, ‘Beyond Retroactivity to Realizing Justice: A Theory on the Principle of

determination of penalties is not necessary for international crimes, sufficing just an indication of criminality. This vision is reflected in the different version of the Draft Codes, only including minimal penalty provisions.¹⁰⁹² Article 5 of the 1951 Draft code established:

“The penalty for any offence defined in this Code shall be determined by the tribunal exercising jurisdiction over the individual accused, taking into account the gravity of the offence.”¹⁰⁹³

This provision left to the judge the competence of determining and fixing the applicable penalty. The Article was strongly criticized by Governments and the Commission finally decided to withdraw the Article from the next Draft Codes versions.¹⁰⁹⁴ The 1991 Draft Code reincorporated a *nulla poena* provision in its Article 3(1) establishing that:

"An individual who commits a crime against the peace and security of mankind is responsible therefore and is liable to punishment."¹⁰⁹⁵

Similarly, Article 3 of the 1996 Draft Code included a fairly similar provision, though with some modifications:

“An individual who is responsible for a crime against the peace and security of mankind shall be liable to punishment. The punishment shall be commensurate with the character and gravity of the crime.”

In its commentary on the 1996 Draft Code, the Commission justified that penalties were not specified for each crime since “everything depends on the legal system adopted to try the person”, refereeing to the different applicable laws if the prosecutions are carried by domestic or international courts.¹⁰⁹⁶ The ILC established as

Legality in International Criminal Law Sentencing’, *Journal of Criminal Law and Criminology* 99 (2009): 886–87; Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes against Humanity, War Crimes*, 320–21.

¹⁰⁹² Ward Ferdinandusse, ‘Direct Application of International Criminal Law in National Courts’ (Amsterdam, University of Amsterdam, 2005), 254.

¹⁰⁹³ International Law Commission, *Draft Code of Crimes against the Peace and Security of Mankind*, Yearbook of the International Law Commission, 1951, vol. II, UN Doc. A/CN.4/44, Art. 5, available at: https://legal.un.org/ilc/publications/yearbooks/english/ilc_1951_v2.pdf.

¹⁰⁹⁴ International Law Commission, *Report of the International Law Commission on the work of its forty-eight session*, December 1996, pp. 202-03.

¹⁰⁹⁵ International Law Commission, *Report of the International Law Commission on the work of its forty-third session*, July 1991, Vol. II, UN Doc. A/46/10 Art. 3(1), available at: https://legal.un.org/ilc/documentation/english/reports/a_46_10.pdf.

¹⁰⁹⁶ ILC, *Draft Code of Crimes against the Peace and Security of Mankind with commentaries*,

well that “It is, in any event, not necessary for an individual to know in advance the precise punishment so long as the actions constitute a crime of extreme gravity for which there will be severe punishment.”¹⁰⁹⁷

4.2.1.2 Draft statute of an international criminal court

In 1948 the UN General Assembly invited the ILC to study the desirability and possibility of creating a permanent judicial organ to prosecute international crimes.¹⁰⁹⁸ Different draft statutes were proposed in the following years, but in 1957 the UN General Assembly decided to postpone the project until the question of the definition of the crime of aggression was solved.¹⁰⁹⁹ As explained above, a definition of aggression was established in 1974 but the project of an international criminal court was left aside for many more years.

Despite the ICL expressed in numerous occasions the desirability of the establishment of a permanent international criminal jurisdiction, it was only in 1991 when the UN General Assembly finally invited the Commission to study and elaborate proposals for the creation of an international criminal.¹¹⁰⁰

Yearbook of the International Law Commission, 1996, vol. II(2), commentary 4-7 on Art. 3.

¹⁰⁹⁷ Ibid., commentary 7. Various States objected to this position, as analyzed in Ferdinandusse, ‘Direct Application of International Criminal Law in National Courts’, 254. The ILC identified two different problems regarding the definition of precise punishments. Methodological problems regarding the question of “whether the relevant penalty should be indicated for each crime – genocide, war crimes and so on – or, since all the crimes are characterized by their extreme gravity, whether the same penalty should be laid down under a general formula for all cases, with a minimum and a maximum according to whether or not there were extenuating circumstances.” The second kind of problems arose from the diversity of national legal system. International Law Commission, *Report of the International Law Commission on the work of its forty-third session*, December 1996, p. 203.

¹⁰⁹⁸ UN General Assembly, *Study by the International Law Commission of the Question of an International Criminal Tribunal*, 9 December 1948, Res. A/RES/3/260B(III), available at: <http://www.un-documents.net/a3r260b.htm>.

¹⁰⁹⁹ For a detailed analysis of the works and evolution of the draft statute until 1957, see Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’, 160–62.

¹¹⁰⁰ UN General Assembly, *Report of the International Law Commission on the work of its forty-third session*, 9 December 1991, Res. A/RES/46/54, available at: <https://undocs.org/en/A/RES/46/54>. Already in 1989, not long after the fall of the Berlin Wall, the UN General Assembly had invited the ILC to address the establishing of an international criminal court with jurisdiction over crimes related to drug trafficking (UN General Assambly, 4 December 1989, Res. A/RES44/39, available at: <https://undocs.org/en/A/RES/44/39>.) Furthermore, the crimes committed by the Iraqui forces when invading Kuwait in 1990 reinforced the desirability of establishing an international court

In 1994 the ILC presented a “draft statute for an international criminal court.”¹¹⁰¹ When elaborating the draft statute, the Commission paid special attention to the ICTY Statute, but as well it took into consideration the existing international treaties, the previous international criminal court proposals, and domestic laws from different legal traditions.¹¹⁰²

The UN General Assembly welcomed the Draft Statute and established an *ad hoc* Committee open to all member States to study the proposed statute. In 1995 the Committee issued a report that for the first time joined the projects of an international criminal code (draft code) and a permanent criminal court (draft statute).¹¹⁰³ Following its approval, the UN General Assembly established a Preparatory Committee (PrepCom) to elaborate a consolidated and consensual text that would be subsequently adopted in an international conference of plenipotentiaries.¹¹⁰⁴ The statute of an international criminal court drafted by the PrepCom and submitted to the Diplomatic Conference at Rome, included a definition of the crimes under the jurisdiction of the court, gathering the contributions of the Draft Code.¹¹⁰⁵ It should be noted the ICTY and ICTR had been established few years before, and when the Rome Conference started, they were fully operational, different procedures were ongoing, several accused had been already arrested and the first judgment had been issued. The overall success

with jurisdiction over aggressive war and war crimes. Antonio Cassese, *International Criminal Law*, 3rd ed. (Oxford: Oxford University Press, 2013), 262.

¹¹⁰¹ International Law Commission, *Report of the International Law Commission on the work of its forty-sixth session*, Yearbook of the International Law Commission, 1994, vol. II (2), p. 26-67.

¹¹⁰² Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’, 193.

¹¹⁰³ UN General Assembly, *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, 6 September 1995, Sup. N°22, A/50/22, available at: <https://www.legal-tools.org/doc/b50da8/pdf/>.

¹¹⁰⁴ UN General Assembly, *Establishment of an international criminal court*, 18 December 1995, Res. A/RES/50/46, available at: <https://undocs.org/en/A/RES/50/46>.

¹¹⁰⁵ UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, 14 April 1998, A/CONF.183/2/Add.1, available at: <https://digitallibrary.un.org/record/253772>. For a detailed account of the initiatives, proposals and debates regarding the draft statute of an international criminal court, from 1989 to 1998, see Cassese, *International Criminal Law*, 261–63; Kai Ambos, ‘Establishing an International Criminal Court and an International Criminal Code: Observations from an International Criminal Law Viewpoint’, *European Journal of International Law* 7, no. 4 (1996): 519–44; Leila N. Sadat, ‘The International Criminal Court’, in *The Cambridge Companion to International Criminal Law*, ed. William A. Schabas, 1st ed. (Cambridge University Press, 2015), 140–41; Bassiouni, *Introduction Au Droit Pénal International*, 200–215.

of the *ad hoc* tribunals constituted a significant incentive for the establishment of an international criminal court whose jurisdiction was not limited temporally and geographically.¹¹⁰⁶

4.2.1.3 The Rome Conference and the adoption of the Rome Statute

The UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court was held in Rome, from the 15 of June to the 17 of July 1998. Despite the above-explained preparatory works for the Conference facilitated agreements, certain issues remained controversial. Some of the matters rising discrepancies among the delegations were the automatic or inherent jurisdiction of the Court, the establishment of an independent prosecutor empowered to initiate proceedings, the inclusion of the crime of aggression or considering the use of nuclear weapons as a violation of humanitarian law. It was as well controversial the role granted to the UN Security Council, the consideration of crimes committed in internal armed conflicts as war crimes, the incorporation of other crimes as drug trafficking or terrorism, or the exclusion of death sentences among the possible penalties.¹¹⁰⁷ On the contrary, there was little debate on the *nullum crimen* provisions and they were adopted with only minor changes.¹¹⁰⁸

Finally, the Conference adopted the Statute by 120 votes to 7 (US, Libya, Israel, Iraq, China, Syria and Sudan), and 20 abstentions, coming into force the 1 July 2002. The so-called Rome Statute not only established a permanent international criminal court but as well comprehensively defined the crimes under the jurisdiction of the Court. This way, the above-explained projects of an international criminal code and a permanent international criminal court merged in the ICC Statute. Unlike the statutes of the *ad hoc* tribunals, the Rome Statute not only grants the ICC material jurisdiction over certain international crimes, but it also contains an important number of substantive criminal provisions precisely defining punishable conducts. Such detailed

¹¹⁰⁶ Cassese, *International Criminal Law*, 262; Ambos, 'Establishing an International Criminal Court and an International Criminal Code: Observations from an International Criminal Law Viewpoint', 519.

¹¹⁰⁷ For further information on these issues and the position taken by the different delegations, see Cassese, *International Criminal Law*, 263. For further information on the Rome Conference, see Ambos, 'General Principles of Criminal Law in the Rome Statute', 1; Sadat, 'The International Criminal Court', 141–43; Bassiouni, *Introduction Au Droit Pénal International*, 215–28; Schabas, 'General Principles of Criminal Law in the International Criminal Court Statute', 92. Bassiouni, *Introduction Au Droit Pénal International*, 215–28.

¹¹⁰⁸ Schabas, 'General Principles of Criminal Law in the International Criminal Court Statute', 92.

definitions significantly contributed to the development of international criminal law and allowed the adoption of a strict principle of legality.

4.2.1.4 General principles of criminal law

Besides the detailed crime definitions, the Rome Statute is especially innovative concerning the general principles of criminal law. It comprehensively gathers and systematically organizes them in a manner that has been considered closer to domestic criminal codes than to the statutes of the previous international criminal courts where only fragmented provisions appeared.¹¹⁰⁹ In fact, Part 3 of the Rome Statute, entitled “General Principles of Criminal Law” resembles a “general part” of international criminal law. Such principles provide guidance to the Court and “secure the degree of predictability and certainty required for the rights of the accused and the ability of defense counsel to respond to the charges to be fully respected”.¹¹¹⁰ Anyhow, despite they represent a significant improvement, the general principles of criminal law show a lower level of maturity and sophistication than the crime’s definitions. The need to merge different legal traditions and to reach compromise solutions explains why the Rome Statute could not be drafted as a dogmatically refined model criminal code, and this was particularly evident in Part 3.¹¹¹¹ The first three Articles of the “General Principles of Criminal Law” are devoted to the principle of legality, establishing its different elements and scope.

4.2.2 The Rome Statute and the principle of legality

The ICC Statute shows a remarkable effort to bridge the gap between domestic criminal law systems and international criminal law, in particular with regard to the concept and requirements derived from the principle of legality.¹¹¹² While the two *ad hoc* international tribunals implicitly embraced the principle of strict legality, in the

¹¹⁰⁹ Schabas, 84–85; Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’, 202.

¹¹¹⁰ UN General Assembly, *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, para. 87.

¹¹¹¹ Ambos, ‘General Principles of Criminal Law in the Rome Statute’, 1; Hernán Hormazábal Malarée, ‘Crímenes Internacionales, Jurisdicción y Principio de Legalidad Penal’, in *Derecho Penal, Constitución y Derechos*, ed. Rafael Rebollo Vargas and Fernando Tenorio Tagle (Barcelona: Tirant lo Blanch, 2013), 259.

¹¹¹² Olásolo, ‘A Note on the Evolution of the Principle of Legality in International Criminal Law’, 303.

Rome Statute it was explicitly laid down.¹¹¹³ In fact, the different legality provisions in the ICC Statute enshrine the four requirements characteristic of the legality principle in civil law domestic legal systems: *lex scripta*, *praevia*, *certa*, *stricta*.¹¹¹⁴ This broad notion culminates the development process of the legality principle in international law from legality understood as a principle of justice at the end of WWII. However, it should be noted that this legality version, including the four requirements, is not embodied in current international human rights law. In fact, only the core content of the principle has received universal acceptance.¹¹¹⁵

Concerns regarding the principle of legality encouraged the ICC drafters to do an important effort to establish precise and comprehensive definitions of the different categories of crimes under the jurisdiction of the Court.¹¹¹⁶ Similarly, the Statute includes a systematically organized set of general principles of criminal law. Those detailed provisions, together with a jurisdiction limited to crimes committed after the entry into force of the Statute, enabled the establishment of a strict principle of legality and the fulfilment of strong requirements that were only distinctive of some domestic legal systems.

A strict principle of legality and its requirements *lex scripta*, *praevia*, *certa* and *stricta*, can generally be fulfilled when the ICC exercises its jurisdiction in situations only involving States parties to the Rome Statute at all relevant times. However, in certain circumstances, the Court can acquire as well *extraordinary* jurisdiction involving States that were not a party to the Statute at the time the crimes were committed. In these situations, concerns regarding the respect of the legality principle may arise. In fact, the Rome Statute contemplates at least two ways in which the ICC may acquire jurisdiction over crimes that did not fall within its jurisdiction at the time of commission: *ad hoc* retroactive acceptances of jurisdiction by non-State parties, and UN Security Council referrals.¹¹¹⁷

¹¹¹³ Antonio Cassese et al., *The Oxford Companion to International Criminal Justice* (Oxford, New York: Oxford University Press, 2009), 439.

¹¹¹⁴ Ambos, 'General Principles of Criminal Law in the Rome Statute', 4.

¹¹¹⁵ Claus Kress, 'Nulla Poena Nullum Crimen Sine Lege', in *Max Planck Encyclopedia of Public International Law* (Max Planck Institute for Comparative Public Law and International Law, heidelberg and Oxford University Press, 2010), para. 33.

¹¹¹⁶ Schabas considers such concerns as "a veritable obsession with the principle of legality". Schabas, 'General Principles of Criminal Law in the International Criminal Court Statute', 90.

¹¹¹⁷ A detailed analysis of these situations will be provided at the end of this Section. The particular problems derived from such situations in relation with the different legality elements will be analysed in each subsection.

4.2.2.1 *The legality provisions*

The different elements of the legality principle are enshrined in several Articles of the Rome Statute, but it should be noted that the language and formulations chosen by the drafters do not follow those of the UDHR or the ICCPR, except in Article 22 and 23.¹¹¹⁸ This way, Part 3 of the Rome Statute, “General Principles of Criminal Law”, begins with Article 22, entitled “*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.”¹¹¹⁹

Similarly, Article 24, establishes non-retroactivity *ratione personae*:

“1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.

2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.”¹¹²⁰

The Rome Statute also intends to ensure the protection against retroactive jurisdiction. This way, Article 11 establishes that the ICC can only prosecute crimes committed after the entry into force of its statute, that is the 1 July 2002.¹¹²¹ For its

¹¹¹⁸ For an analysis of the conception, evolution and approval of the *nullum crimen* provision in the Rome Statute, see William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford New York: Oxford university press, 2010), 404–6; Emmanuel Heugas-Darraspen, ‘Article 22 - Nullum Crimen Sine Lege’, in *Statut de Rome de La Cour Pénale Internationale: Commentaire Article Par Article*, ed. Julian Fernandez and Xavier Pacreau, vol. I (Paris: Pedone, 2012), 781–84; Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge: Cambridge University Press, 2008), 331.

¹¹¹⁹ Rome Statute, Art. 22.

¹¹²⁰ Ibid., Art. 24.

¹¹²¹ Ibid., Art. 11:

“1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.

part, Article 23 recognises the *nulla poena sine lege* principle and establishes that “(A) person convicted by the Court may be punished only in accordance with this Statute.”¹¹²² It should be noted that, contrary to previous human rights conventions or prior drafts of the statute, the Rome Statute legality provisions do not include the so-called Nuremberg clause. Since Article 24 clearly limits the ICC jurisdiction *ratione temporis* to crimes committed after 1 July 2002, and the jurisdiction *ratione materiae* to the crimes defined in the Statute, the content of such clause seems to not have a place in the Statute.

The first time the ICC addressed the legality issue, it adopted strong notion of the principle, expressly referring to the crime definition requirements of *lex praevia, scripta, certa* and *stricta*.¹¹²³ These four elements are used hereinafter to structure the analysis of the legality principle in the Rome Statute.

4.2.2.2 Lex praevia and non-retroactivity

The Rome Statute establishes the non-retroactivity rule including the protection against retroactive laws, but as well against retroactive jurisdiction. Until the establishment of the ICC, all pervious international criminal tribunals had exercised jurisdiction retroactively; in other words, they were created to adjudicate crimes mainly committed before their establishment.¹¹²⁴ On the contrary, the ICC tries to comply with one of the requirements that may derive from the legality principle: the prohibition of retroactively created courts. Therefore, the jurisdiction of the ICC is limited to crimes

2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.”

¹¹²² Rome Statute, Art. 23. For an analysis of the conception, evolution and approval of the *nulla poena* provision in the Rome Statute, see Schabas, ‘General Principles of Criminal Law in the International Criminal Court Statute’, 90–93; Susan Lamb, ‘Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law’, in *The Rome Statute of the International Criminal Court: A Commentary*, by Antonio Cassese, Paola Gaeta, and John R.W.D. Jones, vol. 1 (Oxford: Oxford University Press, 2002), 756–64; Damien Scalia, ‘Article 23 - Nulla Poena Sine Lege’, in *Statut de Rome de La Cour Pénale Internationale: Commentaire Article Par Article*, ed. Julian Fernandez and Xavier Pacreau, vol. I (Paris: Pedone, 2012), 799–801.

¹¹²³ *Prosecutor v Lubanga Dyilo*, Decision on the Confirmation of Charges, ICC Pre-Trial Ch. I, ICC-01/04-01/06, 29 January 2007, para. 303, available at: https://www.icc-cpi.int/CourtRecords/CR2007_02360.PDF.

¹¹²⁴ Schabas, *The International Criminal Court*, 273; Julien Cazala, ‘Article 11 - Compétence Ratione Temporis’, in *Statut de Rome de La Cour Pénale Internationale: Commentaire Article Par Article*, ed. Julian Fernandez and Xavier Pacreau, vol. I (Paris: Pedone, 2012), 569.

committed after the entry into force of its statute, that is the 1 July 2002.¹¹²⁵ To ensure the prospective jurisdiction of the Court, the Rome Statute establishes in its Article 11(2) that “if a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State.”¹¹²⁶

However, in some particular circumstances the jurisdiction of the ICC may be established retrospectively.¹¹²⁷ This occurs when the Court acquires *extraordinary* jurisdiction involving States that were not a party to the Rome Statute at the time the crimes were committed. As previously explained, the ICC may acquire jurisdiction over crimes that did not fall within its jurisdiction at the time of commission by *ad hoc* retroactive acceptance of jurisdictions by a non-State party, and also by UN Security Council referrals.¹¹²⁸

Even in these special circumstances it is generally understood that the ICC’s *ratione temporis* jurisdiction is limited to crimes committed after the 1 July 2002.¹¹²⁹ However, some authors challenge this view and argue that, if at the moment of commission the conducts were already criminalized by international law, the Rome Statute should not be interpreted as precluding the UN Security Council from referring crimes committed before the entry into force of the Statute.¹¹³⁰ On the contrary,

¹¹²⁵ Schabas recalls that there was some disappointment about the fact that the Court would not be able to address past atrocities. However, he considers “doubtful that agreement could ever have been reached on the establishment of an institution like the Court were it to have the power to delve into the history of the State Parties.” Schabas, *The International Criminal Court*, 273.

¹¹²⁶ Rome Statute, Art. 11(2).

¹¹²⁷ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 334.

¹¹²⁸ For an analysis of these situations, see below, Section 4.2.3.2.

¹¹²⁹ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 333–34; Stéphane Bourgon, ‘Jurisdiction Ratione Temporis’, in *The Rome Statute of the International Criminal Court: A Commentary*, by Antonio Cassese, Paola Gaeta, and John R.W.D. Jones, vol. 1 (Oxford: Oxford University Press, 2002), 550, 553; Schabas, *The International Criminal Court*, 273–75; Cazala, ‘Article 11 - Compétence Ratione Temporis’, 571.

¹¹³⁰ The possibility of the UN Security Council extending the ICC jurisdiction is comprehensively analysed in Luigi Condorelli and Santiago Villalpando, ‘Referral and Deferral by the Security Council’, in *The Rome Statute of the International Criminal Court: A Commentary*, by Antonio Cassese, Paola Gaeta, and John R.W.D. Jones, vol. 1 (Oxford: Oxford University Press, 2002), 634–37; Luigi Condorelli and Santiago Villalpando, ‘Can the Security Council Extend the ICC’s Jurisdiction?’, in *The Rome Statute of the International Criminal Court: A Commentary*, by Antonio Cassese, Paola Gaeta, and John R.W.D. Jones, vol. 1 (Oxford: Oxford University Press, 2002), 381. The possibility of a State accepting the jurisdiction of the ICC over crimes

Gallant argues that extending the jurisdiction of the ICC “would improperly allow one international organization (the United Nations acting through the Security Council) to require another international organization (the ICC) to violate the explicit terms of its organic document.”¹¹³¹ In fact, in 2004 it was approved a “Relationship agreement between the United Nations and the International Criminal Court” explicitly establishing that they will “respect each other’s status and mandate.”¹¹³²

With respect to the protection against retroactive laws, since the ICC grounds its prosecutions on the Rome Statute and can only adjudicate crimes committed after its entry into force, the Court will only apply the text prospectively. However, in the above-mentioned situations involving States that were not a party to the Rome Statute at the time the crimes were committed, concerns regarding the non-retroactivity rule may arise. Since at the time of commission the Statute was not applicable and binding for the individuals of such States, the principle of legality would require the existence of other sources of applicable substantive law criminalizing the conduct at the relevant time. These problematic situations are analysed hereinafter together with some possible solutions.¹¹³³

4.2.2.3 *Lex certa and jurisdiction ratione materiae*

Unlike the statutes of the *ad hoc* tribunals, the Rome Statute not only grants the ICC material jurisdiction over certain international crimes, but it also contains an

committed before the entry into force of the Rome Statute, is analysed in Cazala, ‘Article 11 - Compétence Ratione Temporis’, 572–73.

¹¹³¹ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 334.

¹¹³² UN General Assembly, *Relationship Agreement between the United Nations and the International Criminal Court*, 13 September 2004, Res. A/58/318, Art. 2(3), available at: <https://undocs.org/en/A/58/874>.

¹¹³³ Another controversial issue regarding the temporal limits to the ICC jurisdiction concerns “continuing crimes” as enforced disappearances. The issue was debated during the Rome Conference, and there were several unsuccessful proposals to except the jurisdictional limits of the ICC adding the words “unless the crimes continue after this date.” UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, *Summary records of the 9th meeting of the Committee of the Whole*, 15 June – 17 July 1998, A/CONF.183/C.1/SR.9, para. 73, available at: https://legal.un.org/diplomaticconferences/1998_icc/docs/english/vol_2/a_conf183_c1_sr9.pdf. The issue remains undecided and it is uncertain how the Court will solve it. For further information on this issue, see Schabas, *The International Criminal Court*, 419; Bourgon, ‘Jurisdiction Ratione Temporis’, 550–51.

important number of substantive criminal provisions defining punishable conducts.¹¹³⁴ Concerns regarding the principle of legality encouraged an important effort to establish precise and comprehensive definitions of the different categories of crimes under the jurisdiction of the ICC.¹¹³⁵ Crime definitions in the Rome Statute were nourished from the preparatory works, the existing international conventions, the IMT Statute and notably the ICTY and ICTR' statutes and jurisprudence.¹¹³⁶ The result was a set of criminal conducts precisely defined that allowed the adoption of a stricter principle of legality and significantly contributed to the development of international criminal law.¹¹³⁷ Such detailed definitions laid down in the Rome Statute appreciably help avoiding problems derived from the formal application of the *lex scripta, praevia, certa* and *stricta* requirements.¹¹³⁸

The number of crimes under the jurisdiction of the ICC was significantly limited with regard to the initial aspirations of certain States and the previous versions of the Draft Codes of Crimes against the Peace and Security of Mankind.¹¹³⁹ Finally, to ensure

¹¹³⁴ Héctor Olásolo, 'El Principio Nullum Crimen Sine Iure En El Derecho Internacional Contemporáneo', *Anuario Iberoamericano de Derecho Internacional Penal* I (2013): 37.

¹¹³⁵ Schabas, 'General Principles of Criminal Law in the International Criminal Court Statute', 90.

¹¹³⁶ Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional', 199.

¹¹³⁷ Cassese, *International Criminal Law*, 29; Thomas Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege* (Cham: Springer International Publishing, 2017), 44. Rauter, 44. The drafters tried to avoid as well clauses containing general references to other sets of rules. This technique had been used in the ICTY and ICTR statutes, referring for example to violations of the laws and customs of war. An analysis and examples of such clauses, in Olásolo, 'A Note on the Evolution of the Principle of Legality in International Criminal Law', 309–10. Similarly, Gallant considers that "the explicit use of a treaty to define criminal law for individuals, without any requirement of adoption into national law, is an important development for international law." Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 335.

¹¹³⁸ Olásolo, 'El Principio Nullum Crimen Sine Iure En El Derecho Internacional Contemporáneo', 36–37.

¹¹³⁹ The different versions of the Draft Code had progressively reduced the number of crimes covered. With respect to the 1991 Draft Code, the 1996 Draft Code had reduced them already from twelve to five (the crime of aggression, genocide, crimes against humanity, crimes against the United Nations and associated personnel, and war crimes). Among others crimes, there were excluded the threat of aggression, intervention, colonial domination, mercenaries and illicit drug trafficking. For an analysis on this evolution and its reasons, see Ambos, 'Establishing an International Criminal Court and an International Criminal Code: Observations from an International Criminal Law Viewpoint', 529–38. For Bassiouni *realpolitik* is the only reason explaining why efforts to codify international criminal law had failed during half a century and why the number of crimes codified in the Rome Statute was finally reduced to only five. M. Cherif Bassiouni, 'Codification of International Criminal Law 49th Annual Sutton Colloquium:

the broadest possible acceptance of the Rome Statute, it only contemplated genocide (Article 6), crimes against humanity (Article 7), war crimes (Article 8) and the crime of aggression (Article 8 bis). However, the possibility of including other crimes in the future through amendments is also contemplated in the Statute.¹¹⁴⁰ The detailed definition of the crimes is especially relevant regarding crimes against humanity since Article 7 of the Rome Statute provided their first authoritative treaty definition.¹¹⁴¹

While an agreement could be reached regarding the definitions of genocide, crimes against humanity and war crimes, it was not the case concerning the crime of aggression.¹¹⁴² However, the Statute's drafters did not want to exclude this crime and it was incorporated waiting for a future agreement on its definition. This was finally reached in the 2010 ICC Kampala Review Conference and Article 8bis, including a definition of the crime of aggression, was inserted in the Rome Statute.¹¹⁴³

Article 9 of the Statute provides for the forthcoming adoption of the "Elements of Crimes" that shall assist the Court when interpreting and applying each of the crimes. They were adopted in 2002 and provide a comprehensive description of the conducts, consequences and circumstances associated with the different categories of crimes.¹¹⁴⁴ The "Elements of Crimes" together with Articles 6, 7, 8 and 8bis conform

Crisis of Refugees and Mass Migration: Failure of International Law', *Denver Journal of International Law and Policy* 45, no. 3 (2017 2016): 338.

¹¹⁴⁰ ICC Statute, arts. 121 and 123. However, the newly incorporated crimes will only be applicable to the States that had expressly accepted them by means of an instrument of ratification or acceptance (Art. 121(5)). On the possibility of extending the jurisdiction *ratione materiae* of the ICC beyond the definition of Articles 6 to 8, see Hormazábal Malarée, 'Crímenes Internacionales, Jurisdicción y Principio de Legalidad Penal', 265. Against this possibility, see Condorelli and Villalpando, 'Can the Security Council Extend the ICC's Jurisdiction?'

¹¹⁴¹ Crawford, 'The Drafting of the Rome Statute', 152.

¹¹⁴² For an analysis of the reasons for disagreement regarding the definition of aggression, see Cassese, *International Criminal Law*, 131-32, 138; Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional', 199-201.

¹¹⁴³ ICC RC/Res.6 of 11 June 2010. For an account of the debates in the Kampala Conference and an analysis of the definition finally adopted, see Cassese, *International Criminal Law*, 138-45; Elena Maculán, 'El Crimen de Agresión', in *Derecho Penal Internacional*, ed. Alicia Gil Gil and Elena Maculán (Madrid, Spain: Dykinson, 2016), 420-31; Marko Milanovic, 'Aggression and Legality: Custom in Kampala', *Journal of International Criminal Justice* 10, no. 1 (2012): 165-88.

¹¹⁴⁴ Assembly of States Parties to the Rome Statute of the International Criminal Court, *Elements of Crimes*, 3-10 September, ICC-ASP/1/3 and Corr.1, part II.B, available at: https://legal.un.org/icc/asp/1stsession/report/english/part_ii_b_e.pdf. The ICC "Elements of Crimes" are generally more restrictive than the *ad hoc* tribunals' interpretations to parallel provisions of the ICTY and ICTR statutes. Crawford, 'The Drafting of the Rome Statute', 153.

what could be considered the “special part” of conventional international criminal law.¹¹⁴⁵

It is interesting to note that the Rome Statute was not intended to codify customary international law, but the four crimes were already punishable under customary or conventional international law and their definitions corresponded in a general sense to the state of customary international law.¹¹⁴⁶ However, the Statute introduced some new features that in some instances went beyond, and in others restricted the pre-existing definitions of certain crimes.¹¹⁴⁷ Anyhow, the Rome Statute is not meant to prevent or hinder the development of customary international law outside the content of the statute.¹¹⁴⁸ Article 22.3 explicitly establishes that the recognition of the *nullum crimen* principle “shall not affect the characterization of any conduct as criminal under international law independently of this Statute.”¹¹⁴⁹

4.2.2.4 Lex stricta and the prohibition of analogy

The Rome Statute expressly establishes the *lex stricta* requirement in its Article 22(2). It determines that “(T)he definition of a crime shall be strictly construed and shall not be extended by analogy.”¹¹⁵⁰ Such explicit recognition of the *lex stricta* requirement intends to protect individuals from *ex post facto* crime creation and as well to ensure the foreseeability of the punishable conducts.¹¹⁵¹ However, the precise scope of

¹¹⁴⁵ Hormazábal Malarée, ‘Crímenes Internacionales, Jurisdicción y Principio de Legalidad Penal’, 261. See a comprehensive and detailed analysis of Articles 5 to 9, their drafting, interpretation and application in Schabas, *The International Criminal Court*, 101–268.

¹¹⁴⁶ William A. Schabas, *An Introduction to the International Criminal Court*, 3rd ed. (Cambridge New York Melbourne [etc.]: Cambridge University Press, 2007), 85.

¹¹⁴⁷ Cassese, *International Criminal Law*, 29; Schabas, *An Introduction to the International Criminal Court*, 85. See some examples in Olásolo, ‘El Principio Nullum Crimen Sine Iure En El Derecho Internacional Contemporáneo’, 37–38. Despite the significant effort to provide precise and comprehensive crime definitions, the Rome Statute includes abundant normative elements characteristic of international humanitarian law, making conventional and customary norms essential for their interpretation. See some examples and a comprehensive analysis of this issue in Olásolo, ‘A Note on the Evolution of the Principle of Legality in International Criminal Law’, 310–11.

¹¹⁴⁸ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 333; Ambos, ‘General Principles of Criminal Law in the Rome Statute’, 6.

¹¹⁴⁹ Rome Statute, Art. 22(3).

¹¹⁵⁰ Ibid., Art. 12(3).

¹¹⁵¹ Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 49; Lamb, ‘Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law’, 753.

the prohibition of analogies is ambiguous, and there is no consensus about the relative or absolute character of such prohibition. Furthermore, “analogy” can be understood in many different ways, and Article 22(2) does not indicate which types are prohibited.¹¹⁵²

Some authors consider that the explicit prohibition of analogy in the Rome Statute was a reaction to the alleged use of analogies by modern international criminal tribunals, particularly the ICTY. It has been argued that if the rationale behind the prohibition of analogy in the ICC Statute was a reaction to the *ad hoc* tribunals’ jurisprudence, significantly grounded on customary law, it would mean that judges adjudicating upon unwritten international norms would not be bound by the prohibition of analogy.¹¹⁵³ Scholars as Cassese have consistently refuted this view claiming that *nullum crimen sine lege stricta* applies both to customary and conventional international criminal law.¹¹⁵⁴

Anyhow, the same authors recognize that the very definition of certain international crimes may require in some situations reasoning by analogy.¹¹⁵⁵ Even in the Rome Statute, where a significant effort was made to accurately define all the criminal conducts under the jurisdiction of the Court, some examples can be found requiring recourse to analogical reasoning. The clearest example is the definition of crimes against humanity. Article 7(1)(k) contemplates among the underlying crimes “other inhumane acts of a similar character (...)”.¹¹⁵⁶ This has often been considered a catchall or residual category, applicable when the more specific acts of crimes against

¹¹⁵² See a detailed analysis on the issue in Lamb, ‘Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law’, 752–53. According to Cassese, international criminal law only bans the extension of the “scope and purport of a criminal rule to a matter that is unregulated by law (*analogia legis*)”. However, the prohibition of analogies does not reach *analogia juris*, meaning “the regulation of a matter not covered by a specific provision or rule, by resorting to general principles of ICL, or to general principles of criminal justice.” Similarly, in certain cases, analogies *ejusdem generis* (“of the same kind”) are as well permitted. When a general clause includes “the enumeration of a particular class of persons or things, the general clause must be construed as it can be as applying to persons or things of the same kind or class as those enumerated”. A clear example is the clause “other inhuman acts of a similar character” in the definition of crimes against humanity (Rome Statute, Art. 7(1)(k). Cassese, *International Criminal Law*, 33–34.

¹¹⁵³ Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 49.

¹¹⁵⁴ Cassese, *International Criminal Law*, 33; Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 49.

¹¹⁵⁵ Antonio Cassese et al., *International Criminal Law: Cases and Commentary* (Oxford: Oxford University Press, 2011), 74–75; Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 49.

¹¹⁵⁶ Rome Statute, Art. 7(1)(k).

humanity do not seem suitable.¹¹⁵⁷ Such a general crime definition implicitly authorizes an exception to the *lex stricta* requirement since it necessarily demands reasoning by analogy.¹¹⁵⁸

Similarly, there are other crime definitions in the ICC Statute that may require reasoning by analogy or that would be hardly compatible with a strong *lex stricta* requirement.¹¹⁵⁹ This is the case of the crime of apartheid, defined as “inhumane acts of a character similar to those referred to in paragraph 1.”¹¹⁶⁰ Likewise, some other underlying acts of the crimes against humanity are defined in a rather general manner: “The Imprisonment or other severe deprivation of physical liberty”, “any other form of sexual violence of comparable gravity” or “persecution against any identifiable group or collectivity on (...) other grounds that are universally recognized as impermissible under international law.”¹¹⁶¹

In view of these general criminal definitions, some scholars claim that article 22(2) only prohibits the use of analogy to extend the scope of a criminal definition to conducts that were not prohibited, but does not ban all use of analogy, particularly as an interpretative tool.¹¹⁶² Therefore, analogy remains a valid and even necessary method to interpret the Statute, in particular when its criminal definitions are too vague or incomplete.¹¹⁶³ However, the jurisprudence of the *ad hoc* international tribunals shows that in practice, the line between interpretation by analogy and law creation is frequently very thin.¹¹⁶⁴ It will be up to the ICC to define the standards and limits of the acceptable use of interpretative analogies.

Finally, the same Article 22(2) establishes as a consequence of the *lex stricta*

¹¹⁵⁷ Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 49; Schabas, *The International Criminal Court*, 409; Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 336.

¹¹⁵⁸ Cassese et al., *International Criminal Law: Cases and Commentary*, 74–75; Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 49.

¹¹⁵⁹ Philippe Currat, ‘L’interprétation du Statut de Rome’, *Revue québécoise de droit international* 20, no. 1 (2007): 152.

¹¹⁶⁰ Rome Statute, Art. 7(2)(h).

¹¹⁶¹ Ibid., Art. 7(1)(e), (g) and (h).

¹¹⁶² Lamb, ‘Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law’, 753; Currat, ‘L’interprétation du Statut de Rome’, 152; Cassese, *International Criminal Law*, 34.

¹¹⁶³ Lamb, ‘Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law’, 753. For a comprehensive analysis of the role of analogy in the ICC, see Currat, ‘L’interprétation du Statut de Rome’, 151–54.

¹¹⁶⁴ Lamb, ‘Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law’, 753.

requirement that ambiguities or doubts regarding the definition of the crimes are to be resolved in favour of the accused.¹¹⁶⁵ This provision is considered a guarantee of the respect of legality by some authors. If the Court interprets the Statute in favour of the prosecuted person and rejects expansive methods of interpretation, individuals will be able to foresee the conducts to be considered criminal.¹¹⁶⁶

4.2.2.5 *Lex scripta and customary international law*

International criminal law is evolving towards a progressive limitation of the role played by customary law, and the Rome Statute is a central element in such evolution.¹¹⁶⁷ Customary law is recognized as a source of international criminal law enabling criminal prosecutions, and has grounded different international criminal tribunals. However, its non-written character makes it incompatible with a strict version of the legality principle and grants lesser safeguards regarding specificity, accessibility and foreseeability.¹¹⁶⁸ The progressive codification of international law enables the adoption of stricter notions of legality that provide stronger guarantees to the accused, and bridges the gap between national legal orders and international criminal law.¹¹⁶⁹

In this way, among other elements of strict legality, the Rome Statute upholds in its Article 22 the *lex scripta* requirement.¹¹⁷⁰ The Statute, a written code, precisely defines and prohibits the crimes under the jurisdiction of the Court. Since the ICC can only prosecute crimes committed after its entry into force, and the Statute is its primary legal source, the *lex scripta* requirement can be fulfilled.

¹¹⁶⁵ Ambos, 'General Principles of Criminal Law in the Rome Statute', 4; Schabas, *The International Criminal Court*, 410.

¹¹⁶⁶ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 336.

¹¹⁶⁷ Kress, 'Nulla Poena Nullum Crimen Sine Lege', para. 18; Olásolo, 'A Note on the Evolution of the Principle of Legality in International Criminal Law', 318. However, some ICTY's decisions counter this trend reflecting the opposition of certain sectors against the limitation of the role of international customary. This issue has been analysed in Section 4.1.2.2.

¹¹⁶⁸ Olásolo, 'A Note on the Evolution of the Principle of Legality in International Criminal Law', 318; Hormazábal Malarée, 'Crímenes Internacionales, Jurisdicción y Principio de Legalidad Penal', 267–71. Hormazábal Malarée, 267–71.

¹¹⁶⁹ Olásolo, 'A Note on the Evolution of the Principle of Legality in International Criminal Law', 316–18.

¹¹⁷⁰ Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 45–46.

Consequently, the possibility of the ICC trying customary law offences is excluded and recourse to customary international law in the ICC system seems very limited.¹¹⁷¹ However, there are certain situations, analysed hereinafter, where customary law still plays a relevant role in the ICC system. The application of customary law in such circumstances constitutes a significant qualification to the general *lex scripta* rule and, of course, raises questions regarding other aspects of legality derived from the non-written character of customary rules.¹¹⁷²

A. Customary law as the applicable law

The Rome Statute provides in its Article 21 a hierarchy of legal sources to be applied by the ICC.¹¹⁷³ First, the Court should apply the Statute, the Elements of Crimes and its Rules of Procedure and Evidence;¹¹⁷⁴ secondly, applicable treaties and the principles and rules of international law;¹¹⁷⁵ in third place the ICC should apply general principles of national law, including those of the State with jurisdiction over the crime if they are not inconsistent with international law.¹¹⁷⁶ This way, the ICC will move from one source to the next one until it finds the applicable norm.

Article 21.1(b), referring to international law, can be interpreted as including international customary law, and therefore enabling the ICC to employ it as a secondary source of law.¹¹⁷⁷ However, since the *ordinary* jurisdiction of the Court is limited to crimes committed after its entry into force, and the definitions of the

¹¹⁷¹ Schabas considers that this will “possibly incite judges to resist dynamic interpretations of the crimes as set out in the *Rome Statute*. It goes somewhat against the general tendency of international war crimes prosecutions, established in the case law of the tribunals at Nuremberg and The Hague.” Schabas, ‘General Principles of Criminal Law in the International Criminal Court Statute’, 92. See a study on some specific circumstances where the ICC may adjudicate customary law offences, in Hormazábal Malarée, ‘Crímenes Internacionales, Jurisdicción y Principio de Legalidad Penal’, 267–71.

¹¹⁷² For detailed analysis of this issue, and on some specific circumstances where the ICC may adjudicate customary law offences, see Hormazábal Malarée, ‘Crímenes Internacionales, Jurisdicción y Principio de Legalidad Penal’, 267–71.

¹¹⁷³ For an analysis of how the Article on the applicable law was conceived, developed and finally included in the Rome Statute, see Schabas, ‘General Principles of Criminal Law in the International Criminal Court Statute’, 86–90.

¹¹⁷⁴ Rome Statute, Art. 21(1)(a).

¹¹⁷⁵ Ibid., Art. 21(1)(b).

¹¹⁷⁶ Ibid., Art. 21(1)(c).

¹¹⁷⁷ Talita De Souza Dias, ‘Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law’ (University of Oxford, 2019), 246.

prosecutable conducts are rather comprehensive, the role of customary law under this Article is quite limited. Nevertheless, international customary law could still play a relevant role in the ICC system, particularly when the Court exercises *extraordinary* jurisdiction, as it will be analysed hereinafter.

Similarly, it is worth referring to Article 21(3) since some authors have argued that it shuffles the hierarchy of sources in favour of ‘internationally recognized human rights’. The Article requires that “(T)he application and interpretation of law pursuant to this Article must be consistent with internationally recognized human rights.”¹¹⁷⁸ Therefore, more than an interpretation provision, it has been argued that Article 21(3) opens the possibility for the application of other sources of law, including international custom.¹¹⁷⁹

B. Extraordinary jurisdiction and customary law as a source of criminalization

Together with its *ordinary* jurisdiction, that concerns only States which were parties to the Rome Statute at all relevant times, the ICC can acquire as well, in certain circumstances, *extraordinary* jurisdiction involving States that were not a party to the Statute at the time the crimes were committed. As already explained, these situations occur when a non-State party accepts the jurisdiction of the Court over a crime already perpetrated, or when the UN Security Council refers to the ICC a situation in which crimes have been committed involving a non-member State. As it will be further discussed,¹¹⁸⁰ since the Rome Statute was not applicable to the individuals at the moment of commission of the offences, the *nullum crimen* principle requires the ICC to ground its prosecution on other legal sources already applicable to the actors at the relevant time. Therefore, existing international customary law could be in such circumstances the proper legal source to ground the criminal responsibility of the individuals.¹¹⁸¹

¹¹⁷⁸ Rome Statute, Art. 21(3) “Internationally recognized human rights” is a very wide and vague expression that could rise problems regarding *lex certa*.

¹¹⁷⁹ See a detailed analysis of this issue in De Souza Dias, ‘Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law’, 245–46; Bassiouni, *Introduction Au Droit Pénal International*, 248–49.

¹¹⁸⁰ See below, Section 4.2.3.2.

¹¹⁸¹ Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 45–46.

C. The ICC prosecuting consuetudinary crimes

Some authors claim that in certain situations the substantive jurisdiction of the ICC may not be limited to the criminal conducts described in the Rome Statute, and in such cases customary international law would be the legal source of criminalization. The referred situations would be the retroactive acceptance of jurisdiction by non-States parties to the ICC Statute and UN Security Council referrals.

In the event of an *ad hoc* acceptance of the ICC jurisdiction by a non-member State, Article 12(3) of the Rome Statute establishes that such acceptance will be “with respect to the crime in question.”¹¹⁸² Therefore, it could be understood that it is the State itself that sets and determines the substantive jurisdiction of the Court. According to Malarée the accepting State can determine, among the crimes to be prosecuted by the ICC, conducts that go beyond the definitions of Articles 6 to 8 of the Rome Statute.¹¹⁸³ However, such conducts should fall into the categories of Article 5 and be considered criminal under customary international law.¹¹⁸⁴

A similar conclusion could be reached regarding UN Security Council’s referrals. Malarée claims that the UN Security Council may not limit the situations to be referred to the ICC to those described in Articles 6 to 8. The UN Security Council may establish a broader substantive jurisdiction including conducts not covered by the definitions of Articles 6 to 8, or involving further international customary crimes.¹¹⁸⁵ On the contrary, most of the scholars argue that extensions of the jurisdiction *ratione materiae* of the ICC would depart from the provision of the Rome Statute, and that Chapter VII of the UN Charter does not entitle the UN Security Council to do so.¹¹⁸⁶

¹¹⁸² Rome Statute, Art. 12(3).

¹¹⁸³ Hormazábal Malarée, ‘Crímenes Internacionales, Jurisdicción y Principio de Legalidad Penal’, 265.

¹¹⁸⁴ Hormazábal Malarée, 265. Rome Statute, Art. 5. Crimes within the jurisdiction of the Court:

“The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.”

¹¹⁸⁵ The author draws a parallel between the international *ad hoc* tribunals and the ICC, arguing that in the future the ICC will play the role attributed now to the ICTY and ICTR. Therefore, he claims that the ICC objective jurisdiction when acting pursuant an UN Security Council’s referral should be established both by its statute and by customary international law, as it was the case of in the *ad hoc* tribunals. See Hormazábal Malarée, 266.

¹¹⁸⁶ Schabas, *The International Criminal Court*, 301; Condorelli and Villalpando, ‘Referral and Deferral by the Security Council’, 634–37; Condorelli and Villalpando, ‘Can the Security Council Extend the ICC’s Jurisdiction?’, 381. However, Condorelli and Villalpando claim that the extension of the jurisdiction *ratione temporis* does not depart from the provisions of the

4.2.2.6 Nulla poena

The Rome Statute includes in its Article 23 the *nulla poena sine lege* principle and establishes that “(A) person convicted by the Court may be punished only in accordance with this Statute.”¹¹⁸⁷

While the Statute lays down a strict *nullum crimen* principle, establishing strong requirements, it does not occur the same for *nulla poena*. The effort made by the drafters to elaborate precise and comprehensive crimes’ definitions was not comparable to the effort made to determine the penalties corresponding to each of them.¹¹⁸⁸ The Rome Statute only establishes that the Court may impose as a penalty “imprisonment for a specified number of years, which may not exceed a maximum of 30 years” or “life imprisonment” for the most serious offenses, along with fines and forfeitures.¹¹⁸⁹

On the contrary, the *nulla poena* principle in domestic legal systems often requires the previous establishment of a precise penalty or a reasonable range of penalties attached to each offence.¹¹⁹⁰ Therefore, the strongest standards of the legality principle (*lex scripta, praevia, certa* and *stricta*) are only partially met in the ICC

Rome Statute and therefore, it would be acceptable in certain circumstances. The possibility of the UN Security Council extending the ICC jurisdiction *ratione temporis* has been analysed above, in Section 4.2.2.2.

¹¹⁸⁷ Rome Statute, Art. 23. For an analysis of the conception, evolution and approval of the *nulla poena* provision in the Rome Statute, see Schabas, ‘General Principles of Criminal Law in the International Criminal Court Statute’, 90–93; Lamb, ‘Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law’, 756–64.

¹¹⁸⁸ Olásolo, ‘A Note on the Evolution of the Principle of Legality in International Criminal Law’, 311–12.

¹¹⁸⁹ Rome Statute, Art. 77. Applicable penalties:

“1. Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:

(a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or

(b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

2. In addition to imprisonment, the Court may order:

(a) A fine under the criteria provided for in the Rules of Procedure and Evidence;

(b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.”

¹¹⁹⁰ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 335.

system regarding penalties. While the requirements of punishments established by a written and previous law are fulfilled, it is not the case of the standards of certainty and strictness.¹¹⁹¹

Anyhow, compared with all previous international criminal law documents, where no penalties provisions were provided, the Rome Statute takes a significant step towards a stronger *nulla poena* principle.¹¹⁹² Moreover, Rule 145 of the Rules of Procedure and Evidence, entitled “Determination of sentence”, includes a non-exhaustive list of mitigating and aggravating circumstances, along with a number of factors that should guide the determination of the penalty to be imposed by the Court.¹¹⁹³ In any case, the ICC system of penalties complies with the *nullum crimen* principle as understood in international criminal law.¹¹⁹⁴

Similarly to what has been explained regarding *nullum crimen*, some situations involving States that were not a party to the Rome Statute at the time the crimes were committed, may raise concerns about the respect of the *nulla poena* principle. This mainly occurs when the ICC acquires *extraordinary* jurisdiction through retroactive acceptances of jurisdiction by non-State parties or UN Security Council referrals.¹¹⁹⁵ As explained, the legality principle requires the pre-existence of a legal source criminalizing the conduct and applicable to the individual at the time of commission. In the absence of such a source of law, any punishment would infringe the legality principle. Especially in such extraordinary situations it should be taken into account as well that the Rome Statute bans retroactive increases of punishments, and the sentence to be imposed by the Court will be limited to those established in the laws applicable to the individual at the time of commission.¹¹⁹⁶

¹¹⁹¹ Ambos, ‘General Principles of Criminal Law in the Rome Statute’, 6.

¹¹⁹² Ibid., 6.

¹¹⁹³ Article 51 of the Rome Statute provides for the forthcoming adoption of the “Rules of Procedure and Evidence” that shall assist the Court when applying the Statute. The Rules were finally adopted in 2002. Assembly of States Parties to the Rome Statute of the International Criminal Court, *Rules of Procedure and Evidence*.

¹¹⁹⁴ Ambos, ‘General Principles of Criminal Law in the Rome Statute’, 6; Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 334; Ferdinandusse, ‘Direct Application of International Criminal Law in National Courts’, 252–59.

¹¹⁹⁵ These situations are explained and analysed below, in Section 4.2.3.2.

¹¹⁹⁶ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 342. For further information and analysis of the *nulla poena* principle in the ICC Statute, see Dana, ‘Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing’, 905–24.

4.2.3 The International Criminal Court and the principle of legality

Since its establishment the ICC has opened investigations in fourteen situations, has publicly indicted forty-five people and to date eight of them have been convicted.¹¹⁹⁷ Unlike other international tribunals the ICC only have jurisdiction over crimes committed after its establishment and the prosecutions are based on clear and well-defined crimes pre-established in its Statute. Therefore, arguments regarding violations of the *nullum crimen* principle, common in previous international prosecutions, have not been raised often before the ICC.¹¹⁹⁸ However, in certain occasions the defences have invoked the principle and the tribunal has explicitly addressed the issue. It should be noted that, similarly to the ICTY, ICTR and SCSL, the ICC has treated legality as a right the individuals can raise before the Court.¹¹⁹⁹

From the first time the legality issue was addressed, the ICC adopted a strong notion of the principle, expressly referring to the crime definition requirements of *lex praevia, scripta, certa* and *stricta*.¹²⁰⁰ In *Lubanga* the Court dismissed the defence's claim that the terms "enlisting", "conscripting" and "using children under the age of fifteen" as part of war crimes, were not defined with enough particularity. The Court established:

"Accordingly, there is no infringement of the principle of legality if the chamber exercises its power to decide whether Thomas Lubanga Dyilo ought to be committed for trial on the basis of written (*lex scripta*) pre-existing criminal norms approved by the States Parties to the Rome Statute (*lex praevia*), defining prohibited conduct and setting out the related sentence (*lex certa*), which cannot be interpreted by analogy in *malam partem* (*lex stricta*)."¹²⁰¹

¹¹⁹⁷ To date, 17 September 2021, the Office of the Prosecutor has opened investigations in Democratic Republic of the Congo; Uganda, Darfur (Sudan), two in Central African Republic, Kenya, Libya, Côte d'Ivoire, Mali, Georgia, Burundi, State of Palestine, Bangladesh/Myanmar, and Afghanistan. Information on each investigation is available at: <https://www.icc-cpi.int/pages/situation.aspx>. Additionally, the Office of the Prosecutor is conducting preliminary examinations in Colombia, Guinea; Nigeria, Ukraine, the Philippines, Venezuela and Bolivia. See <https://www.icc-cpi.int/pages/pe.aspx>. Information on the cases and the situation of the defendants is available at: <https://www.icc-cpi.int/Pages/defendants-wip.aspx>.

¹¹⁹⁸ Schabas, *The International Criminal Court*, 406.

¹¹⁹⁹ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 333.

¹²⁰⁰ Schabas, *The International Criminal Court*, 408; Kress, 'Nulla Poena Nullum Crimen Sine Lege', 18; Olásolo, 'El Principio Nullum Crimen Sine Iure En El Derecho Internacional Contemporáneo', 36; Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 335.

¹²⁰¹ *Prosecutor v Lubanga Dyilo*, Decision on the Confirmation of Charges, para. 303.

Despite the ICC has established a clear notion and requirements of the legality principle, it remains to be seen how they are applied in complex circumstances. For example, an issue still to be solved but that has already generated relevant debates, concerns the scope of the strong version of legality adopted by the ICC. It is not settled whether such strict notion of legality, and its derived requirements, should be applied only to crime definitions, or as well to the provision conforming the general part of the Rome Statute. However, the Court has recently tackled the above-analysed situations when it may acquire jurisdiction over crimes that did not fall within its jurisdiction at the time of commission.

4.2.3.1 Strict legality to determine the subjective elements or forms of responsibility?

As previously explained, the Rome Statute includes what can be considered as a general part, entitled “General Principles of Criminal Law”. Despite it represents a significant improvement with respect to previous international criminal tribunals, the general principles of criminal law show a lower level of maturity and sophistication than the crime’s definitions. The need to merge different legal traditions and to reach compromise solutions explains why the general part of the Statute could not be drafted in a more dogmatic, precise and refined manner.¹²⁰² As already explained, the development and evolution of a legal system, embracing clear and precise norms, allows the adoption of stricter notions of legality. In the case of the ICC system, this is possible only regarding crime definitions, but not yet the general part, where the lack of norms of similar clarity and sophistication hinders a strict version of legality.

This explains that to date, the ICC has applied a strict notion of legality regarding crime definitions but has been more flexible concerning the general part of the Rome Statute, particularly regarding the determination of the subjective element (*mens rea*) and the authorship or forms of responsibility. However, this jurisprudence has been occasionally challenged.

The early ICC jurisprudence has proved flexible regarding the legality principle when applied to the determination of the subjective element.¹²⁰³ Article 30 of the Rome Statute, entitled “Mental element”, clearly determines intent and knowledge as general

¹²⁰² Ambos, ‘General Principles of Criminal Law in the Rome Statute’, 1.

¹²⁰³ Ilias Bantekas, *International Criminal Law* (Oxford: Hart Publishing, 2010), 27. For a detailed analysis of the subjective element and its application by the ICC, see Cassese et al., *International Criminal Law: Cases and Commentary*, 357–61; Bantekas, *International Criminal Law*, 38–45.

mens rea standards. However, in *Lubanga*, an ICC Trial Chamber argued that *dolus eventualis* was also applicable.¹²⁰⁴

Only two years later, in the *Bemba* Confirmation Decision, another ICC Trial Chamber reached the opposite conclusion and rejected the applicability of *dolus eventualis*. The Chamber established that “to ensure that any interpretation given to the definition of crimes is in harmony with the rule of strict construction set out in Article 22(2) of the Statute” Article 30 could not be interpreted as including “*dolus eventualis*, recklessness or any lower form of culpability.”¹²⁰⁵

The debate about the scope of a strict legality principle has reached as well the modes of participation. Article 25 of the Rome Statute establishes the different forms of individual criminal responsibility and the ICC has generally interpreted such Article as embracing co-perpetration based on joint control over the crime.¹²⁰⁶ However, the compatibility of such interpretation of Article 25 with a strict notion of the legality principle has been questioned, most notably by the ICC Judge Christine Van den Wyngaert.¹²⁰⁷ In its Concurring Opinion to the *Katanga* judgment the Judge criticized the approach taken by previous ICC Trial Chambers and considered that the principle

¹²⁰⁴ *Prosecutor v Lubanga Dyilo*, Decision on the Confirmation of Charges, para. 352. The admission of *dolus eventualis* was justified based on the fact that co-perpetration based on joint control over the crime requires that “the suspect and the other co-perpetrators (a) must all be mutually aware of the risk that implementing their common plan may result in the realisation of the objective elements of the crime, and (b) must all mutually accept such a result by reconciling themselves with it or consenting to it”. *Lubanga*, Decision on the Confirmation of Charges, para. 361. See a detailed analysis on the issue in Cassese et al., *International Criminal Law: Cases and Commentary*, 357–60; Bantekas, *International Criminal Law*, 27.

¹²⁰⁵ *Prosecutor v Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC Pre-Trial Ch. II, ICC-01/05-01/08, 15 June 2009, para. 369, available at: https://www.icc-cpi.int/CourtRecords/CR2009_04528.PDF.

¹²⁰⁶ Among other sentences *Lubanga*, Decision on the Confirmation of Charges, para. 326; *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui* Decision on the Confirmation of Charges, ICC Pre-Trial Ch. I, ICC-01/04-01/07-717, 30 de September 2008, para. 500. Reference to further ICC jurisprudence in Leandro A. Dias, ‘Teoría del dominio del hecho y principio de legalidad en la Corte penal Internacional’, *InDret*, no. 4 (2018): 2. For a comprehensive analysis of co-perpetration as interpreted by the ICC, and references to further literature on the issue, see Cassese et al., *International Criminal Law: Cases and Commentary*, 353–62; Dias, ‘Teoría del dominio del hecho y principio de legalidad en la Corte penal Internacional’.

¹²⁰⁷ *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Judgment pursuant to Article 74 of the Statute - Concurring Opinion of Judge Christine Van den Wyngaert, ICC-Pre Trial Ch. II, ICC-01/04-02/12-4, 18 de diciembre de 2012, available at: https://www.icc-cpi.int/CourtRecords/CR2015_04025.PDF.

of legality should be applied with equal force in relation to the definition of criminal responsibility as with respect to the definition of the crimes.¹²⁰⁸

The views supporting the application of strict legality beyond crime definitions have been refuted based on the impossibility of applying to the Rome Statute's general part, the four requirements derived from strict legality, in particular *lex certa* and *lex stricta*. As explained above, the general principles of criminal law included in the ICC Statute lack the maturity, sophistication, clarity and precision of the norms regarding crime definitions, and therefore, they are incompatible with a strict version of legality.

Similarly, it has been argued that a strict legality principle, as enshrined in Article 22(2) of the ICC Statute, should only reach crime definitions. The Article establishes that "The definition of a crime shall be strictly construed and shall not be extended by analogy" and "in case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted". Therefore, it has been argued that what should be strictly construed are only the disposition regarding "the definition of a crime", that is to say Articles 6 to 8bis, but not other Articles as those conforming the general part.¹²⁰⁹

4.2.3.2 Situations problematic for the legality principle: retroactive acceptances of jurisdiction by non-party States and UN Security Council referrals

The *ordinary* jurisdiction of the ICC, concerning situations involving States parties to the Rome Statute at all relevant times, do not raise significant problems regarding the principle of legality. However, in certain circumstances, the Court can acquire as well *extraordinary* jurisdiction involving States that were not a party to the Rome Statute at the time the crimes were committed. In these situations, concerns regarding the respect of the legality principle, and in particular the non-retroactivity rule, may arise. The Rome Statute contemplates at least two ways in which the ICC

¹²⁰⁸ *Concurring Opinion of Judge Christine Van den Wyngaert*, para. 18. The arguments of the judge are comprehensively explained and analysed in Dias, 'Teoría del dominio del hecho y principio de legalidad en la Corte penal Internacional'.

¹²⁰⁹ Gerhard Werle y Florian Jessberger, *Principles of International Criminal Law*, 3.^a ed. (Oxford: Oxford University Press, 2014), 210. Also see, with further references De Souza Dias, 'Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law', 8.

may acquire jurisdiction over crimes that did not fall within its jurisdiction at the time of commission.¹²¹⁰ This means that the ICC may gain jurisdiction retrospectively.

The first situation appears when a State that is not a party to the Rome Statute decides by an *ad hoc* declaration to accept the jurisdiction of the Court over a crime already committed by its nationals or in its territory.¹²¹¹ The second situation occurs when the UN Security Council refers to the ICC Prosecutor a situation in which crimes have been committed involving a State that is not a party to the Rome Statute.¹²¹² The recent practice of the ICC shows that these scenarios are not merely theoretical, and nowadays the Statute risks to be applied retroactively in several retrospective situations.¹²¹³ Despite the importance of the issue, these situations seem to have been ignored by the drafters of the ICC Statute and by the Court itself until recently.¹²¹⁴

The underlying question is to determine whether the non-retroactivity rule requires relying on other sources of law applicable to the individual at the moment of commission, or if the Rome Statute suffices itself, even regarding non-States parties to the Statute. Despite acknowledging that the Rome Statute was not formally applicable at the time of commission, the Court affirmed its jurisdiction over these situations applying rather loose legality requirements based on the accessibility and foreseeability test. Hereinafter, the doctrinal debates on the issue are presented first, followed by an assessment of this recent ICC decision.

A. Legality is respected only if the conducts were previously criminalized

Some scholars consider that the Rome Statute cannot be applied to crimes committed in States that at the moment of commission were not a party to the

¹²¹⁰ See other possible situations in Bourgon, 'Jurisdiction Ratione Temporis', 552; Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 338. De Souza identifies five scenarios where the ICC could apply retroactively the ICC Statute. A detailed analysis of each of them in De Souza Dias, 'Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law', 144–80.

¹²¹¹ Rome Statute, Art. 12(2),(3).

¹²¹² *Ibid.*, Art. 13(b).

¹²¹³ See an analysis of these situations in Talita De Souza Dias, 'The Retroactive Application of the Rome Statute in Cases of Security Council Referrals and Ad Hoc Declarations', *Journal of International Criminal Justice* 16, no. 1 (1 March 2018): 68.

¹²¹⁴ *Ibid.*, 69.

Statute.¹²¹⁵ It is argued that the provisions of the Rome Statute did not bind nationals of non-party States acting in the territory of a non-party State. Therefore, when the ICC acquires retroactive jurisdiction over such situations, either by a State's retroactive acceptance of jurisdiction or by an UN Security Council referral, the Statute provisions cannot be applied since it would infringe the non-retroactivity rule. Consequently, the *nullum crimen* principle requires the prosecution of these past crimes to be grounded on other sources of law applicable at the time of commission, as would be international customary law.

According to the generally accepted understanding of the legality principle in international law, the prosecution of an individual would only violate the principle if its conduct was not criminal and punishable under any applicable law. Therefore, an ICC prosecution would be compatible with the legality principle if the conduct, occurred before the referral or the *ad hoc* acceptance of jurisdiction, was already prohibited at the moment of commission by a source of applicable law.¹²¹⁶ That is to say, if the ICC Statute provisions grounding the prosecution reflect pre-existing international criminal law, no issues regarding substantial retroactivity would arise.¹²¹⁷ On the contrary, problems regarding the respect of *nullum crimen* would appear if the Statute provisions grounding the prosecution did not reflect pre-existing applicable law.¹²¹⁸ Therefore, other sources of substantive law criminalizing the conduct, and applicable to the individual at the relevant time, should be identified.¹²¹⁹

The *nullum crimen* principle requires that a previous source of law, as customary international law, general principles of law, applicable treaties or even domestic laws, criminalized the conduct and provided the same or a less severe

¹²¹⁵ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 338; Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 45–46.

¹²¹⁶ Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 45–46.

¹²¹⁷ Only issues regarding formal retroactivity may arise, since the ICC would apply retroactively its statute, but, as has been studied, it is not in itself a breach of the principle of non-retroactivity according to the international legality principle.

¹²¹⁸ Cassese et al., *The Oxford Companion to International Criminal Justice*, 27; De Souza Dias, 'Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law', 247.

¹²¹⁹ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 339; Condorelli and Villalpando, 'Referral and Deferral by the Security Council', 635–36; Gabriel M. Lentner, 'UN Security Council Referrals to the ICC and the Principle of Legality', *EJIL: Talk!* (blog), 12 November 2021, <https://www.ejiltalk.org/un-security-council-referrals-to-the-icc-and-the-principle-of-legality/>.

punishment. However, the most likely and appropriate source of substantive law applicable to the individual would be customary international law existing at the time of commission.¹²²⁰ Customary international law is directly applicable to any individual of the world and therefore, no problem regarding substantive retroactivity would arise if a customary rule already contemplated a crime or a mode of liability equivalent to the one defined in the Rome Statute.¹²²¹ Thus, it should be determined if at the relevant time the particular conduct constituted already a customary crime. Other potential sources of criminalization would be a treaty already applicable to the individual at the time of commission, or general principles of law recognized by the community of nations.¹²²²

Besides international legal sources, it has been argued that domestic laws could be another possible ground of criminalization to prosecute crimes respecting the *nullum crimen* principle.¹²²³ The ICC could prosecute a crime included in its Statute if at the time of commission the conducts were already considered criminal by the domestic laws of the relevant State. This option remains controversial since it resembles the above-studied retrospective re-characterization technique, in this case from national to international law.¹²²⁴

In any case, if the ICC cannot find a source of law criminalizing the conduct at the time of commission, the prosecution will not be possible.¹²²⁵ The principle of legality prevents the ICC Statute to retroactively criminalise a conduct that, when carried out, was not prohibited by any applicable law.

B. ICC Statute provisions beyond the applicable law

As above explained, the Rome Statute mostly enshrines already existing international norms. However, in some cases, it also introduced some new features and elements in their crime definition and elements, but as well regarding modes of liability

¹²²⁰ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 339; Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 45–46.

¹²²¹ De Souza Dias, 'The Retroactive Application of the Rome Statute in Cases of Security Council Referrals and Ad Hoc Declarations', 70.

¹²²² An analysis of both possibilities in Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 339–40.

¹²²³ Gallant, 340.

¹²²⁴ Ibid.

¹²²⁵ Ibid.; De Souza Dias, 'Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law', 247.

and the mental element.¹²²⁶ This way, problems regarding the respect of *nullum crimen* would arise if the ICC Statute provisions grounding a prosecution do not reflect pre-existing international criminal law.¹²²⁷ If the Statute provision goes beyond any previously applicable law, the individual could not have had notice of the content of such exceeding statutory provision.¹²²⁸ The prosecution would face then a problem of substantive retroactivity.

However, some relevant scholars seem to deny retroactivity problems even in these situations where the Statute provisions are broader than other pre-existing sources of law.¹²²⁹ Schabas argues that from the moment the Statute entered into force “individuals have received sufficient warning that they risk being prosecuted for such offences, and that the Statute itself (in Article 12(3)) contemplates such prosecution even with respect to States that are not yet parties to the Statute.”¹²³⁰ Therefore, the application of the statutory crimes in such situations would be foreseeable enough to comply with the non-retroactivity rule. This position seems to be embraced by the ICC Judge Ibáñez and, though in a less straightforward manner, by the ICC Pre-Trial Chamber II in the recent case of *Ali Muhammad Ali Abd-Al-Rahman* (“*Ali Kushayb*”).¹²³¹

Nevertheless, the majority of the doctrine,¹²³² and the ICC’s Appeals Chamber,¹²³³ refuted this position. Significantly, Gallant claims that the States party to

¹²²⁶ De Souza Dias, ‘The Retroactive Application of the Rome Statute in Cases of Security Council Referrals and Ad Hoc Declarations’, 70–71.

¹²²⁷ Cassese et al., *The Oxford Companion to International Criminal Justice*, 27; De Souza Dias, ‘Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law’, 247.

¹²²⁸ De Souza Dias, ‘The Retroactive Application of the Rome Statute in Cases of Security Council Referrals and Ad Hoc Declarations’, 68.

¹²²⁹ See a comprehensive explanation and analysis of all the solutions proposed by the doctrine in De Souza Dias, ‘The Retroactive Application of the Rome Statute in Cases of Security Council Referrals and Ad Hoc Declarations’.

¹²³⁰ Schabas, *An Introduction to the International Criminal Court*, 70.

¹²³¹ *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* (“*Ali Kushayb*”), Decision on the Defence ‘*Exception d’incompétence*’, ICC Pre-Trial Chamber II ICC-02/05-01/20-302, 1 May 2021, available at: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_04527.PDF. See above the analysis of the case, in Section 4.2.3.2.C.

¹²³² See, among others, B. Broomhall, ‘Article 22: Nullum Crimen Sine Lege’, in *Rome Statute of the International Criminal Court: A Commentary*, eds. O. Triffterer and K. Ambos, 3rd ed. (Beck/Hart, 2016), 956; T. Meron, ‘Revival of Customary Humanitarian Law’, *American Journal of International Law* 99 (2005): 832; R. O’Keefe, *International Criminal Law* (Oxford: Oxford University Press, 2015), 553–54, as cited in De Souza Dias, ‘The Retroactive Application of the Rome Statute in Cases of Security Council Referrals and Ad Hoc Declarations’, 70.

the Rome Statute have no authority to create new criminal law binding non-member States or individuals with no relevant connection to any member State.¹²³⁴ These States did not have universal prescriptive jurisdiction, or could legislate for the world.¹²³⁵ *Foreseeability* as a legality requirement can comprise legal developments within a legal system with jurisdiction over an individual. But it cannot mean that the person, completely unconnected with any member State of an international organization, foresees that this organization will later attempt to impose him its jurisdiction and substantive rules.¹²³⁶ The vision that the Rome Statute was accessible and foreseeable worldwide since its entry into force is contested as well by De Souza who reminds that a pre-requisite for the application of the foreseeability (and the accessibility) test is that the criminal rule in question should be binding on the accused.¹²³⁷ Therefore, to comply with the legality principle, the ICC would have to ascertain whether the charges based on statutory provisions conform custom or any other binding source of law at the moment of commission.

C. Recent ICC decisions on UN Security Council referrals: *nullum crimen* in the light of international human rights law

The ICC recently addressed some *nullum crimen* issues regarding situations involving States that were not a party to the Rome Statute at the time the crimes were committed. In the *Ali Muhammad Ali Abd-Al-Rahman* (“*Ali Kushayb*”) case, both the

¹²³³ *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman* (“*Ali Kushayb*”), Judgement on the appeal of Mr. Abd-Al-Rahman against the Pre-Trial Chamber II’s “Decision on the Defence ‘Exception d’incompétence’”, ICC Appeals Chamber ICC-02/05-01/20-OA8, 1 November 2021, available at: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2021_09905.PDF. An analysis of this case is provided hereinafter in the next Section.

¹²³⁴ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 342.

¹²³⁵ Alexandre Skander Galand, ‘The ICC Appeals Judgment on Abd-Al-Rahman Jurisdictional Challenge: A Foreseeable Turn to Substantive Justice?’, *EJIL: Talk!* (blog), 22 November 2021, <https://www.ejiltalk.org/the-icc-appeals-judgment-on-abd-al-rahman-jurisdictional-challenge-a-foreseeable-turn-to-substantive-justice/>; Leila N. Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millenium* (Brill Nijhoff, 2002), 263.

¹²³⁶ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 343.

¹²³⁷ Talita De Souza Dias, ‘The Principle of Legality in the ICC’s Appeals Judgment on Abd-Al-Rahman’s Jurisdictional Challenge: A Follow-up on Merits and Shortcomings’, *EJIL: Talk!* (blog), 1 December 2021, <https://www.ejiltalk.org/the-principle-of-legality-in-the-iccs-appeals-judgment-on-abd-al-rahmans-jurisdictional-challenge-a-follow-up-on-merits-and-shortcomings/>. See also Galand, ‘The ICC Appeals Judgment on Abd-Al-Rahman Jurisdictional Challenge’.

Pre-Trial Chamber¹²³⁸ and the Appeals Chamber¹²³⁹ faced a challenge to the jurisdiction of the Court over a situation referred to the ICC Prosecutor by the UN Security Council concerning Darfur, Sudan. The complication is that this country, when the alleged crimes were committed was, and is still not, a party to the Rome Statute.¹²⁴⁰ This made the defence challenge the jurisdiction of the Court based on a violation of the legality principle.

In 2007 and 2020 the Pre-Trial Chamber issued two warrants of arrest against Mr Abd-Al-Rahman for crimes against humanity and war crimes allegedly committed during a non-international armed conflict in Sudan between August 2003 and March 2004. In 2020 the accused surrendered himself to the Court and not long after challenged the jurisdiction of the Court based on an alleged violation of the *nullum crimen* principle. The Pre-Trial Chamber rejected the jurisdictional challenge, a decision later upheld, but on different grounds, by the Appeals Chamber, interpreting the scope of the legality principle in light of human rights norms.

When deploying different arguments to affirm its jurisdiction over the crimes, the Court elaborated on the notion and scope of the legality principle within the framework of the ICC system. In particular, the underlying question was to determine if the respect of the *nullum crimen* principle in these situations required relying on other sources of law applicable to the individual at the moment of commission, or the Rome Statute suffices itself, even regarding non-States parties to the Statute.

The Pre-Trial Chamber did not tackled the issued in depth, but affirmed its jurisdiction compatible with the *nullum* crimen principle without judging necessary to determine whether and to what extend “the conducts charged against Mr Abd-Al-Rahman were criminalised by either Sudan’s national law or as a matter of international customary law”.¹²⁴¹ By its part, the Prosecutor argued that the express

¹²³⁸ *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”)*, Decision on the Defence ‘Exception d’incompétence’, ICC Pre-Trial Chamber II.

¹²³⁹ *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”)*, Judgement on the appeal of Mr. Abd-Al-Rahman against the Pre-Trial Chamber II’s “Decision on the Defence ‘Exception d’incompétence’”, ICC Appeals Chamber.

¹²⁴⁰ UN Security Council, *Situation in Darfur, Sudan* 31 March 2005, Resolution 1593, S/RES/1593 (2005), available at: <https://www.legal-tools.org/doc/4b208f/pdf>.

¹²⁴¹ *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”)*, Decision on the Defence ‘Exception d’incompétence’, ICC Pre-Trial Chamber II, para. 42. The Pre-Trial Chamber reasoned firstly that rejecting the court’s jurisdiction over cases involving non-State parties to the Rome Statute, would restrict the scope of a Security Council referral “to such an extent as to call into question the very raison d’être of that particular triggering mechanism.” *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”)*, Decision on the Defence ‘Exception d’incompétence’, ICC Pre-Trial Chamber II, para. 41.

notice given by the Statute that a person may become subject to the Court's jurisdiction pursuant a UN Security Council referral, is enough to consider the jurisdiction of the ICC over situations concerning non-State members compatible with the *nullum crimen* principle.¹²⁴² This argument reminds the above-studied doctrinal position claiming that from the moment the Statute entered into force all individuals had sufficient warning that they risk being prosecuted for the statutory crimes, and therefore, the application of the Statute in situations concerning non-States parties would be foreseeable enough to comply with the non-retroactivity rule.¹²⁴³

Judge Ibáñez deployed a similar reasoning in a separate opinion to the Appeals Chambers decision. Despite agreeing with the outcome reached by the majority, the Judge claimed that the content of the Statue, including the crimes under its jurisdiction and the associated penalties, has been public since its adoption. Moreover, the Judge argued that despite Sudan has not ratified the Statue, it did sign it in 2000. This way, the statutory norms were public and known for Sudan and the accused. Therefore, Judge Ibáñez considered that the ICC jurisdiction over the alleged crimes complies with the *nullum crimen* principle and further discussions are necessary as to whether the crimes within the Court's jurisdiction existed as well as customary international law.¹²⁴⁴

Subsequently, the ICC Appeals Chamber upheld the Pre-Trial Chamber's decision affirming the Court's jurisdiction, but overturned some of its arguments. The Chamber found that the Pre-Trial Chamber erred in law when considered unnecessary to determine the sources of law applicable to the accused at the moment of commission. Firstly, the Appeals Chamber reminded its obligation to apply and interpret the Statute, including the provisions regarding its jurisdiction or the *nullum crimen* principle, in a manner that is consistent with internationally recognized human rights, as required by Article 21(3) of the Statue.¹²⁴⁵ Then, the Chamber explained that "in

¹²⁴² Prosecution's Response to the Defence Appeal against the "Decision on the Defence 'Exception d'incompétence'", ICC-02/05-01/20-427, 29 June 2021, para. 34, available at: <https://www.legal-tools.org/doc/ln8em4/pdf>.

¹²⁴³ Schabas, *An Introduction to the International Criminal Court*, 70.

¹²⁴⁴ Separate and Concurring Opinion of Judge Luz del Carmen Ibáñez Carranza on the Judgment on the appeal of Mr. Saif Al-Islam Gaddafi against the decision of Pre-Trial Chamber I entitled 'Decision on the "Admissibility Challenge by Dr. Saif Al Islam Gadafi pursuant to Articles 17(1)(c), 19 and 20(3) of the Rome Statute"', ICC-01/11-01/11-6, 21 April 2020, para. 47, available at: <https://www.legal-tools.org/doc/ykvv5y/pdf>.

¹²⁴⁵ *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, Judgement on the appeal of Mr. Abd-Al-Rahman against the Pre-Trial Chamber II's "Decision on the Defence 'Exception d'incompétence', ICC Appeals Chamber, para. 83. Rome Statute Art. 21 (Applicable law):

order to extend to an accused the guarantee of legality consistent with human rights norms, the principle of *nullum crimen sine lege* generally requires that a court may exercise jurisdiction only over an individual who could have reasonably expected to face prosecution under national or international law.”¹²⁴⁶ To define the principle of legality as understood in international human rights law, the ICC referred to the “foreseeability” and “accessibility” test, first developed by the European Court of Human Rights, and latter borrowed by other international and national courts.¹²⁴⁷

The Appeals Chamber disagreed with the Pre-Trial Chamber considering that for conducts taking place on the territory of a non-member States of the Rome Statue, it is not enough that the crimes charged could be found in the text of the Statue. When interpreting its Article 22(1) (*nullum crimen* principle) in a manner constituent with human rights law, the Court “must look beyond the Statute to the criminal laws applicable to the suspect or accused at the time the conduct took place and satisfy itself that a reasonable person could have expected, at that moment in time, to find him or herself faced with the crimes charged.”¹²⁴⁸

Subsequently, the Chamber found that the “foreseeability” test was satisfied in the case of Abd-Al-Rahman, since he was reasonably capable of taking steps to understand and respect his obligations under international law and to foresee the risk of international criminal liability.¹²⁴⁹ It should be noted that that the standard applied by the Appeals Chamber seems rather loose when verifying if the prosecuted crimes where indeed criminalized by applicable international or domestic laws at the moment of commission, or if they were sufficiently accessible and foreseeable to the accused.¹²⁵⁰ In fact, the Chamber did not specify any particular norm of customary international law or other source of law regarding the specific charges. The Court generally

“3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights (...).”

¹²⁴⁶ *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”)*, Judgement on the appeal of Mr. Abd-Al-Rahman against the Pre-Trial Chamber II’s “Decision on the Defence ‘Exception d’incompétence’”, ICC Appeals Chamber, para. 85.

¹²⁴⁷ See below, Section 5.1.4. For an opinion contrary to exclusively rely on the ECtHR’s case law to define the *nullum crimen* principle as understood in international law in Galand, ‘The ICC Appeals Judgment on Abd-Al-Rahman Jurisdictional Challenge’.

¹²⁴⁸ *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”)*, Judgement on the appeal of Mr. Abd-Al-Rahman against the Pre-Trial Chamber II’s “Decision on the Defence ‘Exception d’incompétence’”, ICC Appeals Chamber, para. 86.

¹²⁴⁹ *Ibid.*, para. 88.

¹²⁵⁰ Lentner, ‘UN Security Council Referrals to the ICC and the Principle of Legality’; Galand, ‘The ICC Appeals Judgment on Abd-Al-Rahman Jurisdictional Challenge’.

considered that at the time of the conflict in Darfur, Sudan had ratified a number of treaties and human rights instruments creating obligations regarding internal armed conflict. Similarly, the ICC stated that the charges against Abd-Al-Rahman were grounded on norms globally recognized, including Sudan.¹²⁵¹ It has been observed that the Court's approach implies a risk that even in cases where it cannot verify that certain conduct was criminalized under applicable international or domestic law, the ICC might still consider that prosecution for crimes defined in the Rome Statute was foreseeable for the accused.¹²⁵²

There are as well a number of legality issues the Court chose not to address, but that will need an answer in the future. Firstly, once the ICC acknowledged that the Rome Statute was not formally applicable at the time of commission in this sort of situations, it will have to determine the substantive law to be applied. The Court may retroactively apply its Statute, implementing retroactive re-characterization when needed, for example, when the conduct was criminalized under a different crime name.¹²⁵³ On the contrary, the ICC might prefer to directly apply the source of law previously binding on the individual, as customary international law or applicable treaties, as already have done the *ad hoc* tribunals.¹²⁵⁴

In addition, despite the Chamber acknowledged that some areas of the Statute exceed or deviate from customary international law, it did not elaborate on the consequences.¹²⁵⁵ The respect of *nullum crimen* principle would require the Court to dismiss all charges going beyond or being more severe than the modes of liability

¹²⁵¹ *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, Judgement on the appeal of Mr. Abd-Al-Rahman against the Pre-Trial Chamber II's "Decision on the Defence 'Exception d'incompétence', ICC Appeals Chamber, para. 77.

¹²⁵² Galand, 'The ICC Appeals Judgment on Abd-Al-Rahman Jurisdictional Challenge'.

¹²⁵³ The author advise against this option since "retroactive re-characterisation of crimes, if not done carefully, might lead to the application of more serious criminal provisions or labels than those previously binding on the accused" De Souza Dias, 'The Principle of Legality in the ICC's Appeals Judgment on Abd-Al-Rahman's Jurisdictional Challenge'; De Souza Dias, 'The Retroactive Application of the Rome Statute in Cases of Security Council Referrals and Ad Hoc Declarations', 81.

¹²⁵⁴ This questions and some possible solutions are comprehensively analyzed in De Souza Dias, 'The Retroactive Application of the Rome Statute in Cases of Security Council Referrals and Ad Hoc Declarations', 76–89; Milanovic, 'Aggression and Legality'.

¹²⁵⁵ *Prosecutor v. Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")*, Judgement on the appeal of Mr. Abd-Al-Rahman against the Pre-Trial Chamber II's "Decision on the Defence 'Exception d'incompétence', ICC Appeals Chamber, fn. 162.

applicable to the accused under international or domestic law at the moment of commission.¹²⁵⁶

The Appeals Chamber's decision to rely on the accessibility and foreseeability test, and to interpret the principle of legality in light of international human rights law, is of significant importance and may determine how the Court understands and applies the principle in the future. When invoking international human rights, the ICC recognized that the scope of the *nullum crimen* principle is broader than the definition provided in the Rome Statute, and opened the possibility to engage with other sources of law than the Statute itself.¹²⁵⁷ It remains to be seen if this interpretation rests limited to cases arising from UN Security Council referrals involving non-State parties to the Rome Statute.¹²⁵⁸

¹²⁵⁶ De Souza Dias, 'The Principle of Legality in the ICC's Appeals Judgment on Abd-Al-Rahman's Jurisdictional Challenge'; Galand, 'The ICC Appeals Judgment on Abd-Al-Rahman Jurisdictional Challenge'.

¹²⁵⁷ Galand, 'The ICC Appeals Judgment on Abd-Al-Rahman Jurisdictional Challenge'.

¹²⁵⁸ De Souza Dias, 'The Principle of Legality in the ICC's Appeals Judgment on Abd-Al-Rahman's Jurisdictional Challenge'.

CHAPTER 5: THE PRINCIPLE OF LEGALITY APPLIED BY THE HUMAN RIGHTS TRIBUNALS

Domestic prosecutions of the numerous atrocities committed worldwide during the 20th century involved important challenges for the legality principle and the prohibition of retroactive crimes and punishments. This was especially the case when domestic courts prosecuted past atrocities fitting the definition of an international crime, but that were committed before domestic laws incorporated such legal classification. However, regional human rights courts have generally supported domestic prosecutions of past human rights violations, applying notions of legality capable of conciliating the respect of the main elements and guarantees of the principle, with the prosecution of past atrocities and the fulfilment of other individual rights and State obligations. This way, human rights courts have significantly contributed to the evolution and development of the international principle of legality, shaping its notion, scope and limits. This chapter provides a detailed assessment of the case law of the ECtHR, the IACtHR and the African Court of Human and Peoples' Rights (ACtHPR).

5.1 The European Court of Human Rights

During the 20th century Europe has suffered multiple conflicts and different forms of violence as the result of armed conflicts and authoritarian regimes.¹²⁵⁹ Once the wars were over, or democratic regimes were restored, European societies have generally tried to confront by different means the atrocities committed in the past. In this line, domestic courts have explored different legal formulas to prosecute and punish those responsible.¹²⁶⁰ This has been particularly the case of Eastern countries that since the fall of the Berlin wall and the collapse of the Soviet Union have shown a special

¹²⁵⁹ Julián Casanova, *Una Violencia Indómita El Siglo XX Europeo*, 1st ed. (Editorial Crítica, 2020).

¹²⁶⁰ Gerhard Werle, '“We Asked for Justice and Got the Rule of Law”: German Courts and the Totalitarian Past', *South African Journal on Human Rights* 11, no. 1 (1995): 70–83; Leila Sadat Wexler, 'Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again', *Columbia Journal of Transnational Law* 32, no. 2 (1994): 289–380; Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge: Cambridge University Press, 2008), 129–38; Alicia Gil Gil and Elena Maculan, 'La Justicia penal en los escenarios posconflicto', *Revista UNISCI*, no. 51 (2019): 228; Ward Ferdinandusse, 'Direct Application of International Criminal Law in National Courts' (Amsterdam, University of Amsterdam, 2005), 29–97; Antonio Cassese, 'Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law. The Kolk and Kislyiy v. Estonia Case before the ECHR', *Journal of International Criminal Justice*, no. 4 (2006): 410–18.

interest to bring to justice those responsible for the crimes committed during the former authoritarian regime.¹²⁶¹ These prosecutions of past crimes have involved an important challenge for the legality principle and the prohibition of retroactive crimes and punishments, enshrined in Article 7 of the ECHR. Therefore, the *nullum crimen* principle has played a central role in the domestic criminal proceedings, and also in the subsequent appeals before the ECtHR.

However, the complaints before the European Court not only concerned past human rights violation, but as well a wide variety of situations. Moreover, since the State parties to the European Convention are both of civil and common law, the task of the Court was rather complicated, having to elaborate a notion of legality suitable for both legal systems.¹²⁶² Consequently, the ECtHR have developed the notion, scope and requirements of the legality principle when facing a wide variety of issues as the application of the Nuremberg clause, retroactive re-characterizations, the compatibility of the principle with progressive judicial clarifications of legal norms, or with statutory limitations, among others.

The European Court and its decisions have greatly contributed to the development of different aspects of the legality principle at national and international level. However, the most significant contribution is probably the accessibility and foreseeability test.¹²⁶³ These criteria to assess legality have decisively influenced international and domestic legal systems and in fact, different international and domestic tribunals have borrowed from the ECtHR the accessibility and foreseeability standards to assess conformity with the *nullum crimen* principle.¹²⁶⁴

¹²⁶¹ Triestino Mariniello, 'The "Nuremberg Clause" and Beyond: Legality Principle and Sources of International Criminal Law in the European Court's Jurisprudence', *Nordic Journal of International Law* 82 (2013): 223; María García Casas, *El Derecho Internacional de la Justicia Transicional: La construcción del marco normativo de las transiciones* (Madrid: Wolters Kluwer, 2022), 29–46.

¹²⁶² Rodrigo Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional' (Madrid, Spain, Universidad Carlos III de Madrid, 2015), 219.

¹²⁶³ The ECtHR case law has had an important effect on both continental and common law domestic systems, and it is argued that the former has experienced a shift from a formal to a more substantive interpretation of the legality principle. According to Peristeridou, "the focus on foreseeability, more optimum expectations of legal certainty, acceptance of the dynamic role of courts, and the balancing of rights that often occurs during judicial interpretation was very quickly absorbed, reproduced and applied by continental systems." Christina Peristeridou, 'The Principle of Legality in European Criminal Law' (Antwerp, Maastricht University, 2015), 101. A comprehensive analysis of the influence of ECtHR case law regarding legality in domestic laws, in particular in the United Kingdom, Germany and the Netherlands, but with references to other countries, in Peristeridou, 101–28.

¹²⁶⁴ See below, Section 5.1.4.

In its early case law, the ECtHR only applied the accessibility and foreseeability test regarding ordinary crimes, and when it had to assess the legality of convictions based on international law, the Court automatically applied ECHR Article 7(2) (the Nuremberg clause). However, from 2008 the ECtHR refuses to apply this provision and uses instead the accessibility and foreseeability standards also regarding international crimes. This case-law development significantly improved the individual guarantees granted by Article 7 and indeed the ECtHR has found in some occasions that domestic court's convictions for international crimes had infringed Article 7.¹²⁶⁵ However, as it is analysed hereinafter, the application in practice of the accessibility and foreseeability standards has raised questions as whether individual's safeguards are effectively granted.

5.1.1 The ECtHR and the legality provisions of the ECHR

In the aftermath of the Second World War, some European countries created the Council of Europe having as main objectives the pursuit of peace through international cooperation and the promotion of the principles grounding a “genuine” democracy, as individual freedom, political liberty and the rule of law.¹²⁶⁶ Not long after, they enacted the European Convention on Human Rights to make effective and to give a concrete content to the obligations assumed by the member States regarding the protection of human rights.¹²⁶⁷ The prohibition of retroactive crimes and punishments was enshrined in Article 7, entitled “No punishment without law”. The provision contains the Nuremberg clause (Article 7(2)), an express reference to both national and international law as valid sources of criminalization and the *nulla poena* principle, but it remains silent regarding *lex mitior*.¹²⁶⁸ The ECtHR considers that the object and purpose of Article 7 is to ensure that no one is subject to arbitrary

¹²⁶⁵ See *Korbely v. Hungary*, App. N° 9174/02, ECtHR GC, 19 September 2008, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-88429%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-88429%22]}); *Vasiliauskas v Lithuania*, App. N° 35343/05, ECtHR GC, 20 October 2015, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-158290%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-158290%22]}).

¹²⁶⁶ Council of Europe, *Statute of the Council of Europe*, Preamble and Article 15, May 1949, ETS 1.

¹²⁶⁷ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5. The Convention came into force the 3 September 1953. Currently, the Convention has been ratified by the forty-seven member States of the Council of Europe have ratified the Convention. In addition, the European Union, as an international organization, is negotiating its accession to the Convention, what would be an interesting novelty in international law.

¹²⁶⁸ ECHR, Art. 7. See above, Section 3.1.4.1.

prosecution, conviction or punishment.¹²⁶⁹ The Article not only prohibits retrospective application of criminal law to the accused's disadvantage, but it includes as well the principles that only the law can define a crime or establish a penalty, and that criminal law must not be extensively construed to the accused's disadvantage, for example by analogy.¹²⁷⁰

The Council established the European Court of Human Rights in 1959 to enforce the Convention. The Court has jurisdiction over the 46 member States of the Council of Europe.¹²⁷¹ Both States and individuals can bring alleged violation of ECHR rights before the Court.¹²⁷² The Court's judgments are binding on the member-States and have led to numerous modifications of domestic laws in different areas.¹²⁷³

¹²⁶⁹ *Streletz, Kessler and Krenz v. Germany*, App. N° 34044/96, 35532/97 and 44801/98, ECtHR GC, 22 March 2001, para. 88, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-59353%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-59353%22]}); *Kononov v. Latvia*, App. N° 36376/04, ECtHR GC, 16 May 2010, para. 185, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-98669%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-98669%22]}); *Korbely v. Hungary*, paras 69-71. *Jorgic v. Germany*, App. N° 74613/01, ECtHR ECtHR 1st Section, 12 July 2007, paras 101-09 available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-81608%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-81608%22]}).

¹²⁷⁰ Council of Europe, 'Guide on Article 7 of the European Convention on Human Rights - No Punishment without Law: The Principle That Only the Law Can Define a Crime and Prescribe a Penalty', 30 April 2022, para. 2.

¹²⁷¹ On 24 February 2022 Russia invaded Ukraine. Both countries were Member States of the Council of Europe. Less than a month later the Committee of Ministers decided to expel Russia with immediate effect. The 23 of March the Committee and the Plenary of the European Court of Human Rights decided that from the 16 September 2022 Russia would cease to be a contracting party to the ECHR. However, the ECtHR jurisdiction reaches alleged violations of the Convention committed by Russia until the expulsion became effective in September. Some of the practical and legal issues arising from Russia's withdraw from the ECHR are analysed in Kanstantsin Dzehtsiarou and Laurence Helfer, 'Russia and the European Human Rights System: Doing the Right Thing ... but for the Right Legal Reason?', *EJIL: Talk!* (blog), 29 March 2022, <https://www.ejiltalk.org/russia-and-the-european-human-rights-system-doing-the-right-thing-but-for-the-right-legal-reason/>.

¹²⁷² Until 1998 individuals did not have direct access to the Court. They had to apply to the European Commission on Human Rights (ECmHR), and then, if the case was well funded, it was presented to the Court on their behalf. Protocol 11 abolished the Commission and allowed individuals to directly bring claims to the Court. Council of Europe, *Protocol 11 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Restructuring the Control Machinery Established Thereby*, 11 May 1994, ETS 155, available at: https://www.echr.coe.int/Documents/Library_Collection_P11_ETSI55E_ENG.pdf.

¹²⁷³ Among others, see Dia Anagnostou and Alina Mungiu-Pippidi, 'Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter', *European Journal of International Law* 25, no. 1 (1 February 2014): 205-27; Sarah Casella, 'The European Court of Human Rights and Its Impact on Domestic Legal Systems', *Revista de Direito Econômico e Socioambiental* 11, no. 2 (1 December 2020): 3-23; Helen Keller

5.1.2 The concept of law

The notion of “law” enshrined in the ECHR, and later outlined by the ECtHR, determines the understanding and scope of the legality principle, and comprises qualitative requirements, in particular those of accessibility and foreseeability.¹²⁷⁴ ECHR Article 7 establishes that no one shall be convicted for a conduct that at the time of commission was not considered criminal under national or international law. The concept of national *law* (*droit* and not *loi* in French, *derecho* and not *ley* in Spanish) is understood as covering both domestic legislation and case law.¹²⁷⁵ This is probably due to the existence of common and civil law systems in the Council of Europe.¹²⁷⁶ However, as it will be further analysed, State practice cannot be considered as “law” if it is incompatible with applicable codified norms, and if empties of its substance the legislation on which it was allegedly grounded.¹²⁷⁷ For its part, the notion of international *law* in Article 7 refers to international treaties ratified by the State in question¹²⁷⁸ as well as customary international law, even when it has never been formally codified.¹²⁷⁹

and Alec Stone Sweet, ‘Assessing the Impact of the ECHR on National Legal Systems’, in *A Europe of Rights: The Impact of the ECHR on National Legal Systems* (Oxford, New York: Oxford University Press, 2008), 677–712.

¹²⁷⁴ *Del Río Prada v. Spain*, App. N° 42750/09, ECtHR GC, 21 October 2013, para. 91, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-127697%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-127697%22]}); *S.W. v. United Kingdom*, para. 35. Council of Europe, ‘Guide on Article 7 of the European Convention on Human Rights - No Punishment without Law: The Principle That Only the Law Can Define a Crime and Prescribe a Penalty’, para. 8.

¹²⁷⁵ It also refers to statutes and enactments of lower rank, non-codified constitutional customs, as comprehensively explained, with further references in Council of Europe, para. 8.

¹²⁷⁶ Peristeridou, ‘The Principle of Legality in European Criminal Law’, 96.

¹²⁷⁷ Regarding the former German Democratic Republic border policy, see *Streletz, Kessler and Krenz v. Germany*, paras 67-87, analyzed below. Regarding the practice of eliminating opponents in former Czechoslovakia, see *Polednová v. the Czech Republic* as cited in Council of Europe, ‘Guide on Article 7 of the European Convention on Human Rights - No Punishment without Law: The Principle That Only the Law Can Define a Crime and Prescribe a Penalty’, para. 9.

¹²⁷⁸ *Streletz, Kessler and Krenz v. Germany*, paras 90-106. Council of Europe, ‘The “Quality of Law” Requirements and the Principle of (Non-)Retrospectiveness of the Criminal Law under Article 7 of the Convention’ (Research Division - European Court of Human Rights, 2019), para. 18.

¹²⁷⁹ For the international laws and customs of war see *Kononov v. Latvia*, GC, paras 186, 213, 227, 237 and 244; for the concept of “crime against humanity” see *Korbely v. Hungary*, paras 78-85; and for the concept of “genocide” see *Vasiliauskas v Lithuania*, paras 171-175, 178. Council

Both national and international law are considered valid sources of criminalisation and they both satisfy the requirements of the *nullum crimen* principle. It means that convictions could be based either on domestic legislation or on international norms applicable to the accused at the moment the crime was committed. This could be interpreted in two different manners. First, as requiring either national or international law to criminalise and punish a conduct independently, meaning that each particular legal system have to provide its own criminalisation grounds. Both sources of law would not be interchangeable and, accordingly, a person could be convicted under international law only if the conduct was criminalised by an international norm.¹²⁸⁰

However, Article 7 has been generally understood as only requiring prosecuted conducts to be criminalised at the moment of commission by any source of law, either national or international law. The emphasis has been placed on requiring previous criminalization of the conduct rather than a specific source of law, allowing crimes to be established in a legal system different to the one where the prosecution takes place.¹²⁸¹ Therefore, the interchangeable application of domestic and international criminal law has been accepted. For example, a conviction based on domestic legal provisions adopted years after the commission of the crime, would be compatible with the legality requirements if international law of the time already criminalised the conduct.¹²⁸² In other words, if at the moment of commission domestic laws did not criminalise the conduct, convictions grounded on a direct application of international law are compatible with the requirements of ECHR Article 7.¹²⁸³

of Europe, ‘Guide on Article 7 of the European Convention on Human Rights - No Punishment without Law: The Principle That Only the Law Can Define a Crime and Prescribe a Penalty’, 10.

¹²⁸⁰ Talita De Souza Dias, ‘Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law’ (University of Oxford, 2019), 55–56; Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 48–49, 406. See *Streletz, Kessler and Krenz v. Germany*, Concurring Opinion of Judge Loucaides, para. 40, cited with further references in De Souza Dias, ‘Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law’, 56.

¹²⁸¹ De Souza Dias, ‘Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law’, 55–56; Héctor Olásolo, ‘El Principio Nullum Crimen Sine Iure En El Derecho Internacional Contemporáneo’, *Anuario Iberoamericano de Derecho Internacional Penal* I (2013): 26.

¹²⁸² *Vasiliauskas v Lithuania*, para. 166, Council of Europe, ‘The “Quality of Law” Requirements and the Principle of (Non-)Retrospectiveness of the Criminal Law under Article 7 of the Convention’, para. 118.

¹²⁸³ Among others, see *Kononov v. Latvia*, analysed below.

Nevertheless, scholars do not agree on whether international law can be directly applicable under Article 7(1), and while some agree with the Court's view,¹²⁸⁴ others consider that the legality principle requires the transposition of international law into domestic legal systems.¹²⁸⁵ It seems more convincing the view that it should be assessed whether the specific constitutional system contemplates the direct internal effect of international law and whether the perpetrator could reasonably foresee that his/her acts were considered criminal under international law.¹²⁸⁶ Regarding a related issue analysed below, it should be noted that some scholars consider that the ECtHR has erroneously accepted as a valid ground of criminalization international law sources that only imposed obligations on States or that did not include any reference to individual criminal responsibility.¹²⁸⁷

The ECtHR considers that, for the purposes of Article 7, "law" includes both written and unwritten law.¹²⁸⁸ It is unquestionable that common law has been accepted by the European Court as a valid source of criminalization.¹²⁸⁹ Similarly, the ECtHR

¹²⁸⁴ J. Velu and R. Ergec (eds.), *La Convention Européenne des droits de l'homme* (Bruxelles: Bruylant, 1990), 514, cited in Mariniello, 'The "Nuremberg Clause" and Beyond: Legality Principle and Sources of International Criminal Law in the European Court's Jurisprudence', 242.

¹²⁸⁵ J. Pradel and G. Cortens, *Droit pénal européen* (Paris: Dalloz, 1999), 320; D. Harris, M. O'Boyle and C. Warbrick, *The Law of the European Convention on Human Rights* (London, 1995), 277, cited in Mariniello, 242.

¹²⁸⁶ P. Van Dijk and G.J.H. Van Hoof (eds.), *Theory and Practice Theory and Practice of European Convention on Human Rights* (The Hague, 1990), 486, cited in Mariniello, 243.

¹²⁸⁷ Mariniello, 243–44; Alicia Gil Gil, 'La Excepción al Principio de Legalidad Del Número 2 Del Art. 7 Del Convenio Europeo de Derechos Humanos', *Anuario de Derecho Penal y Ciencias Penales*, no. 63 (2010): 155. Referring, *inter alia*, to the border guards cases and *Kononov v. Latvia*, analysed below.

¹²⁸⁸ *H. W. v. Germany*, 22 March 2001, ECtHR, no. 37201/97, para. 52; *K.-H.W. v. Germany*, App. N°37201/97, ECtHR GC, 22 March 2001, para. 62 available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-59352%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-59352%22]}). Council of Europe, 'The "Quality of Law" Requirements and the Principle of (Non-)Retrospectiveness of the Criminal Law under Article 7 of the Convention', para. 3.

¹²⁸⁹ Council of Europe, 'Guide on Article 7 of the European Convention on Human Rights - No Punishment without Law: The Principle That Only the Law Can Define a Crime and Prescribe a Penalty', para. 8; Machteld Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes against Humanity, War Crimes* (Antwerpen: Intersentia, 2002), 157. Ambos considers that the ECtHR has adopted the common law conception of the *nullum crimen* principle and that it is not the valid standard to assess compliance with the a legality principle. Kai Ambos, 'Common Law y los disparos del muro - Artículo 7 de la Convención Europea de Derechos Humanos', *Isonomía*, no. 20 (2004): 55.

considers that if at the moment of commission a conduct was criminalized under customary international law, its prosecution would fulfil the *nullum crimen* requirements. However, as it will be later analysed, convictions solely based on customary international law could raise issues regarding certainty since, due to its unwritten nature, the content of such norms is often vague and evolves with time.¹²⁹⁰

5.1.3 The principle of legality and international crimes

The European Commission and the European Court of Human Rights had the opportunity to address in different occasions the application of the legality principle to cases regarding convictions for war crimes, genocide or crimes against humanity. The second paragraph of the Article (the Nuremberg clause) was used in early cases to uphold convictions and retroactive applications of domestic laws incorporating pre-existing international crimes into domestic legislations.¹²⁹¹ The application of Article 7(2) excluded the assessment of the *nullum crimen* requirements regarding punishment of conducts criminalised by the “general principles of law recognised by civilised nations”. The conformity of the prosecution to the guarantees provided by the principle of legality, as enshrined in Article 7(1), was not examined. Article 7(2) made irrelevant to ascertain whether a conviction for international crimes fulfilled the legality standards, as if at the time of commission, the individual was aware of the criminal nature of his/her conduct. Therefore, it has been argued that the Commission and the Court admitted the possibility of convictions even if the law criminalizing the conduct

¹²⁹⁰ Ilias Bantekas, *International Criminal Law* (Oxford: Hart Publishing, 2010), 25; H.G. Van der Wilt, ‘Nullum Crimen and International Criminal Law: The Relevance of the Foreseeability Test’, *Nordic Journal of International Law* 84, no. 3 (13 July 2015): 520–21. See below, Section 5.1.4.6.

¹²⁹¹ Regarding war crimes, see *B. v. Belgium*, ECmHR, 10 July 1957; *X v. Norway*, ECmHR, 30 May 1961, as cited in Mariniello, ‘The “Nuremberg Clause” and Beyond: Legality Principle and Sources of International Criminal Law in the European Court’s Jurisprudence’, 229. Concerning treason and collaboration with the enemy, see *De Becker v. Belgium*, App. N° 214/56, ECmHR, 27 March 1962, as cited in Mariniello, 229. Regarding crimes against humanity, see *Paul Touvier v. France*, App. N° 29420/95, ECmHR, Decision on admissibility, 13 January 1997, available at: https://www.stradalex.com/fr/sl_src_publ_jur_int/document/echr_29420-95; *Papon v. France (n°2)*, App. N° 54210/00, ECtHR 1st Section, 15 November 2001, para. 5, available at: <https://hudoc.echr.coe.int/fre#%22itemid%22:%22001-24071%22>}; *Kolk and Kislyiy v. Estonia*, App. N° 23052/04 and 24018/04, ECtHR 4th Section, Decision on admissibility, 17 January 2006, available at: <https://hudoc.echr.coe.int/eng#%22itemid%22:%22001-72404%22>}; *Penart v. Estonia*, App. 14685/04, ECtHR 4th Section, Decision on admissibility, 24 January 2006, available at: <https://hudoc.echr.coe.int/eng#%22itemid%22:%22001-72685%22>}.

was not accessible, or when the applicant could not foresee, at the time of commission, the potential criminal consequences of his/her acts.¹²⁹²

However, with time, the ECtHR showed an increasing reluctance to explicitly use Article 7(2), and in 2008 the Court decided to extend the guarantees of Article 7(1) to the prosecution of international crimes. From that moment, the accessibility and foreseeability test, developed and applied by the court to ordinary crimes, began to be used as well to assess the conformity to the legality principle of convictions for war crimes, genocide or crimes against humanity. The early ECtHR case law, based on ECHR Article 7(2), is hereinafter examined. The accessibility and foreseeability tests, first applied to ordinary offences and then to international crimes, is studied in the next section.

5.1.3.1 Crimes committed during Second World War

Years after the end of the Second World War, some European countries started prosecutions against their own nationals for crimes committed during the war.¹²⁹³ Various individuals were convicted for war crimes or crimes against humanity despite no statutory provision included such crimes in their domestic legislations at the time of commission. Some convicted appealed to the ECtHR claiming that their conviction was based on a retroactive application of criminal laws and therefore, breached ECHR Article 7. However, the Commission and the Court systematically resorted to the Nuremberg clause to declare all the appeals inadmissible, arguing that the crimes were punishable according to the general principles of law recognised by the civilised nations. The *Touvier* case illustrates well this line of reasoning.¹²⁹⁴

¹²⁹² Mariniello, 'The "Nuremberg Clause" and Beyond: Legality Principle and Sources of International Criminal Law in the European Court's Jurisprudence', 233.

¹²⁹³ Among others, case *Menten* in the Netherlands, or *Kappler* and *Priebke* in Italy. See references and other cases in Kai Ambos, *La Parte General Del Derecho Penal Internacional*, trans. Ezequiel Malarino (Montivideo, Uruguay: Konrad-Adenauer-Stiftung e. V., 2005), 19–20. In France, Klaus Barbie, Paul Touvier and Maurice Papon were all convicted for crimes against humanity. See an analysis of the cases, with further references in Leila N. Sadat, 'The Nuremberg Paradox', *American Journal of Comparative Law* 58, no. 151 (2010): 173–87.

¹²⁹⁴ This reasoning had been previously followed by the Commission, regarding war crimes, in *B. v. Belgium*, 10 July 1957, ECmHR; *X v. Norway*, 30 May 1961, ECmHR. In *De Becker v. Belgium*, the Commission used the same argument regarding acts of treason and collaboration with the enemy. In *Touvier*, the Court applied for the first time this reasoning to crimes against humanity. Also with regard to crimes against humanity the Court directly applied ECHR Article 7(2) to declare the appeal inadmissible in *Papon v. France* (*nº2*), para. 5.

Paul Touvier was a senior police official and the intelligence chief of a pro-Nazi militia during the German occupation of France in the Second World War. He was involved in several extrajudicial executions, the shooting of civilian hostages, tortures and the deportation of Jews. After a long judicial proceeding French courts condemned Touvier for crimes against humanity and sentenced him to life imprisonment. At the time of commission French laws included no statutory provision on crimes against humanity. French courts dismissed the applicant's claims regarding the prohibition of retroactive application of criminal laws, and that the prosecution was time barred. The courts based the conviction on a law from 1964 that referred to the Nuremberg Charter and declared crimes against humanity imprescriptible, ICCPR Article 15(2), and ECHR Article 7(2).¹²⁹⁵

Touvier appealed his conviction before the ECmHR claiming an infringement of ECHR Article 7 since he was condemned on the basis of retroactive criminal laws. However, the Commission referred to Article 7(2) and declared the application inadmissible since at the time of commission Touvier's acts were already criminal under the "general principles recognized by the civilized nations". According to the ECmHR "the purpose of paragraph 2 of Article 7 is to specify that this Article does not affect laws which, in the wholly exceptional circumstances at the end of the Second World War, were passed in order to punish war crimes" or crimes against humanity.¹²⁹⁶ Moreover the European Commission considered that the 1964 Law only reflected pre-existent international laws determining that crimes against humanity cannot be time barred.¹²⁹⁷ In addition, the ECmHR considered "unnecessary to rule on whether the offence with which the applicant was charged could, at the time it was committed, be classified as such."¹²⁹⁸ It was determined that the exception provided for in Article 7(2) was applicable to the case and therefore, Touvier's appeal was declared inadmissible.¹²⁹⁹

¹²⁹⁵ A comprehensive analysis of the proceedings before the French courts in Wexler, 'Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again'; Sevan Garibian, 'Le recours au droit international pour la répression des crimes du passé: Regards croisés sur les affaires Touvier (France) et Simón (Argentine)', *Annuaire Français de Droit International* 56, no. 1 (2010): 197–215.

¹²⁹⁶ *Paul Touvier v. France*, para. 7. Decision analysed in Gil Gil, 'La Excepción al Principio de Legalidad Del Número 2 Del Art. 7 Del Convenio Europeo de Derechos Humanos', 157–58.

¹²⁹⁷ *Paul Touvier v. France*, para. 7.

¹²⁹⁸ Ibid.

¹²⁹⁹ The same line of reasoning, based on a direct application of Article 7(2), was followed by the ECmHR and the ECtHR to declare the inadmissibility of the appeals in *B. v. Belgium*; *X v. Norway*; *De Becker v. Belgium*; *Papon v. France* (nº2).

5.1.3.2 Crimes committed after the Second World War: the Kolk and Kislyiy case

Until 2006 the Commission and the Court had applied ECHR Article 7(2) to uphold domestic convictions for crimes committed during the Second World War. However, in *Kolk and Kislyiy* the ECtHR expanded for the first time the application of the Nuremberg clause to events that took place after the war. Previously, when the Court had addressed situations not referring to the Second World War, it had avoided applying paragraph 2 of Article 7, and had always tried to prove the non-violation of the first paragraph.¹³⁰⁰ On the contrary, in *Kolk and Kislyiy* the Court found that the punishment of crimes against humanity committed in 1949 based on domestic criminal laws passed years after the events, did not infringe Article 7, on the basis of its second paragraph. The ECtHR held that at the moment of commission the conducts were already criminal according to the “general principles of law recognized by civilized nations” and therefore their punishment did not breach Article 7.¹³⁰¹ Hereinafter the facts and the ECtHR decisions are first examined, followed by the analysis of some doctrinal critiques.

A. The facts and the ECtHR decisions

In 1949 Kolk and Kislyiy, two governmental officials of the occupied Estonian Republic, participated in the deportation of civilian population from Estonia to remote areas of the Union of Soviet Socialist Republics (USSR). Estonian courts, after the country regained its independence following the USSR’s disintegration, condemned Kolk and Kislyiy for crimes against humanity on the basis of the Estonian Criminal Code, the Nuremberg Charter and the Nuremberg Principles.¹³⁰² However, the domestic criminal laws applicable in Estonia in 1949 did not contain any reference to crimes against humanity, and it was only in 1994 when this offence was included in the Estonian Criminal Code.

Kolk and Kislyiy appealed the domestic court’s decisions before the ECtHR, alleging a breach of ECHR Article 7 since they had been condemned on the basis of a

¹³⁰⁰ Gil Gil, ‘La Excepción al Principio de Legalidad Del Número 2 Del Art. 7 Del Convenio Europeo de Derechos Humanos’, 159, 163.

¹³⁰¹ In the *Penart* decision, issued some weeks later, the ECtHR followed a similar reasoning and applied Article 7(2) to events not related to the atrocities committed during the Second World War. In this case the Court used the second paragraph of Article 7 to uphold the conviction in 2003 of Mr. Penart for crimes against humanity committed in 1953. See *Penart v. Estonia*, para. 7.

¹³⁰² See a summary of the facts and the proceedings before the Estonian Courts in *Kolk and Kislyiy v. Estonia*, paras 2-6.

retroactive criminal law. Similarly, they claimed that their acts had been carried out in time of peace while the crimes against humanity, as defined in the Nuremberg Charter and the Nuremberg Principles, needed to be executed in connection with crimes against peace or war crimes.

The ECtHR dismissed the applicant's claims and found that their conviction by the Estonian courts was in conformity with ECHR Article 7. The European Court considered "that even if the acts committed by the applicants could have been regarded as lawful under the Soviet law at the material time, they were nevertheless found by the Estonian courts to constitute crimes against humanity under international law at the time of their commission. The Court sees no reason to come to a different conclusion."¹³⁰³

The Court noted that Article 6(c) of the Nuremberg Charter expressly recognized deportation of the civil population as a crime against humanity. Regarding the applicability of the Charter to events occurred after the Second World War, the Court established the "universal validity of the principles concerning crimes against humanity" as subsequently confirmed by the 1946 UN General Assembly resolution.¹³⁰⁴ Therefore, "responsibility for crimes against humanity cannot be limited only to the nationals of certain countries and solely to acts committed within the specific time frame of the Second World War."¹³⁰⁵ Hence, the applicants' conducts, occurred some years after the war, were covered by these international criminal norms.

The ECtHR explicitly referred to Article 7(2) to justify the convictions, reminding that it expressly provides that Article 7 "shall not prejudice the trial and punishment of a person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognized by civilized nations."¹³⁰⁶ The Court considered that such general principles included the prohibition of crimes against humanity committed during or after the Second World War, and therefore the punishment of the applicants' acts was acceptable under ECHR Article 7.

To answer the applicants' claim that they could not have been reasonably expected to be aware of the criminal nature of their actions, the ECtHR noted that the Soviet Union was a party to the London Agreement by which the Nuremberg Charter was enacted. Similarly, the Soviet Union was a member State of the United Nations

¹³⁰³ *Kolk and Kislyiy v. Estonia*, para. 9. The expression "at the material time", often used by the ECtHR, refers to the moment when the crime was committed.

¹³⁰⁴ *Kolk and Kislyiy v. Estonia*, para. 6.

¹³⁰⁵ *Ibid.*

¹³⁰⁶ *Ibid.*, para. 7.

when the General Assembly affirmed the principles of international law recognized by the Charter. Therefore, the Court considered that these principles were not unknown for the Soviet authorities.¹³⁰⁷

B. Some doctrinal critiques

Despite the Court's decision has been criticized by different authors,¹³⁰⁸ the most insightful and convincing critical analysis of this decision has been provided by Cassese.¹³⁰⁹ While the author agrees with the final ruling, he disapproves several aspects of the Court's reasoning. Mainly, the author considers the Court's recourse to ECHR Article 7(2) as erroneous and unnecessary. Cassese notes that the aim of Article 7(2) is to ensure that acts that are not criminalized by customary or treaty norms, could be prosecuted by virtue of "general principles of law". These "principles" constitute a subsidiary source only applicable when primary sources of international law, as treaties or custom, do not produce any results.¹³¹⁰ In this sense, the author denies the existence in 1949 of a "general principle of law recognized by civilized nations" prohibiting crimes against humanity. On the contrary, at that time the criminalization of crimes against humanity stemmed from treaty law, as the Nuremberg Charter, and customary norms.¹³¹¹ Therefore, the Court should have upheld the applicants' convictions based on Article 7(1) since it recognizes international law as a valid source of criminalization.

Contrary to the ECtHR's view, Cassese considered that in 1949 international law only established the punishment of crimes against humanity when committed in connection with or in execution of war crimes or crimes against peace, and it was only in the late 1960s when the crimes against humanity were progressively admitted also in times of peace.¹³¹² In Cassese's opinion the ECtHR should have considered that the applicants' crimes were committed in connection with a war of aggression since in 1940 the Soviet Union had illegally invaded and military occupied Estonia. The deportation

¹³⁰⁷ Ibid., para. 9.

¹³⁰⁸ Among others, see Bantekas, *International Criminal Law*, 25; Gil Gil, 'La Excepción al Principio de Legalidad Del Número 2 Del Art. 7 Del Convenio Europeo de Derechos Humanos', 158.

¹³⁰⁹ Cassese, 'Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law. The Kolk and Kislyiy v. Estonia Case before the ECHR'.

¹³¹⁰ Ibid., 14-15.

¹³¹¹ Ibid.

¹³¹² Ibid., 413-14. On the *war nexus*, see as well Mariniello, 'The "Nuremberg Clause" and Beyond: Legality Principle and Sources of International Criminal Law in the European Court's Jurisprudence', 232-33.

of Estonian civilians to remote areas of the Soviet Union was clearly a direct consequence, or was closely linked with the Soviet aggression. Likewise, the international rules applicable at the moment did not require the nexus between the aggression and the crimes against humanity to be close in time.¹³¹³ Consequently, the Estonian courts did not apply criminal law retroactively nor they infringed ECHR Article 7(1) when convicting Kolk and Kislyiy since their acts were already criminalized by international law as crimes against humanity.¹³¹⁴

5.1.4 The accessibility and foreseeability test

The ECtHR has significantly participated to the development of the *nullum crimen* principle in different areas, but the accessibility and foreseeability test are probably its most significant contribution.¹³¹⁵ These criteria to assess legality have decisively influenced both international and domestic legal system. In fact, different international tribunals have borrowed from the ECtHR the accessibility and foreseeability standards to assess conformity with the *nullum crimen* principle.¹³¹⁶

Despite Article 7 only requires previous criminalization of the offender's behaviour, the Court resort to the principle's rationales to assess conformity with legality and verifies if at the moment of commission the individual knew or could have known that his/her conduct would involve criminal liability.¹³¹⁷ This way, the Court

¹³¹³ Cassese, 'Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law. The Kolk and Kislyiy v. Estonia Case before the ECHR', 413–14.

¹³¹⁴ Ibid., 418.

¹³¹⁵ Peristeridou, 'The Principle of Legality in European Criminal Law', 95–96.

¹³¹⁶ For an analysis on how the *ad hoc* international tribunals understand and apply the accessibility and foreseeability test see, *inter alia*, Alexandre Skander Galand, *UN Security Council Referrals to the International Criminal Court: Legal Nature, Effects and Limits* (Brill Nijhoff, 2018), 143–47; Mariniello, 'The "Nuremberg Clause" and Beyond: Legality Principle and Sources of International Criminal Law in the European Court's Jurisprudence', 239; Ferdinandusse, 'Direct Application of International Criminal Law in National Courts', 2005, 239–51. However the accessibility and foreseeability standards have not been universally accepted. Various human rights bodies, international tribunals and domestic courts prefer more stringent tests, and this is becoming a general trend. De Souza Dias, 'Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law', 53, 62–64. On the contrary, Van der Wilt considers that the progressive codification of international criminal law will progressively reduce violations of the legality principle. The remaining infringements will be originated by erratic implementations of international crimes into domestic legal systems. According to the author, in these situations the foreseeability test will be the main indicator of a *nullum crimen* violation. Van der Wilt, 'Nullum Crimen and International Criminal Law', 530.

¹³¹⁷ Van der Wilt, 'Nullum Crimen and International Criminal Law', 519–20.

takes into account the point of view of the accused, and evaluates if at the moment of commission the laws criminalising his/her conduct were sufficiently accessible, and if criminal liability was sufficiently foreseeable. Therefore, the ECtHR understands that Article 7 requires criminal law to be accessible and the criminal consequences to be foreseeable at the relevant time. Accessibility and foreseeability are not conceived as elements of the *nullum crimen* principle, but rather as qualitative requirements or criteria to test conformity with the legality principle in concrete cases.¹³¹⁸ Thus, the tests must be satisfied regarding both crime definitions and penalties.¹³¹⁹

The accessibility and foreseeability standards have experienced a gradual but constant development in international law.¹³²⁰ During the Nuremberg Trials and other post-World War II trials the question of whether the accused knew or could have known that his/her acts were criminal, was not a decisive element when assessing conformity with the legality principle. Three decades later, in 1979, the European Court introduced for the first time accessibility and foreseeability as standards to assess legality.¹³²¹ In the following years, particularly during the 1990s, these criteria were progressively developed, becoming central requirements of the *nullum crimen* principle in the ECtHR's case law.¹³²² Despite the Court recurrently used these standards to evaluate conformity of domestic practice and legislation with Article 7(1), it avoided applying them when confronted to convictions for international crimes. Instead, the ECtHR opted for upholding such convictions applying Article 7(2) arguing that such atrocities were already prohibited by "general principles of law recognised by civilised nations". In 2008 the Court finally decided to assess the conformity of convictions for

¹³¹⁸ Council of Europe, 'Guide on Article 7 of the European Convention on Human Rights - No Punishment without Law: The Principle That Only the Law Can Define a Crime and Prescribe a Penalty', paras 8, 26; De Souza Dias, 'Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law', 51.

¹³¹⁹ Regarding crime's definition see *Jorgic v. Germany*, paras 103-14. With regards to the definition of a penalty and its scope, see *Kafkaris v. Cyprus*, para. 150; *Camilleri v. Malta*, paras 39-45, as cited in Council of Europe, 'Guide on Article 7 of the European Convention on Human Rights - No Punishment without Law: The Principle That Only the Law Can Define a Crime and Prescribe a Penalty', 26.

¹³²⁰ Van der Wilt, 'Nullum Crimen and International Criminal Law', 525-29.

¹³²¹ *Sunday Times v The United Kingdom* App. N° 6538/74, ECtHR, 26 April 1979, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-57584%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57584%22]}).

¹³²² José Augusto Pacheco de Freitas, 'La Relación Entre El Principio de Legalidad En Derecho Penal Internacional y La Tipificación Internacional de Los Crímenes de Lesa Humanidad: Una Perspectiva Histórica', *Agenda Internacional* Año XXVI, no. 37 (2019): 192.

international crimes with Article 7(1), and therefore applied the accessibility and foreseeability test as well to these kinds of offences.¹³²³

The ECtHR used for the first time the accessibility and foreseeability test in the *Sunday Times v. United Kingdom* case. The Court found that these requirements were associated to the notion of “law” in the Convention.

“Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.”¹³²⁴

The Court subsequently recognized that, despite certainty is desirable, the consequences of a conduct do not need to be foreseeable with absolute certainty, since it would be a requirement impossible to satisfy and would bring excessive rigidity.¹³²⁵ The ECtHR stated that laws “must be able to keep pace with changing circumstances”, and many legal provisions are inevitable drafted, to a certain point, in a vague manner, and therefore, their interpretation and application depends on practice.¹³²⁶

In short, the Court considers that the *nullum crimen* principle requires that the individual knew or could have known that his/her conduct was forbidden by the law and would involve criminal liability. However, the ECtHR specifies that foreseeability does not mean a requirement of absolute legal certainty, being sufficient that the individual could foresee a risk of being prosecuted and, therefore, a reasonable degree of uncertainty is accepted.

¹³²³ *Kononov v. Latvia*. For Van der Wilt, a fourth and final phase is inaugurated by the ICC *Lubanga* case. “The decision demonstrates that a comprehensive codification of the elements of crime not only strengthens the *nullum crimen* principle, but also minimizes the scope for a successful defense of mistake of law.” Van der Wilt, ‘Nullum Crimen and International Criminal Law’, 515.

¹³²⁴ *Sunday Times v The United Kingdom*, para. 49.

¹³²⁵ Ibid.

¹³²⁶ Ibid.

5.1.4.1 Accessibility

The accessibility test refers to the possibility of an individual to know the law criminalizing his/her conduct. The Court verifies if the norm grounding a conviction was public and sufficiently accessible to the accused at the material time.¹³²⁷

Regarding prosecutions exclusively based on international law, the ECtHR evaluates whether a treaty had been incorporated into domestic legal system and has been officially published.¹³²⁸ For instance, in *Korbely* the Court considered that the Geneva Conventions, the main legal ground for the conviction, was sufficiently accessible to the applicant since they had been proclaimed and officially published in the State in question.¹³²⁹

However, in some occasions the European Court has merged the assessment of the accessibility and foreseeability requirements, and has considered that official publication was not needed if the perpetrator knew or could have known that his/her conduct was prohibited.¹³³⁰ In *Kononov* the Court considered that the fact “that those international laws and customs were not formally published in the USSR or in the Latvian SSR, (...) cannot be decisive.”¹³³¹ Similarly, in *Kolk and Kislyiy* the Court considered that, since the Soviet Union was as well a party to the London Agreement by which the Nuremberg Charter was enacted, and was a member of the United Nations when the Nuremberg Principles were affirmed, the Soviet authorities could not claim that they were not aware of the developing criminalization of crimes against

¹³²⁷ *G. v. France*, App. N° 15312/89, 27 September 1995, para. 25, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-57968%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57968%22]}); *Kokkinakis v. Greece*, para. 40. De Souza Dias, ‘Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law’, 51; Council of Europe, ‘Guide on Article 7 of the European Convention on Human Rights - No Punishment without Law: The Principle That Only the Law Can Define a Crime and Prescribe a Penalty’, para. 27.

¹³²⁸ Council of Europe, ‘Guide on Article 7 of the European Convention on Human Rights - No Punishment without Law: The Principle That Only the Law Can Define a Crime and Prescribe a Penalty’, para. 27.

¹³²⁹ *Korbely v. Hungary*, paras 74-75. Council of Europe, ‘The “Quality of Law” Requirements and the Principle of (Non-)Retrospectiveness of the Criminal Law under Article 7 of the Convention’, paras 17, 19.

¹³³⁰ “(.) the Court considers that, in the context of a commanding officer and the laws and customs of war, the concepts of accessibility and foreseeability must be considered together.” *Kononov v Latvia* (GC), para. 235.

¹³³¹ *Kononov v Latvia* (GC), para. 237.

humanity.¹³³² The ECtHR may also assess the accessibility of a crime definition in the light of the applicable customary international law.¹³³³

5.1.4.2 Foreseeability

For its part, foreseeability means the capacity of an average person to predict the consequences of his/her conduct and therefore, to allow him/her to adapt his/her conduct accordingly in advance.¹³³⁴ The foreseeability requirement is applicable both to legal rules and their judicial interpretation and clarification, including judicial developments of criminal law through the interpretation of statutory offences or the identification of customary crimes.¹³³⁵ Foreseeability, as understood by the ECtHR, is not absolute and varies depending on a number of factors that will be analysed hereinafter. This way, when assessing the foreseeability of the law, the European Court takes into account, among other factors, the political regime, the rules of general international law and the ECHR standards, and the legal literature at the material times. Similarly, foreseeability depends “to a considerable degree on the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed.”¹³³⁶

¹³³² *Kolk and Kislyiy v. Estonia*, para. 9. However, in this case the ECtHR grounded its decision on Article 7(2), and not on Article 7(1) and therefore, did not apply the accessibility and foreseeability test. The above-mentioned argument was raised to answer the applicants’ allegation that they could not reasonably have been expected to be aware that their acts constituted crimes against humanity at the time of their commission.

¹³³³ *Vasiliauskas v. Lithuania*, paras 167-68, regarding the 1946 UN General Assembly Resolution 96 (I) condemning genocide even before the entry into force of the 1948 Convention on Genocide. Council of Europe, ‘Guide on Article 7 of the European Convention on Human Rights - No Punishment without Law: The Principle That Only the Law Can Define a Crime and Prescribe a Penalty’, para. 27.

¹³³⁴ Council of Europe, ‘The “Quality of Law” Requirements and the Principle of (Non-)Retrospectiveness of the Criminal Law under Article 7 of the Convention’, para. 20.

¹³³⁵ De Souza Dias, ‘Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law’, 50–51.

¹³³⁶ *Vasiliauskas v. Lithuania*, para. 157, cited, with further references, in Council of Europe, ‘The “Quality of Law” Requirements and the Principle of (Non-)Retrospectiveness of the Criminal Law under Article 7 of the Convention’, para. 79. See a comprehensive analysis of ECtHR’s case law regarding these factors, in Council of Europe, 22–28.

A. Foreseeability of legal norms

Regarding legal rules, the ECtHR has found that a law is foreseeable when “the applicant’s act, at the time when it was committed, constituted an offence defined with sufficient precision by domestic and/or international law to be able to guide the applicant’s behaviour and prevent arbitrariness.”¹³³⁷ The ECtHR takes into account that since statutes must be of general application their wording cannot always be absolutely clear and precise. To prevent excessive rigidity and to adapt to changing circumstances numerous laws are inevitably in some extent imprecise and vague, but it does not necessarily make them incompatible with Article 7.¹³³⁸ The European Court has found that a law is sufficiently foreseeable even when an individual needs to take appropriate legal advice to know which conducts would make him/her criminally liable or the scope of the associated penalty.¹³³⁹

Regarding convictions grounded on international law, the European Court assesses its foreseeability in the light of the international law standards applicable at the material time.¹³⁴⁰ Concerning customary international laws, the Court evaluates if secondary sources, as previous judgments of international tribunals made the criminalization of the conduct sufficiently accessible and the punishment sufficiently foreseeable.¹³⁴¹ Previous convictions for similar conducts would give individuals a clear indication that a behaviour is considered criminal and may entail criminal liability.¹³⁴²

¹³³⁷ *Žaja v. Croatia*, App. N^o. 37462/09, 4 October 2016, para. 93, with further references. As cited in Council of Europe, ‘The “Quality of Law” Requirements and the Principle of (Non-)Retrospectiveness of the Criminal Law under Article 7 of the Convention’, para. 21.

¹³³⁸ Council of Europe, ‘Guide on Article 7 of the European Convention on Human Rights - No Punishment without Law: The Principle That Only the Law Can Define a Crime and Prescribe a Penalty’, paras 25, 30.

¹³³⁹ *Cantoni v. France*, App. N^o 17862/91, ECtHR, 11 November 1996, paras 29, 35, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-58068%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58068%22]}); *Del Río Prada v. Spain*, para. 79; *Del Río Prada v. Spain*, para. 79; *Rohlena v. the Czech Republic*, App. N^o 59552/08, ECtHR GC, 27 January 2015, para. 50, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-151051%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-151051%22]}), as cited, with further references in Council of Europe, para. 28. See a comprehensive analysis regarding the foreseeability of legal rules, with numerous practical examples and ECtHR case-law, in Council of Europe, ‘The “Quality of Law” Requirements and the Principle of (Non-)Retrospectiveness of the Criminal Law under Article 7 of the Convention’, paras 21–37.

¹³⁴⁰ Council of Europe, ‘Guide on Article 7 of the European Convention on Human Rights - No Punishment without Law: The Principle That Only the Law Can Define a Crime and Prescribe a Penalty’, para. 34.

¹³⁴¹ Thomas Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege* (Cham: Springer International Publishing, 2017), 80. Referring to ECtHR, Case of Association Ekin v. France, Application No. 39288/98, Judgment, 17 July 2001, para.

The ECtHR has taken a rather flexible case-by-case approach of foreseeability, and while in some occasions it seems to apply an objective appreciation, referring to the concept of “reasonableness”,¹³⁴³ in others it favours a subjective approach.¹³⁴⁴ In other words, while sometimes the Court seems to ascertain foreseeability from the standard of a reasonable or average individual, in other cases it takes into account the particular personal circumstances and abilities of the accused at the time of commission.¹³⁴⁵

This has been particularly true regarding professionals and their possibility of taking appropriate legal advice to know the criminal consequences of a conduct.¹³⁴⁶ The Court considers that professionals are expected to take special care assessing the potential effects of their actions since they are used to pay particular attention to the consequences and risks associated to their occupation or position.¹³⁴⁷ In *Cantoni*, for example, the Court found that a criminal provision that would have been considered

46; *Kokkinakis v. Greece*, App. N° 14307/88, ECtHR Ch, 25 May 1993, para. 40, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-57827%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57827%22]}). For a critical summary of this last case in Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes against Humanity, War Crimes*, 48.

¹³⁴² Rauter notes that the ECtHR seems to take for granted that international case law regarding customary international law is clear and consistent. However, regarding certain issues the ambiguities and conflicting jurisprudence in the case law of the different international criminal tribunals creates uncertainty about the exact content of the law. According to the author, this reality should be taken into account, and in these situations the *in dubio pro reo* principle should allow the accused to enjoy the benefit of the doubt on the existence and scope of customary international criminal law. Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 78.

¹³⁴³ Ambos refers to the concept of “reasonableness”, used by the ECtHR in, *inter alia*, *Cantoni v. France*, para. 35; *Camilleri v Malta*, para. 37; *Vasiliauskas v Lithuania*, para. 156. In the same vein, the author refers to Schabas, *The European Convention on Human Rights: A Commentary* (2015), 341, as cited in Kai Ambos, ‘The Crime of Genocide and the Principle of Legality under Article 7 of the European Convention on Human Rights’, *Human Rights Law Review* 17, no. 1 (2017): 181. See as well Peristeridou, ‘The Principle of Legality in European Criminal Law’, 98.

¹³⁴⁴ Ambos, ‘The Crime of Genocide and the Principle of Legality under Article 7 of the European Convention on Human Rights’, 181.

¹³⁴⁵ Council of Europe, ‘Guide on Article 7 of the European Convention on Human Rights - No Punishment without Law: The Principle That Only the Law Can Define a Crime and Prescribe a Penalty’, 33.

¹³⁴⁶ *Jorgic v. Germany*, para. 113.

¹³⁴⁷ Council of Europe, ‘Guide on Article 7 of the European Convention on Human Rights - No Punishment without Law: The Principle That Only the Law Can Define a Crime and Prescribe a Penalty’, 32. *Streletz, Kessler and Krenz v. Germany*, para. 78; *K.-H.W. v. Germany*, paras 68-81; *Kononov v. Latvia* (GC), paras 235-39; *Vasiliauskas v Lithuania*, para. 157.

too vague for a normal citizen, was sufficiently clear for the applicant to foresee the consequences, since he was a professional expected to have access to legal advice.¹³⁴⁸

Some scholars have questioned the Court's decision of considering legal provisions as sufficiently foreseeable even when legal advice is required to know the criminal consequences of a conduct. It is argued that requiring such hypothetical legal advice, often unavailable, is opposed to what would be expected from an average individual.¹³⁴⁹ The Court has been criticized for not taking into account that not everyone has access to legal advice, especially in situations of war or generalised violence.¹³⁵⁰ Ambos considers that in general the Court adopts an objective approach, taking the view of an average individual, but in some cases it "subjectivizes" or "personalises" the assessment to the detriment of the accused.¹³⁵¹ "Reasonableness" conforms a minimum standard, but it can be upgraded regarding individuals with particular knowledge, abilities or access to legal advice.¹³⁵² According to the author this makes foreseeability a "rather low standard which is easy to meet, and thus, of little help with regard to the preservation of legality."¹³⁵³ However, the problem does not lie in the Court's attempt to personalise the assessment of the foreseeability test to the particular capacities and circumstances of the accused. It rather lies in the potential flaws in such assessment. It seems evident that a common soldier does not have the same information and elements of judgments available for a high official surrounded by legal advisors. Thus, it seems correct to adapt the foreseeability standard to the particularities of the accused. However, when assessing these personal particularities,

¹³⁴⁸ *Cantoni v. France*, paras 29, 35, as analysed in Peristeridou, 'The Principle of Legality in European Criminal Law', 97.

¹³⁴⁹ De Souza Dias, 'Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law', 51–52. The author refers, for a critical analysis of the hypothetical lawyer test, to John Calvin Jeffries Jr, 'Legality, Vagueness, and the Construction of Penal Statutes' [1985] VaLRev 189, 207–212, 229–230, and Sergio García Ramírez and Julieta Morales Sánchez, 'Consideraciones Sobre El Principio de Legalidad Penal En La Jurisprudencia de La Corte Interamericana de Derechos Humanos' (2011) 24 Revista Mexicana de Derecho Constitucional 195, 216.

¹³⁵⁰ De Souza Dias, 51–52. Referring to the position of the defendant in *K.-H.W. v. Germany*, paras 68–72. The author considers that the foreseeability standard including legal advice is rather unrealistic, "particularly in international law, where certain rules are not readily available or identifiable even for legal experts, such as more technical or unwritten ones." De Souza Dias, 52.

¹³⁵¹ Ambos, 'The Crime of Genocide and the Principle of Legality under Article 7 of the European Convention on Human Rights', 181.

¹³⁵² *Ibid.*, 181–82.

¹³⁵³ *Ibid.*, 182.

the Court should take special care to accurately reflect and precisely reconstruct the specific position of the accused at the moment of commission.

The ECtHR has also applied a rather flexible foreseeability standard regarding State practice. As analysed hereinafter, particularly regarding the German border guards cases, the European Court considers that a State practice which flagrantly infringes human rights and in particular the right to life, as in its opinion was the German Democratic Republic border policy allowing deadly measures, cannot be considered as *law*. The Court considers that Article 7 does not protect the accused's prospects based on such State practice, since it only protects expectations generated by authentic law.¹³⁵⁴ Despite a recurring State practice of tolerating or encouraging such conducts might give the perpetrator a certain sense of impunity, it cannot prevent him/her from being brought to justice and punished.¹³⁵⁵

B. Foreseeability of judicial interpretation and clarification of legal norms

Even if laws are drafted in a clear and comprehensive manner, in any legal system there will always be an inevitable element of judicial interpretation.¹³⁵⁶ Despite certainty is highly desirable, it may bring excessive rigidity and, as the ECtHR has recognized, laws “must be able to keep pace with changing circumstances”.¹³⁵⁷ For example, a standard legal technique is to use general categorizations as opposed to exhaustive lists.¹³⁵⁸ Therefore, many legal provisions are inevitably drafted, to a certain point, in a vague or imprecise manner and their interpretation and application are questions of practice.¹³⁵⁹ This way, “there will always be a need for elucidation of doubtful points and for adaptation to changing circumstances” and the courts will necessarily enjoy a certain margin of appreciation when interpreting and applying the laws.¹³⁶⁰ In fact, the “progressive development of the criminal law through judicial law-

¹³⁵⁴ *Streletz, Kessler and Krenz v. Germany*, para. 87. Gil Gil, ‘La Excepción al Principio de Legalidad Del Número 2 Del Art. 7 Del Convenio Europeo de Derechos Humanos’, 151.

¹³⁵⁵ *Streletz, Kessler and Krenz v. Germany*, paras 74, 77-79, 87; *Vasiliauskas v Lithuania*, para. 158.

¹³⁵⁶ *Del Río Prada v. Spain*, para. 92; *Rohlén v. the Czech Republic*, para. 57.

¹³⁵⁷ *Sunday Times v The United Kingdom*, para. 49.

¹³⁵⁸ *Del Río Prada v. Spain*, para. 92. *Kokkinakis v. Greece*, para. 40.

¹³⁵⁹ *Sunday Times v The United Kingdom*, para. 49; *Del Río Prada v. Spain*, para. 92; *Kokkinakis v. Greece*, para. 40; and *Cantoni v. France*, para. 31.

¹³⁶⁰ *Sunday Times v The United Kingdom*, para. 49; *Del Río Prada v. Spain*, para. 92.

making is a well-entrenched and necessary part of legal tradition in the Convention States.”¹³⁶¹

Despite recognize the significant importance of courts interpretation, clarification and application of laws, the ECtHR had to set the boundaries of such judicial discretion in order to comply with the requirements of the legality principle. The European Court resorted to the accessibility and foreseeability standards to assess the conformity of judicial interpretations to the *nullum crimen* principle. This way, the ECtHR progressively developed the notion, scope and limits of the foreseeability and accessibility tests to define legality standards regarding judicial interpretation. The European Court considers that “Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen.”¹³⁶² Thus, the constituent elements of a crime should not be essentially changed by the case law of the courts, if it is in detriment of the offender. However, the courts are allowed to clarify the existing elements of the offence, and to adapt them to new circumstances if they “can reasonably be brought under the original concept of the offence.”¹³⁶³ Beyond those limits, expansive interpretations are considered as forbidden retroactive criminalisation.¹³⁶⁴

Nonetheless, some authors consider that these standards are sometimes interpreted too loosely, and might allow convictions even when is unclear whether the accused could have reasonably foreseen a judicial evolution making his/her conduct punishable. For instance, Rauter criticizes that in *Jorgic* the Court found reasonably foreseeable a judicial progressive interpretation that was contrary to the opinion of what he considers as the majority of scholarly literature and the practice of other international tribunals.¹³⁶⁵ In this case German courts considered the biological-physical

¹³⁶¹ *Rohlena v. the Czech Republic*, para. 93.

¹³⁶² *Korbely v. Hungary*, para. 71, with further references.

¹³⁶³ *X Ltd. and Y v. United Kingdom*, App. N° 8710/79, ECmHR, 07 May 1982, para. 81.

¹³⁶⁴ De Souza Dias, ‘Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law’, 50–51. See a comprehensive analysis regarding foreseeability of judicial clarifications of legal rules, with numerous practical examples and ECtHR case-law, in Council of Europe, ‘The “Quality of Law” Requirements and the Principle of (Non-)Retrospectiveness of the Criminal Law under Article 7 of the Convention’, paras 38–67.

¹³⁶⁵ Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 83. Also see Bantekas, *International Criminal Law*, 25. Other international courts such as the International Court of Justice subsequently rejected the broad concept of genocide adopted by the German courts. Council of Europe, ‘Guide on Article 7 of the European Convention on

destruction of a group as a non-necessary element of the crime of genocide, and instead relied on the social group destruction. The ECtHR considered that domestic courts respected the essence of the offence and that the applicant could have reasonably foresee the risk of being convicted of the crime of genocide based on the opinion of some scholars and in the practice of the United Nations reflected in a UNGA Resolution.¹³⁶⁶

In short, no matter how clearly a legal provision is drafted, a certain margin for interpretation is unavoidable and acceptable in any legal system.¹³⁶⁷ Though its importance differs in each legal tradition, judicial interpretation always plays a necessary role in the progressive development of criminal law. Therefore, the Court considers that Article 7 cannot be understood as preventing the gradual clarification and evolution of both national and international law, regarding the elements of the crimes as well as the applicable penalties.¹³⁶⁸

However, the judicial interpretation should be reasonable, consistent with the essence of the offence, in line with the wording of the provision as read in its context, following a perceptible line of case-law development and reasonably foreseeable.¹³⁶⁹ The Court evaluates if at the moment of commission the accused could have foreseen, after taking legal advice if necessary, that his/her conduct could be prosecuted for the crime in question.¹³⁷⁰ When national courts have extensively interpreted legal provisions in the accused's disadvantage, as unforeseeable case-law reversals or interpretations incompatible with the crime's essence, the ECtHR has found that the foreseeability

Human Rights - No Punishment without Law: The Principle That Only the Law Can Define a Crime and Prescribe a Penalty', para. 38.

¹³⁶⁶ *Jorgic v. Germany*, paras 103-116. Rauters criticizes that according to the ECtHR's case law, "progressive developments of international criminal could be considered foreseeable, as long as there was theoretically some material available that placed the individual on notice", and this includes "exotic" interpretations. Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 84. In the same vein, Gallant notes that one of the dangers of the foreseeability doctrine is the possibility that courts "without thought or analysis, simply declare that an arguable expansion of criminal liability was "foreseeable.""¹³⁶⁶ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 365.

¹³⁶⁷ Council of Europe, 'Guide on Article 7 of the European Convention on Human Rights - No Punishment without Law: The Principle That Only the Law Can Define a Crime and Prescribe a Penalty', 35.

¹³⁶⁸ *Ibid.*, 35-36.

¹³⁶⁹ *Ibid.*, paras 35, 37-38. *S.W. v. United Kingdom*, para. 36; *Streletz, Kessler and Krenz v. Germany*, para. 50; *Kononov v. Latvia* (GC), para. 185; *C. R. v. United Kingdom*.

¹³⁷⁰ Council of Europe, para. 38. *Jorgic v. Germany*, paras 109-13.

requirement was not met.¹³⁷¹ The ECtHR elaborated and established the accessibility and foreseeability standards applicable to judicial clarification of legal norms in the well-known UK marital rape cases and the German border guard cases, analysed hereinafter.

5.1.4.3 *The marital rape cases*

Cases dealing with common law and alleged *ex post facto* judicial law creation gave the ECtHR the opportunity to elaborate on the limits imposed by Article 7 to judicial discretion when interpreting and applying criminal law. In 1995, in two discussed decisions issued the same day, the Court defined the scope of the accessibility and foreseeability requirements, considering compatible with Article 7 the abolition of the marital defence to rape through a case law process in the United Kingdom.¹³⁷²

The applicants claimed a violation of the non-retroactivity rule since they were convicted for rape and attempted rape within marriage despite at the moment of the facts a criminal defence for rape in marriage was applicable. According to the accused, common law defined rape as non-consensual intercourse with a woman other than one's wife.¹³⁷³ The ECtHR refused the argument finding that the case law evolution was foreseeable. Domestic courts deciding not to apply a criminal exception when rape was committed by the victim's husband followed a predictable legal evolution, and was needed to match actual social values. Therefore, the applicants should have predicted that such criminal exception was about to be overruled.

Analysing the predictability of the jurisprudential reversal, the ECtHR found that the decisions of the domestic courts were foreseeable since they:

“(...) did no more than continue a perceptible line of case-law development dismantling the immunity of a husband from prosecution for rape upon his wife. There was no doubt under the law as it stood on 12 November 1989 that a husband who forcibly had sexual intercourse with his wife could, in various circumstances, be found guilty of rape. Moreover, there was an evident evolution, which was consistent with the very essence of the offence, of the

¹³⁷¹ *Vasiliauskas v Lithuania*, paras 179-86, cited, with further references in Council of Europe, para. 42. Peristerideu provides a guideline of what constitutes a foreseeable interpretation according to the ECtHR in Peristeridou, ‘The Principle of Legality in European Criminal Law’, 98.

¹³⁷² *C. R. v. United Kingdom*, and *S.W. v. United Kingdom*.

¹³⁷³ William A. Schabas, ‘Sentencing by International Tribunals: A Human Rights Approach’, *Duke Journal of Comparative & International Law* 7, no. 2 (1997 1996): 474.

criminal law through judicial interpretation towards treating such conduct generally as within the scope of the offence of rape. This evolution had reached a stage where judicial recognition of the absence of immunity had become a reasonably foreseeable development of the law.”¹³⁷⁴

The Court stated that the case-law change was in conformity with ECHR Article 7 and with the prohibition of retroactive criminal laws.

“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 of the Convention, namely to ensure that no one should be subjected to arbitrary prosecution, conviction or punishment (...). 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.”¹³⁷⁵

Therefore, the accessibility and foreseeability requirements are not absolute, and remain compatible with a “gradual clarification of the rules of criminal liability through judicial interpretation from case to case”¹³⁷⁶ At the same time the Court set some limits to jurisprudential evolution establishing that new interpretations should be foreseeable, as following a perceptible line of case-law development, and consistent with the essence of the offence. Extensive interpretations of an offence could be acceptable if they are necessary to adapt to social changes, as long as they do not cover facts that previously clearly were not criminal, and if they remain foreseeable for the individual.¹³⁷⁷

Without questioning the opportunity of criminalizing marital rape, the Courts’ decision has been criticized as going too far allowing *ex post facto* changes in law. It has been argued that the desirability of convicting a husband for raping his wife does

¹³⁷⁴ *C. R. v. United Kingdom*, para. 41. A very similar statement in *S.W. v. United Kingdom*, para. 43.

¹³⁷⁵ *C. R. v. United Kingdom*, para. 42.

¹³⁷⁶ *Ibid.*, para. 34; *S.W. v. United Kingdom*, para. 36; *Del Río Prada v. Spain*, para. 93 with further references.

¹³⁷⁷ See a comprehensive analysis of the marital rape cases in Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes against Humanity, War Crimes*, 152–57; Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 218–19.

not justify his conviction for a conduct that at the time of commission had a valid substantive criminal law defence.¹³⁷⁸ Similarly, some authors have warned about the danger that conducts that are clearly not criminal, could be retroactively criminalized arguing that it was foreseeable that the law was going to evolve.¹³⁷⁹

In the following years the European Court had numerous opportunities to elaborate on the requirements imposed by the accessibility and foreseeability tests regarding judicial interpretation of criminal laws. The ECtHR reiterated the reasoning and conditions established in the martial rape cases and repeatedly used these criteria to assess the compatibility of judicial interpretations with Article 7.¹³⁸⁰

5.1.4.4 The German border guard cases

Between 1949 and 1989 millions of Germans fled from the German Democratic Republic (GDR) to the Federal Republic of Germany (FRG). To face the constant flow of fugitives the GDR built the Berlin Wall in 1961 and reinforced the security measures in the border, installing anti-personnel mines and automatic-fire systems. Likewise, border guards were ordered to shoot individuals who illegally tried to cross the border. As a result of this GDR border policy, many individuals lost their lives. After the reunification of Germany, several criminal proceedings were initiated and German courts condemned different border guards as well as political and military GDR leaders.

Some of these cases arrived to the ECtHR and gave the opportunity to the Court to elaborate on different issues concerning ECHR Article 7.¹³⁸¹ Based on the accessibility and foreseeability test, the European Court found that the convictions were in conformity with the legality principle. As well, the Court found legitimate for a State governed by the rule of law to bring criminal proceedings against individuals who have committed crimes under a former regime. The ECtHR considered that the

¹³⁷⁸ Antonio Cassese, *International Criminal Law*, 3rd ed. (Oxford: Oxford University Press, 2013), 24; Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge: Cambridge University Press, 2008), 219. See other arguments against the ECtHR line of reasoning in Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes against Humanity, War Crimes*, 156–57.

¹³⁷⁹ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 366.

¹³⁸⁰ For an assessment of the notion of foreseeable case-law in situations where there was no judicial precedents, see Council of Europe, ‘The “Quality of Law” Requirements and the Principle of (Non-)Retrospectiveness of the Criminal Law under Article 7 of the Convention’, paras 48–56. Cases addressing situations with no established case-law, Council of Europe, 57–61.

¹³⁸¹ *Streletz, Kessler and Krenz v. Germany; K.-H.W. v. Germany*.

tribunals of the new regime could interpret and apply the legal provisions applicable at the moment of commission in the light of the principles governing the new State subject to the rule of law.¹³⁸²

A. Criminal proceedings in Germany

After the reunification of Germany, different proceedings were brought against border guards as well as against political and military leaders. German courts grounded their convictions on criminal laws applicable at the material time. Both GDR and FRG criminal law prohibited intentional killing, but the accused argued that at the time of commission GDR laws contemplated some justifications, as the State Borders Act that allegedly allowed the use of deadly force to prevent illegal border crossings. However, the German courts rejected the legal validity of such justifications.

Despite the lines of reasoning are slightly different in each stage of the proceedings, it has been noted that they all share the theoretical rationales of the so-called “Radbruch formula”.¹³⁸³ German courts have repeatedly recurred to this formula to avoid extremely unfair results in the application of laws, in particular when facing the legacy of authoritarian regimes: after the Second World War and the dissolution of the National Socialist State, and in the years after the fall of the Berlin Wall.¹³⁸⁴ According to Gustav Radbruch, positive laws lose their validity when they are intolerably contrary to justice. It means that an extremely unfair norm cannot be considered as law and therefore is not applicable.¹³⁸⁵ Some authors consider this formula closer to substantial justice than to strict legality.¹³⁸⁶ As well, this theory has been criticized by juridical positivism that defends a conceptual separation of morality and law, determining the validity of norms on purely formal grounds and non-axiological criteria. From a positivist perspective, rejecting the validity of a norm due to its

¹³⁸² *Streletz, Kessler and Krenz v. Germany*, para. 81.

¹³⁸³ Russell Miller, ‘Rejecting Radbruch: The European Court of Human Rights and the Crimes of the East German Leadership’, *Leiden Journal of International Law* 14, no. 3 (September 2001): 657; Gil Gil, ‘La Excepción al Principio de Legalidad Del Número 2 Del Art. 7 Del Convenio Europeo de Derechos Humanos’, 148.

¹³⁸⁴ Robert Alexy, «Una defensa de la fórmula de Radbruch», *Anuario da Faculdade de Direito da Universidade da Coruña*, n.º 5 (2001): 77-81; Antonio Cassese, *International Criminal Law*, 3.^a ed. (Oxford: Oxford University Press, 2013), 22.

¹³⁸⁵ G. Radbruch, *Gesetzliches Recht und übergesetzliches Unrecht*, *Süddeutschen Juristenzeitung* (1946), 105, cited in Miller, ‘Rejecting Radbruch: The European Court of Human Rights and the Crimes of the East German Leadership’, 654.

¹³⁸⁶ Cassese, *International Criminal Law*, 22.

incompatibility with substantive justice would make the laws uncertain since the concept of justice is subjective and different for each person. On the contrary, other authors claim that the Radbruch formula does not produce an orientation of the totality of the law towards morality. On the contrary, it only introduces a partial link in extreme situations, providing an external limit to the legal system. The Radbruch formula proposes that only those norms that go beyond the threshold of extreme injustice will lose their legal character and validity. This would be summarized as: “extreme injustice is not law.”¹³⁸⁷

The Radbruch formula grounded, either implicitly or explicitly, German courts convictions regarding GDR border policy.¹³⁸⁸ Firstly, Regional Courts found that the exceptions, in the context of border control, to the general prohibition of intentional homicide could not be relied on because they flagrantly and intolerably infringed elementary precepts of justice and human rights protected under international law. Later, the Federal Court of Justice held that a correct interpretation of the State Border Act shows that such grounds of justification could not be pleaded on account of the limits laid down by the Act itself and in the light of the GDR’s Constitution and its obligations under public international law. Finally, the German Constitutional Court identified a conflict between justice and the constitutional principles of legal certainty and criminal legality, and found that in such exceptional situations, “the requirement of objective justice, which also embraces the need to respect the human rights recognized by the international community, makes it impossible for a court to accept such a defense.”¹³⁸⁹

In short, German courts considered that the exceptions to the general prohibition of intentional homicide, as the GDR State Border Act permission to use deadly force, could not be considered as valid *law*. The prohibition of crossing the border was not a valid justification to overrule the right to life, it was disproportionate and infringed elementary principles of justice and human rights protected under international law. Since the justifications were not valid, the conducts could be

¹³⁸⁷ Alexy, ‘Una defensa de la fórmula de Radbruch’, 76.

¹³⁸⁸ Miller, ‘Rejecting Radbruch: The European Court of Human Rights and the Crimes of the East German Leadership’, 655–58; Peter E. Quint, ‘The Border Guard Trials and the East German Past - Seven Arguments’, *American Journal of Comparative Law* 48, no. 4 (2000): 542.

¹³⁸⁹ German Constitutional Court, judgement of 24 October 1996, cited in *Streletz, Kessler and Krenz v. Germany*, para. 22. The ECtHR summarizes the arguments of the different German courts in para. 19-26.

considered criminal at the moment of commission, and therefore, convictions for such murders did not infringe the legality principle.¹³⁹⁰

Subsequently, some sentences were challenged before the ECtHR for an allegedly violation of ECHR Article 7(1). It was the case of the political and military leaders Fritz Streletz, former East German Deputy Minister of Defense, Heinz Kessler, former East German Minister of Defence, and Egon Krenz former President of the Council of State. They had been condemned for the murder of GDR citizens who tried to cross the border between 1971 and 1989.¹³⁹¹

B. The ECtHR decisions

The condemned appealed to the ECtHR claiming that their convictions infringed Article 7(1) of the European Convention. They argued that the conducts were not considered criminal at the relevant time and therefore, they could not have foreseen any criminal liability. However, in two decisions issued the same day, one concerning the political and military leaders, and the other the border guard, the ECtHR found that the convictions did not breach Article 7.

The European Court followed a different and easier reasoning than German courts, grounding its decision on the accessibility and foreseeability test. The ECtHR found that a State practice openly contrary to the applicable domestic and international norms, as in its opinion was the GDR border policy allowing deadly measures, cannot be considered as *law*.¹³⁹² Therefore, the accused's prospects based on such State practice are not protected by Article 7, since it only protects expectations

¹³⁹⁰ Gil Gil, 'La Excepción al Principio de Legalidad Del Número 2 Del Art. 7 Del Convenio Europeo de Derechos Humanos', 148. An intense doctrinal debate accompanied the German courts decisions in the border guard cases. See the references, for and against, in Kai Ambos, *Acerca de la antijuridicidad de los disparos mortales en el muro*, 1. ed, Cuadernos de conferencias y artículos 21 (Bogotá: Univ. Externado de Colombia, Centro de Investigaciones de Derecho Penal y Filosofía del Derecho, 1999), 28; Gil Gil, 'La Excepción al Principio de Legalidad Del Número 2 Del Art. 7 Del Convenio Europeo de Derechos Humanos', 147.

¹³⁹¹ See the references and comprehensive description and analysis of the procedures and arguments before the different German Courts in Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes against Humanity, War Crimes*, 161–63; Miller, 'Rejecting Radbruch: The European Court of Human Rights and the Crimes of the East German Leadership', 655–58; Rudolf Geiger, 'The German Border Guard Cases and International Human Rights', *European Journal of International Law* 9, no. 3 (1 January 1998): 540–49; Quint, 'The Border Guard Trials and the East German Past - Seven Arguments'.

¹³⁹² Gil Gil, 'La Excepción al Principio de Legalidad Del Número 2 Del Art. 7 Del Convenio Europeo de Derechos Humanos', 148–49.

generated by authentic law.¹³⁹³ Moreover, the Court found that the inapplicability of the statutory justification established in the State Border Act was foreseeable for the applicants.¹³⁹⁴ Hereinafter it is analysed how the ECtHR balanced foreseeability with the right to life, and then how it assessed the issue of state practice and the foreseeability of convictions.

First, the ECtHR stated that it was not its task to rule on the applicants' individual criminal responsibility, but to consider whether their conducts, at the time of commission, constituted offences defined with sufficient accessibility and foreseeability by the law of the GDR or by international law.¹³⁹⁵ Then, the Court relied on the right to life, the supreme value in the hierarchy of human rights already at the time of commission, and considered that any conviction for breaches of such right would be considered as sufficiently accessible and foreseeable.¹³⁹⁶ The Court found that even if the aim of the GDR State practice was to preserve its own existence, threatened by a massive exodus of population, the measures taken must be limited by the governing principles of its own legal system. In this sense the Court referred to the right to life, enshrined in the GDR Constitution and the State Border Act, and considered as the supreme value in the hierarchy of human rights.¹³⁹⁷

The European Court held that the right to life was flagrantly infringed by the installation of anti-personnel mines and automatic-fire system, and by the orders to border guards to "annihilate border violators and protect the border at all cost."¹³⁹⁸ The ECtHR found that applicable GDR law also included the principle of proportionality, and that the attempts to illegally cross the border by unarmed fugitives were not serious offences that could justify shooting.¹³⁹⁹

The ECtHR endorsed German court's views and stated that the GDR norm allowing border guards to shoot fugitives was outrageously contrary to human rights, particularly the right to life, and therefore, such norm could not be considered as

¹³⁹³ *Streletz, Kessler and Krenz v. Germany*, para. 87.

¹³⁹⁴ *Ibid.*, paras 77-89.

¹³⁹⁵ *Ibid.*, para. 51.

¹³⁹⁶ With the exception of those breaches justified in the situations described in ECHR Article 2(2). The right to life is enshrined in ECHR Article 2. *K.-H.W. v. Germany*, paras 90-91, 92-99 and 102-104.

¹³⁹⁷ *K.-H.W. v. Germany*, para. 66, with reference to *Streletz, Kessler and Krenz v. Germany*.

¹³⁹⁸ *K.-H.W. v. Germany*, para. 67.

¹³⁹⁹ *Streletz, Kessler and Krenz v. Germany*, para. 61; *K.-H.W. v. Germany*, para. 56.

“law”. In *Streletz, Kessler and Krenz*, concerning the conviction of German political leaders, the Court stated that:

“(…) a State practice such as the GDR’s border-policing policy, which flagrantly infringes human rights and above all the right to life, the supreme value in the international hierarchy of human rights, cannot be covered by the protection of Article 7 § 1 of the Convention. That practice, which emptied of its substance the legislation on which it was supposed to be based, and which was imposed on all organs of the GDR, including its judicial bodies, cannot be described as “law” within the meaning of Article 7 of the Convention.”¹⁴⁰⁰

The Court found that the applicants, as GDR leaders had created an appearance of legality emanating from the legal system, but then implemented “a practice which flagrantly disregarded the very principles of that system.”¹⁴⁰¹ The ECtHR considered that granting the applicants the protection Article 7 would go against the object and purpose of this provision, that is to ensure that no one is subject to arbitrary prosecution, conviction or punishment.¹⁴⁰² It can be inferred from the Court’s reasoning that the foreseeability requirements may imply balancing Article 7 and the general principles of the Convention and other human rights. Thus, a crime would be foreseeable when it flagrantly infringes human rights, and in particular the right to life.¹⁴⁰³

The Court also addressed questions regarding foreseeability arising from the fact that at the time of commission the conducts were tolerated by state practice. The Court considered that despite the behaviours were accepted or encouraged by state practice at the material time, the convictions of East Germany political leaders and the

¹⁴⁰⁰ *Streletz, Kessler and Krenz v. Germany*, para. 87. The ECtHR reached a similar conclusion regarding the practice of eliminating opponents of the communist regime by imposing death penalties in trials conducted in flagrant breach of the legislation and constitution of former Czechoslovakia. See *Polednová v. the Czech Republic* as cited in Council of Europe, ‘Guide on Article 7 of the European Convention on Human Rights - No Punishment without Law: The Principle That Only the Law Can Define a Crime and Prescribe a Penalty’, para. 9.

¹⁴⁰¹ *Streletz, Kessler and Krenz v. Germany*, para. 88.

¹⁴⁰² *Ibid.*

¹⁴⁰³ Council of Europe, ‘The “Quality of Law” Requirements and the Principle of (Non-)Retrospectiveness of the Criminal Law under Article 7 of the Convention’, para. 122. The subsequent case law of the ECtHR reinforced this line of reasoning, considering that States have a primary Convention obligation to protect the right to life. See *Kononov v. Latvia* (GC), para. 241.

border guard sufficiently foreseeable.¹⁴⁰⁴ The ECtHR first assessed the foreseeability of convictions on the basis of national law, and then regarding international law.

At the moment of the facts, the right to life was enshrined in the GDR's Constitution, the State Border Act, and was the supreme value in the hierarchy of human rights.¹⁴⁰⁵ Therefore, the Court found that at the moment of commission the behaviour of both the political leaders and the border guard "constituted offences defined with sufficient accessibility and foreseeability" under GDR law and international human rights law.¹⁴⁰⁶

The Court recognized that a recurrent State practice of tolerating or encouraging the elimination of unarmed fugitives could have given the applicants a certain sense of impunity. However, such State practice, flagrantly infringing fundamental principles and norms of the domestic and international legal system, do not prevent the perpetrators from being brought to justice and punished.¹⁴⁰⁷

Particularly regarding the GDR's political leaders, the Court considered that, because of the very senior position they occupied in the State structure, they could not have ignored the GDR's Constitution and legislation, and their international obligations.¹⁴⁰⁸ The Court found that the right to life was flagrantly infringed by the installation of anti-personnel mines and automatic-fire system, and by the border guards' orders to "annihilate border violators and protect the border at all cost."¹⁴⁰⁹

Regarding the border guard, the ECtHR found that his conviction did not contravene Article 7 since even private soldiers could not blindly follow orders that flagrantly violated principles of the domestic legal system and of international human rights law, in particular the right to life.¹⁴¹⁰

¹⁴⁰⁴ *Streletz, Kessler and Krenz v. Germany*, paras 77-89; *K.-H.W. v. Germany*, paras 68-91.

¹⁴⁰⁵ *K.-H.W. v. Germany*, para. 66, with reference to *Streletz, Kessler and Krenz v. Germany*.

¹⁴⁰⁶ *Streletz, Kessler and Krenz v. Germany*, paras 89, 105; *K.-H.W. v. Germany*, paras 91, 105.

¹⁴⁰⁷ *Streletz, Kessler and Krenz v. Germany*, paras 74, 77-79. The subsequent case law of the ECtHR reinforced this line of reasoning, considering that a state practice flagrantly infringing fundamental principles and norms of the domestic and international legal system, do not prevent the perpetrators from being brought to justice and punished. See *Vasiliauskas v Lithuania*, para. 158; *Streletz, Kessler and Krenz v. Germany*, paras 74 and 77-79; *Kononov v. Latvia* (GC), paras 240-241.

¹⁴⁰⁸ *Streletz, Kessler and Krenz v. Germany*, para. 78.

¹⁴⁰⁹ *K.-H.W. v. Germany*, para. 67.

¹⁴¹⁰ *Ibid.*, para. 30.

As it will be further developed,¹⁴¹¹ the Court found legitimate for State governed by the rule of law to bring criminal proceedings against individuals who have committed crimes under a former regime. In doing so, the courts are allowed to interpret and apply the domestic legal provisions applicable at the moment of commission, in the light of the principles governing the State subject to the rule of law.¹⁴¹²

C. Some doctrinal critiques

Different issues addressed by the ECtHR in the German border guard's cases have been the subjects of doctrinal debates. One of the most discussed issues concerns the assessment of the accessibility and foreseeability requirements. Some scholars have argued that the political and military leaders acted in accordance with the political philosophy of the GDR, and could not foresee that their behaviours would be later prosecuted.¹⁴¹³ However, the most persuasive critiques concern the conviction of the border guard. The Court found that, despite the orders received, it was sufficiently foreseeable for the soldier that his conduct would carry criminal responsibility. However, different scholars, as well as some ECtHR judges, disagreed. They argued that the guard acted under the GDR's legal system and culture, and that he had been indoctrinated in the importance of preserving the integrity of the border at all cost. As well, he risked military prosecution if a fugitive managed to cross the border. Therefore, it seems quite probable that the guard was convinced that he was acting in conformity with GDR's laws, and that he could not have known that his conduct would be later considered criminal.¹⁴¹⁴ These considerations raise the question of whether the ECtHR misunderstood the principle of legality and the defence of mistake of law or prohibition. According to some authors and the dissenting opinion of some

¹⁴¹¹ See below, in this chapter, Section 5.1.5.

¹⁴¹² *Streletz, Kessler and Krenz v. Germany*, para. 81.

¹⁴¹³ Arnold, Karsten, and Kreicker, 'The German Border Guard Cases before the European Court of Human Rights', *European Journal of Crime, Criminal Law and Criminal Justice* 11, no. 1 (2003): 83–84; Mariniello, 'The "Nuremberg Clause" and Beyond: Legality Principle and Sources of International Criminal Law in the European Court's Jurisprudence', 246.

¹⁴¹⁴ Ambos, 'Common Law y los disparos del muro - Artículo 7 de la Convención Europea de Derechos Humanos', 58; Arnold, Karsten, and Kreicker, 'The German Border Guard Cases before the European Court of Human Rights', 87–90. *K.-H.W. v. Germany*, partly dissenting opinion of Judge Cabral Barreto, para. 3, and partly dissenting opinion of Judge Pellonpää, joined by Judge Zupančič.

ECtHR judges, the Court should have overturned the border guard's conviction based on an inevitable mistake of prohibition.¹⁴¹⁵

However, following the Court's view, it seems that shooting against an unarmed fugitive clearly breached the principle of proportionality and that it was foreseeable enough that this conduct violated the legal prohibition on killing. Moreover, when assessing the conformity of German courts decisions to the ECHR, it should be noted that the domestic tribunals took into account the above-explained considerations regarding the border guard and the difference of his position compared with the former GDR leaders. This way, the political and military officials were sentenced to prison terms, but the guard to a term of probation.¹⁴¹⁶ As well, the ECtHR considered these differences and issued separated decisions for the GDR leaders and for the border guard. However, the consequences drew by the European Court of such differences have been questioned since it upheld, anyhow, the conviction of the soldier.

According to Ferdinandusse the ECtHR overextended the doctrine of foreseeability in the border guards' cases since at the moment of commission it could be inferred from GDR's laws that the conducts of the accused were not criminal. The author disagrees with the Court's finding that at the time of commission the human rights to life and freedom of movement sufficiently established the illegality of the shooting.¹⁴¹⁷ He reminds that at the relevant time the GDR was neither a party to the ECHR nor to the ICCPR. Under human rights conventions, both rights to life and freedom of movement were subject to exceptions regulated by law, and the GDR was not the only State to provide for such exceptions.¹⁴¹⁸ Ferdinandusse believes that the border guards' cases show how anger over an immoral act or regime can motivate overlooking the line between moral indignation and legal prohibition under the

¹⁴¹⁵ Ambos, 'Common Law y los disparos del muro - Artículo 7 de la Convención Europea de Derechos Humanos', 58; Van der Wilt, 'Nullum Crimen and International Criminal Law', 527–28. *K.-H.W. v. Germany*, partly dissenting opinion of Judge Cabral Barreto, para. 3. For an analysis of the subtle differences between foreseeability to assess the legality principle and foreseeability in case of mistake of law, see A. van Verseveld, *Mistake of Law; Excusing perpetrators of International Crimes* (The Hague: Asser Press, 2012), 75, cited in Van der Wilt, 527–28.

¹⁴¹⁶ See, with references Arnold, Karsten, and Kreicker, 'The German Border Guard Cases before the European Court of Human Rights', 85.

¹⁴¹⁷ Ferdinandusse, 'Direct Application of International Criminal Law in National Courts', 2005, 249. Gallant seems to agree with this critique. See Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 221–22.

¹⁴¹⁸ Ferdinandusse, 'Direct Application of International Criminal Law in National Courts', 2005, 249.

appearance of manifest illegality.¹⁴¹⁹ Thus, the author considers that in these cases a moral wrong was retroactively converted into a criminal wrong. For its part, Gallant thinks that these cases will not necessarily determine the general Court's interpretation of the ECHR as allowing moral wrongs retroactively becoming crimes.¹⁴²⁰

It has been noted that the ECtHR balanced the principle of legality and the right to life, finding that when the most fundamental human rights are at stake, a more lenient principle of legality is accepted.¹⁴²¹ A criticism made is that the Court did not chose a clear line of reasoning and did not decide whether to ground the permissibility of the prosecution on national and international law proscribing the conducts, or on the balance of the legality principle and human rights at stake.¹⁴²²

Other authors have also questioned the Court decision to interpret past regime's laws in the light of the new regime's rule of law. They argued, that according to the GDR's legal philosophy at the relevant time, the conducts of the accused were not criminal, and in practice, interpreting such legal provisions according to the rule of law leads to the establishment of retroactive criminal liability.¹⁴²³ Similarly, the Court decision to refuse classifying the fugitives' conducts as serious crimes, has been contested since this interpretation was allegedly diametrically opposite to the notion included in the GDR Criminal Code.¹⁴²⁴ This is relevant since according to GDR legal provisions only a serious crime could justify the use of deadly measures.

The ECtHR's line of reasoning regarding the alleged determination of individual criminal liability directly derived from international human rights has also been challenged.¹⁴²⁵ However, despite in other cases the Court upheld convictions solely grounded on international law, it was not the case in the border guard's cases, where in fact convictions were based on domestic norms. Moreover, the Court started its reasoning affirming that it was not its task to rule on the applicants' individual

¹⁴¹⁹ Ibid., 251.

¹⁴²⁰ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 221–22.

¹⁴²¹ Ferdinandusse, 'Direct Application of International Criminal Law in National Courts', 2005, 248.

¹⁴²² Ibid.

¹⁴²³ Arnold, Karsten, and Kreicker, 'The German Border Guard Cases before the European Court of Human Rights', 79; Mariniello, 'The "Nuremberg Clause" and Beyond: Legality Principle and Sources of International Criminal Law in the European Court's Jurisprudence', 246; Quint, 'The Border Guard Trials and the East German Past - Seven Arguments', 557.

¹⁴²⁴ Referring to Art. 213(3) of the GDR's Criminal Code. Arnold, Karsten, and Kreicker, 'The German Border Guard Cases before the European Court of Human Rights', 75.

¹⁴²⁵ Arnold, Karsten, and Kreicker, 78–79, 82.

criminal responsibility, but to consider whether their conducts, at the time of commission, constituted offences defined with sufficient accessibility and foreseeability by the law of the GDR or by international law.¹⁴²⁶

It should be noted as well that to condemn the crimes committed in East Germany and to uphold domestic convictions, the ECtHR chose not to follow German court's line of reasoning and their reliance on the Radbruch formula. It has been suggested that this choice was motivated by the Court's intention to avoid deepening in the difficult rapport between East and West Germany after the reunification. The relations had been eroded, among other factors, by German courts prosecutions of crimes committed by the GDR regime, and in particular by the use of the Radbruch formula, originally shaped to face Nazi's crimes. Its use inevitably drew a comparison between such atrocities and the crimes committed by the GDR. A parallelism that the European Court intended to avoid.¹⁴²⁷

A different rationale for the border guards cases has been presented by Fletcher based on the radical separation of crime creation and defences in German's criminal law. He considers that retroactive destruction of unjust defences is compatible with the *nullum crimen* principle, if the conduct, deprived from the justification, clearly falls within a crime definition. The retroactive defence's removal would be then compatible with the prohibition of retroactive creation of new crimes. This was the case in the above-studied marital rape cases and in the German border guard cases.¹⁴²⁸ However, other authors refute this reasoning noting that defences frequently indicate what behaviours are considered criminal, and therefore, their retroactive destruction may entail that a conduct considered legal could later become criminal.¹⁴²⁹

¹⁴²⁶ *Streletz, Kessler and Krenz v. Germany*, para. 51.

¹⁴²⁷ Miller, 'Rejecting Radbruch: The European Court of Human Rights and the Crimes of the East German Leadership', 661.

¹⁴²⁸ George P. Fletcher, *The Grammar of Criminal Law: American, Comparative, and International*, vol. 1: Foundations (Oxford ; New York: Oxford University Press, 2007), 145–48. Cited and analysed in Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 221.

¹⁴²⁹ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 221; Mariniello, 'The "Nuremberg Clause" and Beyond: Legality Principle and Sources of International Criminal Law in the European Court's Jurisprudence', 246–47.

5.1.4.5 *Accessibility and foreseeability applied to international crimes*

The ECtHR developed the accessibility and foreseeability tests in the *Sunday Times* case, at the end of the 1970's. However, it took almost 30 years to extend such standards to assess as well legality of international crimes. For a long time the ECtHR ignored the question of whether an individual accused of that crimes knew or could have known at the moment of commission that his acts were criminal and could be punished. As previously explained, the ECtHR applied the Nuremberg clause (ECHR Article 7(2)) to uphold convictions based on retroactive applications of domestic laws incorporating pre-existing international crimes into domestic legislations.¹⁴³⁰ In fact, the second paragraph of Article 7 excluded the assessment of the *nullum crimen* requirements regarding punishment of conducts criminalised by the “general principles of law recognised by civilised nations”. This way the application of Article 7(2) made irrelevant to ascertain whether a conviction for war crimes, genocide or crimes against humanity fulfilled the legality standards or if at the time of commission the individual was aware of the criminal nature of his conduct.

However, over the years the ECtHR showed an increasing reluctance to use Article 7(2), and from 2008 the Court decided to extend the guarantees of Article 7(1) to the prosecution of international crimes. This way, in *Korbely*, and two year later in *Kononov*,¹⁴³¹ the European Court departed for the first time from its previous case law and did not automatically apply Article 7(2). From that moment, the accessibility and foreseeability test, developed and applied by the Court regarding ordinary crimes, began to be used as well to assess the conformity to the legality principle of convictions for war crimes, genocide or crimes against humanity.

This way, applying the qualitative elements of the *nullum crimen* principle to prosecutions for international crimes, the ECtHR tried to restore an appropriate balance between substantive justice and individual protection.¹⁴³² However, as analysed hereinafter, the application in practice of the accessibility and foreseeability standards has raised questions among some authors as whether individual's safeguards have effectively been strengthened. Anyhow, the passage from the first to the second

¹⁴³⁰ See *B. v. Belgium*; *X v. Norway*; *De Becker v. Belgium*; *Paul Touvier v. France*; *Papon v. France* (n^o2); *Kolk and Kislyiy v. Estonia*; *Penart v. Estonia*.

¹⁴³¹ *Kononov v. Latvia*. See as well *Vasiliauskas v Lithuania*.

¹⁴³² Mariniello, ‘The “Nuremberg Clause” and Beyond: Legality Principle and Sources of International Criminal Law in the European Court’s Jurisprudence’, 225–26.

paragraph of Article 7 has induced the Court to find that different domestic convictions did not respect the legality principle requirements.¹⁴³³

This relevant case-law evolution was probably stimulated by different elements as the Rome Statute, the progressive codification of criminal law and the jurisprudence of the *ad hoc* tribunals.¹⁴³⁴ These international courts had repeatedly borrowed from the ECtHR the accessibility and foreseeability standards to assess the conformity of convictions for international crimes with the legality principle. This jurisprudential evolution has been considered an example of a phenomenon defined by Cassese as “cross-fertilization” between international courts favouring an alignment of approaches.¹⁴³⁵

Despite the ECtHR has found in some occasions that domestic court’s convictions for international crimes had infringed Article 7, the application in practice of the accessibility and foreseeability standards has raised questions among some authors as whether individual’s safeguards are effectively granted. Some of the alleged flaws are that the Court’s understanding of accessibility and foreseeability is too flexible, that the inclusion of legal advice is idealistic, that it accepts the unrealistic retroactive interpretation of domestic laws applicable at the moment of the facts, or that it accepts norms only establishing obligations for States as sources of individual criminal liability. Some of these criticisms have been already analysed. Hereinafter, an explanation of other ideas and scholarly positions not yet analysed, is provided regarding some relevant ECtHR case law.

A. The *Korbely* case

After the Second World War Hungary became a satellite State of the Soviet Union. In 1956 a revolution broke out against the government and the policies imposed by the USSR, but the uprising failed to force a change in the political regime. Korbely was a military officer and during the revolution he ordered his soldiers to shoot

¹⁴³³ Among others, see *Korbely v. Hungary*; *Vasiliauskas v. Lithuania*, para. 183.

¹⁴³⁴ Van der Wilt, ‘Nullum Crimen and International Criminal Law’, 518, 526; Mariniello, ‘The “Nuremberg Clause” and Beyond: Legality Principle and Sources of International Criminal Law in the European Court’s Jurisprudence’, 240.

¹⁴³⁵ Mariniello, ‘The “Nuremberg Clause” and Beyond: Legality Principle and Sources of International Criminal Law in the European Court’s Jurisprudence’, 240–41. This phenomenon is defined by Cassese as a “gradual interpenetration and cross-fertilization of previously somewhat compartmentalized areas of international law”, Antonio Cassese (ed.), *International Criminal Law* (Oxford: Oxford University Press, 2003), 72, as cited and analyzed in Mariniello, 140.

insurgents who had occupied a police station.¹⁴³⁶ In 1993, after the USSR dissolution, the Hungarian Parliament passed an Act, later upheld by the Constitutional Court, allowing the prosecution of the crimes committed during the 1956 uprising.¹⁴³⁷ Subsequently, Korbely was prosecuted by Hungarian domestic courts for the killing of civilians during the revolution and he was condemned for crimes against humanity on the basis of the common Article 3 of the 1949 Geneva Conventions.¹⁴³⁸ The convicted challenged the judgment before the ECtHR claiming that his conduct did not constitute a crime at the time of commission, and therefore, his conviction was contrary to ECHR Article 7.

The European Court ascertained whether the Geneva Conventions were sufficiently accessible and whether “it was foreseeable that the act for which the applicant was convicted would be qualified as a crime against humanity.”¹⁴³⁹ The Court found that despite the Geneva Conventions were sufficiently accessible, and that the applicant’s acts could be qualified as homicides under domestic laws, the conviction for crimes against humanity was not foreseeable enough and therefore, infringed Article 7. The ECtHR held that in 1956 the protected status of an insurgent was not foreseeable and that it was unclear whether insurgents could be victims of crimes against humanity since they did not clearly fall within any of the categories of non-combatant as defined by common Article 3 of the Geneva Conventions.¹⁴⁴⁰ The ECtHR concluded that “it has not been shown that it was foreseeable that the applicant’s acts constituted a crime against humanity under international law. As a result, there has been a violation of Article 7 of the Convention.”¹⁴⁴¹

The ECtHR was not satisfied that the conducts were already criminal under domestic laws at the moment of commission. Since the Hungarian courts’ conviction was based on international law, the ECtHR considered necessary to assess whether the applicant’s conducts could be qualified with the specific criminal label of crimes against humanity as defined in international law at the time of commission. The Court found that the Hungarian courts did not analyse the elements of crimes against humanity as

¹⁴³⁶ See a detailed account of the facts in *Korbely v Hungary*, paras 9-15.

¹⁴³⁷ *Korbely v Hungary*, paras 16-19, 52.

¹⁴³⁸ See a summary of the proceedings before the domestic Hungarian courts in *Korbely v Hungary*, paras 20-48.

¹⁴³⁹ *Korbely v Hungary*, para. 76.

¹⁴⁴⁰ *Ibid.*, paras 78-95.

¹⁴⁴¹ *Ibid.*, para. 95.

determined in existing international laws, nor did they adequately check whether the applicant's behaviour fitted those elements.¹⁴⁴²

The ECtHR in *Vasiliauskas v Lithuania* followed a similar reasoning, this time regarding genocide.¹⁴⁴³ The Court found that the applicant could not be convicted of genocide against a political group under retroactive domestic laws since at the moment of commission this sort of group was excluded from the scope of genocide under international law. In *Korbely* and in *Vasiliauskas* the Court concluded that domestic courts had incorrectly interpreted international laws existing at the time the crimes were committed and had broadened their scope. Since at the time of commission the conducts did not fall within any criminal label under international law, the retroactive application of domestic criminal laws, that years later had criminalized the conducts, would infringe ECHR Article 7.¹⁴⁴⁴ At the same time, the European Court noted in *Korbely* that the penalties imposed to the accused as a result of his conviction for crimes against humanity were harsher than those he would have received if he had been convicted for homicide.¹⁴⁴⁵

The ECtHR reiterated that its task is not to interpret domestic legislation but “to ascertaining whether the effects of such an interpretation are compatible with the Convention.”¹⁴⁴⁶ Similarly, the Court found that its role is not to rule on the applicant's criminal responsibility but to ascertain “whether the applicant's act, at the time when it was committed, constituted an offence defined with sufficient accessibility and foreseeability by domestic or international law.”¹⁴⁴⁷

B. The *Kononov* case

In the *Kononov* case the ECtHR confirmed its case-law development in *Korbely* and assessed whether a conviction for war crimes respected the legality standards provided in ECHR Article 7(1). In this case the Chamber and the Grand Chamber

¹⁴⁴² Ibid., paras 81-96. Analyzed in Gil Gil, ‘La Excepción al Principio de Legalidad Del Número 2 Del Art. 7 Del Convenio Europeo de Derechos Humanos’, 153–54.

¹⁴⁴³ *Vasiliauskas v Lithuania*.

¹⁴⁴⁴ De Souza Dias, ‘Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law’, 64–65; Casas, *El Derecho Internacional de la Justicia Transicional*, 215.

¹⁴⁴⁵ *Korbely v Hungary*, para. 45. Analysed in De Souza Dias, ‘Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law’, 27.

¹⁴⁴⁶ *Korbely v Hungary*, para. 72.

¹⁴⁴⁷ Ibid., para. 73.

reached completely opposed conclusions, showing that the assessment of foreseeability of international crimes is a challenging task.

Kononov was a member of the “Red partisans”, a Soviet force that fought a guerrilla war against the German forces during World War II. On 27 May 1944 he and the unit under his command entered a Latvian village controlled by the Germans. They executed, by way of reprisal, six men and three women, suspected of having turned in to the Germans another red partisan’s group.¹⁴⁴⁸

After the war Latvian territory passed into the control of the Soviet Union and it was only in 1991 when Latvia regained its sovereignty becoming an independent State. Some years later Kononov was brought before Latvian courts accused of war crimes, and after a complex procedure he was condemned in 2004.¹⁴⁴⁹ His conviction was based on the Latvian Criminal Code provision on war crimes that had been adopted in 1993, almost fifty years after the date of commission. The condemned appealed the sentence before the ECtHR claiming that such retroactive application of domestic criminal laws was contrary to ECHR Article 7.

a. The ECtHR Chamber and Grand Chamber decisions

In the first instance judgment the ECtHR found that Latvian court had infringed Article 7 when condemning the applicant for war crimes. The Chamber considered that according to the facts and the legal definitions existing at the time it was not clear whether the victims could be regarded as “civilians” and therefore the acts could be qualified as war crimes or, conversely, the victims were lawful military targets.¹⁴⁵⁰ The Court found that Kononov could not reasonably foresee that his behaviour amounted to a war crime under international laws of the time. At most his acts could be qualified as murder or another ordinary crime applicable under domestic law, but their prosecution had become statute barred, and therefore domestic law could not serve as the basis for conviction either.¹⁴⁵¹

¹⁴⁴⁸ *Kononov v. Latvia* (GC), paras 15-24.

¹⁴⁴⁹ The procedure before Latvian courts is described in *Kononov v. Latvia* (GC), paras 30-40.

¹⁴⁵⁰ *Kononov v. Latvia*, App. N° 36376/04, ECtHR 3rd Section, 24 July 2008, para. 131, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-87934%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-87934%22]}). On the relevant international legal instruments enshrining the progressive legal distinction and definitions of civilians and combatants, see *Kononov v. Latvia*, Chamber, paras 131-34, and De Souza Dias, ‘Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law’, 24; Van der Wilt, ‘Nullum Crimen and International Criminal Law’, 523.

¹⁴⁵¹ *Kononov v. Latvia* (Ch.), para. 148.

The ECtHR Grand Chamber reached a diametrically different conclusion and found that Kononov's conviction did not contravene ECHR Article 7. First the Court assessed if at the moment of commission individual criminal responsibility for war crimes already existed under international law.¹⁴⁵² The Court answered affirmatively based on the existing legal instruments prohibiting violations of the laws and customs of war, as the Hague and Geneva Conventions, or the Martens clause, and referred to the prosecutions and trials during and after World War II. The Court considered that "States were at least permitted (if not required) to take steps to punish individuals for such crimes".¹⁴⁵³ Then, the Grand Chamber determined that the actions of the applicant could be considered as war crimes under applicable international law, irrespective of whether the victims were qualified as combatants or civilians.¹⁴⁵⁴

Finally, the Court ascertained whether Kononov could have foreseen that the relevant acts constituted war crimes and that he would be prosecuted. The Grand Chamber established that in situations concerning laws and customs of war, "the concepts of accessibility and foreseeability must be considered together."¹⁴⁵⁵ The ECtHR recognized that the 1926 Criminal Code of Soviet Russia, applicable in Latvia at the relevant times, did not contain a reference to the international laws and customs of war, and that those international norms were not formally published in the USSR or in Latvia. However, the Court found this not decisive, and considered that "international laws and customs of war in 1944 were sufficient, of themselves, to found individual criminal responsibility."¹⁴⁵⁶

The Grand Chamber elaborated on that notion that foreseeability needs to be adapted depending on the particular characteristics and situation of the individual to whom the law is addressed. In this regard, the ECtHR noted that international laws and customs of war constituted detailed *lex specialis* regulations setting the parameters of criminal conduct in a time of war, primarily addressed to armed forces, and in particular to commanders. Since Kononov was a commanding military officer, he had an aggravated duty of special care in assessing the risks, and he should have been aware that his actions would entail criminal liability. Moreover the Court emphasized the "flagrantly unlawful nature of the ill-treatment and killing" of the villagers, to demonstrate that the applicant could have easily foresee that his acts could be qualified

¹⁴⁵² I follow here the analysis of the judgment of Van der Wilt, 'Nullum Crimen and International Criminal Law', 523-25.

¹⁴⁵³ *Kononov v. Latvia* (GC), para. 213.

¹⁴⁵⁴ *Ibid.*, paras 235-38.

¹⁴⁵⁵ *Ibid.*, para. 235.

¹⁴⁵⁶ *Ibid.*, para. 237.

as war crimes and that he would be held criminally accountable.¹⁴⁵⁷ Therefore, the Grand Chamber concluded that at the time of commission the applicant's acts constituted offences defined with sufficient accessibility and foreseeability by the laws and customs of war, and that his conviction did not infringe ECHR Article 7.¹⁴⁵⁸

It is relevant to note that the Court explicitly elaborated on the problems arising when a newly established democracy based on the rule of law prosecute the crimes committed under a precedent authoritarian regime. The Court found that the courts of the successor State "cannot be criticised for applying and interpreting the legal provisions in force at the material time during the former regime, but in the light of the principles governing a State subject to the rule of law and having regard to the core principles on which the Convention system is built."¹⁴⁵⁹ The Grand Chamber considered that this is especially true in situations concerning the right to life, due to its supreme value in human rights law.

It is also pertinent to highlight the Court's line of reasoning regarding situations when domestic courts prosecute crimes committed decades before the incorporation of the relevant criminal classification in the domestic legal system. The ECtHR reaffirmed the validity of international law as a source of criminalization compatible with the legality principle's requirement. It is particularly interesting the reasoning of the Chamber when it established that in situations where "domestic criminal law refers to international law for the definition of the offence, the domestic and international provisions form, in practice, a single criminal norm."¹⁴⁶⁰ Although the Grand Chamber overruled the Chamber's decision, this reasoning seems itself in line with the final ECtHR judgment. Despite the domestic criminal norm grounding the conviction was adopted four decades after the moment of commission, the Court considered that the substantive law was not applied retroactively since the conduct was already considered criminal under international law.

b. Some critiques

The Grand Chamber's judgment was not adopted by unanimity and three judges issued a dissenting opinion. They found that "at the material time, neither domestic nor international law was sufficiently clear in relation to war crimes, nor the distinction between war crimes and ordinary crimes, however serious such crimes may

¹⁴⁵⁷ Ibid., paras 238-39.

¹⁴⁵⁸ Ibid., para. 244.

¹⁴⁵⁹ Ibid., para. 241.

¹⁴⁶⁰ *Kononov v. Latvia* (Ch.), para. 119.

have been.”¹⁴⁶¹ Therefore, the dissenting judges questioned that in 1944 the applicant could have foreseen that his acts would be prosecuted more than half a century later.¹⁴⁶² Some scholars share this criticism and argue that the Grand Chamber used strong expressions as “flagrantly unlawful” to show that the criminal nature of the conducts was manifest.¹⁴⁶³ It has been argued that since judges and scholars deeply disagree on whether, at the moment of commission, the prosecution of the conduct was foreseeable or not, the Court should have taken into account the *favor rei* principle in case of doubt, and should have considered the conviction contrary to the *nullum crimen* principle.¹⁴⁶⁴

The ECtHR *Kononov* decision has also been criticized by allegedly upholding some of the shortcoming of the Nuremberg Trials and the *ad hoc* tribunals.¹⁴⁶⁵ In particular, it has been claimed that the 1907 Hague Convention and the other sources of international law applicable at the time only aimed to regulate the conduct of States, but did not establish individual criminal liability.¹⁴⁶⁶ Therefore, they consider the *Kononov* case as an example of retroactive application of a criminal law.¹⁴⁶⁷ In this line, it has been questioned the foreseeability of a conviction based on legal instruments that

¹⁴⁶¹ *Kononov v. Latvia* (GC), dissenting opinion of Judge Costa joined by Judges Kalaydjieva and Poalelungi, para. 16.

¹⁴⁶² *Kononov v. Latvia* (GC), dissenting opinion of Judge Costa joined by Judges Kalaydjieva and Poalelungi, para. 26. It should be noted that the judges explicitly drew a distinction between the situation in *Kononov*, and the *Korbely* case, where the crimes had been committed in 1956, after the adoption of the 1949 Geneva Conventions. The *Kononov* case has been distinguished as well from the German border guards cases, since the convictions were grounded on domestic laws applicable at the time of commission. Mariniello, ‘The “Nuremberg Clause” and Beyond: Legality Principle and Sources of International Criminal Law in the European Court’s Jurisprudence’, 244.

¹⁴⁶³ Van der Wilt, ‘Nullum Crimen and International Criminal Law’, 525. On the convenience of avoiding expression as “manifest illegality”, see Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 366.

¹⁴⁶⁴ Van der Wilt, ‘Nullum Crimen and International Criminal Law’, 519, 525.

¹⁴⁶⁵ Mariniello, ‘The “Nuremberg Clause” and Beyond: Legality Principle and Sources of International Criminal Law in the European Court’s Jurisprudence’, 244.

¹⁴⁶⁶ This criticism is not confined to the *Kononov* case, but concerns as well other cases where the Court has allegedly accepted as valid sources of criminalization some international norms only imposing obligation on States, but not explicitly determining individual criminal liability. See Mariniello, ‘The “Nuremberg Clause” and Beyond: Legality Principle and Sources of International Criminal Law in the European Court’s Jurisprudence’, 225–26, 248.

¹⁴⁶⁷ Gil Gil, ‘La Excepción al Principio de Legalidad Del Número 2 Del Art. 7 Del Convenio Europeo de Derechos Humanos’, 154.

allegedly did not create obligations for individuals, as the 1907 Hague Convention, which additionally had not been ratified by Latvia.¹⁴⁶⁸

5.1.4.6 Accessibility and foreseeability to assess *lex stricta* and *lex certa*

The accessibility and foreseeability tests are used as well by the ECtHR to assess the *lex certa* and *lex stricta* requirements. Offences that are not sufficiently clearly or precisely defined, or that are interpreted by judges too extensively, do not respect the legality principle since the accused would not have been able to know, at the time of commission, that his/her behaviour was criminal.¹⁴⁶⁹

Regarding *lex stricta*, the European Court has recognized that Article 7 includes the obligation of strict interpretation of criminal laws by domestic courts and the prohibition of analogy. Repeatedly, the Court has stated that Article 7 includes “the principle that the criminal law must not be extensively construed to an accused’s detriment, for instance by analogy.”¹⁴⁷⁰ Interpretations by analogy expanding the scope of an offence’s definition renders the accused’s conviction unforeseeable and therefore, contrary to the legality principle.¹⁴⁷¹ Similarly, where national courts have extensively interpreted law provisions in the accused’s disadvantage, as interpretations incompatible with the crime’s essence or unforeseeable case-law reversals, the ECtHR has found violations of the foreseeability requirement.¹⁴⁷² In *Vasiliauskas*, for example, Lithuanian domestic courts had extended the terms “national” or “ethnic” of the Genocide Convention to cover partisans. The ECtHR found that “the domestic courts’ conclusion that the victims came within the definition

¹⁴⁶⁸ Mariniello, ‘The “Nuremberg Clause” and Beyond: Legality Principle and Sources of International Criminal Law in the European Court’s Jurisprudence’, 244.

¹⁴⁶⁹ Alexandre Skander Galand, ‘The ICC Appeals Judgment on Abd-Al-Rahman Jurisdictional Challenge: A Foreseeable Turn to Substantive Justice?’, *EJIL: Talk!* (blog), 22 November 2021, <https://www.ejiltalk.org/the-icc-appeals-judgment-on-abd-al-rahman-jurisdictional-challenge-a-foreseeable-turn-to-substantive-justice/>.

¹⁴⁷⁰ *Kokkinakis v. Greece*; *Vasiliauskas v. Lithuania*, para. 154; *Del Río Prada v. Spain*, para. 78; *Cantoni v. France*, para. 29.

¹⁴⁷¹ *Vasiliauskas v. Lithuania*, para. 154.

¹⁴⁷² *Ibid.*, paras 179-86, cited, with further references in Council of Europe, ‘Guide on Article 7 of the European Convention on Human Rights - No Punishment without Law: The Principle That Only the Law Can Define a Crime and Prescribe a Penalty’, para. 42.

of genocide as part of a protected group was an interpretation by analogy, to the applicant's detriment, which rendered his conviction unforeseeable."¹⁴⁷³

The ECtHR embraces as well the *lex certa* requirement when establishes that offences "must be clearly defined in law" in a way that their effects are accessible and foreseeable.¹⁴⁷⁴ Using the foreseeability test to assess the compatibility of a legal provision with Article 7, the Court considers a definition of a crime as sufficiently clear when "the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable."¹⁴⁷⁵ This foreseeability standard leaves room for certain flexibility and takes into account that, to prevent excessive rigidity and to adapt to changing circumstances, numerous laws are necessarily imprecise and vague to a greater or lesser extent.¹⁴⁷⁶ However, this flexible approach has not prevented the ECtHR from finding some domestic legal provisions incompatible with the *lex certa* requirement.¹⁴⁷⁷

As explained above, the foreseeability test is rather flexible and, to certain point, the Court adapts the standards depending on different elements as the offence's nature or the particular characteristics and situation of the accused.¹⁴⁷⁸ Therefore, the requirements regarding *lex certa* may vary as well depending on these factors. In *Cantoni*, for example, the Court found that a criminal provision that would have been considered too vague for a normal citizen, was sufficiently clear for the applicant to foresee the consequences since he was a professional expected to have access to legal

¹⁴⁷³ *Vasiliauskas v. Lithuania*, para. 183. However, one of the ECtHR Chambers has recently reached the opposite conclusion in *Drėlingas v. Lithuania*, App. N° 28859/16, ECtHR 4th Section, 12 March 2019, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-191702%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-191702%22]}).

¹⁴⁷⁴ *G.I.E.M S.R.L. and Others v. Italy*, App. N° 1828/06, ECtHR GC, 28 June 2018, para. 242, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-184525%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-184525%22]}); *Kokkinakis v. Greece*, para. 52. For a comprehensive analysis of the *lex certa* requirement as understood by the ECtHR, see Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 77–84.

¹⁴⁷⁵ *Kokkinakis v. Greece*, para. 52; *G.I.E.M S.R.L. and Others v. Italy*, para. 242.

¹⁴⁷⁶ *Sunday Times v The United Kingdom*, para. 49. Council of Europe, 'Guide on Article 7 of the European Convention on Human Rights - No Punishment without Law: The Principle That Only the Law Can Define a Crime and Prescribe a Penalty', paras 25, 30.

¹⁴⁷⁷ *Hashman and Harrup v. the United Kingdom*, App. N° 25594/94, ECtHR GC, 25 November 1999, paras 30-31, available at: [https://hudoc.echr.coe.int/rus#{%22itemid%22:\[%22001-58365%22\]}](https://hudoc.echr.coe.int/rus#{%22itemid%22:[%22001-58365%22]}). Cited with further references in Bantekas, *International Criminal Law*, 22.

¹⁴⁷⁸ Council of Europe, 'Guide on Article 7 of the European Convention on Human Rights - No Punishment without Law: The Principle That Only the Law Can Define a Crime and Prescribe a Penalty', 33.

advice.¹⁴⁷⁹ It has been noted as well that regarding international law the foreseeability test only requires the accused to be aware of the risk of being prosecuted, and therefore, to have a general sense of international laws and customs. Whether the particular act qualifies as one or another international crime is for the courts, and not for the perpetrator, to decide.¹⁴⁸⁰

The *lex certa* requirement also needs to be modulated depending on the characteristics of the legal instruments enshrining the crime definition. This is particularly true regarding unwritten laws, both common law and international customary law. These normative bodies are recognised as valid sources of criminalisation and thus, Article 7 is understood as not comprising the *lex scripta* requirement.¹⁴⁸¹ For example, as previously analysed, the European Court upheld domestic courts' convictions based on domestic laws applied retroactively to conducts that at the time of commission were only prohibited by international customary law.¹⁴⁸² However, the unwritten character of these norms inevitably provokes tensions with the *lex certa* requirement, given that their content is often vague and evolves with time.¹⁴⁸³

It seems evident that customary norms are less accessible than other written sources of law as statutes or treaties. In fact, some authors have questioned the accessibility of customary international law arguing that norms that need to be identified by judges based on state practice and *opinion juris*, inevitably cannot be considered sufficiently accessible for individuals.¹⁴⁸⁴ However, the ECtHR considers that in certain circumstances the concepts of accessibility and foreseeability must be considered together, and understands that the accessibility standard is fulfilled when

¹⁴⁷⁹ *Cantoni v. France*, paras 29, 35, as analysed in Peristeridou, 'The Principle of Legality in European Criminal Law', 97.

¹⁴⁸⁰ Van der Wilt, 'Nullum Crimen and International Criminal Law', 527.

¹⁴⁸¹ For a recent study on customary international law and its application by the ECtHR, see William A. Schabas, 'Le droit coutumier, les normes impératives (jus cogens), et la Cour européenne des droits de l'homme', *Revue québécoise de droit international (RQDI)*, 2020, 681–704.

¹⁴⁸² *Kononov v. Latvia* (GC), para. 237.

¹⁴⁸³ Bantekas, *International Criminal Law*, 25; Van der Wilt, 'Nullum Crimen and International Criminal Law', 520–21.

¹⁴⁸⁴ Elena C. Díaz Galán and Harold Bertot Triana, 'La Protección de Los Derechos Humanos En La Justicia Penal Internacional: El Caso Particular Del Tribunal Penal Internacional Para La Ex-Yugoslavia En Relación Con El Derecho Consuetudinario y El Principio de Legalidad', *Universitas*, no. 29 (2019): 98.

the individual had the possibility to know the law criminalizing his/her conduct.¹⁴⁸⁵ The Court requires the accused to be aware of the risk of being prosecuted and that he knew or could have known that his/her conduct would involve criminal liability.¹⁴⁸⁶ Therefore, these standards do not mean a requirement of absolute legal certainty. The Court also evaluates if secondary sources, as previous judgments of international criminal tribunals made the criminalization of the conduct sufficiently accessible and its punishment sufficiently foreseeable.¹⁴⁸⁷ Previous convictions for similar conduct would give individuals a clear indication that a behaviour is considered criminal and may entail criminal liability.¹⁴⁸⁸ Anyhow, it cannot be denied that the risk of punishing an individual that at the time of commission could not foresee the legal consequences of his/her acts significantly increases where criminal responsibility is based on customary norms. Consequently, when convictions are grounded on these norms, the accessibility and foreseeability test should be applied with special diligence.¹⁴⁸⁹

5.1.5 The special cases of political regime changes and State succession

The ECtHR has faced in different occasions questions on the legality of domestic prosecutions against crimes committed during a former political regime not governed by the rule of law. This occurred after changes of State sovereignty over a territory (State succession),¹⁴⁹⁰ but also following a change of political regime on a

¹⁴⁸⁵ *Kokkinakis v. Greece*, para. 40; *Kononov v. Latvia* (GC), para. 235. De Souza Dias, ‘Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law’, 51; Council of Europe, ‘Guide on Article 7 of the European Convention on Human Rights - No Punishment without Law: The Principle That Only the Law Can Define a Crime and Prescribe a Penalty’, para. 27.

¹⁴⁸⁶ Van der Wilt, ‘Nullum Crimen and International Criminal Law’, 519–20.

¹⁴⁸⁷ Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 80. Referring to ECtHR, *Association Ekin v. France*, Application No. 39288/98, Judgment, 17 July 2001, para. 46; *Kokkinakis v. Greece*, para. 40.

¹⁴⁸⁸ Rauter notes that the ECtHR seems to take for granted that international case law regarding customary international law is clear and consistent. However, regarding certain issues, the ambiguities and conflicting jurisprudence in the case law of the different international criminal tribunals creates uncertainty about the exact content of the law. This reality should be taken into account. In these situations, according to the author, the *in dubio pro reo* principle should allow the accused to enjoy the benefit of the doubt on the existence and scope of customary international criminal law. Rauter, 78.

¹⁴⁸⁹ Bantekas, *International Criminal Law*, 25.

¹⁴⁹⁰ For a comprehensive study on the notion, applicable law, and the numerous problems related to State succession, see Matthew C. R. Craven, ‘The Problem of State Succession and

national territory. It was the case of Germany after its reunification, and as well of a number of other States that have gone through a transition to a democratic regime. Issues regarding *nullum crime* arose when the courts of the new regime retroactively applied new legal provisions, or when they reinterpreted the laws of the former regime in the detriment of the accused, punishing conducts that at the time of commission were legal or at least tolerated.

As explained above, the Court considers gradual developments of case-law compatible with Article 7,¹⁴⁹¹ and this is true as well in the cases of State succession or changes of political regime within a State.¹⁴⁹² The European Court determined that “it is legitimate for a State governed by the rule of law to bring criminal proceedings against persons who have committed crimes under a former regime.”¹⁴⁹³ Similarly, the ECtHR found that “the courts of such a State, having taken the place of those which existed previously, cannot be criticized for applying and interpreting the legal provisions in force at the material time in the light of the principles governing a State subject to the rule of law.”¹⁴⁹⁴ In other words, the ECtHR considers that laws of a former political system not governed by the rule of law could be interpreted by the courts of the new regime according to the principles governing the new legal system.

The Court established that this reasoning is particularly true in situations concerning the right to life since States have a primary obligation to protect this right due to its supreme value in the ECHR and in the international hierarchy of human

the Identity of States under International Law’, *European Journal of International Law* 9, no. 1 (1998): 142–62; Hubert Beemelmans, ‘State Succession in International Law: Remarks on Recent Theory and State Praxis’, *Boston University International Law Journal* 15, no. 1 (1997): 71–124; D. P. O’Connell, *The Law of State Succession* (Cambridge: Cambridge University Press, 1956).

¹⁴⁹¹ See above, Section 5.1.4.2.B.

¹⁴⁹² When analysing the compatibility of these domestic prosecutions with ECHR Article 7, the Court refers to crimes committed under the “former regime” or to the courts “having taken the place of those which existed previously” (*Streletz, Kessler and Krenz v. Germany*, para. 81; *Vasiliauskas v Lithuania*, para. 159). It seems that the Court’s reasoning on this issue could be applied to situations of State succession, but also to prosecution following a change of political regime within a State. In this sense, both situations are treated indistinctly regarding the requirements and compatibility of ECHR Article 7 with the prosecution of crimes committed by a former regime in Council of Europe, ‘Guide on Article 7 of the European Convention on Human Rights - No Punishment without Law: The Principle That Only the Law Can Define a Crime and Prescribe a Penalty’, para. 44.

¹⁴⁹³ *Streletz, Kessler and Krenz v. Germany*, para. 81.

¹⁴⁹⁴ *Ibid.*, para. 81. Also in *Vasiliauskas v Lithuania*, para. 159.

rights.¹⁴⁹⁵ As analysed above, particularly regarding the German border guards cases, the European Court considers that a State practice which flagrantly infringes human rights and in particular the right to life, as in its opinion was the GDR border policy allowing deadly measures, cannot be considered as *law*. The Court considers that the accused's prospects based on such state practice are not protected by Article 7, since it only protects expectations generated by authentic law.¹⁴⁹⁶ Despite a recurring State practice of tolerating or encouraging such conducts might give the perpetrator a certain sense of impunity, it cannot prevent him from being brought to justice and punished.¹⁴⁹⁷

However, some authors have questioned this ECtHR line of reasoning, arguing that, in reality, it tolerates *ex post facto* legal interpretations to the detriment of the accused. It has been noted that to avoid retroactivity issues the European Court opted in some cases to ground convictions on domestic laws applicable to the perpetrator at the moment of commission. However, it is uncertain what is left of these laws if the Court allows interpreting such laws according to the principles of the new legal system.¹⁴⁹⁸

The *nullum crimen* notion adopted by the Court in these particular circumstances has also been the object of some criticism. Ambos considers that the ECtHR grounds its conception of the legality principle on an exclusively occidental understanding of the rule of law. Thus, other legal conceptions, as socialist norms, are excluded from the notion of law as understood under ECHR Article 7. This was particularly the case when the Court declared that that RDA state practice could not be considered as valid law. The author agrees with the outcome of the Court's reasoning but considers that such an "occidental" interpretation of the law applicable at the material time is hardly compatible with a *nullum crimen* principle, if it is understood as a neutral and universal principle.¹⁴⁹⁹ However, it should not be forgotten that when the ECtHR assess the compatibility of a domestic decision with the legality principle, it does so in the context of the European Convention. A Convention having

¹⁴⁹⁵ Council of Europe, 'Guide on Article 7 of the European Convention on Human Rights - No Punishment without Law: The Principle That Only the Law Can Define a Crime and Prescribe a Penalty', para. 44. Citing *Kononov v. Latvia* (GC), para. 241.

¹⁴⁹⁶ *Streletz, Kessler and Krenz v. Germany*, para. 87. Gil Gil, 'La Excepción al Principio de Legalidad Del Número 2 Del Art. 7 Del Convenio Europeo de Derechos Humanos', 151.

¹⁴⁹⁷ *Streletz, Kessler and Krenz v. Germany*, paras 74, 77-79, 87; *Vasiliauskas v Lithuania*, para. 158.

¹⁴⁹⁸ Ambos, 'Common Law y los disparos del muro - Artículo 7 de la Convención Europea de Derechos Humanos', 55-56.

¹⁴⁹⁹ *Ibid.*

as main objectives the pursuit of peace through international cooperation and the promotion of the principles grounding a “genuine” democracy, as individual freedom, political liberty and the rule of law.¹⁵⁰⁰ The ECtHR cannot overlook or detach from these fundamental principles and values that constitute the cornerstones of the ECHR system.

Certain authors argue as well that at the material times some authoritarian regimes were not bound by international human rights laws, and in particular by the European Convention. Therefore, when the courts of the new regime interpret the former legal system according to an *ex post facto* human rights regime, they establish an ideal interpretation of former laws that radically diverge from the legal interpretations at the time of commission.¹⁵⁰¹ It is argued that the Court forgets that the country has experienced profound political and legal changes. It overlooks how the legal system was understood at the material time and accepts the creation of a legal fiction to avoid the retroactivity problems.¹⁵⁰² Therefore, when assessing the foreseeability of a conviction in such situations, it exist a risk of reaching conclusions that would have been unrealistic at the material times.¹⁵⁰³ This raises the question of whether at the moment of commission the perpetrator, living under a regime that allowed and never prosecuted similar conducts, could have known that his/her acts were criminal and would be later punished.¹⁵⁰⁴ The deeper the change of regime has been the more these doubts become pertinent.

It cannot be denied that *ex post facto* interpretations of the laws applicable at the time of commission may significantly diverge from the interpretations made by the courts of the authoritarian regime. However, this does not necessarily mean that such interpretations infringed the legality principle, particularly if the conducts were already criminalized by international law. Equally, the fact that a State was not a party to the European Convention does not mean that it did not have other international obligations or was not bound by international norms criminalizing the acts of the

¹⁵⁰⁰ Council of Europe, *Statute of the Council of Europe*, Preamble and Article 15, May 1949, ETS 1.

¹⁵⁰¹ Mariniello, ‘The “Nuremberg Clause” and Beyond: Legality Principle and Sources of International Criminal Law in the European Court’s Jurisprudence’, 246.

¹⁵⁰² Quint, ‘The Border Guard Trials and the East German Past - Seven Arguments’, 557; Mariniello, ‘The “Nuremberg Clause” and Beyond: Legality Principle and Sources of International Criminal Law in the European Court’s Jurisprudence’, 246.

¹⁵⁰³ Mariniello, ‘The “Nuremberg Clause” and Beyond: Legality Principle and Sources of International Criminal Law in the European Court’s Jurisprudence’, 245.

¹⁵⁰⁴ *Ibid.*, 245-56. These situations have been studied in this chapter particular regarding the German border guard cases and the *Kononov* case.

perpetrator. In this way, the ECtHR finds that a State practice encouraging or tolerating behaviours flagrantly infringing human rights might give the perpetrator a certain sense of impunity, but it cannot prevent him from being brought to justice and punished.¹⁵⁰⁵ The foreseeability test guarantees the respect of the legality principle even in the special circumstances of State succession or changes of political regime within a State. It should be carefully examined if at the moment of commission the perpetrator knew, or could have known that his/her conduct could entail criminal responsibility. However, it should be noted that the foreseeability test does not prevent Courts from disagreeing in the evaluation of particular circumstances of each case, involving a risk of misinterpreting the real capacities of the perpetrator to prospect the criminal consequences of his/her acts.

5.1.6 The ECtHR and retroactive re-characterization

ECHR Article 7 bans convictions for acts that at the time of commission were not considered criminal and the European Court has interpreted the provision as compatible with the technique of retroactive re-characterization.¹⁵⁰⁶ In fact, “the Court is not concerned with the formal classifications or names given to criminal offences under the domestic law.”¹⁵⁰⁷ Consequently, to comply with the legality principle, it suffices that at the moment of commission, the behaviour constituted, in its substance, a criminal offence, either under domestic or international law, regardless of the different legal names by which that offence was referred to over time.¹⁵⁰⁸ In other words, the criminal label applicable at the moment of commission can be re-characterized in a new or in a different legal system.¹⁵⁰⁹

The ECtHR has established in different cases the compatibility of retroactive re-characterization and ECHR Article 7. For instance, in *G. v. France*, the Court found no violation of the *nullum crimen* requirements in the conviction under a new domestic

¹⁵⁰⁵ *Streletz, Kessler and Krenz v. Germany*, paras 74, 77-79, 87; *Vasiliauskas v Lithuania*, para. 158. Schabas considers that after Nuremberg punishments for war crimes and crimes against humanity are generally accessible and foreseeable. “Can an accused seriously argue that since Nuremberg the possibility of a serious prison sentence for war crimes and crimes against humanity, up to and including life imprisonment, was not “accessible and foreseeable?” Schabas, ‘Sentencing by International Tribunals’, 475.

¹⁵⁰⁶ Council of Europe, ‘The “Quality of Law” Requirements and the Principle of (Non-)Retrospectiveness of the Criminal Law under Article 7 of the Convention’, 136, 138.

¹⁵⁰⁷ *Ibid.*, 138.

¹⁵⁰⁸ *Ibid.*

¹⁵⁰⁹ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 264–65.

legislation of an offence that at the time of commission was defined under a different criminal label.¹⁵¹⁰ The ECtHR took into account the principle that the more lenient law should apply to the crime definition and the associated penalties. In the case, the new legislation lowered the gravity of the offence, and the retroactive application of the law resulted in the accused favour. In other cases the Court even upheld the conviction of conducts that at the time of commission were not yet qualified as a separate offence, but just as aggravating circumstances of other offences. In these cases the ECtHR found that at the material time the relevant conducts were already considered criminal, and their punishment was sufficiently foreseeable.¹⁵¹¹

The technique of retroactive re-characterization is not without risks and may involve various substantively serious detrimental effects on the accused. For instance, the scope of the criminal offence included in the new legislation may be broader than the criminal classification applicable at the time of commission, including conducts, elements or modes of liability or participation not covered by the previous criminal definition. Similarly, the new criminal label may remove, limit or shorten the statutory periods of limitation, or provide for harsher penalties.¹⁵¹²

The ECtHR is not stranger to those potential threats, and only accepts retroactive re-characterization when the accused's acts were already criminalized at the time of commission, and if the punishment imposed does not exceed the limits fixed by the criminal provision that originally made the acts punishable.¹⁵¹³ For instance, in *Korbely*, the Court found that the domestic courts had infringed Article 7 when

¹⁵¹⁰ *G. v. France*, paras 25-26, as explained in Council of Europe, 'The "Quality of Law" Requirements and the Principle of (Non-)Retrospectiveness of the Criminal Law under Article 7 of the Convention', para. 139. See a critical summary of the case in Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes against Humanity, War Crimes*, 149–50.

¹⁵¹¹ See *Ould Dah v. France*, App. N° 13113/03, ECtHR 5th Section, 17 March 2009, available at: <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-113014%22%5D%7D>; *Berardi and Mularoni v. San Marino*, Apps. N° 24705/16 and 24818/16, ECtHR 1st Section, 10 January 2019, available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-188997%22%5D%7D>. Explained and analysed, together with other related cases in Council of Europe, 'The "Quality of Law" Requirements and the Principle of (Non-)Retrospectiveness of the Criminal Law under Article 7 of the Convention', paras 140–45.

¹⁵¹² De Souza Dias, 'Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law', 27–28.

¹⁵¹³ *Maksimov v. Azerbaijan*, App. N° 38228/05, ECtHR 1st Section, 1 February 2007, available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-79550%22%5D%7D>; *Ould Dah v. France*; *Berardi and Mularoni v. San Marino*, para. 55. See the reference and analysis of these and further cases in Council of Europe, 'The "Quality of Law" Requirements and the Principle of (Non-)Retrospectiveness of the Criminal Law under Article 7 of the Convention', 138–41.

convicting the accused for crimes against humanity committed against armed insurgents. Despite at the moment of commission the conducts were already criminalized under domestic laws as homicides, the Court found that they could not be later re-characterized as crimes against humanity since at the time of the events it was not clear whether insurgents could be victims of that crime.¹⁵¹⁴ The ECtHR noted that as a result of the conviction for crimes against humanity the penalty imposed was more severe than the one prescribed for homicide. Similarly, the ECtHR noted that unlike homicide, crimes against humanity are not subject to statutory limitations, and therefore, using the later criminal label would prevent the accused from claiming that his prosecution was time-barred.¹⁵¹⁵ Finally, it has been indicated that the conviction of Korbely for crimes against humanity involved an additional detrimental effect for the accused since this offence carries greater social stigma than homicide.¹⁵¹⁶

Some authors consider that the accessibility and foreseeability test, only assessing whether the accused had a general understanding of the crime even by seeking some hypothetical legal advice, is not enough to prevent detrimental substantive effects for the accused derived from retroactive re-characterization. De Souza considers that the notions of accessibility and foreseeability fail to “capture the full range of elements and rules that give rise to criminal liability, punishment and prosecution.”¹⁵¹⁷ Therefore, she argues that to better conform the rationales of the legality principle, a more stringent and comprehensive test, focusing on assessment of the actual consequences of the laws, should be adopted.¹⁵¹⁸

¹⁵¹⁴ *Korbely v Hungary*, paras 78-95.

¹⁵¹⁵ De Souza Dias, ‘Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law’, 27.

¹⁵¹⁶ Ibid.

¹⁵¹⁷ Ibid.

¹⁵¹⁸ De Souza notes that in fact the ECtHR and other international courts are progressively adopting more robust legality approaches. She explores some options to prevent that any element substantively affecting the rights of the accused fall outside the safeguards of the legality principle, in De Souza Dias, 53, 90, 236–68. However, as analysed above, in Section 4.1.2.7, modern international criminal tribunals had only allowed retroactive re-characterization of domestic offences to international law crimes if the penalties imposed did not exceed the limits provided by the applicable national law at the moment of commission. See, with further references, in Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 381–82.

5.1.7 ECHR Article 7(2) - The Nuremberg clause

The ECtHR case law regarding ECHR Article 7(2) has significantly evolved over time.¹⁵¹⁹ When assessing conformity with the legality principle, early ECtHR decisions generally applied Article 7(1) to ordinary crimes and Article 7(2) to convictions grounded on international law.¹⁵²⁰ However, in its recent case law, the European Court refuses to use the Nuremberg clause by itself and considers that the first and second paragraph of Article 7 should be interpreted together. Consequently, the qualitative requirements of the legality principle, as accessibility and foreseeability, should be applied as well regarding international crimes.¹⁵²¹

The nature, meaning or scope of Nuremberg clause, included in the second paragraph of ECHR Article 7, has been extensively discussed by the doctrine. Scholars do not agree on the nature and meaning of the Nuremberg clause. Some authors consider Article 7(2) as an exception or limit to the legality principle, and understand that the guarantees of the principle do not reach conducts unequivocally condemned by the international community.¹⁵²² This way, the Nuremberg clause would represent an exception or derogation to the prohibition of retroactive laws, and would allow them regarding international crimes.¹⁵²³ According to these authors, the ECtHR has applied in different cases Article 7(2) as an exception to the *nullum crimen* principle.¹⁵²⁴

¹⁵¹⁹ For a general overview of the Nuremberg clause in the ECtHR case-law, see Mariniello, ‘The “Nuremberg Clause” and Beyond: Legality Principle and Sources of International Criminal Law in the European Court’s Jurisprudence’, 229–34.

¹⁵²⁰ Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 36.

¹⁵²¹ Gil considers that even after this case-law evolution, the extremely flexible nature of the legality standards applied by the ECtHR means that in practice an exception to the *nullum crimen* principle is still applied with regards to international crimes. Gil Gil, ‘La Excepción al Principio de Legalidad Del Número 2 Del Art. 7 Del Convenio Europeo de Derechos Humanos’, 157.

¹⁵²² Christian Tomuschat, ‘The Legacy of Nuremberg’, *Journal of International Criminal Justice* 4, no. 4 (1 September 2006): 835.

¹⁵²³ Ambos, ‘Common Law y los disparos del muro - Artículo 7 de la Convención Europea de Derechos Humanos’, 54; Peristeridou, ‘The Principle of Legality in European Criminal Law’, 96; Gil Gil, ‘La Excepción al Principio de Legalidad Del Número 2 Del Art. 7 Del Convenio Europeo de Derechos Humanos’, 133–34; Mariniello, ‘The “Nuremberg Clause” and Beyond: Legality Principle and Sources of International Criminal Law in the European Court’s Jurisprudence’, 227–28. See further references in De Souza Dias, ‘Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law’, 54.

¹⁵²⁴ Peristeridou, ‘The Principle of Legality in European Criminal Law’, 96; Francesco De Sanctis, ‘Reconciling Justice and Legality: A Quest for Fair Punishment in Cases on Bosnian Atrocity Crimes’, *Journal of International Criminal Justice* 12, no. 4 (2014): 862; Mariniello,

However, this position is contested by other part of the doctrine that do not understand Article 7(2) as an exception of the legality principle, but as a clarification of Article 7(1) to specify that general principles of international law can be as well a valid source of criminalization. Therefore, international crimes, and all sources of law, including general principles, fall within the scope of the *nullum crimen* principle.¹⁵²⁵

Another issue discussed by the legal literature is whether Article 7(2) exclusively refers to prosecution of crimes committed during the Second World War. The minority position maintains that that scope of application of the clause is confined to the atrocities committed during that conflict.¹⁵²⁶ This view has been maintained as well by the ECtHR in some decisions.¹⁵²⁷ This position is grounded on the ECHR preparatory works where is evident that the drafters of the Convention intended to protect the Nuremberg principles from potential legal attacks base on the legality principle.¹⁵²⁸

‘The “Nuremberg Clause” and Beyond: Legality Principle and Sources of International Criminal Law in the European Court’s Jurisprudence’, 227–28. Referring, *inter alia*, to *Kononov v. Latvia* and *Tess v. Latvia*, App. N° 19363/05, ECtHR 3rd Section, 4 January 2008, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-84538%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-84538%22]})).

¹⁵²⁵ De Souza Dias, ‘Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law’, 54–55; Cassese, ‘Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law. The Kolk and Kislyiy v. Estonia Case before the ECHR’, 415; Galand, *UN Security Council Referrals to the International Criminal Court: Legal Nature, Effects and Limits*, 114; De Souza Dias, ‘Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law’, 54–55; Olásolo, ‘El Principio Nullum Crimen Sine Iure En El Derecho Internacional Contemporáneo’, 26–27. For an argument against this reasoning, see Mariniello, ‘The “Nuremberg Clause” and Beyond: Legality Principle and Sources of International Criminal Law in the European Court’s Jurisprudence’, 227.

¹⁵²⁶ Council of Europe, ‘The “Quality of Law” Requirements and the Principle of (Non-)Retrospectiveness of the Criminal Law under Article 7 of the Convention’, para. 121. In the same line, see J. Velu and R. Ergec (eds.), *La Convention Européenne des droits de l’homme* (Bruxelles: Bruylant, 1990), 517, as cited in Mariniello, ‘The “Nuremberg Clause” and Beyond: Legality Principle and Sources of International Criminal Law in the European Court’s Jurisprudence’, 230.

¹⁵²⁷ *Maktouf and Damjanovic v. Bonsia and Herzegovina*, Apps. N° 2312/08 and 34179/08, ECtHR GC, 18 July 2013, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-122716%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-122716%22]}), cited in De Sanctis, ‘Reconciling Justice and Legality: A Quest for Fair Punishment in Cases on Bosnian Atrocity Crimes’, 862.

¹⁵²⁸ Analysed, with further references in Cassese, ‘Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law. The Kolk and Kislyiy v. Estonia Case before the ECHR’, 414.

However, using the preparatory works to interpret Article 7(2) has been considered inconsistent with customary norms of treaty interpretation. In fact, preparatory works are supplementary means of interpretation only applicable when a treaty provision is ambiguous, obscure or leads to a manifestly absurd or unreasonable result.¹⁵²⁹ However, this is not the case of Article 7(2). Its wording is clear and does not provide for any temporal or material limitation, and the majority position is that the ECHR Nuremberg clause can be applicable to situation not related to the World War II.¹⁵³⁰ Some ECtHR decision upheld as well this position and apply Article 7(2) to events occurred after the Second World War.¹⁵³¹ Therefore, the purpose of the second paragraph of Article 7 is “to ensure that conduct which is not criminalized by either treaty or customary rules, may nevertheless be held criminal and therefore punishable by the virtue of ‘general principles of law recognized by the whole international community’.”¹⁵³² Consequently, general principles of law are considered as a subsidiary legal source, available to courts when primary sources, as treaty and custom, do not provide any results.¹⁵³³

5.1.8 *Nulla poena*

ECHR Article 7 embodies the *nulla poena* principle and forbids the imposition of heavier punishments than the ones applicable at the time the crime was committed. In different situations the ECtHR had the possibility of elaborating on the notion,

¹⁵²⁹ Mariniello, ‘The “Nuremberg Clause” and Beyond: Legality Principle and Sources of International Criminal Law in the European Court’s Jurisprudence’, 230; De Sanctis, ‘Reconciling Justice and Legality: A Quest for Fair Punishment in Cases on Bosnian Atrocity Crimes’, 862; Cassese, ‘Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law. The Kolk and Kislyiy v. Estonia Case before the ECHR’, 414. Referring to UN General Assembly, *Vienna Convention on the Law of Treaties*, 23 May 1969, Treaty Series, vol. 1155, p. 331, Art. 32.

¹⁵³⁰ Mariniello, ‘The “Nuremberg Clause” and Beyond: Legality Principle and Sources of International Criminal Law in the European Court’s Jurisprudence’, 230; Cassese, ‘Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law. The Kolk and Kislyiy v. Estonia Case before the ECHR’, 415; Ferdinandusse, ‘Direct Application of International Criminal Law in National Courts’, 2005, 238.

¹⁵³¹ *Kolk and Kislyiy v. Estonia*. In the same line, several separate opinions in other cases, cited and analysed in Ferdinandusse, ‘Direct Application of International Criminal Law in National Courts’, 2005, 238.

¹⁵³² Cassese, ‘Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law. The Kolk and Kislyiy v. Estonia Case before the ECHR’, 415.

¹⁵³³ *Ibid.*, 415; De Souza Dias, ‘Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law’, 55.

scope and content of the principle.¹⁵³⁴ The Court has established that the Convention enshrines the principle that only the law, within the meaning of Article 7, can determine penalties.¹⁵³⁵ This means that criminal law defining penalties must be accessible and foreseeable in its effects.¹⁵³⁶ Similarly, the ECtHR considers that the provision includes as well the *lex stricta* requirement, prohibiting criminal sanctions to be extensively construed to the accused's detriment, for instance by analogy.¹⁵³⁷ Likewise, the Court considers that penalties "must be clearly defined in the law."¹⁵³⁸

Regarding convictions based on international law, early ECtHR' case law automatically applied Article 7(2) and therefore, excluded an assessment of the legality requirements. This was particularly true regarding *nulla poena* since this provision does not contain any requirements regarding the penalty.¹⁵³⁹ However, when the Court decided to apply Article 7(1) to assess these situations, it started as well examining the conformity with *nulla poena*. Due to the lack of development of international criminal

¹⁵³⁴ According to Dana, the ECtHR decisions dealing specifically with the *nulla poena sine lege* are infrequent. The Court has received few appeals based on alleged infringements of the principle, what shows, in the opinion of the author, the entrenchment of the maxim in domestic law and practice. See Shahram Dana, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing', *Journal of Criminal Law and Criminology* 99 (2009): 871. See an analysis of the cases where the ECtHR has found violations of the *nulla poena* requirements in Council of Europe, 'The "Quality of Law" Requirements and the Principle of (Non-)Retrospectiveness of the Criminal Law under Article 7 of the Convention', paras 35–37.

¹⁵³⁵ *Kokkinakis v. Greece*, para. 52, and *Vasiliauskas v Lithuania*, para. 153, as explained in Council of Europe, 'The "Quality of Law" Requirements and the Principle of (Non-)Retrospectiveness of the Criminal Law under Article 7 of the Convention', para. 5.

¹⁵³⁶ *G.I.E.M S.R.L. and Others v. Italy*, para. 242; *Del Río Prada v. Spain*, para. 91.

¹⁵³⁷ *Başkaya and Okçuoğlu v. Turkey*, Apps. N° 23536/94 and 24408/94, ECtHR GC, 8 July 1999, paras 36, 42, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-58276%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-58276%22]}), cited and analyzed in Dana, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing', 868, 883; Council of Europe, 'Guide on Article 7 of the European Convention on Human Rights - No Punishment without Law: The Principle That Only the Law Can Define a Crime and Prescribe a Penalty', para. 25; Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes against Humanity, War Crimes*, 50–51.

¹⁵³⁸ *Başkaya and Okçuoğlu v. Turkey*, para. 36, as cited in Dana, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing', 868.

¹⁵³⁹ Ferdinandusse considers that the Court also left aside the *nulla poena* principle in some cases regarding ordinary crimes, as analysed in WN Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (Asser the Hague, 2006), 256; Ferdinandusse, 'Direct Application of International Criminal Law in National Courts', 2005, 256.

law regarding the determination of penalties, the ECtHR adopted a rather flexible approach, based on the accessibility and foreseeability of punishments. In *Kononov*, for instance, the Court determined that “where international law did not provide for a sanction for war crimes with sufficient clarity, a domestic tribunal could, having found an accused guilty, fix the punishment on the basis of domestic criminal law.”¹⁵⁴⁰

Regarding the scope of the prohibition of retroactive penalties, the ECtHR has determined that even after the final judgement has been issued or while the sentence is being served, the scope of the penalty cannot be modified in the individual’s detriment.¹⁵⁴¹ It should be noted that the *nulla poena* principle do not reach the assessment of the appropriateness of a penalty, and the Court has found that it is not its role to decide on the length of a prison sentence or the type of punishment. The Court’s role is limited to ascertain whether the punishment imposed is heavier than the one applicable at the time of commission.¹⁵⁴²

The ECtHR has also evaluated the *nulla poena* principle in situations where domestic courts had retroactively re-characterized ordinary offences into international crimes, or even aggravating circumstances into separate crimes. The Court considers that Article 7 is not infringed if the penalties imposed do not exceed the limits fixed in the law that made the conduct punishable at the time of commission.¹⁵⁴³

Regarding *lex mitior*, both the ECmHR and the ECtHR initially considered the Article 7 did not include the right to a more lenient penalty provided by a law passed

¹⁵⁴⁰ *Kononov v Latvia* (GC), para. 212. A critical opinion in Gil Gil, ‘La Excepción al Principio de Legalidad Del Número 2 Del Art. 7 Del Convenio Europeo de Derechos Humanos’, 156.

¹⁵⁴¹ *Del Río Prada v. Spain*, para. 89, and further references in Council of Europe, ‘The “Quality of Law” Requirements and the Principle of (Non-)Retrospectiveness of the Criminal Law under Article 7 of the Convention’, paras 120, 132. It has been noted that “the ECtHR’s case law has gradually embraced a more flexible understanding of a penalty. Rather than simply relying on its classification or imposition following a sentence, the ECtHR now considers whether the measure effectively amounts to a change in the nature or scope of the penalty.” De Souza Dias, ‘Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law’, 64. See a comprehensive analysis on the concept of “penalty” in the ECtHR case law in Council of Europe, ‘Guide on Article 7 of the European Convention on Human Rights - No Punishment without Law: The Principle That Only the Law Can Define a Crime and Prescribe a Penalty’, paras 11–15.

¹⁵⁴² Explained, with different illustrative case law examples, in Council of Europe, ‘The “Quality of Law” Requirements and the Principle of (Non-)Retrospectiveness of the Criminal Law under Article 7 of the Convention’, para. 134.

¹⁵⁴³ *Berardi and Mularoni v. San Marino*, para. 55; *Ould Dah v. France*, cited and analyzed with further references in Council of Europe, paras 138–40.

after the commission of the offence.¹⁵⁴⁴ However, from 2009 the European Court changed its position and considered that, despite Article 7 does not explicitly embody *lex mitior*, it does not exclude granting the accused the benefit of a subsequent and favourable change in the law applied to an earlier offence.¹⁵⁴⁵ The Court considers *lex mitior* as a non-derogable fundamental principle of criminal law.¹⁵⁴⁶ Therefore, Article 7 is currently understood as not only prohibiting the application of retroactive heavier penalties, but as well granting the right to the retroactive application of a subsequent and more lenient penalty in the accused's favour.

5.1.9 Positive obligations of States and the rights of the victims

Within the framework of the global trend to recognize the obligations of States to investigate, prosecute and punish human rights violations to prevent impunity, the ECtHR has also interpreted the European Convention as imposing positive duties on States parties. The ECtHR has traditionally maintained a more restrained position than the IACtHR in this regard. However, influenced by its Inter-American counterpart, in the last years the European Court is arguably in the path of closing this gap.¹⁵⁴⁷ Among other duties, the ECtHR's case law shows a progressive tendency to

¹⁵⁴⁴ For an analysis and reference of various cases, see Council of Europe, paras 146–47. By contrast, ICCPR Article 15(1) explicitly embodies *lex mitior*: “(...) If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.”

¹⁵⁴⁵ *Scoppola v Italy (Nº 2)*, App. Nº 10249/03, ECtHR (GC), 7 September 2009, paras 105–06, 109, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-94135%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-94135%22]}). See a comprehensive explanation of this jurisprudential evolution and its subsequent application, in Council of Europe, paras 148–55; De Sanctis, ‘Reconciling Justice and Legality: A Quest for Fair Punishment in Cases on Bosnian Atrocity Crimes’, 854.

¹⁵⁴⁶ As explained, with various case law references, in De Sanctis, ‘Reconciling Justice and Legality: A Quest for Fair Punishment in Cases on Bosnian Atrocity Crimes’, 854; De Souza Dias, ‘Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law’, 53.

¹⁵⁴⁷ Gil and Maculan, ‘La Justicia penal en los escenarios posconflicto’, 230; Kai Ambos and María Laura Bohm, ‘Tribunal Europeo de Derechos Humanos y Corte Interamericana de Derechos Humanos: ¿tribunal Tímido y Tribunal Audaz?’, in *Sistema Interamericano de Protección de Los Derechos Humanos y Derecho Penal Internacional*, ed. Christian Steiner, vol. II (Montevideo, Uruguay: Konrad-Adenauer-Stiftung e. V., 2011), 67. It seems that the fight against impunity of serious human rights violations is becoming a fundamental concern in the European human right system. For instance, the Council of Europe has recently established that it “considers the fight against the impunity of perpetrators of serious human rights violations as a priority for the Council of Europe and all national and international law-enforcement bodies. Impunity must be eradicated both as a matter of individual justice and as a deterrent to future human rights violations.” Parliamentary Assembly Council of Europe, *State of human rights in*

require the intervention of States' *ius puniendi* to face human rights violations.¹⁵⁴⁸ In cases of serious violations of the fundamental rights enshrined in the Convention, as killing, torture, inhuman or degrading treatment or punishment, or slavery and forced labour (ECHR Articles 2, 3 and 4) the Court has developed a series of positive obligations as the criminalization of the conducts and the so-called procedural obligations, including the duty to investigate and prosecute those responsible.¹⁵⁴⁹

Among the positive duties developed by the European Court to protect and effectively guarantee the conventional rights of the individuals, only a part are related to criminal protection.¹⁵⁵⁰ These duties related to the exercise of the State *ius puniendi*

Europe: the need to eradicate impunity, Resolution 1675 (2009), 24 June 2009, para. 6, available at: <https://pace.coe.int/en/files/17756>. In the same vein, see Committee of Ministers of the Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on eradicating impunity for serious human rights violations*, Adopted at the 1110th meeting of the Ministers' Deputies, 30 March 2011, available at: <https://rm.coe.int/1680695d6e>. Cited in Javier Chinchón Álvarez, 'Las leyes de amnistía en el sistema europeo de derechos humanos. De la decisión de la Comisión en Dujardin y otros contra Francia a la sentencia de la Gran Sala en Marguš contra Croacia: ¿progresivo desarrollo o desarrollo circular?', *Revista de Derecho Comunitario Europeo*, no. 52 (2015): 917. The reasoning and decisions of the Inter-American Court have significantly influenced the ECtHR on the elaboration and development of some positive obligations of States. For further information on the influence of the IACtHR on the ECtHR case law, see Carmen Tomás-Valiente Lanuza, 'Deberes positivos del Estado y Derecho penal en la jurisprudencia del TEDH', *Indret: Revista para el Análisis del Derecho*, no. 3 (2016): 28; María Díaz Crego, 'El impacto de la jurisprudencia de la Corte Interamericana sobre el Tribunal Europeo de Derechos Humanos', *Derecho PUCP*, no. 75 (1 November 2015): 31–56; Ambos and Bohm, 'Tribunal Europeo de Derechos Humanos y Corte Interamericana de Derechos Humanos: ¿tribunal Tímido y Tribunal Audaz?'; Alicia Gil Gil, 'Las Aportaciones Del Tribunal Europeo de Derechos Humanos al Derecho Penal Internacional. Coincidencias y Diferencias Con La Corte Interamericana de Derechos Humanos', in *Sistema Interamericano de Protección de Los Derechos Humanos y Derecho Penal Internacional*, ed. Christian Steiner, vol. II (Montevideo, Uruguay: Konrad-Adenauer-Stiftung e. V., 2011), 311–43.

¹⁵⁴⁸ Mattia Pinto, 'Awakening the Leviathan through Human Rights Law – How Human Rights Bodies Trigger the Application of Criminal Law', *Utrecht Journal of International and European Law* 34, no. 2 (1 November 2018): 170.

¹⁵⁴⁹ William A. Schabas, 'Synergy or Fragmentation?: International Criminal Law and the European Convention on Human Rights', *Journal of International Criminal Justice* 9, no. 3 (1 July 2011): 618; Ryszard Piotrowicz, 'States' Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations', *International Journal of Refugee Law* 24, no. 2 (1 May 2012): 181–201.

¹⁵⁵⁰ For further information on the State obligations not concerning criminal law see, with further references, Lanuza, 'Deberes positivos del Estado y Derecho penal en la jurisprudencia del TEDH', 9–10. For a critical view on the ECtHR development of positive duties regarding criminal law see, with further references Gil Gil, 'Las Aportaciones Del Tribunal Europeo de Derechos Humanos al Derecho Penal Internacional. Coincidencias y Diferencias Con La Corte Interamericana de Derechos Humanos', 321–30; Pinto, 'Awakening the Leviathan through

are not construed from the traditional approach of guaranteeing the rights of the defendant, but from the perspective of the due protection to potential or actual victims.¹⁵⁵¹ In other words, the ECtHR recognises the classical “negative obligation” of States to refrain from interfering with individual’s rights, based on potential punitive excesses detrimental for the guarantees protecting the accused.¹⁵⁵² But at the same time, acknowledging the possibility of States infringing the rights of the victims, the European Court considers that the implementation of fundamental rights included in the Convention requires as well positive action by the States.¹⁵⁵³

The ECtHR construction of States’ positive obligations is grounded on ECHR Article 1 that establishes the States “shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.”¹⁵⁵⁴ The Court’s reasoning is based on a teleological understanding of the Convention. The recognition of rights and freedoms involves the guarantee of their effective protection. And this requirement of effectiveness inherently requires States to be actively involved in their protection.¹⁵⁵⁵ Therefore, the rights and freedoms recognised in the Convention, interpreted in the light of Article 1, imply certain positive obligations for the State. Regarding the duties to investigate, prosecute and punish, the Court generally considers that they flow from the substantive guarantees of the Convention, as the right to life or the prohibition of torture or inhuman and degrading treatment (Articles 2 and 3), but they are part as well of the right to an effective remedy (Article 13).¹⁵⁵⁶

Human Rights Law – How Human Rights Bodies Trigger the Application of Criminal Law’, 170–74; Lanuza, ‘Deberes positivos del Estado y Derecho penal en la jurisprudencia del TEDH’, 8, 29.

¹⁵⁵¹ Lanuza, ‘Deberes positivos del Estado y Derecho penal en la jurisprudencia del TEDH’, 3.

¹⁵⁵² Ibid.

¹⁵⁵³ Ibid.

¹⁵⁵⁴ ECHR, Art. 1, “Obligation to respect Human Rights”.

¹⁵⁵⁵ Lanuza, ‘Deberes positivos del Estado y Derecho penal en la jurisprudencia del TEDH’, 7.

¹⁵⁵⁶ Among others, *Aksoy v. Turkey*, App. N° 21987/93, ECtHR, 18 December 1996, para. 98, available at: <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-58003%22%5D%7D>}; *Kaya v. Turkey*, App. N° 22729/93, ECtHR Ch, 19 February 1998, paras 106-07, available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-58138%22%5D%7D>. As explained in International Commission of Jurist, *The Right to a Remedy and Reparation for Gross Human Rights Violations - A Practitioners’ Guide* (Geneva, 2018), 225.

5.1.9.1 State duties to criminalize and investigate

In 1979 the ECtHR established for the first time that in addition to the classical “negative obligations” of States, the European Convention required as well positive action by the States.¹⁵⁵⁷ In 1985 the Court extended these positive obligations to criminal law establishing that States had the duty to create particular criminal offences to protect fundamental rights.¹⁵⁵⁸ The ECtHR held in its subsequent consistent case law that when the most fundamental rights are at stake, effective deterrence is needed, and it can only be achieved through the criminalization of the conducts violating such rights.¹⁵⁵⁹ Therefore, the Court considers that States have the duty to criminalize certain human right breaches including, among others, the right to life, the prohibition of torture, cruel, inhuman or degrading treatment or punishment, and the prohibition of enforced disappearances.¹⁵⁶⁰

The ECtHR gradually shaped in numerous decisions a number of obligations regarding the investigation, prosecution and punishment in case of human rights violations. The Court established for the first time in 1995 the State duty to effectively

¹⁵⁵⁷ *Marckx v. Belgium*, App. N° 6833/74, ECtHR, 13 June 1979, available at: <https://www.refworld.org/cases,ECHR,3ae6b7014.html>.

¹⁵⁵⁸ *X and Y v. Netherlands*, App. N° 8978/80, ECtHR Chamber, 26 March 1985, para. 27, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-57603%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57603%22]}).

¹⁵⁵⁹ Analysed, with further case law references, in Ambos and Bohm, ‘Tribunal Europeo de Derechos Humanos y Corte Interamericana de Derechos Humanos: ¿tribunal Tímido y Tribunal Audaz?’, 55. Regarding the protection of the right to life the Court established: “The Court notes that the first sentence of Article 2(1) enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (...). It is common ground that the State obligation in this respect extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions.” *Osman v. The United Kingdom*, App. N° 23452/94, ECtHR GC, 28 October 1998, para. 115, available at: [https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22001-58257%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-58257%22]}).

¹⁵⁶⁰ For an analysis of the appearance and development of the criminalization duty of States see, with further references, Ambos and Bohm, ‘Tribunal Europeo de Derechos Humanos y Corte Interamericana de Derechos Humanos: ¿tribunal Tímido y Tribunal Audaz?’, 54–59; Pinto, ‘Awakening the Leviathan through Human Rights Law – How Human Rights Bodies Trigger the Application of Criminal Law’, 171–72; Tomás-Valiente Lanuza, ‘Deberes positivos del Estado y Derecho penal en la jurisprudencia del TEDH’, 12–15. For a critical view on the foundations and scope of this duty, see Pinto, ‘Awakening the Leviathan through Human Rights Law – How Human Rights Bodies Trigger the Application of Criminal Law’, 172; Tomás-Valiente Lanuza, ‘Deberes positivos del Estado y Derecho penal en la jurisprudencia del TEDH’, 12–15.

investigate alleged violations of human rights.¹⁵⁶¹ In *McCann and others v. The United Kingdom* the ECtHR established concerning the right to life (ECHR Article 2):

“The Court confines itself to noting, like the Commission, that a general legal prohibition of arbitrary killing by the agents of the State would be ineffective, in practice, if there existed no procedure for reviewing the lawfulness of the use of lethal force by State authorities. The obligation to protect the right to life under this provision (art. 2), read in conjunction with the State general duty under Article 1 (art. 2+1) of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alia, agents of the State.”¹⁵⁶²

The following year, the Court extended the obligation to perform effective investigations to alleged cases of torture (ECHR Article 3) and considered that it should be interpreted in connection with the right to an effective remedy (ECHR Article 13):

“The nature of the right safeguarded under Article 3 of the Convention (art. 3) has implications for Article 13 (art. 13). Given the fundamental importance of the prohibition of torture (...) and the especially vulnerable position of torture victims, Article 13 (art. 13) imposes, without prejudice to any other remedy available under the domestic system, an obligation on States to carry out a thorough and effective investigation of incidents of torture.”¹⁵⁶³

In this context, the Court also elaborated on the content and requirements associated to the right to an effective remedy, notably establishing, that it entails a “thorough and effective investigation capable of leading to the identification and punishment of those responsible.”¹⁵⁶⁴ In subsequent decisions the ECtHR kept

¹⁵⁶¹ *McCann and Others v. The United Kingdom*, App. N° 18984/91, ECtHR GC, 27 September 1995, available at: <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-57943%22%5D%7D>. Chinchón Álvarez, ‘Las leyes de amnistía en el sistema europeo de derechos humanos. De la decisión de la Comisión en Dujardin y otros contra Francia a la sentencia de la Gran Sala en Marguš contra Croacia: ¿progresivo desarrollo o desarrollo circular?’, 923.

¹⁵⁶² *McCann and Others v. The United Kingdom*, para. 161.

¹⁵⁶³ *Aksoy v. Turkey*, para. 98.

¹⁵⁶⁴ Ibid. The Court also recognized that “no express provision exists in the Convention such as can be found in Article 12 of the 1984 United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which imposes a duty to proceed to a “prompt and impartial” investigation whenever there is a reasonable ground to believe that an act of torture has been committed. However, in the Court’s view, such a requirement is implicit

developing the notion and scope of the procedural obligation of States to carry out an effective investigation, recently considering it as a “separate and autonomous duty”.¹⁵⁶⁵ The Court established that the procedural obligation associated to the fundamental rights enshrined in the Convention, “operates independently of the substantive obligation.”¹⁵⁶⁶ Consequently, this obligation could be demanded even for killings committed before the entry into force of the Convention and without invoking other permanent violations.¹⁵⁶⁷ It is worth noting the reasoning of the Court regarding the duty to investigate enforced disappearances. The Court considers that due to the different nature of death and disappearance, the obligation to investigate them should be distinct.¹⁵⁶⁸ Therefore, regarding enforced disappearances, “the procedural obligation will, potentially, persist as long as the fate of the person is unaccounted for; the ongoing failure to provide the requisite investigation will be regarded as a continuing violation (...). This is so, even where death may, eventually, be presumed.”¹⁵⁶⁹

in the notion of an "effective remedy" under ECHR Article 13. *Aksoy v. Turkey*, para. 98. In the same vein *Kaya v Turkey*, para. 107.

¹⁵⁶⁵ “The Court concludes that the procedural obligation to carry out an effective investigation under Article 2 has evolved into a separate and autonomous duty. (...) In this sense it can be considered to be a detachable obligation arising out of Article 2 capable of binding the State even when the death took place before the critical date.” *Šilih v. Slovenia*, App. N° 71463/01, ECtHR GC, 9 April 2009, para. 159, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-92142%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-92142%22]}). In the same vein, see *Varnava and Others v. Turkey*, Apps. N° 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, ECtHR GC, 18 September 2009, paras 147-48, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-94162%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-94162%22]}).

¹⁵⁶⁶ *Varnava and Others v. Turkey*, para. 147.

¹⁵⁶⁷ *Šilih v. Slovenia*, para. 159. See a critical analysis of this decision in Alicia Gil Gil, ‘Los Crímenes de La Guerra Civil Española: ¿Responsabilidad Del Estado Español Por Infracción Del Convenio Europeo de Derechos Humanos?’, *InDret, Revista Para El Analisis Del Derecho*, no. 4 (2012): 16.

¹⁵⁶⁸ “There is, however, an important distinction to be drawn in the Court’s case-law between the obligation to investigate a suspicious death and the obligation to investigate a suspicious disappearance. A disappearance is a distinct phenomenon, characterized by an ongoing situation of uncertainty and unaccountability in which there is a lack of information or even a deliberate concealment and obfuscation of what has occurred (...). This situation is very often drawn out over time, prolonging the torment of the victims’ relatives. It cannot therefore be said that a disappearance is, simply, an “instantaneous” act or event; the additional distinctive element of subsequent failure to account for the whereabouts and fate of the missing person gives rise to a continuing situation.” *Varnava and Others v. Turkey*, para. 148.

¹⁵⁶⁹ *Varnava and Others v. Turkey*, para. 148. See further information on the procedural obligations of States regarding continuous crimes, as enforced disappearances, in Section 5.1.11.

5.1.9.2 State duty to prosecute and punish

The ECtHR considers that the protection of the right to life,¹⁵⁷⁰ the prohibition of torture¹⁵⁷¹ or cruel, inhuman or degrading treatment or punishment,¹⁵⁷² the prohibition of enforced disappearances,¹⁵⁷³ the prohibition of slavery and servitude¹⁵⁷⁴ and the prohibition of human trafficking¹⁵⁷⁵ require the prosecution and punishment of those responsible.¹⁵⁷⁶ However, the Court finds that the obligation to prosecute and punish not only flows from these substantive guarantees, but also from the right to an effective remedy (Article 13).¹⁵⁷⁷

According to some scholars the ECtHR understands State procedural duties as obligations of means and not of results, and does not require investigations and prosecutions to result in actual convictions.¹⁵⁷⁸ In fact, in some decisions the Court does not provide for an express duty to punish, and only requires States to carry out “effective investigation capable of leading to the identification and punishment of those responsible.”¹⁵⁷⁹ However, particularly when facing serious human rights violations, it

¹⁵⁷⁰ E.g., *Osman v. The United Kingdom*, para. 116; *Öneryildiz v. Turkey*, App. N° 48939/99, ECtHR (GC), 30 November 2004, paras 93-95, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-67614%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-67614%22]}).

¹⁵⁷¹ E.g., *Aksoy v. Turkey*, para. 98.

¹⁵⁷² E.g., *Kopylov v. Russia*, App. N° 3933/04, ECtHR 1st Section, 29 July 2010, para. 140, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-100099%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-100099%22]}).

¹⁵⁷³ E.g., *Varnava and Others v. Turkey*, para. 148.

¹⁵⁷⁴ E.g., *Siliadin v. France*, App. 73316/01, ECtHR 2nd Section, 26 July 2005, para. 89, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-69891%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-69891%22]}).

¹⁵⁷⁵ *Rantsev v. Cyprus and Russia*, App. N° 25965/04, ECtHR 1st Section, 10 May 2010, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-96549%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-96549%22]}). Despite the prohibition of human trafficking is not explicitly included in the ECHR, the Court relied on Article 4 (prohibition of slavery and forced labour), and recognised the procedural and substantive obligations of all States involved, including the duty to adopt effective measures to prosecute and punish traffickers. *Rantsev v. Cyprus and Russia*, paras 283-85.

¹⁵⁷⁶ International Commission of Jurist, *The Right to a Remedy and Reparation for Gross Human Rights Violations - A Practitioners' Guide*, 223.

¹⁵⁷⁷ E.g., *Vasil Petrov v. Bulgaria*, App. N° 57883/00, ECtHR 5th Section, 31 October 2008, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-87877%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-87877%22]}). See further case law references in International Commission of Jurist, 225.

¹⁵⁷⁸ Ambos and Bohm, ‘Tribunal Europeo de Derechos Humanos y Corte Interamericana de Derechos Humanos: ¿tribunal Tímido y Tribunal Audaz?’, 62; Gil Gil, ‘Los Crímenes de La Guerra Civil Española: ¿Responsabilidad Del Estado Español Por Infracción Del Convenio Europeo de Derechos Humanos?’, 11.

¹⁵⁷⁹ *Kaya v. Turkey*, para. 107. See also *Al Nashiri v. Romania*, App. N° 33234/12, ECtHR 1st

seems that the ECtHR is evolving in the last years towards a stronger position expressly requiring States to prosecute and punish.¹⁵⁸⁰

In recent decisions the European Court held that the prosecution and punishment of those responsible is required in order to prevent impunity and to grant the effectiveness of the general legal prohibitions of killing, torture and inhuman and degrading treatment.¹⁵⁸¹ Similarly, the Court lately considered that the mere payment of compensation in these cases do not fulfil the State procedural obligations under Article 2 and 3.¹⁵⁸² In other cases the ECtHR established that these Articles involve a primary State obligation to put in place “effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions.”¹⁵⁸³ In the same vein, the Court expressed a strong position regarding the duty to prosecute and punish establishing that:

“The obligations deriving from Article 2 do not end there. Where lives have been lost in circumstances potentially engaging the responsibility of the State, that provision entails a duty for the State to ensure, by all means at its disposal, an adequate response – judicial or otherwise – so that the legislative

Section, 31 May 2018, para. 638, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-183685%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-183685%22]}). As explained in Pinto, ‘Awakening the Leviathan through Human Rights Law – How Human Rights Bodies Trigger the Application of Criminal Law’, 172.

¹⁵⁸⁰ See, with further case law, and legal literature references Pinto, ‘Awakening the Leviathan through Human Rights Law – How Human Rights Bodies Trigger the Application of Criminal Law’, 172; Tomás-Valiente Lanuza, ‘Deberes positivos del Estado y Derecho penal en la jurisprudencia del TEDH’, 12–15. The notion of serious human rights violations is rather broad and its limits are sometimes unclear. As explained, with examples and references in Maculan, 122.

¹⁵⁸¹ *Nikolova and Velichkova*, para. 55; *Jeronovičs v Latvia*, para. 105; *Al Nashiri v. Romania*, para. 638.

¹⁵⁸² *Nikolova and Velichkova v. Bulgaria*, App. N° 7888/03, ECtHR 5th Section, 20 December 2007, para. 55, available at: [https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22001-84112%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-84112%22]}); *Mousesyan v. Armenia*, App. N° 27524/09, ECtHR 1st Section, 16 November 2017, para. 74, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-178517%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-178517%22]}); *Abdu v. Bulgaria*, App. N° 26827/08, ECtHR, 4th Section, 11 March 2014, para. 51, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-141908%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-141908%22]}); *Jeronovičs v Latvia*, App. N° 44898/10, ECtHR (GC), 05 July 2016, para. 105, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-165032%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-165032%22]}); *Al Nashiri v. Romania*, para. 638.

¹⁵⁸³ *Keenan v. The United Kingdom*, App. N° 27229/95, ECtHR 3rd Section, 3 April 2001, para. 88, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-59365%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-59365%22]}); *Osman v. The United Kingdom*, para. 115.

and administrative framework set up to protect the right to life is properly implemented and any breaches of that right are repressed and punished.”¹⁵⁸⁴

In this line, and particularly regarding the prohibition of killing, torture and inhuman or degrading treatment or punishment (ECHR Articles 2 and 3), the ECtHR considers that States not only have the obligation to investigate and prosecute, but as well to provide for a sufficient and proportionate punishment and to ensure its effective implementation.¹⁵⁸⁵ The Court holds that “while there is no absolute obligation for all prosecutions to result in conviction or in a particular sentence, the national courts should not under any circumstances be prepared to allow” those responsible to go unpunished.¹⁵⁸⁶ According to the Court this is fundamental to preserve public confidence to ensure adherence to the rule of law and to prevent tolerance of illegal conducts.¹⁵⁸⁷ Consequently, the Court assesses “whether and to what extent the national authorities have done everything within their powers to prosecute and punish” those responsible, and “whether they have imposed adequate and deterring sanctions on them.”¹⁵⁸⁸ Hence, the Court would intervene “in cases of manifest disproportion between the gravity of the act and the punishment imposed” since otherwise the “States’ duty to carry out an effective investigation would lose much of its meaning”, and the conventional rights, in particular those of Article 2 and 3, would be ineffective in practice despite its fundamental importance.¹⁵⁸⁹

The Court considers that an adequate response by the authorities regarding the investigation, prosecution and punishment of serious human rights violations “may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of impunity, collusion in or tolerance

¹⁵⁸⁴ *Öneryildiz v. Turkey*, para. 91.

¹⁵⁸⁵ *Kopylov v. Russia*, para. 140; *Yeter v Turkey*, App. N° 33750/03, ECtHR 2nd Section, 13 January 2009, paras 67-69, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-90598%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-90598%22]}); *Okkali v. Turkey*, App. N° 52067/99, ECtHR 2nd Section, 17 October 2006, para. 68, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-77522%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-77522%22]}). Lanuza, ‘Deberes positivos del Estado y Derecho penal en la jurisprudencia del TEDH’, 11; International Commission of Jurist, *The Right to a Remedy and Reparation for Gross Human Rights Violations - A Practitioners’ Guide*, 224.

¹⁵⁸⁶ *Kopylov v. Russia*, para. 140, in this case regarding police ill-treatment.

¹⁵⁸⁷ *Kopylov v. Russia*, para. 140, with references to further case law.

¹⁵⁸⁸ *Kopylov v. Russia*, para. 140. In the same vein *Okkali v. Turkey*, para. 68.

¹⁵⁸⁹ *Kopylov v. Russia*, para. 140; *Nikolova and Velichkova v. Bulgaria*, para. 62; *Yeter v Turkey*, para. 67, with further case law references.

of unlawful acts.”¹⁵⁹⁰ Accordingly, facing human rights violation with adequate criminal justice measures may prevent future human rights abuses.¹⁵⁹¹

5.1.9.3 *The right to truth*

Contrary to the approach taken by the IACtHR, the ECtHR understands that the State duty to investigate, prosecute and punish is not grounded on the individual rights of the victims to truth or restoration. The Court has been very reluctant to establish subjective rights of the victims associated to the above-mentioned State positive duties.¹⁵⁹² However, recent decisions considering criminal proceedings and penalties as remedial measures for the victim, suggest that future developments in line with the Inter-American Court cannot be excluded.¹⁵⁹³ For instance, the right to truth, both in its individual and collective aspect, has been recognized and developed by the European Court in recent years.¹⁵⁹⁴

The ECtHR had frequently recognized the importance of investigating the truth about serious human rights violations, in particular enforced disappearance.¹⁵⁹⁵ However, it was in 2011 when the ECtHR expressly recognized for the first time the right to truth acknowledging “the importance of the right of victims and their families and heirs to know the truth about the circumstances surrounding events involving a massive violation of rights”.¹⁵⁹⁶ The Court considered that such right to truth is “as

¹⁵⁹⁰ *Al Nashiri v. Romania*, para. 641; *Kopylov v. Russia*, para. 140.

¹⁵⁹¹ Pinto, ‘Awakening the Leviathan through Human Rights Law – How Human Rights Bodies Trigger the Application of Criminal Law’, 172.

¹⁵⁹² Lanuza, ‘Deberes positivos del Estado y Derecho penal en la jurisprudencia del TEDH’, 27.

¹⁵⁹³ Pinto, ‘Awakening the Leviathan through Human Rights Law – How Human Rights Bodies Trigger the Application of Criminal Law’, 173. Referring to *Nikolova and Velichkova v. Bulgaria* and *Marguš v. Croatia*, App. N° 4455/10, ECtHR (GC), 27 May 2014, available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-144276%22%5D%7D>}.

¹⁵⁹⁴ For a recent and comprehensive analysis of the right to truth in the ECtHR’s case law, see Marloes Van Noorloos, ‘A Critical Reflection on the Right to the Truth about Gross Human Rights Violations’, *Human Rights Law Review* 21, no. 4 (2021): 880–84; Juan Manuel López Ulla, ‘El “derecho a la verdad” en la jurisprudencia del Tribunal Europeo de Derechos Humanos’ 69 (2014): 127–64; Juan Manuel López Ulla, *Derecho a la verdad y desapariciones forzadas* (Pamplona: Aranzadi, 2015).

¹⁵⁹⁵ Van Noorloos, ‘A Critical Reflection on the Right to the Truth about Gross Human Rights Violations’, 880.

¹⁵⁹⁶ *Association «21 December 1989» and Others v. Romania*, App. N° 33810/07 and 18817/08, ECtHR 3rd Section, 24 May 2011, para. 144, available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-104864%22%5D%7D>}. Despite not being explicitly recognized, the right to truth was implicit in previous Court’s decisions. “The right to

fundamental as that of the right to life, which implies the right to an effective judicial investigation and a possible right to compensation.”¹⁵⁹⁷ Not long after, the ECtHR Grand Chamber also recognized the right to truth and found that the inadequate character of the investigation of alleged enforced disappearances had a negative impact on the right to the truth for the applicant and his family.¹⁵⁹⁸ The recognition of the right to truth has been reaffirmed and developed by the Court in recent decisions, confirming as well its collective aspect:

“Furthermore, where allegations of serious human rights violations are involved in the investigation, the right to the truth regarding the relevant circumstances of the case does not belong solely to the victim of the crime and his or her family but also to other victims of similar violations and the general public, who have the right to know what has happened.”¹⁵⁹⁹

the truth is not a novel concept in our case-law, nor is it a new right. Indeed, it is broadly implicit in other provisions of the Convention, in particular the procedural aspect of Articles 2 and 3, which guarantee the right to an investigation involving the applicant and subject to public scrutiny.” *El-Masri v. The Former Yugoslav Republic of Macedonia*, Joint Concurring Opinion of Judges Tulkens, Spielmann, Sicilianos and Keller, para. 5. In fact, The ECtHR had recognized the suffering of relatives of victims of enforced disappearances, and had established that the failure of the State to investigate such crimes and to inform the families amounted to an infringement of the relatives’ own right not to be subjected to cruel and inhuman treatment. As explained, with numerous case-law references, in International Commission of Jurist, *The Right to a Remedy and Reparation for Gross Human Rights Violations - A Practitioners’ Guide*, 129; Van Noorloos, ‘A Critical Reflection on the Right to the Truth about Gross Human Rights Violations’, 880.

¹⁵⁹⁷ *Association «21 December 1989» and Others v. Romania*, para. 144.

¹⁵⁹⁸ *El-Masri v. The Former Yugoslav Republic of Macedonia*, App. N° 39630/09, ECtHR (GC), 13 December 2012, para. 191, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-115621%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-115621%22]}). For an analysis and implications of this decision, see Federico Fabbrino, ‘The European Court of Human Rights, Extraordinary Renditions and the Right to the Truth: Ensuring Accountability for Gross Human Rights Violations Committed in the Fight against Terrorism’, *Human Rights Law Review* 14, no. 1 (2014): 85–106; Van Noorloos, ‘A Critical Reflection on the Right to the Truth about Gross Human Rights Violations’, 881–82. The two concurring opinions to the decision show an interesting debate within the Court about the opportunity of expressly recognise the right to truth, and whether to set it as an individual right or also as a collective right of society, as analysed in Van Noorloos, 882; International Commission of Jurist, *The Right to a Remedy and Reparation for Gross Human Rights Violations - A Practitioners’ Guide*, 128–29.

¹⁵⁹⁹ *Al Nashiri v. Romania*, para. 641. In the same vein, see *El-Masri v. The Former Yugoslav Republic of Macedonia*, para. 191. The ECtHR jurisprudence on the collective dimension of right to truth is still in a nascent stage, and the Court did not clearly identify yet the holders of the right, its scope and implications. For a comprehensive analysis, with further scholarly references, on the collective dimension of the right to truth in the ECtHR case law, and its potential implications, see Van Noorloos, ‘A Critical Reflection on the Right to the Truth about

5.1.10 The ECtHR and amnesty laws

Compared with other international organizations and institutions, as the IACtHR, the ECtHR has been extremely cautious and even ambiguous regarding the compatibility of amnesty laws with the international human rights instruments.¹⁶⁰⁰ While sometimes the Court strongly expressed the incompatibility of amnesty laws with the ECHR, in other occasions its positions arguably suggest the opposite. The ambivalent position of the Court responds to an underlying general doctrinal debate on the utility and tolerable scope of amnesties in transitional justice contexts.¹⁶⁰¹ In fact, two different and parallel lines of reasoning can be identified in the ECtHR case law on amnesties.

In its first decisions the Court considered the application of some amnesty laws compatible with the ECHR taking into account elements as the purpose of the

Gross Human Rights Violations’, 883, 888, 898; López Ulla, ‘El “derecho a la verdad” en la jurisprudencia del Tribunal Europeo de Derechos Humanos’, 152–55.

¹⁶⁰⁰ Gil Gil, ‘Los Crímenes de La Guerra Civil Española: ¿Responsabilidad Del Estado Español Por Infracción Del Convenio Europeo de Derechos Humanos?’, 11. Contrary to other regional human rights system, the European Court has not often performed legal assessments on amnesty laws, as explained in Chinchón Álvarez, ‘Las leyes de amnistía en el sistema europeo de derechos humanos. De la decisión de la Comisión en Dujardin y otros contra Francia a la sentencia de la Gran Sala en Marguš contra Croacia: ¿progresivo desarrollo o desarrollo circular?’, 912. According to some authors, the ECtHR has not yet conducted a direct or explicit judicial review of amnesties. Juan Pablo Pérez León Acevedo, ‘The European Court of Human Rights (ECtHR) Vis-à-Vis Amnesties and Pardons: Factors Concerning or Affecting the Degree of ECtHR’s Deference to States’, *The International Journal of Human Rights* 26, no. 6 (3 July 2022): 1108; Jackson Miles, ‘Amnesties in Strasbourg’, *Oxford Journal of Legal Studies* 38, no. 3 (September 2019): 451–52.

¹⁶⁰¹ This debate confronts arguments regarding the utility of amnesties to end armed conflicts, reach peace and stop human rights violations, against claims concerning the need to prosecute those responsible, provide justice and prevent impunity. For an overview of this debate, with further references in Chinchón Álvarez, «Las leyes de amnistía en el sistema europeo de derechos humanos. De la decisión de la Comisión en Dujardin y otros contra Francia a la sentencia de la Gran Sala en Marguš contra Croacia: ¿progresivo desarrollo o desarrollo circular?», 942–43; Malarino, «Transición, derecho penal y amnistía. Reflexiones sobre la utilización del derecho penal en procesos de transición»; Xavier Philippe, «La mémoire et l’oubli : la place de la justice transitionnelle», *Les Cahiers Portalis* 3, n.º 1 (2016): 34–39. These debates were particularly evident in the Grand Chamber’s judgment and its concurring opinions in *Marguš v. Croatia*, as analyzed in Pérez León Acevedo, ‘The European Court of Human Rights (ECtHR) Vis-à-Vis Amnesties and Pardons’, 1121; Chinchón Álvarez, ‘Las leyes de amnistía en el sistema europeo de derechos humanos. De la decisión de la Comisión en Dujardin y otros contra Francia a la sentencia de la Gran Sala en Marguš contra Croacia: ¿progresivo desarrollo o desarrollo circular?’, 945–46.

measure, its democratic origins or the rights and interests at stake.¹⁶⁰² The ECtHR seemed to distinguish between amnesties putting an end to a conflict, promoting peace and reconciliation, and thus being potentially compatible with the ECHR, and those generating a climate of impunity, encouraging the continuation of human rights violations and therefore being clearly incompatible with the Convention.¹⁶⁰³ Despite the Court has progressively evolved towards stronger positions against all sorts of amnesties, occasionally this reasoning reappear. In fact, some authors consider that the ECtHR standpoint is still not clear on whether such distinction among amnesty laws should be made and whether the first ones are compatible or not with the ECHR.¹⁶⁰⁴

The development of States' positive duties to investigate and prosecute human rights violations, and the evolution of international law on the subject, has caused an increase in the scrutiny of the effects of amnesties on human rights.¹⁶⁰⁵ The ECtHR recently increasing case law on amnesties has gradually evolved towards a position in line with the general trend in international law. Thus, the Court generally considers now that amnesty laws preventing the investigation, prosecution and punishment of those responsible for serious human rights violations are incompatible with the ECHR.¹⁶⁰⁶ Despite this line of reasoning is progressively gaining ground, in some decisions the ECtHR is still not as clear and direct.

¹⁶⁰² For an analysis of these factors, see Pérez León Acevedo, 'The European Court of Human Rights (ECtHR) Vis-à-Vis Amnesties and Pardons'.

¹⁶⁰³ Gil Gil, 'Los Crímenes de La Guerra Civil Española: ¿Responsabilidad Del Estado Español Por Infracción Del Convenio Europeo de Derechos Humanos?', 14; Pérez León Acevedo, 'The European Court of Human Rights (ECtHR) Vis-à-Vis Amnesties and Pardons', 1127–30.

¹⁶⁰⁴ Gil Gil, 'Los Crímenes de La Guerra Civil Española: ¿Responsabilidad Del Estado Español Por Infracción Del Convenio Europeo de Derechos Humanos?', 14; Miles, 'Amnesties in Strasbourg', 452. See an overview of the scholarly opinions on the ECtHR case law regarding amnesties in Chinchón Álvarez, 'Las leyes de amnistía en el sistema europeo de derechos humanos. De la decisión de la Comisión en Dujardin y otros contra Francia a la sentencia de la Gran Sala en Marguš contra Croacia: ¿progresivo desarrollo o desarrollo circular?', 912–23.

¹⁶⁰⁵ Pérez León Acevedo, 'The European Court of Human Rights (ECtHR) Vis-à-Vis Amnesties and Pardons', 1112. See a recent and detailed analysis on the influence of the IACtHR case law on the evolving position of the ECtHR regarding amnesties in Miguel Arenas Meza, 'El diálogo judicial euro-latinoamericano en el tema de leyes de amnistía: un ejemplo de "cross-fertilization" entre tribunales de Derechos Humanos', *Araucaria (Triana)* 20, no. 40 (2018): 585–600.

¹⁶⁰⁶ Chinchón Álvarez, 'Las leyes de amnistía en el sistema europeo de derechos humanos. De la decisión de la Comisión en Dujardin y otros contra Francia a la sentencia de la Gran Sala en Marguš contra Croacia: ¿progresivo desarrollo o desarrollo circular?', 947.

5.1.10.1 *Origins and evolution of the ECtHR position on amnesties*

The legal effects of an amnesty law were analysed for the first time in the European human rights system in 1991.¹⁶⁰⁷ In the *Dujardin* case the European Commission upheld an amnesty law adopted by France in the context of New Caledonia's decolonization process, and that covered acts that could be qualified as war crimes.¹⁶⁰⁸ The applicants, relatives of French gendarmes assassinated in that conflict, claimed that ECHR Article 2 (right to life) had been violated since the amnesty laws had put to an end all the judicial proceedings in this regard. However, the Commission rejected the claim and established that, if considered necessary, States are entitled to adopt amnesty laws as long as they balance their legitimate interests with those of the individuals. The Commission also grounded its decision on the exceptional nature of the measure and its purpose of resolving the conflict, seeking peace and reconciliation.¹⁶⁰⁹ Despite at that moment some voices had already started demanding a stricter assessment of amnesty laws, the Commission's position cannot be considered unique or extravagant in the international community at the time.¹⁶¹⁰

¹⁶⁰⁷ *Dujardin et autres contre la France*, App. N° 16734/90, ECmHR, 2 September 1991, available at: <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%22001-24687%22%5D%7D>. Comprehensively analysed in Chinchón Álvarez, 918–25; Gil Gil, 'Los Crímenes de La Guerra Civil Española: ¿Responsabilidad Del Estado Español Por Infracción Del Convenio Europeo de Derechos Humanos?', 11–12.

¹⁶⁰⁸ See an analysis of the amnesty law, in Chinchón Álvarez, 'Las leyes de amnistía en el sistema europeo de derechos humanos. De la decisión de la Comisión en *Dujardin* y otros contra Francia a la sentencia de la Gran Sala en *Marguš* contra Croacia: ¿progresivo desarrollo o desarrollo circular?', 918.

¹⁶⁰⁹ "La question qui se pose est donc de savoir si ce faisant, il a été porté atteinte au droit protégé par l'Article 2 (Art. 2) de la Convention. La Commission estime à cet égard que la loi d'amnistie, qui présente un caractère tout à fait exceptionnel, a été adoptée dans le cadre d'un processus de règlement du contentieux entre les diverses communautés de l'archipel.

Il n'appartient pas à la Commission de porter un jugement sur l'opportunité des mesures prises par la France à cet égard. En effet, l'Etat est en droit d'adopter, dans le cadre de sa politique criminelle, les lois d'amnistie qu'il juge nécessaires à condition toutefois qu'un équilibre soit ménagé entre les intérêts légitimes d'un Etat et l'intérêt des justiciables à ce que le droit à la vie soit protégé par la loi. En l'occurrence, la Commission estime qu'un tel équilibre a été respecté et qu'il n'a, dès lors, pas été porté atteinte à la disposition précitée." *Dujardin et autres contre la France*, p. 3.

¹⁶¹⁰ As explained, together with an overview of the opinion of different international institutions regarding amnesties at the moment, in Chinchón Álvarez, 'Las leyes de amnistía en el sistema europeo de derechos humanos. De la decisión de la Comisión en *Dujardin* y otros contra Francia a la sentencia de la Gran Sala en *Marguš* contra Croacia: ¿progresivo desarrollo o desarrollo circular?', 918–25. For instance, at the time the Inter-American Commission was in line with

Despite some ideas from the Court's reasoning in *Dujardin* would occasionally reappear in subsequent decisions, in the following years the ECtHR progressively adopted a new line of reasoning and assumed stricter positions regarding amnesty laws. The evolution of international law was determinant in this development, as well as its own jurisprudential construction on States' positive obligations.¹⁶¹¹ As above-explained the ECtHR gradually developed the so-called "procedural obligations", embracing the duty of States to investigate, prosecute and punish violations of substantive conventional rights, as those of Articles 2 (right to life) or 3 (prohibition of torture). This way, when facing amnesty laws, the Court started assessing as well their impact of on these duties.

A significant example of this evolution is the *Abdülşamet Yaman* case in 2004. In this decision regarding a State agent charged with crimes involving torture or ill-treatment, the ECtHR already declared that "it is of the utmost importance for the purposes of an "effective remedy" that criminal proceedings and sentencing are not time-barred and that the granting of an amnesty or pardon should not be permissible."¹⁶¹² The formula "should not be permissible", also employed by the Court in some subsequent cases, gave rise to a doctrinal debate about its meaning and whether it was just a recommendation or advice, an expressions suggesting that amnesties would not be possible, or a strict prohibition.¹⁶¹³

In 2009 the Court had a new opportunity to elaborate on amnesty laws in *Ould Dah*.¹⁶¹⁴ The decision is a good example of the ambiguity of the Court on the subject, reflecting in the same decision two distinctive lines of reasoning. On one hand the Court established the general incompatibility of amnesties laws with the ECHR, but on

the ECmHR considering that it was not its role to decide on the difficult questions faced by newly established democracies regarding the investigation of past human rights violations and the eventual punishment of those responsible. However, no long after, the IACHR and the IACtHR radically changed their position, as explained below, in Section 5.2.4.3.

¹⁶¹¹ See above, footnote 1605.

¹⁶¹² *Abdülşamet Yaman v. Turkey*, App. N° 32446/96, ECtHR 2nd Section, 2 November 2004, para. 55, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-67228%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-67228%22]}).

¹⁶¹³ See, with further case-law references, *Yeter v Turkey*, para. 70. For an analysis of the Court's employment of this expression and some subtle variations, and an account on these doctrinal debates, see Chinchón Álvarez, 'Las leyes de amnistía en el sistema europeo de derechos humanos. De la decisión de la Comisión en Dujardin y otros contra Francia a la sentencia de la Gran Sala en Marguš contra Croacia: ¿progresivo desarrollo o desarrollo circular?', 925–28.

¹⁶¹⁴ *Ould Dah v. France*. This case concerned a Mauritanian official who had benefitted from a Mauritanian amnesty law, but who was later prosecuted and convicted by French courts for a number of acts of torture.

the other the ECtHR recovered some ideas from *Dujardin*, as the recognition of the utility of some amnesties to promote reconciliation. This way, the Court reminded first the fundamental importance of the prohibition of torture, and referred to the position of some international organisms as the ICTY who highlighted the contradiction of recognising the *ius cogens* value of the prohibition of torture and at the same time allowing States to take domestic measures authorizing or condoning torture or absolving its perpetrators.¹⁶¹⁵ Then, the ECtHR established that “like the United Nations Human Rights Committee and the ICTY, the Court considers that an amnesty is generally incompatible with the duty incumbent on the States to investigate such acts.”¹⁶¹⁶

However, the Court also expressed that “the possibility of a conflict arising between, on the one hand, the need to prosecute criminals and, on the other hand, a country’s determination to promote reconciliation in society cannot, generally speaking, be ruled out.”¹⁶¹⁷ Anyhow, the Court considered that no reconciliation process of this type had been put in place in Mauritania and “the obligation to prosecute criminals should not therefore be undermined by granting impunity to the perpetrator in the form of an amnesty law that may be considered contrary to international law.”¹⁶¹⁸

The *Ould Dah* decision has been interpreted in various manners. The Court’s expression considering amnesties as “generally” incompatible with the duty to investigate, and the recognition of the possibility of a conflict between prosecuting criminals and a country’s determination to promote reconciliation, have led some scholars to suggest that some amnesties are or could be compatible with the European Convention. In this vein, according to certain authors, the Court seems to follow the line of argument initiated in *Dujardin* and does not express the incompatibility of amnesties with the ECHR in a categorical and absolute manner.¹⁶¹⁹ Other writers note that the ECtHR shows more openness to the permissibility of amnesties in certain circumstances than other international tribunal or human right bodies.¹⁶²⁰ On the contrary, other scholars understand the *Ould Dah* decision as an evolution of the Court towards a stronger position against amnesties. It is argued that for the first time the ECtHR established the incompatibility of these laws with the ECHR when they

¹⁶¹⁵ *Ould Dah v. France*, para. 11, 16; *Prosecutor v. Furundzija*, Judgement, para. 155.

¹⁶¹⁶ *Ould Dah v. France*, para. 17.

¹⁶¹⁷ *Ibid.*

¹⁶¹⁸ *Ibid.*

¹⁶¹⁹ Gil Gil, ‘Los Crímenes de La Guerra Civil Española: ¿Responsabilidad Del Estado Español Por Infracción Del Convenio Europeo de Derechos Humanos?’, 12.

¹⁶²⁰ Schabas, ‘Synergy or Fragmentation?’, 621.

prevent the effective fulfilment of the obligations set forth in ECHR Articles 2 and 3.¹⁶²¹ Anyhow, the majority position considers that the ECtHR's intention was to establish a general incompatibility of amnesty laws with the ECHR when they prevent the investigation and prosecution of serious human rights violations.¹⁶²²

No long after, the ECtHR had another opportunity to elaborate on amnesties.¹⁶²³ The Court reiterated that “an amnesty is generally incompatible with the duty incumbent on the States to investigate acts of torture (...) and to combat impunity for international crimes”.¹⁶²⁴ The ECtHR reached this conclusion after recognizing that in cases involving massive human rights violations, the importance of the right of victims and their families to know the truth is “as fundamental as that of the right to life, which implies the right to an effective judicial investigation and a possible right to compensation.”¹⁶²⁵ It has been noted that in this case, concerning a transition from a totalitarian regime to a more democratic system, the Court focused on the State duties and the rights of the victims, but not on the possibility to promote reconciliation. This has been interpreted as a confirmation, or at least as a step further towards a full recognition of the incompatibility of amnesty laws with the ECHR when they prevent effective compliance with the procedural obligations of ECHR Articles 2 and 3.¹⁶²⁶

In 2012 the first instance judgment in *Marguš v. Croatia* followed the same line of reasoning and established that granting amnesty regarding international crimes “is increasingly considered to be prohibited by international law.”¹⁶²⁷ No reference was made to concepts as “reconciliation” or to the *Dujardin* case. However, one month later an ECtHR Section issued a decision that could be considered a setback in the Court's

¹⁶²¹ Arenas Meza, ‘El diálogo judicial euro-latinoamericano en el tema de leyes de amnistía’, 591.

¹⁶²² See an overview of these doctrinal debates, Chinchón Álvarez, ‘Las leyes de amnistía en el sistema europeo de derechos humanos. De la decisión de la Comisión en Dujardin y otros contra Francia a la sentencia de la Gran Sala en Marguš contra Croacia: ¿progresivo desarrollo o desarrollo circular?’, 933–34.

¹⁶²³ *Association «21 December 1989» and Others v. Romania*. Regarding a draft amnesty law aiming to exonerate members of the Romanian armed forces from any responsibility for crimes committed during the Romanian revolution of December 1989.

¹⁶²⁴ *Association «21 December 1989» and Others v. Romania*, para. 144.

¹⁶²⁵ Ibid.

¹⁶²⁶ Chinchón Álvarez, ‘Las leyes de amnistía en el sistema europeo de derechos humanos. De la decisión de la Comisión en Dujardin y otros contra Francia a la sentencia de la Gran Sala en Marguš contra Croacia: ¿progresivo desarrollo o desarrollo circular?’, 935–36.

¹⁶²⁷ *Marguš v. Croatia*, App. N° 4455/10, ECtHR 1st Section, 13 November 2012, para. 47, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-114487%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-114487%22]}).

case law evolution towards stronger positions against amnesties, and that showed that some ECtHR judges are still opposite to this jurisprudential development.¹⁶²⁸ Returning to the reasoning of *Dujardin* the Court stated that “the Convention organs have already held that, even in such fundamental areas of the protection of human rights as the right to life, the State is justified in enacting, in the context of its criminal policy, any amnesty laws it might consider necessary, with the proviso, however, that a balance is maintained between the legitimate interests of the State and the interests of individual members of the public.”¹⁶²⁹ Nevertheless, in 2014 the Grand Chamber judgment in *Marguš v. Croatia* returned to its previous case law development.

5.1.10.2 *The ECtHR current position on amnesties*

The ECtHR Grand Chamber decision in *Marguš v. Croatia*, is considered the most recent authoritative decision on amnesties.¹⁶³⁰ The Court acknowledged the evolution of international law on the subject and aligned its position with other international organizations confirming that amnesty laws covering serious human rights violations are not compatible with the ECHR. However, the Grand Chamber also added a phrase that could lead to some ambiguity.

The ECtHR Grand Chamber first referred to its well-established case law regarding the obligation of States to prosecute acts such as torture and intentional killings. Then, the Court affirmed that, according to its previous decisions, granting amnesty regarding killing and ill-treatment of civilians “would run contrary to the

¹⁶²⁸ *Tarbuk v. Croatia*, App. N°31360/10, ECtHR 1st Section, 11 December 2012, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-115166%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-115166%22]}).

¹⁶²⁹ *Tarbuk v. Croatia*, para. 50. It should be noted that in this case concerned the application of an amnesty law to alleged illegal espionage acts, and not to serious human rights violations. Some authors considered that this judgment proved that according to the ECtHR amnesty laws were tolerable in certain circumstances, as explained with references in Chinchón Álvarez, ‘Las leyes de amnistía en el sistema europeo de derechos humanos. De la decisión de la Comisión en Dujardin y otros contra Francia a la sentencia de la Gran Sala en Marguš contra Croacia: ¿progresivo desarrollo o desarrollo circular?’, 936.

¹⁶³⁰ *Marguš v. Croatia* (GC). Pinto, ‘Awakening the Leviathan through Human Rights Law – How Human Rights Bodies Trigger the Application of Criminal Law’, 173; Arenas Meza, ‘El diálogo judicial euro-latinoamericano en el tema de leyes de amnistía’, 593. The case concerned the 1996 Croatian amnesty law initially applied to exonerate those responsible for the death of several civilians, but later considered inapplicable by the Croatian Supreme Court. See a comprehensive analysis of this case in Chinchón Álvarez, ‘Las leyes de amnistía en el sistema europeo de derechos humanos. De la decisión de la Comisión en Dujardin y otros contra Francia a la sentencia de la Gran Sala en Marguš contra Croacia: ¿progresivo desarrollo o desarrollo circular?’, 937–47.

State obligations under Articles 2 and 3 of the Convention since it would hamper the investigation of such acts and necessarily lead to impunity for those responsible.”¹⁶³¹ The Chamber continued arguing that such result “would diminish the purpose of the protection guaranteed under Articles 2 and 3 of the Convention and render illusory the guarantees in respect of an individual’s right to life and the right not to be ill-treated.”¹⁶³² Finally, the Court reminded that the object and purpose of the ECHR require its provisions to be interpreted and applied in a manner rendering its safeguards practical and effective.¹⁶³³

Despite its position is rather clear, in the conclusions the Court added a sentence that could seem contradictory. First, the Court sum up its findings and established that a “growing tendency in international law is to see such amnesties as unacceptable because they are incompatible with the unanimously recognised obligation of States to prosecute and punish grave breaches of fundamental human rights.”¹⁶³⁴ Then, the Court continued with an unexpected sentence: “Even if it were to be accepted that amnesties are possible where there are some particular circumstances, such as a reconciliation process and/or a form of compensation to the victims, the amnesty granted to the applicant in the instant case would still not be acceptable since there is nothing to indicate that there were any such circumstances.”¹⁶³⁵

Some authors have interpreted this sentence as a sort of nuance or relaxation of the Court’s position compared with other international bodies, or at least the recognition of the possibility that amnesties might hypothetically be acceptable in “some particular circumstances, such as a reconciliation process and/or a form of compensation to the victims”.¹⁶³⁶ However, this position would be hardly compatible with the general trend in international law. In fact, the majority doctrine considers that

¹⁶³¹ *Marguš v. Croatia* (GC), para. 127.

¹⁶³² *Ibid.*

¹⁶³³ *Ibid.*

¹⁶³⁴ *Ibid.*, para. 139.

¹⁶³⁵ *Ibid.*

¹⁶³⁶ Pinto, ‘Awakening the Leviathan through Human Rights Law – How Human Rights Bodies Trigger the Application of Criminal Law’, 174. For the Commissioner for Human Rights of the Council of Europe’s “the compatibility of such amnesty measures with international human rights law must be thoroughly assessed on a case-by-case basis.” Council of Europe - Commissioner for Human Rights, ‘Missing Persons and Victims of Enforced Disappearance in Europe’ (Council of Europe, 2016), 39, <https://rm.coe.int/missing-persons-and-victims-of-enforced-disappearance-in-europe-issue-/16806daa1c>.

this sentence does not modify the Court's general conclusion and remains consistent with the view of most international tribunals and human rights bodies.¹⁶³⁷

5.1.11 Permanent or continuous crimes

Permanent or continuous crimes¹⁶³⁸ raise some substantial questions regarding two aspects of the legality principle. First, concerning the Court's jurisdiction *ratione temporis* over States' procedural obligations arising from ECHR violations occurred before its entry into force or before the State recognised the competence of the ECtHR, but that continued after that moment.¹⁶³⁹ And second, regarding the compatibility of

¹⁶³⁷ See an overview of this doctrinal debate in Chinchón Álvarez, 'Las leyes de amnistía en el sistema europeo de derechos humanos. De la decisión de la Comisión en Dujardin y otros contra Francia a la sentencia de la Gran Sala en Marguš contra Croacia: ¿progresivo desarrollo o desarrollo circular?', 940–41. In this regard, it has been suggested that the inclusion of this unexpected sentence responds to the aim to reach a compromise solution including the views of three judges, also expressed in their concurring opinion, and the arguments of a group of academics that took part in the proceedings. As explained in Chinchón Álvarez, 942–46. In a recent case the ECtHR established, referring to *Marguš*, that "pardons and amnesties are primarily matters of member States' domestic law and are in principle not contrary to international law, save when relating to acts amounting to grave breaches of fundamental human rights." *Makuchyan and Minasyan v. Azerbaijan and Hungary*, App. N° 17247/13, ECtHR 4th Section, 12 October 2020, para. 160, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-202524%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-202524%22]}).

¹⁶³⁸ The expressions "continuous" or "permanent" crimes are used as equivalents in the international legal system, as explained with examples, in Javier Chinchón Álvarez, *El Tratamiento Judicial de Los Crímenes de La Guerra Civil y El Franquismo En España. Una Visión de Conjunto Desde El Derecho Internacional* (Bilbao: Deusto Digital. Instituto de Derechos Humanos Pedro Arrupe, 2012), 26–27. Also see below some examples of the Inter-American human rights system, in footnote 1805. However, in certain domestic legal orders continuous and permanent crimes are different types of crimes, as it's the case of Spain and various Latin-American countries: "while permanent crimes are those in which the extension of the unlawful situation depends on the will of the offender and whose harmfulness intensifies with the passing of time, continuing offenses imply the perpetration of a series of criminal acts with a common link, allowing the consideration of each of them as part of a single (and continual) process." See, with further references to legal literature and State practice in Marina Mínguez Rosique, 'The Principle of Legality in Criminal Law in the Inter-American System for the Protection of Human Rights', in *Multilevel Protection of the Principle of Legality in Criminal Law*, ed. Juan Antonio Lascaraín Sánchez, Marina Rosique Mínguez, and Mercedes Pérez Manzano (Madrid: Springer, 2018), 101–2. For an analysis of the notion of continuous crime and its evolution in the ECtHR case law, see Chinchón Álvarez, *El Tratamiento Judicial de Los Crímenes de La Guerra Civil y El Franquismo En España. Una Visión de Conjunto Desde El Derecho Internacional*, 131–33.

¹⁶³⁹ Regarding the extension in time of State responsibility resulting from a breach of an international obligation, also see ILC, *Draft articles on Responsibility of States for*

ECHR Article 7 with domestic convictions based on national criminal law provisions adopted or modified after the consummation of the crime, but before its termination.¹⁶⁴⁰

As already analysed, the ECtHR established procedural obligations of States related to the fundamental rights of the Convention. In this vein, the Court recently considered the obligation of States to carry out an effective investigation as a “separate and autonomous duty”¹⁶⁴¹ that “operates independently of the substantive obligation.”¹⁶⁴² Similarly, it established that the procedural obligation continues as long as measures to elucidate the circumstances of the violation and establish responsibility can reasonably be expected.¹⁶⁴³ Therefore, the procedural obligations could be demanded to the State even for ECHR violations committed before the entry into force of the Convention and without invoking other permanent violations.¹⁶⁴⁴ Logically this raises the question about the ECtHR *ratione temporis* jurisdiction over these situations or over ECHR violations giving rise to procedural duties occurred before the State recognised the competence of the Court.

This question arises not only regarding procedural obligations, but as well in case of substantive ECHR violations caused by continuous or permanent crimes initiated before the ECHR entered into force, or the State recognised the Court’s competence, but continuing after that moment. The paradigmatic example of a crime producing continuous substantive and procedural ECHR violations is enforced disappearance.¹⁶⁴⁵ The Court normally assesses cases of enforced disappearance in connection with ECHR Articles 2 (right to life), 3 (prohibition of torture), 5 (right to liberty and security) and 13 (right to an effective remedy).¹⁶⁴⁶ Regarding Articles 2 or 3,

Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission, 2001, vol. II (2), Art. 14, available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

¹⁶⁴⁰ As explained regarding the IACtHR, in Mínguez Rosique, ‘The Principle of Legality in Criminal Law in the Inter-American System for the Protection of Human Rights’, 100–105.

¹⁶⁴¹ *Šilih v. Slovenia*, para. 159. In the same vein, see *Varnava and Others v. Turkey*, paras 147–48.

¹⁶⁴² *Varnava and Others v. Turkey*, para. 147.

¹⁶⁴³ *Šilih v. Slovenia*, para. 157.

¹⁶⁴⁴ *Ibid.*, para. 159. See a critical analysis of this decision in Gil Gil, ‘Los Crímenes de La Guerra Civil Española: ¿Responsabilidad Del Estado Español Por Infracción Del Convenio Europeo de Derechos Humanos?’, 16.

¹⁶⁴⁵ The ECtHR characterizes enforced disappearance as a permanent or continuous crime. See *inter alia*, with further case law references, *Varnava and Others v. Turkey*, paras 147–48.

¹⁶⁴⁶ In some cases the Court finds as well a violation of Article 8 (right to respect for private and family life). As explained, with case law references, in Council of Europe - Commissioner for

the Court analyses whether the crime involves only the substantive aspect of the provision or also the procedural one.¹⁶⁴⁷ It can be considered that enforced disappearances can lead to differentiated and independent continuing violations of ECHR Articles 2 and 3, regarding the substantive or the procedural aspect of the provisions. Therefore, the substantive violation of the ECHR would persist as long as the fate or whereabouts of the victim has not been determined, and the procedural violation would continue until appropriate measures to elucidate the circumstances and establish responsibility have been taken.

The ECtHR recently tackled the issue of its *ratione temporis* jurisdiction over enforced disappearances occurred before the State recognised the competence of the Court. In the *Varnava* case Turkey claimed that the ECtHR had no jurisdiction over disappearances dating from 1974, since the State had only accepted the Court's individual complaints system in 1987. However, the ECtHR Grand Chamber confirmed its competence over the facts since "the procedural obligation will, potentially, persist as long as the fate of the person is unaccounted for; the ongoing failure to provide the requisite investigation will be regarded as a continuing violation (...). This is so, even where death may, eventually, be presumed."¹⁶⁴⁸

However, in different decisions the ECtHR established some limits to its *ratione temporis* competence regarding violations of procedural obligations. The Court required the existence of a "genuine connection" between the triggering event and the entry into force of the Convention in respect of the respondent State.¹⁶⁴⁹ The Court considered that the time factor is the first and most crucial indicator of such "genuine" connection. In *Janowiec*, despite recognizing that "there are no apparent legal criteria by which the absolute limit on the duration of that period may be defined" the Court established that such period should be reasonably short and in any case should not exceed ten years.¹⁶⁵⁰ Nevertheless, the Court established that in exceptional circumstances, as serious crimes under international law, it might be justified to extend the time-limit further into the past.¹⁶⁵¹ But, the Court specified that even in

Human Rights, 'Missing Persons and Victims of Enforced Disappearance in Europe', 38.

¹⁶⁴⁷ Council of Europe - Commissioner for Human Rights, 38.

¹⁶⁴⁸ *Varnava and Others v. Turkey*, para. 148.

¹⁶⁴⁹ *Šilih v. Slovenia*, para. 163; *Janowiec and Others v. Russia*, Apps. N° 55508/07 and 29520/09, ECtHR GC, 21 October 2013, para. 145, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-127684%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-127684%22]}).

¹⁶⁵⁰ *Janowiec and Others v. Russia*, paras 146-47.

¹⁶⁵¹ *Ibid.*, para. 146. To determine the existence of such exceptional circumstances, the Court relies on the "Convention values" test whose requirements would be met "if the triggering event was of a larger dimension than an ordinary criminal offence and amounted to the negation of

these cases such time extension could not be applied to events occurred before the ECHR's date of adoption (4 November 1950).¹⁶⁵²

The Court has also limited its competence regarding past enforced disappearances by requiring the applicants to make proof of a certain amount of diligence and initiative, and to introduce their complaints before the ECtHR without undue delay.¹⁶⁵³ The Court considers that “applications can be rejected as out of time in disappearance cases where there has been excessive or unexplained delay on the part of applicants” once they have become aware that the State was not willing to fulfil its duty to effectively investigate.¹⁶⁵⁴

The Court has also addressed the questions about legality arising when a criminal provision is adopted or modified after the consummation of a continuous crime, but before its termination. The ECtHR considered that a domestic court's

the very foundations of the Convention. This would be the case with serious crimes under international law, such as war crimes, genocide or crimes against humanity, in accordance with the definitions given to them in the relevant international instruments.” *Janowiec and Others v. Russia*, para. 150.

¹⁶⁵² For a comprehensive and critique analysis of this case, considering the ECtHR arguments to limit its *ratione temporis* jurisdiction as unexpectedly rigid and contrary to its previous case law and the decisions of other international courts, see Corina Heri, ‘Enforced Disappearance and the European Court of Human Rights’ Ratione Temporis Jurisdiction: A Discussion of Temporal Elements in *Janowiec and Others v. Russia*’, *Journal of International Criminal Justice* 12, no. 4 (1 September 2014): 751–68. According to the Court: “The heinous nature and gravity of such crimes prompted the Contracting Parties to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity to agree that they must be imprescriptible and not subject to any statutory limitation in the domestic legal order. The Court nonetheless considers that the “Convention values” clause cannot be applied to events which occurred prior to the adoption of the Convention, on 4 November 1950, for it was only then that the Convention began its existence as an international human rights treaty. Hence, a Contracting Party cannot be held responsible under the Convention for not investigating even the most serious crimes under international law if they predate the Convention. Although the Court is sensitive to the argument that even today some countries have successfully tried those responsible for war crimes committed during the Second World War, it emphasises the fundamental difference between having the possibility of prosecuting an individual for a serious crime under international law where circumstances allow it, and being obliged to do so by the Convention.” *Janowiec and Others v. Russia*, para. 151.

¹⁶⁵³ *Varnava and Others v. Turkey*, para. 161.

¹⁶⁵⁴ *Ibid.*, para. 165. In the same vein, declaring the inadmissibility of a complaint regarding enforced disappearances in Spain, *Antonio Gutiérrez Dorado y Carmen Dorado Ortiz v. Spain*, App. N° 30141/09, ECtHR 3rd Section, 27 Mars 2012, para. 39. See a critical analysis of this criteria in Chinchón Álvarez, *El Tratamiento Judicial de Los Crímenes de La Guerra Civil y El Franquismo En España. Una Visión de Conjunto Desde El Derecho Internacional*, 134–38.

conviction for a continuing offence introduced under a reform of the Criminal Code, for acts committed prior to the entry into force of that reform, did not amount to retroactive application of a criminal law to the accused's disadvantage.¹⁶⁵⁵ According to the domestic law a continuous criminal offence was considered as a single act and its legal classification had to be assessed under the law in force at the time of completion of the last occurrence of the offence.¹⁶⁵⁶ The ECtHR found that the use by the domestic court of the concept of continuing offence was sufficiently foreseeable.¹⁶⁵⁷

5.1.12 The legality principle and statutes of limitations

The ECtHR has determined that the prohibition of retroactivity embodied in Article 7 do not cover procedural laws.¹⁶⁵⁸ Besides the doctrinal debate about the substantive or procedural nature of statutes of limitations, the ECtHR has only considered the issue of statutory limitations in relation to the *nullum crimen* principle in rare occasions.¹⁶⁵⁹ In *Kononov*, for instance, the Court treated in the context of Article 7 the claim that the prosecution for war crimes was time-barred.¹⁶⁶⁰ The conviction of the domestic courts was based on a criminal provision adopted in 1993, almost fifty years after the date of commission, that incorporated pre-existent international crimes in national legal system. This 1993 norm specified that prosecutions for war crimes cannot be time-barred. Conversely, the domestic laws that criminalized the conducts at the moment of commission as ordinary offences also prescribed statutory periods of limitations. And when Kononov was convicted such periods had already expired. However, the ECtHR claimed that the conviction was grounded on international laws applicable at the material times, and in such norms

¹⁶⁵⁵ *Rohlena v. The Czech Republic*, paras 57-64. As explained and analyzed in Council of Europe, 'Guide on Article 7 of the European Convention on Human Rights - No Punishment without Law: The Principle That Only the Law Can Define a Crime and Prescribe a Penalty', 20.

¹⁶⁵⁶ *Rohlena v. The Czech Republic*, para. 59.

¹⁶⁵⁷ *Ibid.*, para. 64.

¹⁶⁵⁸ See, with references Council of Europe, 'Guide on Article 7 of the European Convention on Human Rights - No Punishment without Law: The Principle That Only the Law Can Define a Crime and Prescribe a Penalty', para. 16; Council of Europe, 'The "Quality of Law" Requirements and the Principle of (Non-)Retrospectiveness of the Criminal Law under Article 7 of the Convention', para. 144.

¹⁶⁵⁹ Olásolo, 'El Principio Nullum Crimen Sine Iure En El Derecho Internacional Contemporáneo', 39.

¹⁶⁶⁰ In their joint concurring opinion judges Rozakis, Tulkens, Spielmann and Jebens questioned the consideration of statutes of limitation as falling under the scope of protection of Article 7.

nothing was said about statutes of limitations regarding war crimes. The Court found that since the conviction was not based on domestic law of the time, its statutes of limitations were not applicable.¹⁶⁶¹

Also in other cases, the ECtHR has refused to consider that prosecutions for international crimes were time-barred. According to the Court the rule that crimes against humanity are not subject to any statutory limitation was already applicable in international law at least from the Second World War. The Court established that this rule was laid down by the Charter of the Nuremberg Tribunal and argued that the 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity had retroactive force.¹⁶⁶²

In other decisions the Court seems to be aware of the detrimental effects on the accused, regarding statutes of limitations, of the retroactive re-characterization technique. In fact, the new criminal label may limit, shorten or remove statutory periods of limitation. For instance, in *Korbely*, the Court found that the applicant's conviction for crimes against humanity violated Article 7. In its reasoning the ECtHR took into account that when erroneously classifying the applicant's conducts as crimes against humanity, domestic courts had also deprived him from the possibility of

¹⁶⁶¹ *Kononov v Latvia* (GC), paras 230-35. The ECtHR Grand Chamber overruled the Chamber decision that had found contrary to the principle of foreseeability to punish the applicant half a century after the expiry of the limitation period (*Kononov v Latvia* (Ch.), para. 146). Three judges of the Grand Chamber issued as well a dissenting opinion (considering that the prosecution of the offence was "statute-barred from 1954 under the applicable domestic legislation (d) and as a consequence, the finding that the applicant's acts were not subject to statutory limitation, thus resulting in his conviction, amounted to retrospective application of the criminal law to his detriment." *Kononov v Latvia* (GC), dissenting opinion of Judge Costa, joined by Judges Kalaydjieva and Poalelungi. The Grand Chamber's reasoning has been criticized as well by some scholars, as Gil who considers that since, in her opinion, at the moment of commission international law did not prescribe war crimes as offences entailing individual criminal responsibility, nor any associated penalty, it seems logical that international law did not provide either for any limitation period. The Court found that the prosecution was not time-barred since international law of the time did not prescribe for statutes of limitations, and Gil considers that the same conclusion could have been reached regarding penalties. Gil Gil, 'La Excepción al Principio de Legalidad Del Número 2 Del Art. 7 Del Convenio Europeo de Derechos Humanos', 155.

¹⁶⁶² *Kolk and Kislyiy v. Estonia*, paras 6-7, referring as well to *Papon v. France* (no. 2) and *Paul Touvier v. France*. While disagreeing with the Court's finding that the Nuremberg Charter contained the rule that crimes against humanity are not subject to statutory limitation, Cassese considers correct the reasoning regarding the retroactive force of the 1968 UN Convention on Statutory Limitations. Cassese, 'Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law. The Kolk and Kislyiy v. Estonia Case before the ECHR', 412-14.

claiming that his prosecution was time-barred since, unlike ordinary crimes, crimes against humanity are not subject to any statute of limitations.¹⁶⁶³

5.2 The Inter-American Court of Human Rights

Latin America is one of the regions of the world where domestic courts have been more active during last decades in the investigation, prosecution and punishment of serious human rights violations.¹⁶⁶⁴ One of the main factors that explain this phenomenon is the case law of the IACtHR and its great influence on domestic legal systems.¹⁶⁶⁵ During the second half of the 20th century most Latin-American countries suffered *coups d'états*, authoritarian and repressive regimes or armed internal conflicts, having as a result frequent human right violations and the recurrent commission of international crimes. Once peace and democracy were restored different legal provisions, as amnesties, statutes of limitations or the non-retroactivity rule, prevented domestic courts from investigating and punishing those responsible.

However, the IACtHR took a leading role to revert this situation. Based on international law and the wording of the American Convention on Human Rights, the Court developed and established a series of positive obligations of States aiming to fight impunity and protect the rights of the victims. This way, the Inter-American Court determined that States had the duty to investigate, prosecute, punish and repair international crimes and serious human rights violations committed in their territory. Likewise, they were compelled to take all appropriate measures to ensure the fulfilment of the victims' rights to justice, truth and reparation. Similarly, the IACtHR established that States had to interpret and apply their domestic laws, including the

¹⁶⁶³ As analysed in De Souza Dias, 'Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law', 27.

¹⁶⁶⁴ See a summary of the prosecutions for international crimes conducted by domestic courts of the region in Héctor Olásolo and Pablo Galain Palermo, *Los Desafíos Del Derecho Internacional Penal: Atención Especial a Los Casos de Argentina, Colombia, España, México y Uruguay* (Valencia, Spain: Tirant lo Blanch, 2018), 101–5.

¹⁶⁶⁵ For a study on how States recognise and implement the IACtHR judgements and the conflicts that have arisen in this regard in some national legal systems, see Javier Chinchón Álvarez, 'A Propósito de La Interpretación de Los Tratados Internacionales: Algunas Reflexiones al Hilo de La Sentencia de La Suprema Corte de Justicia de Uruguay de 12 de Febrero de 2013', *Espacio Abierto - Revista Del Centro de Investigación y Estudios Judiciales*, no. 18 (2013): 104–11; César Alfonso, 'La Obligatoriedad de Las Decisiones de La Corte Interamericana de Derechos Humanos Desde La Perspectiva de Distintos Países de América Del Sur', in *Sistema Interamericano de Protección de Los Derechos Humanos y Derecho Penal Internacional*, ed. Gisela Elsner (Montevideo, Uruguay: Konrad-Adenauer-Stiftung e. V., 2010), 63–80.

legality principle, statutes of limitations or amnesty acts, in a manner compatible with these international duties.¹⁶⁶⁶

This way, the notion of legality developed by the Court is somehow ambivalent and depends on the context, the crimes and the rights at stake. When it concerned domestic offences, the Court adopted a strict notion of legality that broadened the scope of the principle further than required by the wording of the Convention.¹⁶⁶⁷ The IACtHR dropped the accessibility and foreseeability requirements, and adopted those of *lex praevia*, *lex scripta*, *lex certa* and *lex stricta*. Therefore, the Court extended the content of the *nullum crimen* principle beyond its understanding in the universal and European human rights systems, or in the case law of the international criminal tribunals.¹⁶⁶⁸

However, in cases concerning serious human rights violations or international crimes the Inter-American Court relied on international law and the American Convention to establish that the principle of legality could not be used by States to deter prosecutions. When interpreting and applying the principle in these situations, it was determined that the rights of the victims had to be taken into account, as well as the above-mentioned State obligations. The IACtHR contribution to the development of the *nullum crimen* principle is of significant importance since it provides alternative approaches about how to combine an effective protection of the accused's rights granted by the legality principle, and the fulfilment of the victims' rights to justice, truth and reparation.

¹⁶⁶⁶ Ward Ferdinandusse, 'Direct Application of International Criminal Law in National Courts' (Amsterdam, University of Amsterdam, 2005), 192; John A. E. Vervaele, 'Violations graves des droits de l'homme et crimes internationaux. Du jus (non) puniendi de l'État nation à un deber puniendi impératif tiré du jus cogens', *Revue de science criminelle et de droit pénal comparé* 3, no. 3 (2014): 489.

¹⁶⁶⁷ Héctor Olásolo, 'El Principio Nullum Crimen Sine Iure y El Elemento Contextual Del Delito de Genocidio', in *La Evolución de La Definición y La Aplicación Del Delito de Genocidio. La Contribución Iberoamericana y El Legado Del Tribunal Penal Internacional Para La Ex-Yugoslavia*, vol. 9 (Valencia, Spain: Tirant lo Blanch, 2019), 440; Héctor Olásolo, 'El Principio Nullum Crimen Sine Iure En El Derecho Internacional Contemporáneo', *Anuario Iberoamericano de Derecho Internacional Penal I* (2013): 20.

¹⁶⁶⁸ For an analysis of legality principle in the Universal and European human rights system, see above, Chapter 3 and Section 5.1. For a study of the case law of the international criminal tribunals, see Chapter 4.

5.2.1 The Court and the legality provisions of the ACHR

The Inter-American system for the protection of human rights is composed by the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR).¹⁶⁶⁹ The Commission was created in 1959 as an organ of the Organization of American States (OAS) and six years later it started examining individual complaints regarding alleged violations of the 1948 American Declaration of the Rights and Duties of Man.¹⁶⁷⁰ For its part, the Inter-American Court of Human Rights was established in 1969 by the ACHR.¹⁶⁷¹ The IACtHR is the judicial organ of the Inter-American human rights system, and its role is to interpret and apply the Convention. However, it also has an advisory function and can order provisional measures. The Court's competence is limited to the twenty States that have accepted its jurisdiction and its judgments are binding.¹⁶⁷² Individuals can only bring alleged human rights violations before the Commission since appeals to the Court are limited to States Parties and the Commission itself.

Three separated articles of the American Convention contain different aspect of the legality principle. Article 9, entitled "Freedom from Ex Post Facto Laws", establishes the usual *nullum crimen, nulla poena* rule.¹⁶⁷³ Article 7, on the right to personal liberty, establishes a broader and more procedural version of the legality principle that can be interpreted as extending the prohibition of retroactivity to non-criminal reasons for imprisonment, as could be mental incompetence.¹⁶⁷⁴ Finally, Article 8, on the right to a fair trial, establishes the prohibition of *ex post facto* created courts.¹⁶⁷⁵ Responding to an historical experience of retroactively created courts in

¹⁶⁶⁹ The Inter-American system is also conformed by additional organs focused on particular rights or groups, as the Inter-American Commission of Women, or the Working Group on the Protocol of San Salvador.

¹⁶⁷⁰ The human rights violations under the competence of the Commission are those recognized in the OAS Charter, the American Declaration of the Rights and Duties of Man, and the ACHR. The Commission has competence over the 35 Member States of the OAS. Until the date the Commission has received thousands of petitions and has processed more than 12.000 individual cases. For further information, see the official site of the Commission: <https://www.oas.org/en/IACHR/jsForm/?File=/en/iachr/mandate/what.asp>.

¹⁶⁷¹ American Convention on Human Rights, "Pact of San Jose".

¹⁶⁷² For further information, see the official site of the Commission: https://www.corteidh.or.cr/que_es_la_corte.cfm?lang=en.

¹⁶⁷³ ACHR, Art. 9. See above, Section 3.1.4.2.

¹⁶⁷⁴ Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge: Cambridge University Press, 2008), 204. See above, Section 3.1.4.2.

¹⁶⁷⁵ ACHR, Art. 8(1).

many American States, the ACHR contains the stronger protection against *ex post facto* jurisdiction of all human rights treaties.¹⁶⁷⁶ The last paragraph of ACHR Article 9 embodies the mandatory retroactivity of lighter penalties (*lex mitior*).¹⁶⁷⁷

The Inter-American Court had the opportunity to elaborate on the notion of legality in various occasions, and has repeatedly affirmed the fundamental importance of the principle. The Court established that “freedom from *ex post facto* laws constitutes one of the central elements of the criminal prosecution in a democratic society.”¹⁶⁷⁸ Notably, the Court has determined that “under the rule of law, the principles of legality and non-retroactivity govern the actions of all bodies of the State in their respective fields of competence, particularly when the exercise of that punitive power.”¹⁶⁷⁹ In its case law the Court elaborated on different aspects of the legality principle and progressively defined and clarified its scope and content.¹⁶⁸⁰

¹⁶⁷⁶ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 205. Scholars as De Souza Dias consider ACHR Articles 7(2) and 8(1) as part of a trend towards an expansion of the scope of the legality principle to cover certain procedural human rights. Despite admitting that this approach is not yet widespread the author claims that, as international criminal law develops, it becomes less and less justifiable to apply procedural rules retrospectively. Talita De Souza Dias, ‘Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law’ (University of Oxford, 2019), 80.

¹⁶⁷⁷ For an analysis of the IACtHR case law interpreting and applying the *lex mitior* rule see Aly Mokhtar, ‘Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects’, *Statute Law Review* 26, no. 1 (2005): 49; Sergio García Ramírez and Julieta Morales Sánchez, ‘Consideraciones sobre el principio de legalidad penal en la jurisprudencia de la Corte Interamericana de Derechos Humanos’, *Cuestiones constitucionales*, no. 24 (2011): 222; María Luisa Piqué, ‘Artículo 9. Principio de Legalidad y de Retroactividad’, in *La Convención Americana de Derechos Humanos y Su Proyección En El Derecho Argentino*, ed. Enrique M. Alonso Regueira (Buenos Aires, Argentina: La Ley, 2013), 171–72.

¹⁶⁷⁸ *Fermín Ramírez v. Guatemala*, Merits, Reparations and Costs, IACtHR, 20 June 2005, para. 90, available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_126_ing.pdf.

¹⁶⁷⁹ *Baena-Ricardo et al. v. Panama*, Merits, Reparations and Costs, IACtHR, 2 February 2001, para. 107, available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_72_ing.pdf; *Lori Berenson-Mejía v. Peru*, Merits, Reparations and Costs, IACtHR, 25 November 2004, para. 126, available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_119_ing.pdf; *Fermín Ramírez v. Guatemala*, para. 90; *García-Asto and Ramírez-Rojas v. Peru*, Preliminary Objection, Merits, Reparations and Costs, IACtHR, 25 November 2005, para. 187, available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_137_ing.pdf.

¹⁶⁸⁰ García Ramírez and Morales Sánchez, ‘Consideraciones sobre el principio de legalidad penal en la jurisprudencia de la Corte Interamericana de Derechos Humanos’, 198.

5.2.2 The concept of law

ACHR Article 9 establishes that no one should be condemned for a conduct that at the moment of commission was not considered criminal under “the applicable law”. Contrary to the legality provisions in the treaties and conventions already studied, ACHR Article 9 does not explicitly refer to crimes under national or international law, or crimes under the general principles of law. However, there is no evidence of intent to exclude international law from being a valid source of criminalization, and the content of Article 9 has been considered comparable to the equivalent UDHR, ICCPR or ECHR provisions.¹⁶⁸¹ In fact, the IACtHR has found that criminal prosecutions can be perfectly grounded on international law. Convictions for international crimes are in conformity with the Convention even if at the time of commission the conducts were authorized under the domestic legal system. The Court clearly established that “the fact that the action complies with domestic law is no justification from the point of view of international law.”¹⁶⁸²

However, the Inter-American Court has extended the content of ACHR Article 9 beyond the understanding of the legality principle in the Universal and European human rights systems, or in the case law of the international criminal tribunals.¹⁶⁸³ In fact, the IACtHR has replaced the accessibility and foreseeability requirements, for those of *lex praevia*, *lex scripta*, *lex certa* and *lex stricta*. Therefore, the expression “applicable law” in Article 9 is interpreted by the Court as requiring written statutes, as could be domestic laws or international treaties, but rejecting non-written sources of law as international custom.¹⁶⁸⁴ Therefore, to comply with the requirements of the

¹⁶⁸¹ See the ACHR *travaux préparatoires* above, in Section 3.1.4.2. In the same vein, see Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 204; García Ramírez and Morales Sánchez, ‘Consideraciones sobre el principio de legalidad penal en la jurisprudencia de la Corte Interamericana de Derechos Humanos’, 221; José Luis Guzmán Dalbora, ‘El Principio de Legalidad Penal En La Jurisprudencia de La Corte Interamericana de Derechos Humanos’, in *Sistema Interamericano de Protección de Los Derechos Humanos y Derecho Penal Internacional*, Gisela Elsner (Montevideo, Uruguay: Konrad-Adenauer-Stiftung e. V., 2010), 175–76.

¹⁶⁸² *International responsibility for the promulgation and enforcement of laws in violations of the Conventions (Arts. 1 and 2 of the American Convention on Human Rights)*, Advisory Opinion OC-14/94, 9 December 1994, para. 54, available at: https://www.corteidh.or.cr/docs/opiniones/seriea_14_ing.pdf.

¹⁶⁸³ Olásolo, ‘El Principio Nullum Crimen Sine Iure En El Derecho Internacional Contemporáneo’, 32.

¹⁶⁸⁴ Guzmán Dalbora, ‘El Principio de Legalidad Penal En La Jurisprudencia de La Corte Interamericana de Derechos Humanos’, 173; Olásolo, ‘El Principio Nullum Crimen Sine Iure y El Elemento Contextual Del Delito de Genocidio’, 427; Piqué, ‘Artículo 9. Principio de Legalidad y de Retroactividad’, 169.

legality principle, both crimes and punishments need to be established by statutory norms.

The extension of the scope of the legality principle not only reaches laws' formal aspect, but as well their content. The Court's understanding of the *nullum crimen* principle goes beyond the traditional formal legality requirements and adopts a rather substantial approach. In the context of an advisory opinion on the scope of possible restrictions of the Conventional rights (Article 30), the IACtHR considered that "law in a democratic state is not merely a mandate of authority cloaked with certain necessary formal elements" but as well it should respect material requirements.¹⁶⁸⁵ Therefore, a valid laws are not only required to be enacted following the due procedures, but as well to respect certain norms regarding its content.¹⁶⁸⁶ According to the Court, the principle of legality "must be understood as one in which general legal norms must be created by the relevant organs pursuant to the procedures established in the constitutions of each State Party".¹⁶⁸⁷ Therefore, in "a democratic society, the principle of legality is inseparably linked to that of legitimacy" and therefore formal legality and material legality (legitimacy) concur.¹⁶⁸⁸

According to the IACtHR, "the promulgation of a law that manifestly violates the obligations assumed by a state upon ratifying or acceding to the Convention constitutes a violation of that treaty".¹⁶⁸⁹ State sovereignty is consequently limited by the obligations imposed by human rights. A legal provision that contravenes such obligations, and in particular those enshrined in the Convention, could not be considered as *law*. Some authors drew a parallel between these reasoning and the above-analysed Radbruch formula that considers that the validity of legal norms not only depends on the respect of formal requirements, but as well on their compatibility

¹⁶⁸⁵ *The word "laws" in article 30 of the American Convention on Human Rights*, Advisory Opinion OC-6/86, IACtHR, 9 May 1986, para. 32, available at: https://www.corteidh.or.cr/docs/opiniones/seriea_06_ing.pdf.

¹⁶⁸⁶ *The word "laws" in article 30 of the American Convention on Human Rights*, paras 26-32. María Carmelina Londoño Lázaro, 'El principio de legalidad y el control de convencionalidad de las leyes: confluencias y perspectivas en el pensamiento de la Corte Interamericana de Derechos Humanos', *Boletín mexicano de derecho comparado* 43, no. 128 (August 2010): 764.

¹⁶⁸⁷ *The word "laws" in article 30 of the American Convention on Human Rights*, para. 32.

¹⁶⁸⁸ *The word "laws" in article 30 of the American Convention on Human Rights*, para. 32. See, with further references García Ramírez and Morales Sánchez, 'Consideraciones sobre el principio de legalidad penal en la jurisprudencia de la Corte Interamericana de Derechos Humanos', 202; Ludovic Hennebel and Hélène Tigroudja, *The American Convention on Human Rights: A Commentary* (Oxford University Press, 2022), 370–71.

¹⁶⁸⁹ *International responsibility for the promulgation and enforcement of laws in violations of the Conventions (Arts. 1 and 2 of the American Convention on Human Rights)*, para. 50.

with the most fundamental human rights.¹⁶⁹⁰ In the same sense, legal acts are only considered “legal” if they respect formal requirements and if they are fair and legitimate.¹⁶⁹¹ Additionally, the Inter-American Court found that “the enforcement of a law manifestly in violation of the Convention by agents or officials of a state results in international responsibility for that state.”¹⁶⁹² And if the implementation in question “constitutes an international crime, it will also subject the agents or officials who execute it to international responsibility.”¹⁶⁹³

5.2.3 The extension of the legality principle

The ACHR legality provisions extend the scope of the principle beyond the guarantees established in other international instruments. The American Convention embodies procedural aspects of the legality principle, extending the prohibition of retroactivity to non-criminal reasons for imprisonment, as could be mental incompetence.¹⁶⁹⁴ Similarly, as a reaction against the regional historical experience of numerous retroactively created courts, the ACHR establishes the strongest rule against *ex post facto* created courts among human rights treaties.¹⁶⁹⁵ These statutory extensions of the legality principle were complemented by the IACtHR case law that confirmed the extension of the principle’s scope. This way, the Court considered that the *nullum crimen* principle covers the type of court, criminal proceedings and administrative measures.¹⁶⁹⁶

¹⁶⁹⁰ García Ramírez and Morales Sánchez, ‘Consideraciones sobre el principio de legalidad penal en la jurisprudencia de la Corte Interamericana de Derechos Humanos’, 204. For further information on the Radbruch formula see above, Section 5.1.4.4.

¹⁶⁹¹ Londoño Lázaro, ‘El principio de legalidad y el control de convencionalidad de las leyes: confluencias y perspectivas en el pensamiento de la Corte Interamericana de Derechos Humanos’, 764.

¹⁶⁹² *International responsibility for the promulgation and enforcement of laws in violations of the Conventions (Arts. 1 and 2 of the American Convention on Human Rights)*, para. 57.

¹⁶⁹³ Ibid.

¹⁶⁹⁴ ACHR, Art. 7(2).

¹⁶⁹⁵ Ibid., Art. 8(1).

¹⁶⁹⁶ As explained, with case law references, in De Souza Dias, ‘Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law’, 79–80. The author notes that such extensions of the legality principle are not widespread and would be difficult to implement in a decentralized international legal order. However, De Souza argues that the development of international law and international criminal law makes the retroactive application of procedural and administrative rules less and less justifiable.

The IACtHR case law extension of the legality principle not only concerned its scope but as well its requirements. The Court dropped the accessibility and foreseeability tests, and interpreted the ACHR legality provisions as requiring *lex praevia*, *lex scripta*, *lex certa* and *lex stricta*.¹⁶⁹⁷ As analysed hereinafter, the Court extended the *nullum crimen* requirements when assessing criminal convictions based on the Peruvian anti-terrorist legislation, adopted in 1992 by the authoritarian regime of Alberto Fujimori, and directed against the activities of the guerrilla group Shining Path (*Sendero Luminoso*). Such domestic laws established an open-ended definition of the crime of terrorism that embraced alternative behaviours. These legal provisions were implemented in a context of a strong social condemnation of the offenders that was likely shared by the domestic courts.¹⁶⁹⁸ The IACtHR judges considered that the accessibility and foreseeability standards, employed in the Universal and European human rights systems, and by the international criminal tribunals, did not provide enough protection to the accused in such particular circumstances.¹⁶⁹⁹ Therefore, they opted for a stricter notion of legality, and embraced the *lex praevia*, *scripta*, *certa* and *stricta* requirements. Such strict notion of the *nullum crimen* principle was subsequently adopted as well by the ICC. However, the interpretation made by the ICC was required by the Rome Statute, which already embodied these requirements.¹⁷⁰⁰

¹⁶⁹⁷ Anyhow, some authors note that the IACtHR implicitly takes into account the accessibility and foreseeability standards when considering that “for the sake of legal certainty, the punitive norm must exist and be known, or could be known before the occurrence of the act or omission that violates it, and which it is intended to penalize.” *De La Cruz-Flores v. Peru*, Merits, Reparations and Costs, IACtHR, 18 November 2004, para. 104 available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_115_ing.pdf; Similarly in *García-Asto and Ramírez-Rojas v. Peru*, para. 206; *Ricardo Canese v. Paraguay*, Merits, Reparations and Costs, IACtHR, 31 August 2004, para. 175, available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_111_ing.pdf; *Baena-Ricardo et al. v. Panama*, para. 106; *Castillo Petruzzi et al. v. Peru*, Merits, Reparations and Costs, IACtHR, 30 May 1999, para. 121, available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_52_ing.pdf. Alejandro Ayala González, ‘El principio de legalidad penal desde la óptica de la Corte Interamericana de Derechos Humanos’, *Revista Internacional de Derechos Humanos* 8 (31 December 2018): 30.

¹⁶⁹⁸ *García-Asto and Ramírez-Rojas v. Peru*, Dissenting Opinion of Judge Medina-Quiroga, para. 6. In other cases, also regarding the application of the Peruvian anti-terrorist legislation, the Court interpreted ACHR Article 9 as requiring *lex praevia*, *lex scripta*, *lex certa* and *lex stricta*. See *Castillo Petruzzi et al. v. Peru*, paras 119-21; *De La Cruz-Flores v. Peru*, paras 70-82; *Lori Berenson-Mejía v. Peru*, para. 126; *García-Asto and Ramírez-Rojas v. Peru*, paras 187-91, 206-07 para. 187; *Fermín Ramírez v. Guatemala*, paras 90-91.

¹⁶⁹⁹ Olásolo, ‘El Principio Nullum Crimen Sine Iure En El Derecho Internacional Contemporáneo’, 34.

¹⁷⁰⁰ See above, Section 4.2.

On the contrary, ACHR Article 9 did not necessarily demand such a strict *nullum crimen* concept.¹⁷⁰¹

The adoption of stricter or more exigent versions of the legality principle is not contrary *per se* to international law. However, the implementation of strong requirements, as *lex praevia*, *scripta*, *certa* and *stricta*, could be an obstacle for States to fulfil some of their international obligations, as the duty to investigate and prosecute serious human rights violations. Similarly, the implementation of strong versions of legality might conflict with certain individual or collective rights, notably those of the victims. In this vein Olásolo considers that the IACtHR notion of legality involves a serious risk of breaching the *pro homine* principle of interpretation, recognized in ACHR Article 29 and other international instruments.¹⁷⁰² The IACtHR has repeatedly acknowledged the importance of this hermeneutical principle that establishes that the interpretation of human rights norms should be based “on the principle of the rule most favourable to the human being.”¹⁷⁰³ According to this principle, human rights norms should be interpreted in an extensive manner when implementing human rights obligations, and conversely, they should be restrictively construed when limiting rights. Similarly, the principle establishes that in case of doubt or conflict between different human rights norms, the most protective interpretation for the individual should be adopted.¹⁷⁰⁴ Therefore, the *pro homine* principle requires special attention to the effective application of the safeguards granted by the legality principle. However, it also demands to take into account the victims’ rights to an effective judicial remedy and to judicial protection regarding the prosecution and punishment of perpetrators.¹⁷⁰⁵ Similarly, the principle requires considering the victims’ right to truth and reparation. This is especially needed in the context of crimes against humanity, where victims are in a particularly vulnerable position and have suffered systematic or generalized

¹⁷⁰¹ Olásolo, ‘El Principio Nullum Crimen Sine Iure En El Derecho Internacional Contemporáneo’, 36; Olásolo, ‘El Principio Nullum Crimen Sine Iure y El Elemento Contextual Del Delito de Genocidio’, 440.

¹⁷⁰² ICCPR, Art. 5(1); VCLT, Art. 31, cited in Olásolo, ‘El Principio Nullum Crimen Sine Iure En El Derecho Internacional Contemporáneo’, 34.

¹⁷⁰³ *Baena-Ricardo et al. v. Panama*, para. 189. See further cases in Alejandro Fuentes, ‘Expanding the Boundaries of International Human Rights Law. The Systemic Approach of the Inter-American Court of Human Rights’, *European Society of International Law Conference Paper Series* 10, no. 3 (2018): 3.

¹⁷⁰⁴ Valerio De Oliveira Mazzuoli and Dilton Ribeiro, ‘The Japanese Legal System and the Pro Homine Principle in Human Rights Treaties’, *Anuario Mexicano de Derecho Internacional* 15, no. 1 (2015): 265.

¹⁷⁰⁵ ACHR, Arts. 8 and 25. Olásolo, ‘El Principio Nullum Crimen Sine Iure En El Derecho Internacional Contemporáneo’, 35.

violence from perpetrators usually acting under the direct or indirect protection of the State.¹⁷⁰⁶

In cases concerning serious human rights violations, the formal application of the *lex praevia*, *lex scripta*, *lex certa* and *lex stricta* requirements might involve infringements of the *pro homine* principle. Since crimes against humanity, or other international crimes, were only included in domestic legislations in the last two decades, the application of these requirements prevents the investigation and punishment of crimes committed before that moment. The situation of impunity created by such interpretation of the *nullum crimen* principle precludes the fulfilment of the above-mentioned rights of the victims. While the accused's rights are effectively protected, the rights of those who have suffered systematic or generalized violence are overlooked.¹⁷⁰⁷ Therefore, the application of *lex praevia*, *lex scripta*, *lex certa* and *lex stricta* requirements in situations concerning serious human rights violations is hardly compatible with the *pro homine* principle.

Similarly, the adoption of these legality requirements might prevent States from fulfilling their international obligations to investigate, prosecute, punish and repair international crimes, and their duty to ensure the full exercise of the victims' right to justice, truth and reparation. Conversely, the accessibility and foreseeability test might enable prosecutions of international crimes committed in the past and thus, the fulfilment of the victims' rights while complying with the legality principle and the guarantees provided to the accused. In this sense, the accessibility and foreseeability standards seem to provide a better protection of individual rights than strict notions of legality.¹⁷⁰⁸

5.2.3.1 Lex certa

According to the IACtHR, the *nullum crimen* principle is grounded on the need of legal certainty. In the words of the Court it means that individuals should be able "to make their conduct conform to an existing and certain legal system embodying social reproach and its consequences."¹⁷⁰⁹ On this ground the Court elaborated the

¹⁷⁰⁶ Olásolo, 35.

¹⁷⁰⁷ Ibid.

¹⁷⁰⁸ Commented in Rodrigo Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional' (Madrid, Spain, Universidad Carlos III de Madrid, 2015), 219.

¹⁷⁰⁹ *García-Asto and Ramírez-Rojas v. Peru*, para. 206. Similarly, in *Ricardo Canese v. Paraguay*, para. 175; *Baena-Ricardo et al. v. Panama*, para. 106; *Castillo Petruzzi et al. v. Peru*, para. 121, cited in Rodrigo Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional', *Eunomía. Revista En Cultura de La Legalidad* 11 (2017): 218.

requirements associated to the legality principle, and established that crimes' definitions should clearly describe the prohibited conducts and the elements of the crime in a manner permitting to easily distinguish criminal conducts from those not involving criminal liability.¹⁷¹⁰ This way, individuals would be able to adapt their conducts to the current legality.

As above-mentioned the Inter-American Court adopted a notion of legality requiring *lex praevia*, *lex scripta*, *lex certa* and *lex stricta* in cases regarding Peruvian anti-terrorist legislation.¹⁷¹¹ Such domestic laws established an open-ended definition of the crime of terrorism embracing alternative behaviours.¹⁷¹² The Court considered in different decisions that the definitions of the crimes of terrorism and treason against the fatherland “used expressions common to both crimes, which were identical or coincided as regards typical conduct, the elements with which they were carried out, the objects or property against which they were carried out, and the effects they had on the whole of society.”¹⁷¹³ In the same vein, the Court found that the broad definition of methods of participation in the commission of treason and terrorism bring both crimes “so close together that they become one.”¹⁷¹⁴ This meant that the same act could fall both within the description of terrorism and treason and consequently a person prosecuted for the first crime could be instead prosecuted for the second. This would be prejudicial for the defendant since, contrary to cases of terrorism that were heard before ordinary jurisdiction, charges for the crime of treason involved being tried by a military tribunal, in summary proceedings, without guarantees, before “faceless” judges and facing sentences to life imprisonment.¹⁷¹⁵ Consequently, the fact that both crimes “have certain elements in common and the vague distinction between the two categories of crime is prejudicial to the defendant’s legal situation on several counts:

¹⁷¹⁰ Olásolo, ‘El Principio Nullum Crimen Sine Iure En El Derecho Internacional Contemporáneo’, 32.

¹⁷¹¹ *Castillo Petruzzi et al. v. Peru*, paras 119-21; *De La Cruz-Flores v. Peru*, paras 70-82; *Lori Berenson-Mejía v. Peru*, para. 126; *García-Asto and Ramírez-Rojas v. Peru*, paras 187-91, 206-07; *Fermín Ramírez v. Guatemala*, paras 90-91. Olásolo, ‘El Principio Nullum Crimen Sine Iure y El Elemento Contextual Del Delito de Genocidio’, 440.

¹⁷¹² Decree-Law N° 25.475 and Decree-Law N° 25.659. In addition, conducts such as collaboration or belonging to a terrorist organization were described as a separate crimes.

¹⁷¹³ *Lori Berenson-Mejía v. Peru*, para. 117; *Cantoral-Benavides v. Peru*, Merits, IACtHR, 18 August 2000, para. 155, available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_69_ing.pdf.

¹⁷¹⁴ *Cantoral-Benavides v. Peru*, para. 155.

¹⁷¹⁵ *Castillo Petruzzi et al. v. Peru*, para. 119. *Lori Berenson-Mejía v. Peru*, para. 117; *Cantoral-Benavides v. Peru*, para. 156.

the applicable penalty, the court with jurisdiction, and the nature of the proceedings.”¹⁷¹⁶

Therefore, the Court found that the Peruvian anti-terrorist legislation infringed ACHR Article 9, and at the same time elaborated on the requirements emanating from this provision. The Court established that “crimes must be classified and described in precise and unambiguous language that narrowly defines the punishable offense. (...) This means a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from behaviours that are either not punishable offences or are punishable but not with imprisonment.”¹⁷¹⁷ The Court emphasized that “ambiguity in describing crimes creates doubts and the opportunity for abuse of power, particularly when it comes to ascertaining the criminal responsibility of individuals and punishing their criminal behavior with penalties that exact their toll on the things that are most precious, such as life and liberty.”¹⁷¹⁸ Therefore, the Court found that laws, as the Peruvian anti-terrorist legislation, that “fail to narrowly define the criminal behaviors, violate the principle of *nullum crimen nulla poena sine lege praevia* recognized in Article 9 of the American Convention.”¹⁷¹⁹

The Court has reiterated these requirements regarding clear and precise criminal definitions in some decisions not concerning the anti-terrorist Peruvian laws. The IACtHR found in different cases that domestic legal provisions including broad or imprecise criminal definitions violated Article 9.¹⁷²⁰ It should be noted that ACHR Article 2 establishes the obligation of States to adapt their domestic laws to give effect to the rights and freedoms enshrined in the Convention.¹⁷²¹ When the Court finds that

¹⁷¹⁶ *Castillo Petruzzi et al. v. Peru*, para. 119; *Cantoral-Benavides v. Peru*, para. 156.

¹⁷¹⁷ *García-Asto and Ramírez-Rojas v. Peru*, para. 188. See in the same sense *Castillo Petruzzi et al. v. Peru*, para. 121; *Lori Berenson-Mejía v. Peru*, para. 125; *Fermín Ramírez v. Guatemala*, para. 90; *De La Cruz-Flores v. Peru*, para. 79.

¹⁷¹⁸ *Castillo Petruzzi et al. v. Peru*, para. 121; *Lori Berenson-Mejía v. Peru*, para. 125.

¹⁷¹⁹ *Castillo Petruzzi et al. v. Peru*, para. 121.

¹⁷²⁰ For instance, the Court established that “Article 9 of the Convention obliges the States to define those criminal “actions or omissions” in the most clear and precise manner possible.” *Fermín Ramírez v. Guatemala*, para. 90. Similarly: “Concerning the principle of legality, Law 25 contained only a very broad and imprecise concept on possible unlawful conduct, whose specific characteristics were not established exactly, their being characterised only under the concept of participation in acts contrary to democracy and the constitutional order.” *Baena-Ricardo et al. v. Panama*, para. 108. See an analysis of some decisions not concerning Peru in Ayala González, ‘El principio de legalidad penal desde la óptica de la Corte Interamericana de Derechos Humanos’, 28–30.

¹⁷²¹ ACHR, Art. 2. “Domestic Legal Effects”:

a domestic legal provision contravene Article 9, it considers as well that the State infringed Article 2 for having maintained in force such a legal provisions.¹⁷²²

5.2.3.2 Lex stricta

The Court also considered that the *nullum crimen* principle required domestic courts to interpret criminal laws in a strict and rigorous manner. The IACtHR established that “it is incumbent upon the criminal judge, upon applying criminal law, to strictly abide by the provisions thereof and be extremely rigorous when likening the accused person’s conduct to the criminal definition, so as not to punish someone for acts that are not punishable under the legal system.”¹⁷²³

The Court emphasized that the respect of the above-mentioned requirements emanating from the legality principle are of particular importance in cases of a state of emergency or regarding the crime of terrorism. A clear crime definition is not only necessary for individuals to know which acts are prohibited, but also “because it limits the authority of the court to interpret the law in a context in which there is usually strong social condemnation of the alleged offender, which is most likely shared by the court”.¹⁷²⁴ The Inter-American Court underlines the particular importance of the *nullum crimen* guarantees in this sort of situation in order to protect those who face criminal proceeding in a context of great social rejection.¹⁷²⁵

Despite the Inter-American Court has not explicitly established that ACHR Article 9 prohibits interpretations by analogy, this can be inferred from its case law. For instance, in *Cantoral Benavides* regarding Peruvian anti-terrorist legislation, the Court found that the “broad methods of participation in the commission of the

“Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.”

¹⁷²² See for example *Fermín Ramírez v. Guatemala*, para. 98. The Court found in this case “that the State has violated Article 9 of the Convention, in relation to Article 2 of the same, for having maintained in force the part of Article 132 of the Criminal Code that refers to the dangerousness of the agent, once the Convention was ratified by Guatemala”.

¹⁷²³ *García-Asto and Ramírez-Rojas v. Peru*, para. 190. The Court refers in the same sense to *Fermín Ramírez v. Guatemala*, para. 90; *De La Cruz-Flores v. Peru*, para. 82.

¹⁷²⁴ *García-Asto and Ramírez-Rojas v. Peru*, Dissenting Opinion of Judge Medina-Quiroga, para. 6.

¹⁷²⁵ Olásolo, ‘El Principio Nullum Crimen Sine Iure En El Derecho Internacional Contemporáneo’, 33–34.

corresponding crime, (...) alters the definition of the perpetrator of treason against the fatherland, bringing this crime and the crime of terrorism so close together that they become one.”¹⁷²⁶ The Court considered that the principle of specificity was not respected, and indirectly condemned the use of analogy in *malam partem*.¹⁷²⁷

5.2.3.3 Lex scripta

ACHR Article 9 establishes that “No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed”. The expression “applicable law” is interpreted by the Court as requiring written statutes, as could be domestic laws or international treaties, but rejecting non-written sources of law as international custom.¹⁷²⁸ Therefore, to comply with the requirements of the legality principle, both crimes and punishments need to be established by statutory norms.

As previously explained, according to the IACtHR in “a democratic society, the principle of legality is inseparably linked to that of legitimacy”¹⁷²⁹ and therefore formal legality and material legality (legitimacy) must concur.¹⁷³⁰ It has been argued that the requirement of written laws is grounded as well in these principles since only statutes

¹⁷²⁶ *Cantoral-Benavides v. Peru*, para. 155.

¹⁷²⁷ Ayala González, ‘El principio de legalidad penal desde la óptica de la Corte Interamericana de Derechos Humanos’, 28. In the same vein, see Roberto A. Ochoa Romero, ‘Criterios de la Corte Interamericana de Derechos Humanos sobre la tipificación de conductas ilícitas’, in *Criterios y jurisprudencia interamericana de derechos humanos: influencia y repercusión en la justicia penal* (Mexico D. F.: Universidad Nacional Autónoma de México. Instituto de Investigaciones Jurídicas, 2014), 151–53; García Ramírez and Morales Sánchez, ‘Consideraciones sobre el principio de legalidad penal en la jurisprudencia de la Corte Interamericana de Derechos Humanos’, 218; Piqué, ‘Artículo 9. Principio de Legalidad y de Retroactividad’, 170. For further information on the IACtHR case law regarding *lex certa*, see Federico Andreu Guzmán, *Retroactividad Penal de Crímenes Internacionales*, ed. Comisión Colombiana de Juristas (Bogotá, Colombia: Opciones Gráficas Editores Ltda., 2012), 15; Guzmán Dalbora, ‘El Principio de Legalidad Penal En La Jurisprudencia de La Corte Interamericana de Derechos Humanos’, 182; García Ramírez and Morales Sánchez, ‘Consideraciones sobre el principio de legalidad penal en la jurisprudencia de la Corte Interamericana de Derechos Humanos’, 217.

¹⁷²⁸ Guzmán Dalbora, ‘El Principio de Legalidad Penal En La Jurisprudencia de La Corte Interamericana de Derechos Humanos’, 173; Olásolo, ‘El Principio Nullum Crimen Sine Iure y El Elemento Contextual Del Delito de Genocidio’, 427; Piqué, ‘Artículo 9. Principio de Legalidad y de Retroactividad’, 169.

¹⁷²⁹ *The word “laws” in article 30 of the American Convention on Human Rights*, para. 32.

¹⁷³⁰ See, with further references García Ramírez and Morales Sánchez, ‘Consideraciones sobre el principio de legalidad penal en la jurisprudencia de la Corte Interamericana de Derechos Humanos’, 202.

emanated from a parliament respect these democratic and legitimacy conditions.¹⁷³¹ Conversely, other sources of law, as custom, would not respect such conditions.

Despite the Inter-American Court generally requires written statutes as valid sources of criminalization, when it concerns situations regarding serious human rights violations, the application of such condition has not been as clear. As analysed hereinafter, the Court referred to international law, not excluding customary norms, to ground the inapplicability of amnesty acts or statutory limitations, or to interpret the non-retroactivity rule.¹⁷³² This is particularly true regarding the binding nature of customary norms prohibiting crimes against humanity.¹⁷³³

5.2.3.4 Lex praevia

The IACtHR has repeatedly affirmed the prohibition of retroactive application of criminal laws. The Court has clearly established that according “to the principle of non-retroactivity of unfavourable criminal laws, the State must not exercise its punitive power by applying, retroactively, criminal laws that impose heavier penalties, establish aggravating circumstances or create aggravated definitions of the crime.”¹⁷³⁴ In the same sense, the Court recognized that “this principle implies that a person may not be convicted of an act that, at the time of its commission, was not criminalized or punishable.”¹⁷³⁵ The application of the principle to domestic crimes do not raise significant questions, however, when it concerns serious human rights violations or international crimes the application of the rule does not seem so straightforward and may be subject to some qualifications.

¹⁷³¹ Ayala González, ‘El principio de legalidad penal desde la óptica de la Corte Interamericana de Derechos Humanos’, 23. The author considers that in this sense the Court’s position is inconsistent since in some cases it has accepted executive orders as valid sources of criminalization despite they are not norms enacted by a Parliament.

¹⁷³² Some IACtHR judges, in particular judge Cançado Trindade, recurrently referred to international customary norms in their separate opinions. See, with further references, *Blake v. Guatemala*, Merits, IACtHR, 24 January 1998, Separate Opinion of Judge A. A. Cançado Trindade, para. 24, available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_36_ing.pdf; *Barrios Altos v. Peru*, Merits, IACtHR, 4 March 2001, Concurring Opinion of Judges A.A. Cançado Trindade, para. 14, available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_75_ing.pdf.

¹⁷³³ Joan Sánchez Montero, ‘Inter-American Court, Crimes Against Humanity and Peacebuilding in South America’, *International Catalan Institute for Peace*, no. 2 (2010): 23.

¹⁷³⁴ *García-Asto and Ramírez-Rojas v. Peru*, para. 191.

¹⁷³⁵ Ibid. Also in *De La Cruz-Flores v. Peru*, para. 105; *Ricardo Canese v. Paraguay*, para. 175; *Baena-Ricardo et al. v. Panama*, para. 106.

5.2.4 The legality principle facing serious human rights violations

Until the beginning of the 2000s the Inter-American Court avoided any pronouncement about the principle of legality in cases regarding human rights and international crimes.¹⁷³⁶ It was only in the well-known “Barrios Altos” case when the Court started elaborating on the complex relation between the *nullum crimen* principle, and the prosecution of certain crimes considered as serious human rights violations. From that moment, the Court has progressively defined the notion, scope and limits of the principle when applied in such particular situations.

The Inter-American Court explicitly recognized the importance of the *lex praevia* requirement, and made clear that “under the Rule of Law, the principle of freedom from *ex post facto* laws governs the actions of all State agencies, in relation to their respective duties, particularly when they must exercise their punitive power.”¹⁷³⁷ However, the Court acknowledged that when prosecuting international crimes or human rights violations, the application of the guarantees emanating from the legality principle directly affected other individual rights and certain States’ obligations. Based on international law and the wording of the American Convention, the Court recognised the obligations of States to investigate, prosecute, punish and repair international crimes, and the rights of the victims to justice, truth and reparation. Such duties and rights were taken into account by the IACtHR when implementing the accused’ guarantees derived from the legality principle, and when interpreting and applying amnesty acts, statutes of limitations or the non-retroactivity rule.

5.2.4.1 States positive obligations and the rights of the victims

The text of the American Convention does not contain any explicit reference to the obligation of State parties to investigate, prosecute, punish and repair international crimes and serious human rights violations. However, the Inter-American Court has inferred these obligations of States from ACHR Articles 1(1) and 2.¹⁷³⁸ The

¹⁷³⁶ Sánchez Montero, ‘Inter-American Court, Crimes Against Humanity and Peacebuilding in South America’, 26.

¹⁷³⁷ *García-Asto and Ramírez-Rojas v. Peru*, para. 187. In the same sense *Fermín Ramírez v. Guatemala*, para. 90; *Lori Berenson-Mejía v. Peru*, para. 126; *De La Cruz-Flores v. Peru*, para. 80.

¹⁷³⁸ Alicia Gil Gil, ‘Los Crímenes de La Guerra Civil Española: ¿Responsabilidad Del Estado Español Por Infracción Del Convenio Europeo de Derechos Humanos?’, *InDret, Revista Para El Analisis Del Derecho*, no. 4 (2012): 10–11; Ana Messuti, *Un Deber Ineludible*, 1ª (Buenos Aires, Argentina: Ediar, 2013), 186. ACHR, Art. 1. “Obligation to Respect Rights”:

establishment of this sort of positive duties on States is not an isolated phenomenon of the Inter-American human rights system. These international obligations, as well as the State international responsibility in case of non-compliance, are generally recognised by the international community, and in the last decades they have been enshrined in various international instruments.¹⁷³⁹ However, the Inter-American Court has taken a leading role in the development and establishment of such positive obligations to fight impunity.¹⁷⁴⁰

In *Velásquez-Rodríguez v. Honduras* the Court established for the first time the States' duty to investigate and punish human rights violations.¹⁷⁴¹ ACHR Article 1(1) establishes two obligations on States parties: (i) to respect the rights and freedoms recognised in the Convention, and (ii) to ensure to all persons subject to their jurisdiction the free and full exercise of those rights. Regarding the scope of the second obligation, the Court established that it "implies the duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights."¹⁷⁴² More significantly, the Court established that "as a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation."¹⁷⁴³

"The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

¹⁷³⁹ See a comprehensive study on the international obligation of States to criminally prosecute international crimes committed in its territory, the international instruments where the obligation is enshrined, its implementation by international courts and proof of its *ius cogens* nature, in Messuti, *Un Deber Ineludible*, 153–430; Vervaele, 'Violations graves des droits de l'homme et crimes internationaux. Du jus (non) puniendi de l'État nation à un deber puniendi impératif tiré du jus cogens', 491–98. Also see below, Section 7.1.2.

¹⁷⁴⁰ Ferdinandusse, 'Direct Application of International Criminal Law in National Courts', 192; Vervaele, 'Violations graves des droits de l'homme et crimes internationaux. Du jus (non) puniendi de l'État nation à un deber puniendi impératif tiré du jus cogens', 489.

¹⁷⁴¹ *Velásquez-Rodríguez v. Honduras*, Merits, IACtHR, 29 July 1988, available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_04_ing.pdf.

¹⁷⁴² *Ibid.*, para. 66.

¹⁷⁴³ *Ibid.*. Analysed in Pablo F. Parenti, 'La Inaplicabilidad de Normas de Prescripción En La Jurisprudencia de La Corte Interamericana de Derechos Humanos', in *Sistema Interamericano*

The IACtHR also grounded these positive obligations of States on the victims' right to truth. The Court noted that this right has been developed by International Human Rights Law and is generally recognized by the international community.¹⁷⁴⁴ In this regard the Court established that "the right to the truth is subsumed in the right of the victim or his next of kin to obtain clarification of the events that violated human rights and the corresponding responsibilities from the competent organs of the State, through the investigation and prosecution that are established in Articles 8 and 25 of the Convention."¹⁷⁴⁵ The IACtHR established that the right to truth is not only a victims' right, but also a right of the entire society where the grave human right violations took place. Based on this right to truth the Court consider that States must effectively investigate the crimes to identify, try and punish all the direct perpetrators and accessories, and that the outcome of the proceeding must be made known to the public for the society to know the truth.¹⁷⁴⁶

These positive duties translate into an obligation of States to adapt their domestic laws to give effect to the rights and freedoms enshrined in the Convention.¹⁷⁴⁷ However, the IACtHR explicitly established that such duties concerned as well domestic courts. The Inter-American Court acknowledged that "domestic judges and courts are bound to respect the rule of law, and therefore, they are bound to apply the

de Protección de Los Derechos Humanos y Derecho Penal Internacional, ed. Gisela Elsner (Montevideo, Uruguay: Konrad-Adenauer-Stiftung e. V., 2010), 212.

¹⁷⁴⁴ See a summary of international instruments and case law recognizing and implementing the right to truth in *Myrna Mack Chang v. Guatemala*, Merits, Reparations and Costs, IACtHR, 25 November 2003, para. 274, available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_101_ing.pdf.

¹⁷⁴⁵ *Barrios Altos v. Peru*, para. 48. In the recent *Herzog* case, the Court established: "Even though, fundamentally, the right to know the truth has been included in the right of access to justice, the right to know the truth is very broad and its violations may affect different rights recognized in the American Convention, depending on the particular context and circumstances of the case. In this regard, the Court reiterates that this right is included in and protected by Articles 1(1), 8(1), 25, and also – in certain circumstances – Article 13 of the Convention." *Herzog et al. v. Brazil*, para. 328.

¹⁷⁴⁶ *Myrna Mack Chang v. Guatemala*, para. 275. For an analysis of the right to truth as implemented by the IACtHR, with further case law references, see Héctor Olásolo and Pablo Galain, 'La Influencia En La Corte Penal Internacional de La Jurisprudencia de La Corte Interamericana de Derechos Humanos En Materia de Acceso, Participación y Reparación de Víctimas', in *Sistema Interamericano de Protección de Los Derechos Humanos y Derecho Penal Internacional*, ed. Gisela Elsner (Montevideo, Uruguay: Konrad-Adenauer-Stiftung e. V., 2010), 396–99; Vervaele, 'Violations graves des droits de l'homme et crimes internationaux. Du jus (non) puniendi de l'État nation à un deber puniendi impératif tiré du jus cogens', 495.

¹⁷⁴⁷ ACHR, Art. 2, "Domestic Legal Effects", first implemented in this sense in *Barrios Altos v. Peru*, para. 42.

provisions in force within the legal system. But when a State has ratified an international treaty such as the American Convention, its judges, as part of the State, are also bound by such Convention”.¹⁷⁴⁸ Consequently, they have the duty to “to see that all the effects of the provisions embodied in the Convention are not adversely affected by the enforcement of laws which are contrary to its purpose and that have not had any legal effects since their inception.”¹⁷⁴⁹ In other words, domestic courts “must exercise a sort of “conventionality control” between the domestic legal provisions which are applied to specific cases and the American Convention on Human Rights.”¹⁷⁵⁰ To perform this task, domestic courts have to take into account both the Convention and the interpretation made by the IACtHR.¹⁷⁵¹ Significantly, the IACtHR also established that the right to effective judicial protection and the victims’ right to know the truth requires domestic judges to direct proceedings in such a way as to avoid obstructions leading to impunity. This means that domestic courts have the “duty to direct and channel the judicial proceeding with the aim of not sacrificing justice and due legal process in favour of formalism and impunity”.¹⁷⁵²

The Inter-American Court’s case law has promoted the prosecution of international crimes by States regardless of the date of commission, their domestic legal classification, the existence of amnesty laws or statutes of limitations. Compelling States to fulfil their above-mentioned positive obligations endorsed as well the satisfaction of the victims’ right to truth, justice and reparation, considered as fundamental pillars for building peace in the region.¹⁷⁵³

However, some scholars consider the IACtHR case law as an example of judicial activism, arguing that the Court has gone too far in its interpretations, establishing

¹⁷⁴⁸ *Almonacid-Arellano et al v. Chile*, Preliminary Objection, Merits, Reparations and Costs, IACtHR, 26 September 2006, para. 124, available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_154_ing.pdf.

¹⁷⁴⁹ Ibid.

¹⁷⁵⁰ Ibid.

¹⁷⁵¹ Ibid.. As analyzed, with further case law references in Londoño Lázaro, ‘El principio de legalidad y el control de convencionalidad de las leyes: confluencias y perspectivas en el pensamiento de la Corte Interamericana de Derechos Humanos’, 800–803.

¹⁷⁵² *Myrna Mack Chang v. Guatemala*, paras 210-11.

¹⁷⁵³ Sánchez Montero, ‘Inter-American Court, Crimes Against Humanity and Peacebuilding in South America’, 18. For further information on the influence of the IACtHR case law on domestic courts’ jurisprudence, see Vervaele, ‘Violations graves des droits de l’homme et crimes internationaux. Du jus (non) puniendi de l’État nation à un deber puniendi impératif tiré du jus cogens’, 489–90; Alfonso, ‘La Obligatoriedad de Las Decisiones de La Corte Interamericana de Derechos Humanos Desde La Perspectiva de Distintos Países de América Del Sur’.

rules that exceed the content of the Convention.¹⁷⁵⁴ The rules established by the Court regarding, among others, the inapplicability of amnesties, statutes of limitations or the non-retroactivity rule when they prevent the prosecution and punishment of serious human rights violations, have been considered by some authors as unacceptable intrusions in the functions of domestic courts,¹⁷⁵⁵ and the sovereignty of domestic legislative bodies.¹⁷⁵⁶ In the same vein, some scholars consider that the IACtHR is experiencing a process of punitivization, based on the gravity of the crimes and the need to protect victims, that is disarticulating rights, principles and fundamental guarantees as limitation periods or the non-retroactivity principle.¹⁷⁵⁷ It's even claimed

¹⁷⁵⁴ Ezequiel Malarino, 'Activismo Judicial, Punitivización y Nacionalización. Tendencias Antidemocráticas y Antiliberales de La Corte Interamericana de Derechos Humanos', in *Sistema Interamericano de Protección de Los Derechos Humanos y Derecho Penal Internacional*, ed. Gisela Elsner (Montevideo, Uruguay: Konrad-Adenauer-Stiftung e. V., 2010), 29–45; Kai Ambos and María Laura Bohm, 'Tribunal Europeo de Derechos Humanos y Corte Interamericana de Derechos Humanos: ¿tribunal Tímido y Tribunal Audaz?', in *Sistema Interamericano de Protección de Los Derechos Humanos y Derecho Penal Internacional*, ed. Christian Steiner, vol. II (Montevideo, Uruguay: Konrad-Adenauer-Stiftung e. V., 2011), 46. Some authors suggest that the expansive interpretations of the ACHR could explain the low compliance rate of IACtHR' decisions compared with the ECtHR. See with further references in Ambos and Bohm, 46. However, in this work the authors show that the positions of the IACtHR and the ECtHR regarding prosecutions of serious human rights violations are not so distinct as commonly thought.

¹⁷⁵⁵ Malarino, 'Activismo Judicial, Punitivización y Nacionalización. Tendencias Antidemocráticas y Antiliberales de La Corte Interamericana de Derechos Humanos', 29–45, 57.

¹⁷⁵⁶ Gil Gil, 'Los Crímenes de La Guerra Civil Española: ¿Responsabilidad Del Estado Español Por Infracción Del Convenio Europeo de Derechos Humanos?', 9. Gargarella considers that the IACtHR decisions to overrule laws adopted by democratically elected parliaments represent a problem for what he calls the democratic pedigree. The author particularly criticizes the IACtHR decision to overrule Uruguayan amnesty law without taking into consideration that it was adopted by the Uruguayan Congress and ratified in referendum (*Gelman v. Uruguay*). Gargarella finds that the Court should make a special argumentative effort to differentiate amnesty laws adopted via democratic proceedings from amnesties adopted by non-democratic regimes. Roberto Gargarella, 'No Place for Popular Sovereignty? Democracy, Rights, and Punishment in *Gelman v. Uruguay*', *SELA Papers*, no. 124 (2013): 15–16; Roberto Gargarella, 'La Corte Interamericana de Derechos Humanos y La "conversación Entre Iguales"', *International Journal of Constitutional Law* 19, no. 4 (1 October 2021): 1223–28.

¹⁷⁵⁷ Marina Mínguez Rosique, 'The Principle of Legality in Criminal Law in the Inter-American System for the Protection of Human Rights', in *Multilevel Protection of the Principle of Legality in Criminal Law*, ed. Juan Antonio Lascaraín Sánchez, Marina Rosique Mínguez, and Mercedes Pérez Manzano (Madrid: Springer, 2018), 106–7, 117.

that “the violation of human rights is justified in the name of human rights themselves”.¹⁷⁵⁸

It has been argued as well that the IACtHR infringes the *pro homine* when compelling States to fulfil an obligation that involves the limitation of an individual right or freedom recognised in domestic law. For instance, when the Court prohibits the use of domestic provisions, as amnesty acts, statutes of limitations or the non-retroactivity rule, to hinder prosecutions for serious human rights violations. Malarino considers that such domestic provisions grant individual rights to the accused and the Court’s interpretation, when limiting them, breaches the *pro homine* principle.¹⁷⁵⁹ However, this approach seems too simplistic and overlooks that according to the *pro homine* principle all the individual rights at stake should be taken into account, including not only the accused’s rights but also those of the victims. Particularly in prosecutions for serious human rights violations the accused’s rights cannot be considered to be operating by themselves. On the contrary, the victims’ rights to a judicial remedy, judicial protection, truth and reparation, are directly affected in these proceedings, and they interact and often oppose the accused’s rights.

The Inter-American Court has repeatedly established that States cannot invoke domestic legal provisions to justify the violation of the above-explained international obligations.¹⁷⁶⁰ Consequently, the Court considers that a State “may not invoke the statute of limitations, the non-retroactivity of criminal law or the *ne bis in idem* principle to decline its duty to investigate and punish those responsible.”¹⁷⁶¹ Therefore, as explained hereinafter, the positive obligations of States directly interact and sometimes limit the applicability of different aspects of the legality principle.

5.2.4.2 Qualifications to the non-retroactivity rule

The IACtHR has strictly applied the prohibition of retroactive criminal laws in situations concerning domestic crimes. However, when it comes to serious violations of

¹⁷⁵⁸ Malarino, ‘Activismo Judicial, Punitivización y Nacionalización. Tendencias Antidemocráticas y Antiliberales de La Corte Interamericana de Derechos Humanos’, 48; Mínguez Rosique, ‘The Principle of Legality in Criminal Law in the Inter-American System for the Protection of Human Rights’, 107.

¹⁷⁵⁹ Malarino, ‘Activismo Judicial, Punitivización y Nacionalización. Tendencias Antidemocráticas y Antiliberales de La Corte Interamericana de Derechos Humanos’, 59.

¹⁷⁶⁰ *Almonacid-Arellano et al v. Chile*, para. 125, referring to *International responsibility for the promulgation and enforcement of laws in violations of the Conventions (Arts. 1 and 2 of the American Convention on Human Rights)*, para. 35.

¹⁷⁶¹ *Almonacid-Arellano et al v. Chile*, para. 151.

human rights the Court has effectuated a more flexible interpretation, taking into account other individual rights and State obligations also enshrined in the American Convention.¹⁷⁶² Having the *Almonacid Arellano* case as a starting point, the IACtHR progressively developed different lines of reasoning to justify that in practice the non-retroactivity rule cannot prevent the prosecution and punishment of serious human rights violations. While in some occasions the Court simply stated that the legality principle cannot be an obstacle for prosecutions, in other decisions the modulation of the principle was grounded on a sort of balance between the respect of the legality principle and other individual rights and State obligations. Finally, in some cases the Court also considered that prosecutions respected the *nullum crimen* principle since at the time of commission the relevant conducts were already criminal under domestic or international law.

A. The *Almonacid Arellano* case

Luis Alfredo Almonacid Arellano was a trade unionist and a member of the Chilean Communist Party. In 1973, few days after the military *coup d'état* that brought General Augusto Pinochet to power, he was arrested and executed by the Carabineros (Chilean militarized police).¹⁷⁶³ In 1992, once the country regained democracy, Almonacid's widow initiated criminal proceedings against those responsible for the death of his husband. After a tortuous process a military criminal court issued a definitive dismissal of the case in application of the self-amnesty law the Pinochet's regime had passed in 1978. After the Chilean Supreme Court upheld the decision, the victims' relatives appealed to the Inter-American Commission for an alleged violation of judicial guarantees (ACHR Articles 8 and 25) and the obligation to respect human rights and to adopt appropriate domestic provisions to give effect to those rights (ACHR Articles 1 and 2).

The case finally reached the IACtHR and the Court addressed first a challenge to its competence over the case. Since Chile became a member of the American Convention and recognized the contentious jurisdiction of the Court only in 1990, the

¹⁷⁶² Both the Commission and the Court have addressed in numerous occasions situations involving retroactive application of domestic criminal laws. On the contrary, the case law regarding retroactive application of national laws referring to international law is rather scarce. As explained with case-law examples in Andreu Guzmán, *Retroactividad Penal de Crímenes Internacionales*, 24.

¹⁷⁶³ See a summary of the proven facts in *Almonacid-Arellano et al v. Chile*, para. 82. Also in Andreu Guzmán, 25. For a comprehensive analysis of this case, also see F. Parenti, 'La Inaplicabilidad de Normas de Prescripción En La Jurisprudencia de La Corte Interamericana de Derechos Humanos', 220–23.

State claimed as a preliminary objection that the Court was not competent to hear the case.¹⁷⁶⁴ However, the IACtHR dismissed the State objection arguing that the alleged violation of the Convention occurred after 1990. The domestic criminal proceeding took place after that date, and from the moment the State ratified the ACHR, it accepted the obligation to adapt its domestic legislation to the standards of the American Convention.¹⁷⁶⁵ Despite the crimes were committed in 1973 the Court affirmed its competence because from 1990 the State had violated its newly accepted duty to adapt its domestic legislation and take appropriate measure to prosecute crimes against humanity.¹⁷⁶⁶

The Court then examined whether the murder of Almonacid could be considered a crime against humanity. The Court found that in 1973 “the commission of crimes against humanity, including murder committed in the course of a generalized or systematic attack against certain sectors of the civil population, was in violation of a binding rule of international law.”¹⁷⁶⁷ The IACtHR held that the prohibition to commit crimes against humanity was already an *ius cogens* rule, and that the punishment of such crimes was mandatory according to the general principles of international law.¹⁷⁶⁸

Then, after examining the proven facts and the context, the Court determined that “there is sufficient evidence to reasonably state that the extra-legal execution committed by State agents in detriment of Mr. Almonacid-Arellano, (...) was committed following a systematic and generalized pattern against the civilian population, and thus, it is a crime against humanity.”¹⁷⁶⁹ The Court considered that the murder of Almonacid was just an example of many other illegal acts that took place during the same period.¹⁷⁷⁰ The IACtHR established that according to basic rules of international law crimes against humanity could not be susceptible of amnesties or other similar domestic provisions.¹⁷⁷¹ Therefore, the Court concluded that the Chilean

¹⁷⁶⁴ *Almonacid-Arellano et al v. Chile*, paras 17, 38-39.

¹⁷⁶⁵ *Ibid.*, paras 50-51.

¹⁷⁶⁶ Some scholars have questioned this line of reasoning arguing that in practice it derogates the prohibition of retroactive application of the Convention. In fact, it seems that the Court can affirm its competence over facts and laws preceding the entry into force of the Convention if the effects or the omission of reparations continue after that moment. See Malarino, ‘Activismo Judicial, Punitivización y Nacionalización. Tendencias Antidemocráticas y Antiliberales de La Corte Interamericana de Derechos Humanos’, 28.

¹⁷⁶⁷ *Almonacid-Arellano et al v. Chile*, para. 99.

¹⁷⁶⁸ *Ibid.*

¹⁷⁶⁹ *Ibid.*, para. 104.

¹⁷⁷⁰ *Ibid.*, para. 129.

¹⁷⁷¹ *Ibid.*, paras 105-114, 129.

State had violated its obligation to take appropriate measures to prosecute the murder of Almonacid. Since the amnesty law was still in force and was applied by the domestic tribunals to crimes against humanity, the IACtHR found that the State had infringed its obligation to modify its domestic legislation in order to guarantee the rights provided in the American Convention.¹⁷⁷²

As already established in other cases, the Court determined that States cannot invoke domestic legislations to justify the violation of their international law obligations.¹⁷⁷³ Consequently, the Court found that the Chilean State “may not invoke any domestic law or provision to exonerate itself from the Court's order to have a criminal court investigate and punish those responsible for Mr. Almonacid-Arellano’s death.”¹⁷⁷⁴ Then, the IACtHR established that “the State may not invoke the statute of limitations, the non-retroactivity of criminal law or the *ne bis in idem* principle to decline its duty to investigate and punish those responsible.”¹⁷⁷⁵ This last affirmation has great relevance since it seems to establish an exception to the application of the non-retroactivity rule when it prevents States to comply with its obligations under the American Convention.

B. Subsequent case law: previous criminalization and a balance between the legality principle, individual rights and State obligations

The IACtHR’s position in *Almonacid Arellano* regarding the non-retroactivity rule was subsequently reiterated other decisions. For instance, in *Gelman v. Uruguay* the Court affirmed that “the State should ensure that no other analogous norm, such as a statute of limitations, non-retroactivity of the criminal law, *res judicata*, *ne bis in idem* or any other similar law exonerating responsibility, be applied and that the authorities refrain from carrying out acts that would implicate the obstruction of the investigative process.”¹⁷⁷⁶

Two different lines of arguments can be inferred from the Court’s reasoning to justify that the non-retroactivity rule cannot prevent the prosecution and punishment

¹⁷⁷² Ibid., para. 129.

¹⁷⁷³ Ibid., para. 125, referring to *International responsibility for the promulgation and enforcement of laws in violations of the Conventions (Arts. 1 and 2 of the American Convention on Human Rights)*, para. 35.

¹⁷⁷⁴ *Almonacid-Arellano et al v. Chile*, para. 151.

¹⁷⁷⁵ Ibid.

¹⁷⁷⁶ *Gelman v. Uruguay*, Merits and Reparations, IACtHR, 24 February 2011, para. 254, available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_221_ing.pdf.

of serious human rights violations. First, an argument similar to those used by other international courts, grounded on the previous criminalization of conducts under international law. Second, an argument not yet developed in depth by other international tribunals, based on a sort of balance between the respect of the legality principle and other individual rights and State obligations.

Firstly, regarding the argument based on international law, it seems that the Court alternatively followed two different approaches to reach the same conclusion. At times it seems that the IACtHR established *de facto* a sort of Nuremberg clause, considering, without further developments, that the principle of legality cannot be used to obstruct the prosecution and punishment of international crimes.¹⁷⁷⁷ However, at other times, the Court refers to different international law sources to prove that the conducts were already criminalized under applicable international law, and therefore, that the principle of legality was fully respected.¹⁷⁷⁸ For instance, in *Almonacid Arellano* the Court argued that despite domestic laws did not contemplate crimes against humanity at the moment of commission, international law already included such criminal classification and that the prosecuted conduct squarely fell within the definition of that crime.¹⁷⁷⁹

Secondly, the need to establish equilibrium between the respect of the legality principle and other individual rights and State obligations has also underpinned the Court's reasoning to limit the application of the non-retroactivity rule. The American Convention does not contain any provision providing for a limitation or an attenuated application of the non-retroactivity rule. On the contrary, Article 27(2) establishes that this norm cannot be suspended in time of war or other emergency threatening the independence or security of a State. However, the Court considered that in some circumstances the legality principle prevents the exercise of individual rights enshrined in the Convention, as the right to be heard by a judge (Article 8(1)), the right to judicial protection (Article 25), or other rights of the victims as the right to truth,

¹⁷⁷⁷ "The State may not invoke (...) the non-retroactivity of criminal law (...) to decline its duty to investigate and punish those responsible." *Almonacid-Arellano et al v. Chile*, para. 151; *Gelman v. Uruguay*, para. 254. Malarino considers that the Court has inferred from international law a norm excluding international crimes from the application of the non-retroactivity rule. Malarino, 'Activismo Judicial, Punitivización y Nacionalización. Tendencias Antidemocráticas y Antiliberales de La Corte Interamericana de Derechos Humanos', 30, 47. In the same vein, referring to enforced disappearances, see Guzmán Dalbora, 'El Principio de Legalidad Penal En La Jurisprudencia de La Corte Interamericana de Derechos Humanos', 187–89.

¹⁷⁷⁸ Referring to various international instruments and the case law of different international tribunals, see *Almonacid-Arellano et al v. Chile*, paras 93-101.

¹⁷⁷⁹ *Almonacid-Arellano et al v. Chile*, para. 99.

justice and reparation. A strict application of the non-retroactivity norm can also prevent States from fulfilling some of their obligations under the American Convention, as the duty to respect and ensure the free and full exercise of the rights embodied in the Convention (Article 1(1)).¹⁷⁸⁰

In 2018 the IACtHR issued a decision bringing together both lines of reasoning.¹⁷⁸¹ The case concerned the detention, torture and assassination of Vladimir Herzog, a journalist member of the Brazilian Communist Party, in 1975 during the Brazilian dictatorship (1964-1985). Domestic courts renounced to prosecute those responsible arguing, among others, that the limitation period had expired, and that at the time of commission Brazilian laws did not include crimes against humanity. However, the Inter-American Court condemned Brazil for its omission to investigate, prosecute and condemn the public agents allegedly responsible for the torture and assassination of Herzog. On the one hand, the IACtHR considered that despite crimes against humanity were not formally included in domestic legislation at the time of commission, the prosecution based on such legal classification would respect the legality principle and the requirement of legal certainty. The Court argued that the accused could have predicted the legal consequences of its acts since at the moment of commission crimes against humanity were already prohibited under international law and the underlying conducts already constituted ordinary crimes in the domestic legal system.¹⁷⁸² On the other hand, the IACtHR referred to the State duties to investigate, prosecute and condemn those responsible for serious human rights violations, and reminded that according to Article 27 of the Vienna Convention on the Law of Treaties, States “may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”¹⁷⁸³ Therefore, the Court concluded that “Brazil violated the rights to judicial guarantees and judicial protection established in Articles 8(1) and 25(1) of the American Convention, in relation to Articles 1(1) and 2 of this instrument”.¹⁷⁸⁴

¹⁷⁸⁰ *Barrios Altos v. Peru*, para. 42.

¹⁷⁸¹ *Herzog et al. v. Brazil*, preliminary objections, merits, reparations and costs, IACtHR, 15 March 2018, paras 304-10, available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_353_ing.pdf. Analysed in Hennebel and Tigroudja, *The American Convention on Human Rights*, 372.

¹⁷⁸² *Herzog et al. v. Brazil*, preliminary objections, merits, reparations and costs, IACtHR, 15 March 2018, paras 304-10.

¹⁷⁸³ *Herzog et al. v. Brazil*, para. 311. In the same vein, the Court established: “The treaty-based obligations of the States Parties are binding for all their powers and organs, which must ensure compliance with the provisions of the Convention and their practical effects (effet utile) in the sphere of their domestic laws.” *Herzog et al. v. Brazil*, para. 311

¹⁷⁸⁴ *Herzog et al. v. Brazil*, para. 312.

However, some scholars consider that the solutions found by the Court regarding the legality principle are not convincingly founded,¹⁷⁸⁵ or contravene fundamental rights and involve excessively repressive results.¹⁷⁸⁶ Even if at times the Court's reasoning could lack sufficient developed grounds regarding the non-retroactivity rule, the general rationales and conclusions seem correct. The *nullum crimen* principle, as enshrined in international instruments and implemented by international tribunals, allows the prosecution and punishment of international crimes if at the time of commission the conducts were already criminalized either by domestic or international law. It was indeed the case in the studied situations addressed by the IACtHR. Moreover, the approach adopted by the Court, taking into account other individual rights and State obligations, seems as well appropriate. It cannot be ignored that the rights of different individuals are often linked and even opposed. In fact, in certain situations the protection of someone's rights might involve the retreat of the rights of other individuals. This is particularly the case of situations relating international crimes. The role of the courts in these situations is to weigh all the rights at stake and find the best possible equilibrium. The IACtHR is right not focusing exclusively on the safeguards granted by the legality principle to the accused, but having a broader perspective and taking also into account other individual and collective rights affected in the criminal proceedings.

5.2.4.3 *Amnesty laws*

The complex relation between the *nullum crimen* principle, amnesty laws and the prosecution of certain crimes considered as serious human rights violations¹⁷⁸⁷ was

¹⁷⁸⁵ F. Parenti, 'La Inaplicabilidad de Normas de Prescripción En La Jurisprudencia de La Corte Interamericana de Derechos Humanos', 223. In the same vein, see Guzmán Dalbora, 'El Principio de Legalidad Penal En La Jurisprudencia de La Corte Interamericana de Derechos Humanos', 186–87.

¹⁷⁸⁶ Guzmán Dalbora, 'El Principio de Legalidad Penal En La Jurisprudencia de La Corte Interamericana de Derechos Humanos', 186–87, 90; Malarino, 'Activismo Judicial, Punitivización y Nacionalización. Tendencias Antidemocráticas y Antiliberales de La Corte Interamericana de Derechos Humanos', 45–49.

¹⁷⁸⁷ For further information on the issue see, among others, Alicia Gil Gil and Elena Maculan, 'La Justicia penal en los escenarios posconflicto', *Revista UNISCI*, no. 51 (2019): 227–52; Ezequiel Malarino, 'Transición, derecho penal y amnistía. Reflexiones sobre la utilización del derecho penal en procesos de transición', *Revista de Derecho Penal y Criminología*, no. 9 (2013): 205–22; Javier Chinchón Álvarez, 'El Derecho Penal Internacional En Contextos Transicionales', in *Derecho Penal Internacional*, ed. Alicia Gil Gil and Elena Maculan (Madrid, Spain: Dykinson, 2016), 465–84; Mattia Pinto, 'Awakening the Leviathan through Human Rights Law – How Human Rights Bodies Trigger the Application of Criminal Law', *Utrecht Journal of International and European Law* 34, no. 2 (1 November 2018): 161–84; María García Casas, *El*

tackled for the first time by the Inter-American Court in the *Barrios Altos* case. In 1991, under the authoritarian regime of Alberto Fujimori, a death squad conformed by members of the Peruvian Army and Intelligence Service, murdered fifteen people in a neighbourhood of Lima known as Barrios Altos. Peruvian domestic courts initiated investigations but refused to consider the massacre as a crime against humanity since domestic laws did not include such criminal classification. The murders were considered ordinary crimes and therefore, covered by an amnesty law adopted in 1995 to exonerate from criminal liability those responsible for human rights violations committed between 1980 and 1995.

The case reached the Inter-American Court and it established that “all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility” are incompatible with the Convention if they prevent the investigation and conviction of those responsible for serious human rights violations.¹⁷⁸⁸ The IACtHR recognized that “self-amnesty laws lead to the defencelessness of victims and perpetuate impunity; therefore, they are manifestly incompatible with the aims and spirit of the Convention.”¹⁷⁸⁹ The Court examined as well the impact of amnesty laws on the victims’ rights to truth and reparation, and found that this type of laws “precludes the identification of the individuals who are responsible for human rights violations, because it obstructs the investigation and access to justice and prevents the victims and their next of kin from knowing the truth and receiving the corresponding reparation.”¹⁷⁹⁰

Consequently, since the Peruvian amnesty act prevented the investigation and prosecution of the Barrios Altos’ massacre, the Court considered that it violated the right of the surviving victims from being heard by a judge (ACHR Article 8(1)), the right to judicial protection (ACHR Article 25) and the obligation of States to respect and ensure the free and full exercise of the rights embodied in the Convention (ACHR Article 1(1)).¹⁷⁹¹ In addition, the Court established that “the adoption of self-amnesty laws that are incompatible with the Convention meant that Peru failed to comply with the obligation to adapt internal legislation that is embodied in Article 2 of the

Derecho Internacional de la Justicia Transicional: La construcción del marco normativo de las transiciones (Madrid: Wolters Kluwer, 2022), 7–17; Javier Dorado Porras, ‘Justicia transicional, persecución penal y amnistías’, *Derechos y libertades*, no. 28 (2013): 81–114.

¹⁷⁸⁸ *Barrios Altos v. Peru*, para. 41.

¹⁷⁸⁹ *Ibid.*, para. 43.

¹⁷⁹⁰ *Ibid.*

¹⁷⁹¹ *Ibid.*, para. 42.

Convention.”¹⁷⁹² The Court found that States are “obliged to take all measures to ensure that no one is deprived of judicial protection and the exercise of the right to a simple and effective recourse” and consequently they violate their international obligations if they “adopt laws that have the opposite effect, such as self-amnesty laws.”¹⁷⁹³ Finally, the Court established that, since amnesty laws are manifestly incompatible with the American Convention, they lack legal effect and cannot obstruct criminal proceedings for crimes similar to those of Barrios Altos.¹⁷⁹⁴

Some scholars have argued that the *Barrios Altos* doctrine is an example of how the IACtHR applied the international principle of legality to remedy situations of extreme injustice. Despite domestic laws barred the prosecution of the crimes, the Court referred to previously existing international law criminalizing the conduct to prove the legality of prosecutions and to determine that the State violated its duty to investigate and punish the crimes.¹⁷⁹⁵ According to Sánchez Montero the Inter-American Court established the nullity of amnesties on the basis of pre-existing customary norms, even when they were not incorporated into domestic laws.¹⁷⁹⁶ In the same vein, the IACtHR president, judge Cançado Trindade, considered in his separate opinion that conducts seriously violating human rights, as international crimes and other atrocities, were already prohibited before being embodied in international conventions.¹⁷⁹⁷ The judge also made reference to the idea of objective justice and “the reaction of the *universal juridical conscience* to the recurrent abuses committed against human beings, often warranted by positive law.”¹⁷⁹⁸ It is worth noting that when applying the *Barrios Altos* doctrine, some domestic courts argued that the retroactive declaration of non-applicability of amnesty acts did not infringe the legality principle since the grounds for such nullity already existed in the legal system at the time the amnesty laws were adopted.¹⁷⁹⁹

The *Barrios Altos* doctrine has been consistently followed in subsequent IACtHR decisions reaffirming the lack of legal effects and the inapplicability of

¹⁷⁹² Ibid.

¹⁷⁹³ Ibid., para. 43.

¹⁷⁹⁴ Ibid., para. 44.

¹⁷⁹⁵ Sánchez Montero affirms that the conducts were previously criminalized under international customary law. Sánchez Montero, ‘Inter-American Court, Crimes Against Humanity and Peacebuilding in South America’, 28.

¹⁷⁹⁶ Sánchez Montero, 18.

¹⁷⁹⁷ As explained in Sánchez Montero, 29.

¹⁷⁹⁸ *Barrios Altos v. Peru*, Concurring Opinion of Judges A.A. Cançado Trindade, para. 14.

¹⁷⁹⁹ Piqué, ‘Artículo 9. Principio de Legalidad y de Retroactividad’, 183.

amnesty laws due to their incompatibility with the rights and obligations enshrined in the ACHR.¹⁸⁰⁰ The Inter-American Court considers all amnesty laws contrary to the Convention, including those adopted in the context of peace negotiations or those adopted by democratically elected parliaments or approved by referendum.¹⁸⁰¹ Some scholars believe that in its more recent decisions the IACtHR has arguably nuanced its position by increasingly balancing competing interest in post-conflict contexts, particularly when amnesties aim to end internal conflicts.¹⁸⁰² However, other authors consider that there is little evidence to acknowledge a relevant shift in the IACtHR case law.¹⁸⁰³ The Inter-American Court's jurisprudence on amnesties has significantly

¹⁸⁰⁰ See, among others, *Almonacid-Arellano et al v. Chile*, paras 105-13, 116, 119; *La Cantuta v. Perú*, Merits, Reparations and Costs, IACtHR, 29 November 2006, available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_162_ing.pdf; *Gelman v. Uruguay*, paras 230-40; *Herzog et al. v. Brazil*, 277-94.

¹⁸⁰¹ For a comprehensive analysis of the IACtHR case law regarding amnesties, see José Elías Esteve Moltó, 'La jurisprudencia de la Corte Interamericana de Derechos Humanos ante las leyes de amnistía: un referente para la necesaria "fertilización" trasatlántica', *EUNOMÍA. Revista en Cultura de la Legalidad*, 28 September 2015, 105-23; Javier Dondé Matute, 'El Concepto de Impunidad: Leyes de Amnistía y Otras Formas Estudiadas Por La Corte Interamericana de Derechos Humanos', in *Sistema Interamericano de Protección de Los Derechos Humanos y Derecho Penal Internacional*, ed. Gisela Elsner (Montevideo, Uruguay: Konrad-Adenauer-Stiftung e. V., 2010), 263-394; Christina Binder, 'The Prohibition of Amnesties by the Inter-American Court of Human Rights', *German Law Journal* 12, no. 5 (May 2011): 1203-30; Louise Mallinder, 'The End of Amnesty or Regional Overreach? Interpreting the Erosion of South America's Amnesty Laws', *The International and Comparative Law Quarterly* 65, no. 3 (2016): 645-80. For a critical view, see Gargarella, 'No Place for Popular Sovereignty?'; Malarino, 'Activismo Judicial, Punitivización y Nacionalización. Tendencias Antidemocráticas y Antiliberales de La Corte Interamericana de Derechos Humanos'.

¹⁸⁰² As explain, with reference to different decisions, in Juan Pablo Pérez León Acevedo, 'The European Court of Human Rights (ECtHR) Vis-à-Vis Amnesties and Pardons: Factors Concerning or Affecting the Degree of ECtHR's Deference to States', *The International Journal of Human Rights* 26, no. 6 (3 July 2022): 1109. Particularly the recent *Massacres of El Mozote* decision has been understood by some scholars as easing the IACtHR position on amnesties aiming the consolidation of peace processes. In fact, a concurring separate opinion distinguished between amnesties adopted to end internal conflicts and those adopted by dictatorships. *Massacres of El Mozote and nearby places v. El Salvador*, Merits, Reparations and Costs, IACtHR, 25 October 2012, available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_252_ing1.pdf. As analysed in Pérez León Acevedo, 1109; Moltó, 'La jurisprudencia de la Corte Interamericana de Derechos Humanos ante las leyes de amnistía', 115-19.

¹⁸⁰³ Mallinder, 'The end of amnesty or regional overreach?'; Miguel Arenas Meza, 'El diálogo judicial euro-latinoamericano en el tema de leyes de amnistía: un ejemplo de "cross-fertilization" entre tribunales de Derechos Humanos', *Araucaria (Triana)* 20, no. 40 (2018): 594.

influenced international and domestic courts, particularly those of Latin American countries that have generally followed and implemented its doctrine.¹⁸⁰⁴

5.2.4.4 *Permanent or continuous crimes*

Permanent or continuous crimes¹⁸⁰⁵ raise significant questions regarding two aspects of the legality principle. First, concerning the Court's jurisdiction over ACHR violations that occurred before its entry into force or before the State recognised the competence of the IACtHR, but that continued after that moment. And second, regarding the creation or modification of criminal law provisions after the consummation of the crime, but before its termination.¹⁸⁰⁶

Enforced disappearance, an exceptionally frequent crime in the Latin-American experience, is a paradigmatic example of continuous crimes.¹⁸⁰⁷ According to the Court, "forced disappearance constitutes a multiple violation to several rights protected by the Convention, of a permanent or continued nature".¹⁸⁰⁸ This means that "due to its permanent nature, while the fate or whereabouts of the victim or their remains is not established, the forced disappearance continues in execution."¹⁸⁰⁹ Various situations

¹⁸⁰⁴ For further information on the influence of the IACtHR case law on domestic legal systems regarding amnesty laws, see Malarino, 'Transición, derecho penal y amnistía. Reflexiones sobre la utilización del derecho penal en procesos de transición', 209–10; Olásolo and Galain Palermo, *Los Desafíos Del Derecho Internacional Penal: Atención Especial a Los Casos de Argentina, Colombia, España, México y Uruguay*; Pérez León Acevedo, 'The European Court of Human Rights (ECtHR) Vis-à-Vis Amnesties and Pardons', 1110; Binder, 'The Prohibition of Amnesties by the Inter-American Court of Human Rights', 1218–26.

¹⁸⁰⁵ The expressions "continuous" or "permanent" are used as equivalents in the Inter-American human rights system, referring to continuous/permanent crimes, executions or nature of a crime. E.g.: "This offense shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined." OAS, *Inter-American Convention On Forced Disappearance Of Persons*, 28 Mars 1996, Article 3, available at: <https://www.oas.org/juridico/english/treaties/a-60.html>. "Forced disappearance constitutes a multiple violation to several rights protected by the Convention, of a permanent or continued nature." *Tiu Tojín v. Guatemala*, para. 84. However, in certain domestic legal systems continuous and permanent crimes are totally different sorts of crimes. See above, footnote 1638.

¹⁸⁰⁶ See an analysis of these two questions in Mínguez Rosique, 'The Principle of Legality in Criminal Law in the Inter-American System for the Protection of Human Rights', 100–105.

¹⁸⁰⁷ *Velásquez-Rodríguez v. Honduras*, para. 149. The Court recognised for the first time the continuous or permanent nature of enforced disappearances in *Velásquez-Rodríguez v. Honduras*, para. 155.

¹⁸⁰⁸ *Tiu Tojín v. Guatemala* Merits, Reparations, and Costs, IACtHR, 26 November 2008, para. 84 available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_190_ing1.pdf.

¹⁸⁰⁹ Ibid.

concerning the prosecution of this offence have arrived to the Court. The IACtHR had to tackle the issue of its competence *ratione temporis* when the crimes were originated before its establishment or before the relevant State accepted the competence of the Court. The IACtHR found that its jurisdiction over these continuous or permanent crimes was consistent with ACHR Article 8 (prohibition of *ex post facto* created courts) since, despite the commission of the crime started before the State recognised the Court's jurisdiction, it persisted after that moment.¹⁸¹⁰

The second issue concerning the legality principle arises when new legal provisions are adopted after the commission of the crime, but before its execution ended. This is particularly the case when the crime of enforced disappearance was included in domestic legislations years after the direct victims disappeared, but before their whereabouts were established. The IACtHR considered that the application of the new legal provisions was compatible with the *nullum crimen* principle since, due to its permanent nature, the crime was also committed after the adoption of the law. The Court argued that “(S)ince this is a crime of permanent execution, that it, its consummation is prolonged in time, if at the time the definition of the crime of forced disappearance of persons when into force in the domestic criminal law, the author maintains his criminal behavior, the new law is applicable.”¹⁸¹¹ Therefore, the Court

¹⁸¹⁰ From the *Velásquez-Rodríguez v. Honduras* case, the Court's case law has been constant, as explained with further case law references, in *Tiu Tojín v. Guatemala* Merits, para. 84. The compatibility of ACHR Article 8 and the prosecution of continuous crimes as enforced disappearance is critically analysed in Mínguez Rosique, ‘The Principle of Legality in Criminal Law in the Inter-American System for the Protection of Human Rights’, 100–105. See a critical analysis of the IACtHR line of reasoning, with further case law and doctrinal references, in García Ramírez and Morales Sánchez, ‘Consideraciones sobre el principio de legalidad penal en la jurisprudencia de la Corte Interamericana de Derechos Humanos’, 223–24; Ayala González, ‘El principio de legalidad penal desde la óptica de la Corte Interamericana de Derechos Humanos’, 31–33. This problematic regarding the Court's *ratione temporis* competence is not unknown for States. In fact, when accepting the Court's jurisdiction some have limited the Court's competence regarding continuous crimes. For instance, Chile established “that its recognitions of the competence of the Commission and the jurisdiction of the Court apply to events subsequent to the date of deposit of this instrument of ratification.” Likewise, El Salvador set that “in recognizing that competence, expressed that its recognition is for an indefinite period and on condition of reciprocity, and that it retains the right to include exclusively subsequent deeds or juridical acts or deeds or juridical acts began subsequent to the date of deposit of this declaration of acceptance.” The declarations and reservations to the ACHR are available at: https://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm.

¹⁸¹¹ *Tiu Tojín v. Guatemala*, para. 87. The IACtHR noted that courts of a higher hierarchy within the American continent had issued rulings in this same sense, referring to different courts of Peru, Mexico, Bolivia, Panama, Venezuela or Colombia. The courts of other States, as Argentina, consider compatible with the legality principle the retroactive application of

established that according to the *nullum crimen* principle the crime of forced disappearance could be applied regardless of the date of adoption in domestic legislation, if the whereabouts of the victims are still unknown.¹⁸¹²

5.2.4.5 Statutes of limitations

According to the IACHR and the IACtHR, the scope of Article 9 reaches certain procedural rules that severely impact the defendant's fundamental rights. This way, subsequent laws should respect the conditions of punishment or prosecution, as statutes of limitations, or the criminal labels applicable at the time of commission.¹⁸¹³ However, when it concerns the prosecution of serious human rights violations the Inter-American Court has found that statutes of limitations, as well as other procedural norms, cannot prevent the investigation and punishment of those responsible. States have the obligation to investigate, prosecute, punish and repair serious violations of human rights, and statutes of limitations should not be an obstacle to fulfil such duties.

In *Barrios Altos* the IACtHR established for the first time, and without providing further grounds, that the American Convention was incompatible with

domestic provisions establishing the crime of enforced disappearance, since when the commission begun, the conducts were already considered illegal, though under other criminal names, as explained in Piqué, 'Artículo 9. Principio de Legalidad y de Retroactividad', 183.

¹⁸¹² *Tiu Tojín v. Guatemala*, para. 88. For a critical analysis of this case law, see Guzmán Dalbora, 'El Principio de Legalidad Penal En La Jurisprudencia de La Corte Interamericana de Derechos Humanos', 188. For comprehensive analysis of the IACtHR case law regarding enforced disappearances see Juan Luis Modolell González, 'El Crimen de Desaparición Forzada de Personas Según La Jurisprudencia de La Corte Interamericana de Derechos Humanos', in *Sistema Interamericano de Protección de Los Derechos Humanos y Derecho Penal Internacional*, ed. Gisela Elsner (Montevideo, Uruguay: Konrad-Adenauer-Stiftung e. V., 2010), 193–210.

¹⁸¹³ As explained in De Souza Dias, 'Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law', 61. See, *inter alia*, *Castillo Petruzzi et al. v. Peru*, para. 119; *Ricardo Canese v. Paraguay*, para. 175; *García-Asto and Ramírez-Rojas v. Peru*, para. 191. On the contrary, Olásolo considers that the IACtHR, and other international tribunals, interpreted the legality provisions in international treaties and conventions as not covering procedural rules. Conversely, some domestic legal system have included in the notion of the legality principle certain aspect of procedural norms through which the State exercises its punitive power. See an explanation and some examples in Olásolo, 'El Principio Nullum Crimen Sine Iure En El Derecho Internacional Contemporáneo', 38–40. For a general discussion and further references on whether the *nullum crimen* principle covers procedural rules, see above, Section 5.1.12, Also see Olásolo, 38–39; De Souza Dias, 'Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law', 81–82.

statutes of limitations preventing the prosecution of serious human rights violations.¹⁸¹⁴ Later, in *Bulacio*, the Court expanded the inapplicability of statutes of limitations to crimes that involve any human right.¹⁸¹⁵ Finally, the IACtHR in *Almonacid Arellano* and further cases, restricted to international crimes the scope of rule prohibiting the application of statutes, and grounded the prohibition on the wording of the Convention and international law. The Court qualified some human rights violations as international crimes, and consequently considered that they were not subject to statutory limitations. The Inter-American Court established that the non-applicability of statutory limitations to international crimes was a customary international norm applicable to States even if at the moment of commission they had not yet ratified the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, or if they had not implemented it in their domestic legislations.¹⁸¹⁶

The view of the IACtHR regarding statutes of limitations has been generally supported by the majoritarian doctrine.¹⁸¹⁷ However, a minority position argue that

¹⁸¹⁴ *Barrios Altos*, para. 41.

¹⁸¹⁵ *Bulacio v. Argentina*, Merits, Reparations and Costs, IACtHR, 18 September 2003, paras 100, 106-08, 113-14, 116-17, available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_100_ing.pdf.

¹⁸¹⁶ *Almonacid Arellano*, para. 153: “Even though the Chilean State has not ratified said Convention, the Court believes that the non-applicability of statutes of limitations to crimes against humanity is a norm of General International Law (*ius cogens*), which is not created by said Convention, but it is acknowledged by it. Hence, the Chilean State must comply with this imperative rule.” In the same vein, see *Albán-Cornejo et al. v. Ecuador*, Merits, Reparations, and Costs, IACtHR, 22 November 2007, para. 111, available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_171_ing.pdf. See a comprehensive study of this case-law evolution, with further references, in F. Parenti, ‘La Inaplicabilidad de Normas de Prescripción En La Jurisprudencia de La Corte Interamericana de Derechos Humanos’. Also see Piqué, ‘Artículo 9. Principio de Legalidad y de Retroactividad’, 181; Dondé Matute, ‘El Concepto de Impunidad: Leyes de Amnistía y Otras Formas Estudiadas Por La Corte Interamericana de Derechos Humanos’, 285–87. For further information on the influence of the IACtHR case law on domestic legal systems regarding statutes of limitations, see Gustavo de la Orden, ‘La erradicación de la violencia institucional de las dictaduras en el Cono Sur. El contexto histórico como clave de resolución e impacto en la jurisprudencia de la Corte Interamericana’, *Oñati Socio-Legal Series*, 30 November 2021, 18–19; F. Parenti, ‘La Inaplicabilidad de Normas de Prescripción En La Jurisprudencia de La Corte Interamericana de Derechos Humanos’, 219–20, 25; Lisandro Pellegrini, ‘El Incumplimiento de Las Sentencias de La Corte Interamericana de Derechos Humanos’, in *Sistema Interamericano de Protección de Los Derechos Humanos y Derecho Penal Internacional*, ed. Gisela Elsner (Montevideo, Uruguay: Konrad-Adenauer-Stiftung e. V., 2010), 96–97.

¹⁸¹⁷ See, with further references, F. Parenti, ‘La Inaplicabilidad de Normas de Prescripción En La Jurisprudencia de La Corte Interamericana de Derechos Humanos’, 222–23; Piqué, ‘Artículo 9.

even international crimes can be time barred if at the moment of commission no domestic law provided for such exception since international laws cannot be directly applied in some legal systems, and the subsequent domestic law implementing that international norm cannot be applied retroactively.¹⁸¹⁸ Some scholars also claim that the IACtHR doctrine constitutes an *ex post facto* jurisprudential extension of the limitation periods and therefore, it infringes the legality principle.¹⁸¹⁹ As well, it has been denounced that the above-mentioned progressive jurisprudential evolution created uncertainty regarding the scope of the rule excluding statutes of limitations.¹⁸²⁰

5.3 The African Court of Human and Peoples' Rights

Africa has historically experienced numerous and widespread human rights violations. However, during the last decades the recently created African human rights system has significantly contributed to the improvement of the human rights protection in the region.¹⁸²¹ The African system is the youngest of the three regional human rights

Principio de Legalidad y de Retroactividad', 181; Sánchez Montero, 'Inter-American Court, Crimes Against Humanity and Peacebuilding in South America', 23.

¹⁸¹⁸ See an explanation with further references in Piqué, 'Artículo 9. Principio de Legalidad y de Retroactividad', 181.

¹⁸¹⁹ Mínguez Rosique, 'The Principle of Legality in Criminal Law in the Inter-American System for the Protection of Human Rights', 105–6; Malarino, 'Activismo Judicial, Punitivización y Nacionalización. Tendencias Antidemocráticas y Antiliberales de La Corte Interamericana de Derechos Humanos', 58.

¹⁸²⁰ Malarino, 'Activismo Judicial, Punitivización y Nacionalización. Tendencias Antidemocráticas y Antiliberales de La Corte Interamericana de Derechos Humanos', 41; Dondé Matute, 'El Concepto de Impunidad: Leyes de Amnistía y Otras Formas Estudiadas Por La Corte Interamericana de Derechos Humanos', 287.

¹⁸²¹ Manisuli Ssenyonjo, 'Responding to Human Rights Violations in Africa: Assessing the Role of the African Commission and Court on Human and Peoples' Rights (1987–2018)', *International Human Rights Law Review* 7, no. 1 (19 June 2018): 40–42. It should be acknowledged the increasing doctrinal literature critical with some principles mechanisms and institutions of the international criminal justice system or proposed by transitional justice theories. It is claimed that the westernized international community impose on weak countries with weak economies, "one-size-fits-all" solutions grounded on western notions and values, often alien and distant to those who actually have to live together after atrocity. Against this alleged new form of colonialism, and particularly regarding the African region, the value is placed on local or indigenous peace-building, reconciliation and healing mechanisms. It is claimed that broader approaches encompassing local and indigenous alternatives might improve the efficacy and legitimacy of globalized transitional justice and the international criminal justice system. Among others, see with further references, Rosemary Nagy, 'Transitional Justice as Global Project: Critical Reflections', *Third World Quarterly* 29, no. 2 (2008): 275–89; Everisto Benyera, *Indigenous, Traditional, and Non-State Transitional Justice in Southern Africa: Zimbabwe and*

systems and this, among other factors, explains that so far, its protection organs did not have many opportunities to decide and elaborate on the notion, scope and requirements of the legality principle. Despite the contribution to the international development of the principle is rather modest, some relevant decisions should be analysed, particularly regarding the legality requirements and the obligation of States to investigate and punish human rights violations.

5.3.1 The African system of human rights and the legality provisions in the ACHPR

The Organisation of African Unity, later replaced by the African Union, adopted in 1981 the ACHPR, also known as the Banjul Charter.¹⁸²² Following the adoption of the Charter, a number of sectoral human rights treaties were progressively adopted to reinforce the protection of different vulnerable groups.¹⁸²³ A Commission and a Court, having complementary mandates, currently compose the African human rights system. The African Commission on Human and Peoples' Rights (ACmHPR) was directly established by the Charter and its role is to promote and protect human and peoples' rights, to interpret the ACHPR, and to consider individual complaints for alleged human rights violations.¹⁸²⁴

In 1998 an additional protocol created the African Court on Human and Peoples' Rights (ACtHPR), and it effectively started to function in 2006.¹⁸²⁵ The Court's mandate, complementing and reinforcing the functions of the Commission, is to

Namibia (Rowman & Littlefield, 2019); Simeon P. Sungi and Hal Pepinsky, *Dealing With International Crimes in Africa: When Are Indigenous Justice Systems Better Than Criminal Trials?* (Lewiston: Edwin Mellen Pr, 2015); P. Gready and S. Robins, 'From Transitional to Transformative Justice: A New Agenda for Practice', *The International Journal of Transitional Justice* 8, no. 3 (2014): 339–61.

¹⁸²² *African Charter on Human and Peoples' Rights* ("Banjul Charter"). The Charter came into force in 1986.

¹⁸²³ Among others, refugees, children, women, or internally displaced persons. See the different treaties, in Ssenyonjo, 'Responding to Human Rights Violations in Africa', 3.

¹⁸²⁴ ACHPR, Arts. 30 to 59. The decisions of the Commission are not binding. See a comprehensive analysis, with further references, of the functioning, achievements and challenges of the African Commission, in Ssenyonjo, 5–31.

¹⁸²⁵ Organization of African Unity (OAU), *Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, 10 June 1998, available at: <https://www.refworld.org/docid/3f4b19c14.html>. The Protocol came into force in 2004. For an assessment of the functioning and the role of the African Court, with further references, see Ssenyonjo, 31–40.

interpret and enforce the Charter issuing advisory opinions and adjudicating contentious cases. Article 3 of the Protocol establishes a broad Court's jurisdiction since its competence extends to all cases and disputes concerning the interpretation and application of the Charter, the Protocol and "any other relevant human rights instrument ratified by the States concerned."¹⁸²⁶ The jurisdiction *ratione temporis* of the Court is limited to those human rights violations committed after the State concerned had ratified the African Charter or other human rights treaty claimed to be infringed.¹⁸²⁷ However, the Court adheres to the doctrine of continuous or permanent human rights violations and in some occasions has extended its jurisdiction beyond those temporal limits. In this way, the ACtHPR affirmed its competence over permanent human rights violations even if they were originated before the Court's establishment, before the relevant State accepted the competence of the Court or before the State had ratified the relevant international instrument.¹⁸²⁸ In 2008 the African Union decided to merge the ACtHPR with the Court of Justice of the African Union¹⁸²⁹ creating a new tribunal named African Court of Justice and Human Rights (ACJHR).¹⁸³⁰ This Court, despite not being operational yet, will have jurisdiction over disputes between States, will determine State responsibility for human rights violations,

¹⁸²⁶ Organization of African Unity (OAU), *Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, Art. 3(1).

¹⁸²⁷ *Lohé Issa Konaté v. Burkina Faso*, Application N° 004/2013, ACtHPR, 4 October 2013, paras 11-16, available at: <https://africanlii.org/afu/judgment/african-court/2013/10-0>.

¹⁸²⁸ *Tanganyika Law Society and the Legal and Human Rights Centre and Rev. Christopher Mtikila v. The United Republic of Tanzania*, Applications N° 009/2011 and 011/2011, ACtHPR, 14 June 2013, para. 84, available at: <https://africanlii.org/afu/judgment/african-court/2013/1-0>. Analysed in María García Casas, *El Derecho Internacional de la Justicia Transicional: La construcción del marco normativo de las transiciones* (Madrid: Wolters Kluwer, 2022), 217.

¹⁸²⁹ The Court of Justice of the African Union (CJAU) was originally projected to be the principal judicial organ of the African Union and to decide on disputes over the interpretation of AU treaties. However, before the CJAU came into existence it was merged with the African Court on Human and Peoples' Rights. The protocol establishing the CJAU was adopted in 2003, but did not enter into force until 2009. However, in the meantime it was superseded by the protocol creating the African Court of Justice and Human right it was adopted (2008). Organization of African Unity (OAU), *Protocol of the Court of Justice of the African Union*, 1 July 2003, available at: http://www.worldcourts.com/cjau/eng/instruments/2003.07.11_CJAU_Protocol.htm. The Protocol came into force on 11 February 2009.

¹⁸³⁰ African Union (AU), *Protocol on the Statute of the African Court of Justice and Human Rights*, 1 July 2008, available at: https://www.african-court.org/en/images/Basic%20Documents/ACJHR_Protocol.pdf. Lacking enough ratifications, the Protocol has not come yet into force.

but also it will prosecute international crimes, as provided in the 2014 Malabo Protocol.¹⁸³¹ This Protocol, amending the one creating the ACJHR, broadened the Court's jurisdiction to a wide variety of offences. Among them, some that had never been criminalized by international law or prosecuted by international courts, as money laundry.¹⁸³² Therefore, if the Court decides to prosecute crimes committed before the entry into force of the Malabo Protocol, some legality issues might be raised, particularly regarding non-retroactivity. However, if the ACJHR grounds prosecutions on the Protocol's provisions, and only exercises prospective jurisdiction, legality problems in this regard will be minimized.¹⁸³³ At the same time, some offences, as terrorism or corruption as a transnational crime, are defined in the Protocol in an ambiguous or over-broad manner, which could potentially raise as well concerns regarding the legality principle requirements.¹⁸³⁴

Article 7(2) of the African Charter enshrines the *nullum crimen, nulla poena* principle. However, its wording is significantly different compared to the legality provisions of other human rights instruments.¹⁸³⁵ ACHPR Article 7(2) does not specify

¹⁸³¹ African Union (AU), *Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights* ("Malabo Protocol"), 27 June 2014, available at: <https://au.int/en/treaties/protocol-amendments-protocol-statute-african-court-justice-and-human-rights>. See an analysis on the strengths and weaknesses of this new Court, with further references, in Casas, *El Derecho Internacional de la Justicia Transicional*, 216–18; Naomi Roht-Arriaza, 'Just a "Bubble"? Perspectives on the Enforcement of International Criminal Law by National Courts', *Journal of International Criminal Justice*, no. 11 (2013): 543.

¹⁸³² For a comprehensive analysis on the legality problems that may rise before the new African Court regarding money laundering, in Cecily Rose, 'Money Laundering and the African Court of Justice and Human and Peoples' Rights', in *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges*, ed. Charles C. Jalloh, Kamari M. Clarke, and Vincent O. Nmeihelle (Cambridge: Cambridge University Press, 2019), 505–28; Charles C. Jalloh, Kamari M. Clarke, and Vincent O. Nmeihelle, eds., 'The Crimes', in *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges* (Cambridge: Cambridge University Press, 2019), 223.

¹⁸³³ Rose, 'Money Laundering and the African Court of Justice and Human and Peoples' Rights', 527.

¹⁸³⁴ Jalloh, Clarke, and Nmeihelle, 'The Crimes', 252; Ben Saul, 'The Crime of Terrorism within the Jurisdiction of the African Court of Justice and Human and Peoples' Rights: Article 28G of the AU's Malabo Protocol 2014', in *The African Court of Justice and Human and Peoples' Rights in Context: Development and Challenges*, ed. Charles C. Jalloh, Kamari M. Clarke, and Vincent O. Nmeihelle (Cambridge: Cambridge University Press, 2019), 409–48.

¹⁸³⁵ For an analysis of the legality provisions of the Charter, see above, Section 3.1.4.3.

valid sources of criminalization and only refers to a “legally punishable offence.”¹⁸³⁶ Despite the ACHPR legality provision does not mention either the *lex mitior* rule, the African Court has established in its case law the inapplicability of the non-retroactivity principle when the posterior law is more favourable to the accused.¹⁸³⁷ Like the other regional human rights systems, claims regarding alleged infringements of the legality principle can be brought before the ACmHPR or the ACtHPR.¹⁸³⁸ Since the Court started functioning in 2006, issuing its first sentence three years later, it did not have yet many opportunities to elaborate on the notion, scope or requirements of the legality principle.¹⁸³⁹ Similarly, the Commission did not have many occasions to address the issue.¹⁸⁴⁰

5.3.2 Notion and requirements of the legality principle

According to the African Commission the non-retroactivity rule enshrined in ACHPR Article 7(2) ensures that “citizens at all times are fully aware of the state of the law under which they are living.”¹⁸⁴¹ Therefore, the Commission considers that the

¹⁸³⁶ As analysed in Talita De Souza Dias, ‘Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law’ (University of Oxford, 2019), 57–58.

¹⁸³⁷ “The only exception where a criminal law may apply retroactively is when its application favours an individual by decriminalizing a previous criminal conduct which he/she is accused of or provides lighter penalty than the law which was in force during the commission of the conduct.” *Ingabire Victoire Umuhoza v. Republic of Rwanda*, App. 003/2014, ACtHPR Judgment, 24 November 2017, para. 110, and paras 111-17, available at: <https://www.african-court.org/cpmt/storage/app/uploads/public/5fa/a76/468/5faa7646871e5498448857.pdf>.

¹⁸³⁸ Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge: Cambridge University Press, 2008), 397.

¹⁸³⁹ Sosa, ‘Aut Dedare Aut Judicare, Crimen de Lesa Humanidad y Corte Penal Internacional’, 37–38.

¹⁸⁴⁰ It has been argued that the lack of case law regarding the legality principle in the African system is due to the fact that domestic laws of States parties strictly respect the principle. Solange Ngono, ‘Article 7.2’, in *La Charte Africaine Des Droits de l’homme et Des Peuples et Le Protocole y Relatif Portant Création de La Cour Africaine Des Droits de l’homme: Commentaire Article Par Article*, by Maurice Kamto, Collection de Droit International 67 (Bruxelles: Editions Bruylant Editions de l’Université de Bruxelles, 2011), 194. More convincing reasons are provided in Casas, *El Derecho Internacional de la Justicia Transicional*, 216. The project “African Human Rights Case Law Analyser” provides an updated and comprehensive collection of human rights decisions of African supra-national mechanisms. Available at: <http://caselaw.ihrda.org/>.

¹⁸⁴¹ *Sir Dawda K Jawara v Gambia*, Communication N° 147/95, ACmHPR, 11 May 2000, para. 63, available at: <https://www.achpr.org/sessions/descions?id=117>.

legality principle requires the relevant offences to be in force and to be known before the moment of commission of the punishable conduct.¹⁸⁴² These requirements seem rather general and vague, and establish a low threshold of compliance with the legality principle. However, in the last years, the Commission is progressively developing a more elaborated notion of legality. In 2015 the Commission issued the “*Principles and Guidelines on Human and Peoples’ Rights while Countering Terrorism in Africa*”, and the section devoted to the principle of legality explicitly refers to both national and international law as valid sources of criminalization.¹⁸⁴³ Similarly, it requires laws criminalizing acts of terrorism to be accessible to the public, and criminal definitions to be clear and precise.¹⁸⁴⁴

Regarding the Court, it has not addressed the legality issue in many occasions.¹⁸⁴⁵ However, in a decision issued in 2017 the Court explicitly tackled the subject in a case regarding the conviction of an individual for the offence of negation of genocide.¹⁸⁴⁶ According to the applicant, the domestic laws criminalizing such conduct were vague and unclear and therefore its conviction infringed ACHPR Article 7(2). First, the Court established that the “principle of legality requires that society is informed of prohibited behaviour before the law prohibiting or criminalizing such behaviour comes into force.”¹⁸⁴⁷ Therefore, the “prohibited conduct must be clear and verifiable”.¹⁸⁴⁸ Similarly, the Court reminded that ACHPR Article 7(2) must be interpreted in the light of international human rights standards, which require domestic laws criminalizing a conduct to be sufficiently clear, foreseeable and compatible with the objectives of the Charter and international human rights law.¹⁸⁴⁹

¹⁸⁴² *Tsatsu Tsikata v Republic of Ghana*, Communication N° 322/2006, ACmHPR, 14 October 2014, paras 128, 135, 137, available at: https://www.achpr.org/public/Document/file/English/achpr55_322_06_eng.pdf.

¹⁸⁴³ ACmHPR, *Principles and Guidelines on Human and Peoples’ Rights while Countering Terrorism in Africa*, 56th Ordinary Session 21 April to 7 May 2015, 15, available at: <https://www.achpr.org/legalinstruments/detail?id=9>.

¹⁸⁴⁴ *Ibid.*, 27.

¹⁸⁴⁵ Some authors have not found any relevant ACtHPR decision on the legality principle. De Souza Dias, ‘Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law’, 60.

¹⁸⁴⁶ *Ingabire Victoire Umuhoza v. Republic of Rwanda*. For an analysis of this case, with further references, see Casas, *El Derecho Internacional de la Justicia Transicional*, 217–18.

¹⁸⁴⁷ *Ingabire Victoire Umuhoza v. Republic of Rwanda*, para. 109.

¹⁸⁴⁸ *Ibid.*

¹⁸⁴⁹ *Ibid.* para. 136.

Then, the Court recognized that some provisions of the domestic laws related to the minimization of genocide were couched in broad and general terms, and could be subject to various interpretations.¹⁸⁵⁰ However, the Court took into account that “the nature of the offences, that these laws seek to criminalise, is admittedly difficult to specify with precision.”¹⁸⁵¹ The ACtHPR found that despite their broad and general terms, such legal provisions provided “adequate notice for individuals to foresee and adapt their behaviour to the rules” and therefore were compatible with the requirements of Article 7(2).¹⁸⁵²

It can be concluded that the Court and the Commission recognized the importance of clear and precise crime definitions to allow individuals to adapt their behaviours to the existing legal system. However, when implementing such requirements, they adopted a rather flexible notion of legality, closer to the accessibility and foreseeability standards than to *lex praevia*, *lex scripta*, *lex certa* and *lex stricta*.¹⁸⁵³

¹⁸⁵⁰ Ibid., para. 137.

¹⁸⁵¹ Ibid. para. 138.

¹⁸⁵² Ibid.

¹⁸⁵³ Despite it does not belong to the African system of human rights, the Court of Justice of the Economic Community of West African States issued in 2010 an interesting decision concerning the legality principle. *Hissein Habré v. Republic of Senegal*, Court of Justice of the Economic Community of West African States (ECOWAS), N° ECW/CCJ/APP/07/08 Judgment, 18 November 2010, available at: <https://ihrda.uwazi.io/en/entity/92h4hkzgzb?page=2>. The domestic courts of Senegal were investigating Habré for the crimes of torture and crimes against humanity allegedly committed in Chad between 1982 and 1990. Their competence was grounded on a law adopted in 2007 to provide domestic courts with extraterritorial jurisdiction over international crimes. However, the ECOWAS Court found that Senegalese courts would violate the non-retroactivity rule if the prosecution was based on this *ex post facto* law. Conversely, the Court found that an *ad hoc* tribunal would be entitled to prosecute Habré. Some authors have criticised this decision claiming that since at the moment of commission the relevant offences were already criminalized, Senegal’s legislative changes only had a jurisdictional function and therefore could be applied retroactively. Similarly, it has been argued that the Court “was wrong in holding that there would be a difference between an *ad hoc* tribunal (which would be entitled to apply criminal law retroactively) and a Senegalese court (which would instead not be empowered to do so).” As explained, together with a comprehensive analysis of the case, in Valentina Spiga, ‘Non-Retroactivity of Criminal Law - A New Chapter in the Hissène Habré Saga’ 9 (23 January 2011): 5. As ruled by the ECOWAS, Senegal and AU agreed in 2013 to create the Extraordinary African Chambers (EAC) within Senegalese judiciary to prosecute the above-mentioned international crimes committed in Chad between 1982 and 1990. The EAC was an hybrid tribunal applying international criminal law and governed by Senegalese procedure. According to its Statute the Chambers had the mandate to prosecute those responsible for serious international crimes, under customary international law and conventions ratified by Chad (Article 3). Echoing the Rome Statute, the EAC Statute also defined the core crimes under the competence of the Court, namely genocide, crimes against humanity, war crimes and torture (Article 4). In 2017 the Appeals chamber upheld the First Instance’s

5.3.3 Positive obligations of States and rights of the victims

The African Commission established that the Charter imposes on States both negative and positive obligations, and the lack of fulfilment of both sorts of duties gives rise to international responsibility.¹⁸⁵⁴ Among the positive obligations of States, the ACmHPR included that to investigate and punish human rights violations. ACHPR Article 1 establishes that all Member States “shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.”¹⁸⁵⁵ The African Commission interpreted this Article as imposing on States a due diligence obligation to prevent human rights violations and to adequately respond to them.¹⁸⁵⁶ In other words, according to the ACmHPR, States have the obligation to investigate and punish violations of the rights recognized in the Charter.

The Commission referred to the case law of the Inter-American Court of Human Rights, and in particular to the *Velásquez Rodríguez v Honduras* case, and considered that it “represents an authoritative interpretation of an international standard on State duty.”¹⁸⁵⁷ The Commission considered the obligation to prosecute and punish as part of State obligation to protect human rights in their territory. Similarly, it considered that even if the victims did not institute any domestic judicial action, the State cannot

conviction of Habré for war crimes, crimes against humanity and torture, and sentenced him to life imprisonment. The EAC Statute, the First Instance and Appeals judgments, and further relevant documents are available at: <http://www.chambresafricaines.org/index.php>. For a recent and comprehensive overview and analysis of the procedure before the EAC, see Sharon Weill, Kim Thuy Seelinger, and Kerstin Bree Carlson, eds., *The President on Trial: Prosecuting Hissène Habré* (Oxford University Press, 2020); Juan Pablo Perez Leon Acevedo, ‘The Extraordinary African Chambers in the Senegalese Courts and the Development of International Criminal Law in Africa’, in *Africa’s Role and Contribution to International Criminal Justice*, ed. Ellah T. M. Siang’andu and Jeremy Sarkin (Intersentia, 2020), 53–84.

¹⁸⁵⁴ *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, 245/02, ACmHPR, 39th Ordinary Session, 11 to 15 May 2006, para. 145 available at: https://www.achpr.org/public/Document/file/English/achpr39_245_02_eng.pdf. Analyzed in Casas, *El Derecho Internacional de la Justicia Transicional*, 228.

¹⁸⁵⁵ ACHPR, Art. 1:

“The Member States of the Organisation of African Unity, parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them.”

¹⁸⁵⁶ *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, para. 145.

¹⁸⁵⁷ *Ibid.*, para. 144.

abdicate that duty.¹⁸⁵⁸ Therefore, “States must prevent, investigate and punish acts which impair any of the rights recognised under international human rights law”.¹⁸⁵⁹ Additionally, the Commission establish that “if possible, it must attempt to restore the right violated and provide appropriate compensation for resulting damage.”¹⁸⁶⁰ Finally, the ACmHPR concluded that “failure to exercise due diligence to prevent or remedy violation, or failure to apprehend the individuals committing human rights violations gives rise to State responsibility.”¹⁸⁶¹

It is relevant to note that the African Commission has recently established, in the context of the fight against terrorism, some States’ duties to victims. The Commission stated that States shall seek out justice for the victims “through effective official investigations (...) with a view to securing accountability and learning lessons for the future.”¹⁸⁶² At the same time, the ACmHPR recognised the obligation of States to ensure accountability, to effectively investigate and to “bring to justice, including through prosecution, perpetrators of human rights abuses”,¹⁸⁶³ comprising situations where perpetrators are State officials.¹⁸⁶⁴

Contrary to the IACtHR, the African Court and the Commission did not have yet the opportunity to implement these positive obligations of States in situations where domestic courts had relied on the legality principle to refuse investigating and punishing human right violations. It is yet to see the solution the ACtHPR will find in these situations where the rights of the accused are confronted to those of the victims and the obligations of States. Anyhow, considering the African Court’s adherence to the IACtHR case law regarding State duty to prosecute human rights violations, it would not surprising if the ACtHPR also ease the legality requirements to enable prosecutions. In this regard it should be noted that the African Commission has established in different occasions the obligation of States to fight impunity, as well as the incompatibility of the African Charter with blanket or unconditional amnesties preventing investigations.¹⁸⁶⁵

¹⁸⁵⁸ Ibid., para. 70.

¹⁸⁵⁹ Ibid., para. 146.

¹⁸⁶⁰ Ibid.

¹⁸⁶¹ Ibid., para. 147.

¹⁸⁶² ACmHPR, *Principles and Guidelines on Human and Peoples’ Rights while Countering Terrorism in Africa*, 35.

¹⁸⁶³ Ibid.

¹⁸⁶⁴ Ibid., 17.

¹⁸⁶⁵ *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, paras 204, 208; *Thomas Kwoyelo v. Uganda*, Communication 431/12, ACmHPR, 62th Ordinary Session, 25 April to 9 July 2018,

Finally, it is relevant to point out that when a human right protected by the Charter is violated, the African Court has the capacity to “make appropriate orders to remedy the violation.”¹⁸⁶⁶ Among the available remedies the Court may grant orders of investigation and prosecution of perpetrators, demand institutional reforms, or mandate the adoption of domestic legislation providing for adequate sanctions and guarantees of non-repetition.¹⁸⁶⁷

paras 283-293, available at: <https://www.achpr.org/sessions/descions?id=265>. Analysed, with further references, in Casas, *El Derecho Internacional de la Justicia Transicional*, 228–30; Sosa, ‘Aut Dedare Aut Judicare, Crimen de Lesa Humanidad y Corte Penal Internacional’, 159; Javier Chinchón Álvarez, ‘Las leyes de amnistía en el sistema europeo de derechos humanos. De la decisión de la Comisión en Dujardin y otros contra Francia a la sentencia de la Gran Sala en Marguš contra Croacia: ¿progresivo desarrollo o desarrollo circular?’, *Revista de Derecho Comunitario Europeo*, no. 52 (2015): 926–29.

¹⁸⁶⁶ OAU, *Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, Art. 27(1).

¹⁸⁶⁷ Ssenyonjo, ‘Responding to Human Rights Violations in Africa’, 31–32; Casas, *El Derecho Internacional de la Justicia Transicional*, 236–37.

PART III:
THE PRINCIPLE OF LEGALITY IN CURRENT
CUSTOMARY INTERNATIONAL LAW

CHAPTER 6: THE PRINCIPLE OF LEGALITY AS A RULE OF CUSTOMARY INTERNATIONAL LAW AND AN *IUS COGENS* NORM

Since its emergence in the international arena the principle of legality has experienced a continuous development concerning its content, its scope and its normative force. During the post-World War II trials, the *nullum crimen* principle was only understood as a principle of justice and as a prerogative of States not limiting their sovereignty. However, following the progressive development and codification of international criminal law, the legality principle evolved towards stronger and stricter versions. It also became an universally recognised human right enshrined in various international instruments and has been generally applied by international courts and tribunals. While the applicability of the principle in international law is currently undisputed, its content, scope and international legal status are still open to debate. In this chapter it will be examined whether the principle, or some of its elements and requirements, can be currently considered as a rule of customary international law, and if so, if it has also become an *ius cogens* norm. Then, the content of the principle of legality under general international law will be analysed. First, its core elements are assessed to determine their scope and to what extent they have become norms of customary international law. Finally, further legality elements, characteristic of the strongest legality versions, are also analysed to study its applicability, scope, and legal status under international law.

6.1 The principle of legality as a rule of international customary law

The universal adherence to the principle of legality and its inclusion in the most relevant human rights and humanitarian international instruments suggest that the principle has become a rule of international customary law. To verify if this is true, the methods for the identification of rules of international customary law are first examined. Then, they will be used to assess whether state practice and *opinio iuris* can confirm that the principle currently constitutes a norm of customary international law.

6.1.1 Identification of rules of international customary law

Customary international law is considered as one of the main sources of international law,¹⁸⁶⁸ and is defined in Article 38 of the Statute of the ICJ “as evidence of a general practice accepted as law”.¹⁸⁶⁹ To determine the existence and content of a rule of customary international law, it should be ascertain whether there is a general practice among States and whether they accept it as law (*opinio iuris*).¹⁸⁷⁰ Therefore, two constituent elements conform international custom: a consistent general behaviour of States (the material or objective element), and *opinio iuris*, meaning the States’ belief that there is a legal obligation to act in that manner (the subjective or psychological element).¹⁸⁷¹

¹⁸⁶⁸ International Law Commission (ILC), First report on formation and evidence of customary international law, by Sir Michael Wood, Special Rapporteur, para. 28, available at: <https://digitallibrary.un.org/record/751888>. For an overview of the scholarly debates on the value of customary rules in international law, see Shaw, *International Law*, 69; Carlos Ramón Fernández Liesa, «La aplicabilidad de la costumbre internacional en el derecho penal español», en *Justicia de transición, justicia penal internacional y justicia universal*, ed. Josep Tamarit Sumalla y Coral Aranguena Fanego (Barcelona: Atelier, 2010), 72-76.

¹⁸⁶⁹ ICJ Statute, Art. 38(1)(b).

¹⁸⁷⁰ International Law Commission (ILC), *Draft conclusions on identification of customary international law, with commentaries*, Yearbook of the International Law Commission, 2018, vol. II(2), conclusion 2, available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/1_13_2018.pdf.

¹⁸⁷¹ Ibid., conclusion 2 and commentaries. Also see, with further references, Shaw, *International Law*, 70; Shahram Dana, «Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing», *Journal of Criminal Law and Criminology* 99 (2009): 872; Fernández Liesa, «La aplicabilidad de la costumbre internacional en el derecho penal español», 73-76. Despite state practice and *opinio iuris* should be always analyzed separately, in certain cases the same material can be used to ascertain both practice and acceptance as law. This way, national legislation or domestic case law, among other materials, can evidence both state practice and *opinio iuris*. See ILC, *Draft conclusions on identification of customary international law, with commentaries*, commentary (8) on conclusion 3; ILC, Fourth report on *jus cogens* by Dire Tladi, Special Rapporteur, UN Doc. A/CN.4/727, 31 January 2019, para. 18, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N16/063/33/PDF/N1606333.pdf?OpenElement>; International Law Commission (ILC), Third report on identification of customary international law, by Sir Michael Wood, Special Rapporteur, paras 13-15, available at: https://legal.un.org/ilc/documentation/english/a_cn4_682.pdf. Also see, with further references, Talita De Souza Dias, ‘Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law’ (University of Oxford, 2019), 36.

Regarding state practice, it has to be general and consistent, sufficiently widespread and representative,¹⁸⁷² but absolute uniformity is not required.¹⁸⁷³ State practice can be expressed by the behaviour of States in their international relations, but as well by the practice followed internally.¹⁸⁷⁴ Therefore, evidence of state practice can take various forms as, among others, diplomatic acts, conducts in connection with treaties or resolutions adopted by international organizations, but as well domestic legislation or decisions of national courts.¹⁸⁷⁵ No predetermined hierarchy has been established among the different forms of practice.¹⁸⁷⁶

To be considered as a rule of international customary law it is not enough that a certain practice is consistently and generally followed by a widespread and representative number of States. The relevant practice also needs to be accepted by States as law (*opinio iuris sive necessitatis*). In other words, States should undertake the relevant conduct being convinced that they are legally obliged to act in such a way.¹⁸⁷⁷ Evidence of *opinio iuris* may take various forms, including treaty provisions,

¹⁸⁷² ILC, *Draft conclusions on identification of customary international law, with commentaries*, conclusion 8. Also see *Anglo-Norwegian Fisheries (United Kingdom v. Norway)*, Judgment, 1951 ICJ Reports 116, 131 and 138, available at: <https://www.icj-cij.org/public/files/case-related/5/005-19511218-JUD-01-00-EN.pdf>; *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*, Merits, 1969 ICJ Reports 3, available at: <https://www.icj-cij.org/en/case/52>. For further information, and an analysis of these cases, see with further references, Shaw, *International Law*, 73.

¹⁸⁷³ ILC, *Draft conclusions on identification of customary international law, with commentaries*, commentaries 1-7 to conclusion 8. Also see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, 1986 ICJ Reports 14, 98, available at: <https://www.icj-cij.org/en/case/70/judgments>. For an analysis of these and further cases, see Shaw, *International Law*, 73.

¹⁸⁷⁴ Dana, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing', 872.

¹⁸⁷⁵ ILC, *Draft conclusions on identification of customary international law, with commentaries*, conclusion 6. For further information on which conducts of a State can be considered as State practice, see ILC, *Draft conclusions on identification of customary international law, with commentaries*, commentaries on conclusions 5 and 6.

¹⁸⁷⁶ ILC, *Draft conclusions on identification of customary international law, with commentaries*, conclusion 6(3).

¹⁸⁷⁷ As explained, with references to most relevant ICJ's jurisprudence, in Shaw, *International Law*, 80; Fernández Liesa, «La aplicabilidad de la costumbre internacional en el derecho penal español», 74-75. In the same vein, ILC, *Draft conclusions on identification of customary international law, with commentaries*, conclusion 9 and its commentary.

conducts in connection with resolutions adopted by international organizations, or decisions of national courts.¹⁸⁷⁸

In addition, some materials are recognized as being relevant in the process of determining the existence and content of customary international law. It is the case of treaties, resolutions of international organizations, decisions of international and domestic courts and tribunals, and scholarly opinions.¹⁸⁷⁹

6.1.2 The principle of legality as customary international law

State practice and *opinio iuris* evidence that the legality principle has become a rule of international customary law. A comprehensive study of 192 national constitutions and domestic legal systems conducted by Gallant demonstrates that all but two UN member States adhere to the non-retroactivity rule, either by constitution, statute or through treaty obligations.¹⁸⁸⁰ National legislation is a valid evidence of state

¹⁸⁷⁸ For further information of forms of evidence of acceptance as law (*opinio juris*), see ILC, *Draft conclusions on identification of customary international law, with commentaries*, conclusion 10 and commentary.

¹⁸⁷⁹ ILC, *Draft conclusions on identification of customary international law, with commentaries*, conclusions 11 -14 and their commentaries.

¹⁸⁸⁰ Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge: Cambridge University Press, 2008), 353. As explained above, in Section 3.1.3, to prove the universal acceptance of the *nullum crimen* principle, Gallant connects the ICCPR with the CRC. The later has been ratified by all UN member States except the United States and Somalia. However, these two States have ratified the ICCPR. Since both international instruments enshrine the prohibition of retroactive crimes and punishments, as a matter of fact, every State has accepted the international obligation of applying the *nullum crimen* principle in its criminal law, at least for children and in most States for everyone. Taking this reasoning further, we can deduce that even the countries that have not yet ratified the ICCPR accept as well a general application of the non-retroactivity rule. As Gallant points out, it would incongruent that a country accepts the international obligation to apply *nullum crimen* for children but not for adults, since juvenile justice is generally much more flexible than adult criminal law. Gallant, 201-2. A survey conducted by Bassiouni in 1993 also demonstrated the widespread adherence of States to the *nullum crimen* principle. M. Cherif Bassiouni, 'Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions', *Duke Journal of Comparative & International Law* 3, no. 2 (1 April 1993): 291. In the same vein, to prove its customary nature, the International Committee of the Red Cross established that the principle of legality is "set forth in several military manuals and is part of most, if not all, national legal systems." ICRC, *Customary International Humanitarian Law*, Rule 101, 371-72. However, after a rather limited comparative study, Donde Matute concludes that the application of the principle of criminal legality is erratic and inconsistent. Javier Donde Matute, *Principio de legalidad penal: perspectivas del derecho nacional e internacional*, Colección Cicerón 1 (México: Barcelona: Editorial México Universitario; Bosch, 2007), 316.

practice,¹⁸⁸¹ but could prove as well *opinio iuris*.¹⁸⁸² The adoption of the legality principle in domestic legal systems seems sufficiently general, consistent, widespread and representative to suggest its customary nature.

Treaty provisions are recognized as relevant evidence to determine the existence and content of rules of international law.¹⁸⁸³ Indeed, the fact that a rule is enshrined in an important number of treaties may indicate that it reflects a rule of customary international law.¹⁸⁸⁴ Similarly, the number of parties to an international instrument may be an important element to assess the customary nature of a rule enshrined in the treaty.¹⁸⁸⁵ Therefore, the consideration of the legality principle as a rule of customary international law is evidenced by the widespread States' adherence to international instruments comprising the principle.¹⁸⁸⁶ Among others, the legality principle is included in the UDHR, ICCPR, ECHR, ACHR, and ACHPR.¹⁸⁸⁷ Similarly, humanitarian law instruments also enshrine the prohibition of retroactive laws, as is the case of Third and Fourth Geneva Conventions and the Additional Protocols I and II to the Geneva Conventions.¹⁸⁸⁸ Furthermore, several universal and regional human rights instruments, as the ICCPR, ECHR, ACHR, or the ArCHR establish that the legality principle is non-derogable even in times of emergency.¹⁸⁸⁹

¹⁸⁸¹ ILC, *Draft conclusions on identification of customary international law, with commentaries*, conclusions 5 and 6.

¹⁸⁸² *Ibid.*, commentary (5) on conclusion 10.

¹⁸⁸³ *Ibid.*, conclusions 11-14 and their commentaries.

¹⁸⁸⁴ *Ibid.*, conclusion 11(2).

¹⁸⁸⁵ *Ibid.*, commentary (3) to conclusion 11.

¹⁸⁸⁶ See above, Section 3.1.3.

¹⁸⁸⁷ UDHR, Art. 11(2); ICCPR, Art. 15; ECHR, Art. 7; ACHR, Art. 9; ACHPR, Art. 7(2). Also in the Arab Charter of Human Rights, Art. 15, or in the ASEAN Human Rights Declaration, Art. 20(2). As explained above, in Section 3.1. In 2012 the ASEAN adopted by unanimity a Human Rights Declaration including the principle of legality with a wording almost identical than the UDHR legality provision. ASEAN Human Rights Declaration, Art. 20(2). Despite the Declaration is not binding it can be regarded as evidence of the ASEAN ten member States' *opinio iuris* concerning the binding nature of the legality principle under customary international law. As explained in De Souza Dias, 'Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law', 41-42.

¹⁸⁸⁸ Third Geneva Convention, Art. 99; Fourth Geneva Convention, Art. 65, 67; GC Additional Protocol I, Art. 75(4)(c); GC Additional Protocol II, Art. 6(c). As explained above, in Section 3.2.4.

¹⁸⁸⁹ ICCPR, Art. 4(2); ECHR, Art. 15(2); ACHR, Art. 27; ArCHR, Art. 4(2).

The negotiation and conclusion of international instruments can also prove state practice.¹⁸⁹⁰ Similarly, multilateral drafting and diplomatic processes can provide as well valuable and accessible evidence of *opinio iuris*.¹⁸⁹¹ Both the UDHR and the ICCPR were drafted by the UN Commission on Human Rights, which members were elected as representatives of States. Therefore, their conducts and statements during the negotiations and drafting of both international instruments can be regarded as state practice and *opinio iuris*. Moreover, the UDHR legality provision was unanimously adopted, with no abstentions, by the UN General Assembly, and constitutes strong evidence that UN member States perceived the principle as binding under customary international law.¹⁸⁹²

The non-retroactivity rule is also reflected in the statutes and organic documents of most international and internationalized courts, and even when it was not the case, the tribunals assumed the prohibition of retroactive laws as a legal requirement.¹⁸⁹³ The International Committee of the Red Cross (ICRC) in its 2005 report “Customary International Humanitarian Law” provides clear evidence that the principle of legality constitutes customary international law.¹⁸⁹⁴ Its Rule 101, presented as a “norm of customary international law applicable in both international and non-international armed conflicts”, establishes that “No one may be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal

¹⁸⁹⁰ ILC, *Draft conclusions on identification of customary international law, with commentaries*, conclusion 6 and its commentary (5).

¹⁸⁹¹ On how treaties and their *travaux préparatoires* may demonstrate the existence of “acceptance as law”, ILC, *Draft conclusions on identification of customary international law, with commentaries*, conclusion 10 and its commentary (6); International Law Commission (ILC), Second report on Identification of customary international law, by Sir Michael Wood, Special Rapporteur, para. 76(f), available at: https://legal.un.org/ilc/documentation/english/a_cn4_672.pdf. See further references in De Souza Dias, ‘Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law’, 40.

¹⁸⁹² As explain, with further references in De Souza Dias, 40. Resolutions unanimously adopted by States within international organizations, and in particular those of the UN General Assembly, are considered as having significant importance when identifying rules of customary international law. ILC, *Draft conclusions on identification of customary international law, with commentaries*, conclusion 12 and its commentary (2); ILC, Third report on identification of customary international law, paras 45-49. See further information on the *travaux préparatoires* of these international instruments above, in Section 3.1.1 and Section 3.1.2.

¹⁸⁹³ See above, Section 4.1.2. The decisions of international courts and tribunals are considered subsidiary means for the determination of rules of customary international law. ILC, *Draft conclusions on identification of customary international law, with commentaries*, conclusion 13 and its commentary.

¹⁸⁹⁴ ICRC, *Customary International Humanitarian Law*, Rule 101, 371-72.

offence under national or international law at the time it was committed.”¹⁸⁹⁵ Finally, the customary nature of this version of the legality principle has been acknowledged as well by leading publicist.¹⁸⁹⁶

Based on all this overwhelming evidence, it seems unquestionable that the principle of legality constitutes a rule of international customary law. However, the principle has very different meanings and its content greatly varies depending on the legal system. In this chapter each element of the principle will be individually analysed to assess if they are part of the legality version that has become customary international law. As it will be shown, numerous domestic legal systems, and a few international instruments adhere to strong versions of legality requiring *lex certa*, *praevia*, *scripta* and *stricta*. However, different States and most humanitarian and human rights international instruments do not require all these elements and have adopted more flexible legality notions. Therefore, only the core legality elements, generally shared by States and present in most international instruments, can be considered to conform the customary legality principle.

This version of legality, grounded on legal certainty and articulated around the non-retroactivity rule, safeguards the basic rationales of the principle. It prevents the *ex post facto* criminalization of conducts and requires individuals to be able to know which behaviours are considered criminal and the maximum associated penalties. Therefore, at the time of commission the conduct should be considered criminal either under the applicable domestic or international laws. Consequently, unwritten legal sources are not excluded as legal grounds of criminalization. However, the law grounding a prosecution should be sufficiently specific in order to allow individuals to foresee the legal consequences of their conducts, but it is not required that the

¹⁸⁹⁵ Ibid.

¹⁸⁹⁶ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 352–403; Susan Lamb, ‘Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law’, in *The Rome Statute of the International Criminal Court: A Commentary*, by Antonio Cassese, Paola Gaeta, and John R.W.D. Jones, vol. 1 (Oxford: Oxford University Press, 2002), 734–35; Claus Kress, ‘Nulla Poena Nullum Crimen Sine Lege’, in *Max Planck Encyclopedia of Public International Law* (Heidelberg and Oxford University Press, 2010), para. 19; Ward Ferdinandusse, ‘Direct Application of International Criminal Law in National Courts’ (Amsterdam, University of Amsterdam, 2005), 236–58; Theodore Meron, *War Crimes Law Comes of Age* (Oxford: Oxford University Press, 1998), 244; De Souza Dias, ‘Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law’, 39–64; Dana, ‘Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing’, 878–79. Teachings of the most prominent publicist may serve as a subsidiary means for the determination of rules of customary international law. ILC, *Draft conclusions on identification of customary international law, with commentaries*, conclusion 14 and its commentary.

individual is able to predict their exact legal qualification. This legality notion, described by some authors as *nullum crimen, nulla poena sine iure*,¹⁸⁹⁷ is the one enshrined in the UDHR, the ICCPR or the ECHR, and applied by most international criminal tribunals. Similarly, based on States' universal adherence, it can be affirmed that the principle of legality constitutes a general principle of law common to national legal system within the meaning of ICJ Statute's Article 38(1)(c).¹⁸⁹⁸ Therefore, the legality principle is part of international law in two ways, as a rule of international customary law and as a general principle.¹⁸⁹⁹ Additionally, it is very probable that the international legality principle has become an *ius cogens* norm, as examined hereinafter.

6.2 The principle of legality as an *ius cogens* norm

Once it has been proven that the principle of legality constitutes a rule of customary international law, it is relevant to examine whether it has become as well an *ius cogens* norm. Its customary nature, and its consideration as a non-derogable norm in several international instruments, point in that direction. However, to assess if this is correct, the methods for the identification of *ius cogens* norms should be first examined. Subsequently, they will be used to assess whether the prohibition of retroactive crimes and punishments can be currently considered an *ius cogens* norm.

6.2.1 The notion of *ius cogens* norms

Jus cogens norms, meaning “the compelling law”, reflect and protect fundamental values of the international community as a whole, and enjoy the highest status a norm or principle can reach in the international legal system.¹⁹⁰⁰ *Ius cogens*

¹⁸⁹⁷ See below, Section 6.3.1.

¹⁸⁹⁸ Kress, ‘Nulla Poena Nullum Crimen Sine Lege’, para. 19; De Souza Dias, ‘Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law’, 33; Dana, ‘Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing’, 879–81. For general information on general principles of law as a source of international law, see Shaw, *International Law*, 92–102; Antonio Cassese, *International Criminal Law*, 3rd ed. (Oxford: Oxford University Press, 2013), 15–18.

¹⁸⁹⁹ Héctor Olásolo, ‘El Principio Nullum Crimen Sine Iure En El Derecho Internacional Contemporáneo’, *Anuario Iberoamericano de Derecho Internacional Penal I* (2013): 25; De Souza Dias, ‘Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law’, 33.

¹⁹⁰⁰ M. Cherif Bassiouni, ‘International Crimes: “Jus Cogens” and “Obligatio Erga Omnes”’, *Law and Contemporary Problems* 59, no. 4 (1996): 67. International Law Commission (ILC), *Draft*

norms are peremptory, non-derogable, universally applicable and hierarchically superior to other norms of international law.¹⁹⁰¹ Article 53 of the Vienna Convention on the Law of Treaties (VCLT) provides an authoritative definition establishing that a peremptory norm of general international law is a norm “accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”¹⁹⁰²

International and domestic case law referring to peremptory norms is increasing in recent years and the legal literature is showing a renewed interest on the issue.¹⁹⁰³ In this vein, the International Law Commission (ILC) decided in 2014 to include *ius cogens* norms in its long term working programme, and since then the Special Rapporteur has issued four different rapports on the issue.¹⁹⁰⁴ Finally, the ILC adopted in 2022 the “Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*).” Despite few scholars still question the existence of *ius cogens*,¹⁹⁰⁵ peremptory norms are well established as part of current

conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), with commentaries, Yearbook of the International Law Commission, 2022, vol. II(2), conclusion 2, available at: https://legal.un.org/ilc/texts/instruments/english/commentaries/1_14_2022.pdf.

¹⁹⁰¹ For a comprehensive study, with further references, on the nature of peremptory norms of international law, see ILC, *Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), with commentaries*, conclusion 2 and its commentary; International Law Commission (ILC), First report on *jus cogens* by Dire Tladi, Special Rapporteur, UN Doc. A/CN.4.693, 8 March 2016, paras 61-63, available at: <https://digitallibrary.un.org/record/830720>. Bassiouni, 67.

¹⁹⁰² Vienna Convention on the Law of Treaties (VCLT), Art. 53. In the same vein, see ILC, *Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), with commentaries*, conclusion 3.

¹⁹⁰³ Thomas Kleinlein, ‘Jus Cogens Re-Examined: Value Formalism in International Law’, *European Journal of International Law* 28, no. 1 (1 February 2017): 296. In the same vein, with further references and an overview of the evolution of the notion of *ius cogens* norms in international law, see ILC, *Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), with commentaries*, conclusion 1 and its commentary.

¹⁹⁰⁴ ILC, Report on the Work of its Sixty-Sixth Session (5 May-6 June and 7 July-8 August 2014), Official Records of the General Assembly, Sixty-Ninth Session, Supplement N° 10 (A/69/10), para. 268, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/134/72/PDF/G1413472.pdf?OpenElement>. All the rapports of the Special Rapporteur and the associated documents are available at: https://legal.un.org/ilc/guide/1_14.shtml#mandate.

¹⁹⁰⁵ The number of authors skeptical about the existence and applicability of peremptory norms

international law, and States and other international legal subjects do not longer question their existence.¹⁹⁰⁶ Various international tribunals, as the ICJ, ICTY, ICTR, ECtHR or IACtHR, have expressly referred to *ius cogens* norms in their case law.¹⁹⁰⁷ Similarly, peremptory norms have been often invoked before domestic courts, being part of the *ratio decidendi* in different cases.¹⁹⁰⁸

Jus cogens norms are hierarchically superior to other norms of international law.¹⁹⁰⁹ Therefore, in case of conflict, they can invalidate other rules of international law

is diminishing, as explain, together with a review of the different scholarly positions on the issue in Ulf Linderfalk, ‘The Effect of Jus Cogens Norms: Whoever Opened Pandora’s Box, Did You Ever Think About the Consequences?’, *European Journal of International Law* 18, no. 5 (1 November 2007): 855. Also see an overview of the doctrinal debates on *ius cogens* in ILC, First report on *jus cogens* by Dire Tladi, Special Rapporteur, para. 44. Also in Bassiouni, ‘International Crimes’, 68. Some leading authors consider that peremptory norms will be crucial in the upcoming international community, and claim for an enhance role of *ius cogens* in the future and for its increased used by domestic and international courts. Antonio Cassese, ‘For an Enhanced Role of Jus Cogens’, in *Realizing Utopia: The Future of International Law*, ed. Antonio Cassese (Oxford: Oxford University Press, 2012), 160, 163; Bassiouni, ‘International Crimes’.

¹⁹⁰⁶ Cassese, ‘For an Enhanced Role of Jus Cogens’, 163. ILC, First report on *jus cogens* by Dire Tladi, Special Rapporteur, para. 49. For references of domestic cases where *ius cogens* was invoked and applied, see. Cassese, 158; Andrea Bianchi, ‘Human Rights and the Magic of Jus Cogens’, *European Journal of International Law* 19, no. 3 (1 June 2008): 498–500. For references of domestic case law on the *ius cogens* nature of the different international crimes, see ILC, Fourth report on *jus cogens* by Dire Tladi, Special Rapporteur, paras 62–135.

¹⁹⁰⁷ See, among others, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, 2012 ICJ Reports 422, para. 99, available at: <https://www.icj-cij.org/public/files/case-related/144/144-20120720-JUD-01-00-EN.pdf>; *Prosecutor v. Anto Furundžija*, ICTY Judgment, paras 153–156; *Al-Adsani v. United Kingdom*, ECtHR, para. 11; *Bámaca-Velásquez v. Guatemala*, IACtHR Judgment, para. 25. For an analysis of international case law on *ius cogens*, with further references, see ILC, First report on *jus cogens* by Dire Tladi, Special Rapporteur, paras 46–47; ILC, *Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), with commentaries*, commentary to conclusions 1, 2 and 3. For references of international case law on the *ius cogens* nature of international crimes as aggression, torture, genocide and crimes against humanity, see ILC, Fourth report on *jus cogens* by Dire Tladi, Special Rapporteur, paras 38–40, 69–72, 84–85, 106, 126.

¹⁹⁰⁸ Cassese, ‘For an Enhanced Role of Jus Cogens’, 159. For further references to domestic case law regarding peremptory norms, see ILC, *Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), with commentaries*, commentary (5), (12) and (16) to conclusion 2, commentary (4) to conclusion 5.

¹⁹⁰⁹ Cassese, 159; Bianchi, ‘Human Rights and the Magic of Jus Cogens’, 494–95. ILC, First report on *jus cogens* by Dire Tladi, Special Rapporteur, para. 69, with reference to case law and abundant scholarly opinions; ILC, *Draft conclusions on identification and legal consequences of*

holding lower status.¹⁹¹⁰ In the same vein, peremptory norms can only be modified by subsequent norms of general international law having the same character.¹⁹¹¹ This way, *ius cogens* rules have been considered as “constitutional” parameters¹⁹¹² safeguarding the higher values of the international community and the universal and common core of human values.¹⁹¹³ However, the legal effects, the content, and the method to identify *ius cogens* norms are still a matter of discussions.¹⁹¹⁴

6.2.2 Obligations *erga omnes*

Regarding their legal effects, *ius cogens* norms imply obligations *erga omnes*, meaning “flowing to all” or “towards all”,¹⁹¹⁵ and owed to the international community as a whole, in relation to which all States have a legal interest.¹⁹¹⁶ Consequently, any State is entitled to invoke the responsibility of another State for breaching an *ius*

peremptory norms of general international law (jus cogens), with commentaries, conclusion 2 and its commentary (14) and (15).

¹⁹¹⁰ VCLT, Art. 53; ILC, First report on *jus cogens* by Dire Tladi, Special Rapporteur, para. 69, with reference to international jurisprudence and various scholarly opinions; ILC, *Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), with commentaries*, conclusions 10, 13 and 14, and their commentary.

¹⁹¹¹ VCLT, Art. 53; ILC, *Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), with commentaries*, conclusion 3.

¹⁹¹² Cassese, ‘For an Enhanced Role of Jus Cogens’, 159; Bianchi, ‘Human Rights and the Magic of Jus Cogens’, 499; Ana Messuti, ‘El Principio de Legalidad y El Derecho Penal Internacional: Posible Conciliación a Través de La Hermenéutica’, *Derecho Penal Contemporáneo. Revista Internacional* 41 (2012): 14–16.

¹⁹¹³ Hélène Ruiz Fabri, ‘Enhancing the Rhetoric of Jus Cogens’, *European Journal of International Law* 23, no. 4 (1 November 2012): 1050. The debates on the existence, notion, scope and consequences of *ius cogens* norms are closely related to the long-standing discussion on the role, applicability and implementation of ethical and moral values in international law. See a summary of these debates, in Bianchi, ‘Human Rights and the Magic of Jus Cogens’, 494–96; Ruiz Fabri, ‘Enhancing the Rhetoric of Jus Cogens’, 1051–53; Kleinlein, ‘Jus Cogens Re-Examined’, 305–10.

¹⁹¹⁴ Kleinlein, ‘Jus Cogens Re-Examined’, 296; Cassese, ‘For an Enhanced Role of Jus Cogens’, 158. ILC, First report on *jus cogens* by Dire Tladi, Special Rapporteur, para. 42.

¹⁹¹⁵ Bassiouni, ‘International Crimes’, 72.

¹⁹¹⁶ ILC, *Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), with commentaries*, conclusion 17. Despite all *ius cogens* norms give rise to obligations *erga omnes*, not all obligations *erga omnes* arise from *ius cogens* norms, as explained with examples and further references in ILC, *Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), with commentaries*, commentary (3) to conclusion 17.

cogens norm.¹⁹¹⁷ Some authors consider that while *ius cogens* regards the legal status of a legal norm, *erga omnes* refers to its legal implications.¹⁹¹⁸ For other scholars *ius cogens* concern the content of the norm, and *erga omnes* the addressees of the norm.¹⁹¹⁹ Since peremptory norms are compelling and universally applicable it seems coherent that the obligations flowing from them are necessarily *erga omnes*.¹⁹²⁰

In the *Barcelona Traction* case the ICJ recognized the obligations *erga omnes* distinguishing between the obligations of a State “vis-à-vis another State” and those “obligations of a State towards the international community as a whole.”¹⁹²¹ The Court considered that “In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.”¹⁹²² In its subsequent jurisprudence, the ICJ reaffirmed and developed the connection between *ius cogens* norms and *erga omnes* obligations.¹⁹²³ Similarly, state practice has also accepted the direct relation between peremptory norms and obligations *erga omnes*.¹⁹²⁴ International and domestic courts, as well as the legal literature, have mainly focused on the identification and content of *ius cogens* norms rather than on the consequences

¹⁹¹⁷ ILC, *Draft conclusions on identification and legal consequences of peremptory norms of general international law (ius cogens), with commentaries*, conclusion 17(2).

¹⁹¹⁸ Bassiouni, ‘International Crimes’, 63.

¹⁹¹⁹ Alain Pellet, “Conclusions” in *The Fundamental Rules of the International Legal Order*, e. Christian Tomuschat and Jean-Marc Thouvenin (Leiden and Boston: Martin Nijhoff, 2006), 418, as cited in ILC, Third report on peremptory norms of general international law (*ius cogens*) by Dire Tladi, Special Rapporteur, UN Doc. A/CN.4/714, 12 February 2018, para. 109, available at: <https://digitallibrary.un.org/record/1483378>.

¹⁹²⁰ Bassiouni considers them “two sides of the same coin”, Bassiouni, ‘International Crimes’, 72. ILC, *Draft conclusions on identification and legal consequences of peremptory norms of general international law (ius cogens), with commentaries*, conclusion 17 and its commentary.

¹⁹²¹ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain); Second Phase*, Judgment, 1970 ICJ Reports 3, para. 33, available at: <https://www.icj-cij.org/public/files/case-related/50/050-19700205-JUD-01-00-EN.pdf>.

¹⁹²² Ibid.

¹⁹²³ The ICJ has not explicitly established the existence of a link between *ius cogens* norms and *erga omnes* obligations, but it can be deduced from its case law, as explained, with references, in ILC, *Draft conclusions on identification and legal consequences of peremptory norms of general international law (ius cogens), with commentaries*, commentary (2) to conclusion 17. In the same vein ILC, Third report on peremptory norms of general international law (*ius cogens*) by Dire Tladi, Special Rapporteur, para. 105.

¹⁹²⁴ As analyzed, with references to domestic case law, in ILC, Third report on peremptory norms of general international law (*ius cogens*) by Dire Tladi, Special Rapporteur, para. 106; ILC, *Draft conclusions on identification and legal consequences of peremptory norms of general international law (ius cogens), with commentaries*, commentary (1) to conclusion 17.

such status may imply and the legal implications derived from *erga omnes* obligations.¹⁹²⁵ Below, in section 7.1.2, the implications and consequences of the *ius cogens* nature of some international crimes will be analysed.

6.2.3 Identifying *ius cogens* norms

While the existence of peremptory norms as part of international law is generally accepted, state practice and the legal literature still struggle to agree on a theory or method to identify norms that have reached *ius cogens* status and their content.¹⁹²⁶ However, VCLT Article 53 is recognized as providing the minimum requirements for a norm to be considered peremptory.¹⁹²⁷

VCLT Article 53 has been interpreted as establishing two cumulative requirements for a norm to be identified as *ius cogens*.¹⁹²⁸ First, the relevant norm must be a norm of general international law, and second, it should be accepted and recognized by the international community of States as being non-derogable.¹⁹²⁹ Regarding the first requirement, a norm of general international law has been defined in contrast to treaty law and *lex specialis*, and “general” in the context of VCLT Article 53 is understood as referring to the scope of applicability.¹⁹³⁰ Since customary international law is the most apparent expression of general international law, it has been considered as the most common ground for the emergence of peremptory

¹⁹²⁵ ILC, Third report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur, paras 20-21; Bassiouni, ‘International Crimes’, 73.

¹⁹²⁶ Cassese, ‘For an Enhanced Role of Jus Cogens’, 158. For an overview of the different positions and the reasons of disagreement, see Bassiouni, ‘International Crimes’, 68; Bianchi, ‘Human Rights and the Magic of Jus Cogens’, 495; Cassese, ‘For an Enhanced Role of Jus Cogens’, 164. ILC, First report on *jus cogens* by Dire Tladi, Special Rapporteur, paras 42-43. For Cassese, the authoritative determination of whether a norm has become *ius cogens* correspond to courts and tribunals, and not to States or international political bodies. Cassese, 164.

¹⁹²⁷ As explained, with various reference to States declarations and scholarly writings in ILC, Second report on *jus cogens* by Dire Tladi, Special Rapporteur, UN Doc. A/CN.4/706, 16 March 2017, paras 32-33, available at: <https://digitallibrary.un.org/record/1286559>.

¹⁹²⁸ In the same vein, ILC, *Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), with commentaries*, conclusion 4.

¹⁹²⁹ See, together with other possible interpretations, in ILC, Second report on *jus cogens* by Dire Tladi, Special Rapporteur, paras 37-39.

¹⁹³⁰ See an overview on the scholarly and jurisprudential opinions on the notion of general international law in ILC, Second report on *jus cogens* by Dire Tladi, Special Rapporteur, paras 40-41.

norms.¹⁹³¹ The close connection between customary norms and *ius cogens* is evidenced by state practice and domestic and international case law.¹⁹³² In the same vein, for some international and domestic courts, as well as for some scholars, becoming customary international law is the previous step for a norm to become *ius cogens*.¹⁹³³

Regarding the second requirement, a norm of general international law should be “accepted and recognized by the international community of States as a whole” as a norm from which no derogation is permitted and which can be modified only by a subsequent norm having the same character.¹⁹³⁴ This differentiates *ius cogens* norms from the majority of rules of general international law that are *ius dispositivum*,

¹⁹³¹ ILC, *Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), with commentaries*, conclusion 5 and its commentary; ILC, Second report on *jus cogens* by Dire Tladi, Special Rapporteur, para. 43.

¹⁹³² See various reference to domestic and international case law in ILC, *Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), with commentaries*, commentary (4), (5) and (6) to conclusion 5; ILC, Second report on *jus cogens* by Dire Tladi, Special Rapporteur, paras 43-46.

¹⁹³³ See, with further references, Cassese, ‘For an Enhanced Role of Jus Cogens’, 164. ILC, Second report on *jus cogens* by Dire Tladi, Special Rapporteur, paras 43-46. Some scholars upheld the “custom plus” method, considering that the *ius cogens* status of a norm can be inferred from the same evidence that proves its international customary character, with and additional requirement of *opinio iuris* regarding its *ius cogens* status. Therefore, at least some peremptory international norms are particularly compelling norms of customary international law. As explained, with further references in Cathryn Costello and Michelle Foster, ‘Non-Refoulement as Custom and Jus Cogens? Putting the Prohibition to the Test’, in *Netherlands Yearbook of International Law 2015, Netherlands Yearbook of International Law (The Hague: T.M.C. Asser Press, 2016), 279–80.*

¹⁹³⁴ According to Cassese the expression “the international community of States as a whole” does not require the acceptance and recognition by all States, but “by the *majority* of States provided that such majority includes States which are representative of the various political and geographic areas of the world”. The author considers that “unlike the customary process, the two elements of *usus* and *opinio iuris* are not required. It may suffice for the majority of members of the world community in some way to show their ‘acceptance’ of a customary rule as having the rank of a peremptory norm.” Cassese, 165. In the same vein, see the ILC, *Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), with commentaries*, conclusion 6 and 7, and their commentary; ILC, Second report on *jus cogens* by Dire Tladi, Special Rapporteur, Draft conclusion 7.3. However, Bassiouni considers that “a *jus cogens* norm rises to that level when the principle it embodies has been universally accepted, through consistent practice accompanied by the necessary *opinio iuris* by most States.” Bassiouni, ‘International Crimes’, 68. For a comprehensive study on how the acceptance and recognition could be expressed, and on the notion and actors comprised in the expression “the international community of States as whole”, see ILC, Second report on *jus cogens* by Dire Tladi, Special Rapporteur, paras 70-89, and ILC, *Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), with commentaries*, commentary to conclusion 6.

meaning that they can be amended or derogated by agreements among States.¹⁹³⁵ Consequently, the international community accepts that if a *ius dispositivum* international rule conflicts an *ius cogens* norm, the later prevails and remain universally applicable while the former is deemed invalid.¹⁹³⁶

In addition to these two requirements flowing from VCLT Article 53, the doctrine and the jurisprudence have identified other core elements of peremptory norms and have resorted to additional indicators to identify *ius cogens* norms. Three main additional fundamental features of peremptory norms have been acknowledged, namely their universal application, their higher hierarchical status, and their aim to protect essential values of the international community.¹⁹³⁷ In this vein, it has been argued that for the identification of *ius cogens* norms it should be taken into account whether the value safeguarded by the candidate peremptory norm is consistent with the goals and values defended by the international community, as those of peace, respect for human rights, democracy or the rule of law.¹⁹³⁸ Similarly, it should be studied if the values protected by the norm are considered as having the same relevance and importance for the international community as those protected by other already well established *ius cogens* norms.¹⁹³⁹ Likewise, it has been noted that the international *opinio iuris*, reflected in the case law of international tribunals or in pronouncements of various international subjects, should be taken into account for the identification of peremptory norms.¹⁹⁴⁰ Another indicator would be the large number of States having ratified treaties including the norm, or including the norm in their internal legal system.¹⁹⁴¹ Decisions of international courts and tribunals, decisions of national courts, and the teaching of the most highly qualified scholars may serve as subsidiary means for the identification of peremptory norms of general international law.¹⁹⁴²

¹⁹³⁵ ILC, Second report on *jus cogens* by Dire Tladi, Special Rapporteur, para. 60.

¹⁹³⁶ ILC, *Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), with commentaries*, conclusions 10, 13 and 14; ILC, Second report on *jus cogens* by Dire Tladi, Special Rapporteur, paras 74.

¹⁹³⁷ ILC, First report on *jus cogens* by Dire Tladi, Special Rapporteur, para. 63.

¹⁹³⁸ Cassese, 'For an Enhanced Role of Jus Cogens', 166.

¹⁹³⁹ Cassese, 166.

¹⁹⁴⁰ Bassiouni, 'International Crimes', 68. ILC, *Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), with commentaries*, conclusion 9 and its commentary.

¹⁹⁴¹ Bassiouni, 68–70.

¹⁹⁴² ILC, *Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), with commentaries*, conclusion 9 and its commentary.

6.2.4 *Ius cogens* and the principle of legality

According to some leading publicist the principle of legality has already become, is in the process to be consolidated, or is at least emerging as a *ius cogens* norm. While some scholars provide some evidence and proof of the *ius cogens* nature of the legality principle, other authors just affirm this status without further development or elaboration. Gallant provides the most authoritative argument grounding his affirmation of the *ius cogens* nature of the legality principle on a comprehensive study of domestic and international legislation and practice. He concludes that the peremptory character of the principle flows from the repeated recognition of the principle “in near-universal treaty law, its adoption as a matter of domestic law by so many States, and the lack of opposition to it in modern times.”¹⁹⁴³ Other writers recognize the *ius cogens* nature of the legality principle but do not provide further evidence or elaboration on the grounds of such statement. Meron, for instance, considers that the “prohibition of retroactive penal measures is a fundamental principle of criminal justice and a customary, even peremptory, norm of international law that must be observed in all circumstances by national and international tribunals.”¹⁹⁴⁴ By its part, Olásolo focuses on the legal consequences of this *ius cogens* character without examining the criteria for its identification.¹⁹⁴⁵

Based on the above-explained criteria to identify peremptory norms of general international law, it seems that the conclusion of these authors recognizing the *ius cogens* nature of the legality principle is correct. Both *nullum crimen* and *nulla poena* can be considered as norms of general international law, as evidenced by their status of customary international law.¹⁹⁴⁶ At the same time, the prohibition of retroactive crimes and punishments seems to be considered by the international community as a norm from which no derogation is permitted. This can be inferred by the quasi-universal adherence to international instruments where the *nullum crimen* and *nulla poena*

¹⁹⁴³ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 401–2.

¹⁹⁴⁴ Meron, *War Crimes Law Comes of Age*, 244. In the same vein, recognizing the *ius cogens* nature of legality, see Elena Maculan, ‘International Crimes or Ordinary Crimes? The “Dual Classification of the Facts” as an Interpretive Method’, *International Criminal Law Review* 21, no. 3 (22 April 2021): 422; José Augusto Pacheco de Freitas, ‘La Relación Entre El Principio de Legalidad En Derecho Penal Internacional y La Tipificación Internacional de Los Crímenes de Lesa Humanidad: Una Perspectiva Histórica’, *Agenda Internacional* Año XXVI, no. 37 (2019): 25.

¹⁹⁴⁵ Olásolo, ‘El Principio Nullum Crimen Sine Iure En El Derecho Internacional Contemporáneo’, 25.

¹⁹⁴⁶ See above, Section 6.1.2.

principle are explicitly considered as non-derogable. In particular, the most prominent universal and regional human rights instruments, as the ICCPR, ECHR, ACHR and ArCHR, establish that their legality provisions cannot be derogated under any circumstance.¹⁹⁴⁷

In addition, other elements or criteria also suggest that the legality principle has become an *ius cogens* norm. The prohibition of punishing conducts that were not considered criminal by any applicable law at the time of commission has been universally accepted, as proved by state practice and *opinio iuris*.¹⁹⁴⁸ In fact, all but two UN member States adhere to the rule either by their constitutions, domestic statutes or through treaty obligations.¹⁹⁴⁹ In this vein, the vast majority of States have ratified international instruments enshrining *nullum crimen* and *nulla poena*.¹⁹⁵⁰ The large number of States having ratified treaties comprising the principle of legality, or its generalized presence in domestic legal system could be seen as indicators of its peremptory nature. Similarly, the current lack of opposition to the non-retroactivity rule suggests that the norm has become *ius cogens*.¹⁹⁵¹

The principle of legality seems to hold further characteristics distinctive of peremptory norms. It is universally adopted and applied as a human right, safeguarding values considered fundamental for the international community, as democracy and the rule of law. At the same time, international and internationalized courts have assumed and implemented the non-retroactivity rule as a settled legal requirement.¹⁹⁵² Thus, international *opinio iuris*, reflected in the case law of international tribunals and in pronouncements of various international subjects could indicate that the principle of legality is at the very least a nascent peremptory norm.¹⁹⁵³

¹⁹⁴⁷ ICCPR, Art. 4(2); ECHR, Art. 15(2); ACHR, Art. 27; ArCHR, Art. 4(2). In the same vein, “the Convention on the Rights of the Child and the African Charter on Human and Peoples’ Rights do not allow for the possibility of derogations.” ICRC, *Customary International Humanitarian Law*, Rule 101, 372.

¹⁹⁴⁸ See above, Section 6.1.2. Also see below, Section 6.3.1.1.

¹⁹⁴⁹ See above, footnote 1880.

¹⁹⁵⁰ See above, Chapter 3.

¹⁹⁵¹ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 401–2.

¹⁹⁵² See above, Section 4.1.2.

¹⁹⁵³ Some international tribunals have explicitly stated that the legality principle is an *ius cogens* norm. See among others, *Prosecutor v. Enver Hadzihasanovic, Mehmed Alagic and Amir Kubura*, ICTY, Decision on interlocutory appeal challenging jurisdiction in relation to command responsibility, para. 55; *Ayyash et al. Case*, STL, Interlocutory Decision on the Applicable Law, para. 76. In the same vein, see *Maktouf and Damjanović v. Bosnia and Herzegovina*, ECtHR, Concurring opinion of Judge Pinto de Albuquerque joined by Judge Vučinić, para. 9.

However, not all versions of the legality principle, or all its associated possible requirements, seem to have reached the *ius cogens* status. In the next sections, the different elements of the principle are individually analysed to assess whether they have become norms of general international law or even *ius cogens*. However, it can be advanced that only a narrow legality notion, just comprising the core elements of the principle, safeguarding its basic rationales and already considered customary international law, could be currently considered as a peremptory norm of general international law.¹⁹⁵⁴ This legality version, that has been defined as *nullum crimen, nulla poena sine iure*, seems to be generally accepted by the international community as non-derogable and superior to other rules of general international law.

On the contrary, stronger or more exigent legality versions cannot be considered as a norm of general international law accepted and recognized by the international community as non-derogable. Despite adopted by many domestic legal systems, legality requirements as *lex scripta* or *lex certa* are not included in the legality provisions of most international instruments¹⁹⁵⁵ and its application have been modulated, excluded in certain circumstances, or even generally rejected by domestic and international courts and tribunals.¹⁹⁵⁶ Clear evidence is that, despite the progressive codification of *common law* and international criminal law, unwritten norms, as customary international law, still play a fundamental role in the international justice system.¹⁹⁵⁷ In fact, both domestic and international legal courts have often prosecuted conducts that at the time of commission were considered criminal by norms inconsistent with the *lex scripta* or the *lex certa* requirements.¹⁹⁵⁸

If the principle of legality has become a peremptory norm of general international law, the obligation to respect it can be considered *erga omnes*. It implies that the guarantees associated to the principle are enforceable before the tribunals of any State, but as well before any international or internationalized tribunal.¹⁹⁵⁹ The content of the legality principle considered *ius cogens* should be applicable in all circumstances and cannot be subject to any form of derogation or exception, and should prevail if in conflict with any non-peremptory norm.

¹⁹⁵⁴ Kress, 'Nulla Poena Nullum Crimen Sine Lege', para. 19.

¹⁹⁵⁵ See above, Chapter 3.

¹⁹⁵⁶ See above, Chapters 4 and 5.

¹⁹⁵⁷ See above, Section 4.1.2.2, Section 4.2.2.5, Section 5.1.2 and Section 5.1.4.6.

¹⁹⁵⁸ Ibid.

¹⁹⁵⁹ Olásolo, 'El Principio Nullum Crimen Sine Iure En El Derecho Internacional Contemporáneo', 25.

Logically, this hierarchical superiority only concerns the elements of the legality principle considered peremptory. On the contrary, those legality features not included in the *nullum crimen, nulla poena sine iure* principle do not hold similar normative prerogatives. Since they are not considered *ius cogens*, international law does not prevent those elements to be subject to derogation or to be limited in their application. Following this reasoning, and as a consequence of the hierarchical superiority of peremptory norms, those legality requirements not considered *ius cogens* would bow when in conflict with peremptory norms, or when preventing the fulfilment of its resulting *erga omnes* obligations. These situations will be further discussed, in particular when strong legality versions including requirements not considered *ius cogens*, as *lex scripta* or *lex certa*, prevent the prosecution of international crimes or the fulfilment of certain *erga omnes* obligations flowing from *ius cogens* international crimes.

6.3 The core rules of the international legality principle: *nullum crimen, nulla poena sine iure*

There is overwhelming evidence that the principle of legality has become a rule of international customary law and even an *ius cogens* norm. However, the scope and content of the international legality principle is not as settled. As outlined above, it can be affirmed that only the main elements of the principle can be considered rules of general international law. Hereinafter, the scope and content of the core elements conforming the international *nullum crimen* principle will be analysed, followed by an assessment of the actual *nulla poena* principle under customary international law.

6.3.1 *Nullum crimen sine iure*

The version of the legality principle that constitutes a rule of customary international law and that has most probably become an *ius cogens* norm, has non-retroactivity as the main element, but comprises as well the prohibition of analogies and the requirement of sufficient specificity. The essential concern shared by the international community is that an individual cannot be prosecuted and condemned for a conduct that at the time of commission was not prohibited by an applicable law. It exists a common understanding about the importance of legal certainty and therefore, about providing individuals prospective notice of which conducts are prohibited and may involve criminal consequences, to enable them to act in conformity. Similarly, there is a general determination to protect individuals against arbitrariness in the exercise of the *ius puniendi* and to guarantee that crimes and punishments are not created *ex post facto* or retroactively applied to a particular person or case. Therefore,

it seems pertinent to examine if the legality principle, framing these common ideas and concerns, has become a rule of customary international law, and if so, if it can also be considered an *ius cogens* norm

Some authors use the formula *nullum crimen sine iure*, as opposed to *nullum crimen sine lege*, to distinguish the international principle of legality from stronger legality versions.¹⁹⁶⁰ While *lege* only refers to statutory law, *iure* is a broader term comprising non-written legal sources.¹⁹⁶¹ Therefore, *nullum crimen sine lege* describe stronger versions of legality, characteristic of civil law domestic legal systems, requiring written laws and higher specificity standards, and frequently excluding international law as an independent ground for prosecution and punishment.

Nullum crimen sine iure does not impose a specific system of legal sources and only requires that at the moment of commission the prosecuted conduct already constituted a crime in accordance with the system of sources of the specific legal system.¹⁹⁶² Accordingly, in States adhering to the common law tradition, the principle would also be fulfilled by crimes created by jurisprudence. Similarly, in the international legal system this legality principle would admit crimes provided in treaty law, but as well in other sources of law as common law, customary international law or general principles of law recognized by the community of nations. Therefore, *nullum crimen sine iure* does not require *lex scripta* and consequently it admits lower specificity standards

¹⁹⁶⁰ See, among others, M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, 2nd Revised edition (The Hague; Boston: Kluwer Law International, 1999), 144, 162; Olásolo, 'El Principio Nullum Crimen Sine Iure En El Derecho Internacional Contemporáneo'; Rodrigo Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional' (Madrid, Spain, Universidad Carlos III de Madrid, 2015), 269–71; Manuel Ollé Sesé, *Justicia Universal Para Crímenes Internacionales* (Madrid: La Ley, 2008), 183; M. Cherif Bassiouni and Peter Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Irvington on Hudson, New York: Transnational publishers, 1996), 268; Thomas Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege* (Cham: Springer International Publishing, 2017), 48. Other scholars, as Ferdinandusse prefer using the formula *nullum crimen sine lege* but specifying that under customary law or in human right treaties it does not exclude unwritten law. Ferdinandusse, 'Direct Application of International Criminal Law in National Courts', 2005, 236. Similarly, Gallant generally uses the term *lege*, and when statutory or treaty law is required he employs *lege scripta*. Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 14.

¹⁹⁶¹ In Spanish and French this distinction is more evident. *Iure* would be equivalent to *derecho* or *droit*, while *lege* would be *ley* or *loi*.

¹⁹⁶² Olásolo, 'El Principio Nullum Crimen Sine Iure En El Derecho Internacional Contemporáneo', 27–28.

The *nullum crimen sine iure* principle defines the core content of the legality principle, prohibiting the prosecution of conducts that at the time of commission were not considered criminal under domestic or international law, including treaty law, customary law and general principles of law. However, civil law countries, and at the international level the Rome Statute and the IACtHR, have adopted stronger notions of legality requiring *lex certa*, *lex praevia*, *lex scripta* and *lex stricta*. Nevertheless, this strict version of legality goes beyond the international principle of legality as defined in humanitarian and human rights instruments, and implemented by most international courts and tribunals.¹⁹⁶³ In fact, as analysed hereinafter, only a modulated version of legality that could be defined with the formula *nullum crimen sine iure*, has become a norm of general international law.

6.3.1.1 *The non-retroactivity rule*

When the legality principle first emerged in the international arena the strict application of the non-retroactivity rule was questioned. It has been argued that in the post-World War II trials some criminal labels were created *ex post facto* and retroactively applied.¹⁹⁶⁴ However, since then the international principle of legality has substantially evolved towards stronger and more exigent versions. Currently it is undisputed that international law prohibits the prosecution of conducts that at the time of commission were not considered criminal by an applicable law. Regional and domestic legal systems adhere to different versions of legality, but the differences concern the requirements of the applicable law criminalizing the conduct or its interpretation. The prohibition of retroactive laws is the core element of *nullum crimen* and its applicability is not questioned anymore. Hereinafter it is first assessed whether the non-retroactivity rule can be considered a rule of customary international law, and then whether international law can be accepted as a valid source of criminalization.

A. *Lex praevia* as a rule of customary international law

The non-retroactivity rule is the cornerstone of the legality principle and constitutes a rule of customary international law, as evidenced by state practice and *opinio iuris*, treaty provisions, domestic and international case law, and by the writings of leading scholars.¹⁹⁶⁵ The evidence that the prohibition of retroactive crimes is a rule

¹⁹⁶³ See above, Chapters 3, 4 and 5.

¹⁹⁶⁴ See above, Section 2.2.2.5.

¹⁹⁶⁵ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 358; Lamb, 'Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law', 734–35; Kress,

of customary international law has been provided throughout this work. If an international instrument or a domestic legislation enshrine the legality principle, the non-retroactivity rule is always present. While other elements could be absent, legality provisions always comprise the prohibition of prosecuting conducts that at the time of commission were not considered criminal by an applicable law.

Regarding state practice and *opinio iuris*, it should be noted that all but two UN member States adhere to the non-retroactivity rule.¹⁹⁶⁶ Since national legislation could be valid evidence of both state practice and *opinio iuris*,¹⁹⁶⁷ the adoption of the non-retroactivity rule in domestic legal systems seems sufficiently general, consistent, widespread and representative to suggest its customary nature.

As previously explained, treaty provisions provide relevant evidence to determine the existence and content of rules of international law.¹⁹⁶⁸ In this vein, the prohibition of retroactive crimes and punishments is included, among others in the UDHR, ICCPR, ECHR, ACHR, ACHPR, ArCHR, or the ASEAN Human Rights Declaration.¹⁹⁶⁹ Likewise, the non-retroactivity rule is enshrined in humanitarian international instruments, including those applicable to internal armed conflicts.¹⁹⁷⁰ The organic documents of the international or internationalized modern criminal courts and tribunals also comprise the principle.¹⁹⁷¹ In the same vein, the ICC, the regional human rights courts, the *ad hoc* international criminal tribunals and other international and internationalized criminal courts have adopted and implemented the non-retroactivity rule.¹⁹⁷²

‘Nulla Poena Nullum Crimen Sine Lege’, para. 19; Ferdinandusse, ‘Direct Application of International Criminal Law in National Courts’, 2005, 236–58; Meron, *War Crimes Law Comes of Age*, 244; De Souza Dias, ‘Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law’, 39–64. Teachings of the most prominent publicist may serve as a subsidiary means for the determination of rules of customary international law. ILC, *Draft conclusions on identification of customary international law, with commentaries*, conclusion 14 and its commentary.

¹⁹⁶⁶ See above, footnote 1880.

¹⁹⁶⁷ ILC, *Draft conclusions on identification of customary international law, with commentaries*, conclusions 5 and 6; commentary (5) on conclusion 10.

¹⁹⁶⁸ Ibid., conclusions 11, 12, 13 and 14 and their commentary.

¹⁹⁶⁹ UDHR, Art. 11(2); ICCPR, Art. 15; ECHR, Art. 7; ACHR, Art. 9; ACHPR, Art. 7(2); ArCHR, Art. 15; ASEAN Declaration, Art. 20(2). See above, Section 3.1.

¹⁹⁷⁰ Third Geneva Convention, Art. 99; Fourth Geneva Convention, Art. 65, 67; GC Additional Protocol I, Art. 75(4)(c); GC Additional Protocol II, Art. 6(c). See above, Section 4.2.4.

¹⁹⁷¹ See above, Chapter 4.

¹⁹⁷² See above, Chapter 4. The decisions of international courts and tribunals are considered subsidiary means for the determination of rules of customary international law. ILC, *Draft*

B. International law as a valid source of criminalization

The legality provisions in humanitarian and human rights instruments establish that no one shall be held guilty of any conduct that did not constitute an offence under a law applicable to the individual at the moment of commission. Most international treaties and conventions explicitly determine that the previous applicable law criminalizing the conduct could be either national or international.¹⁹⁷³ In few international conventions the legality provision only establish that no one should be condemned for a conduct that at the moment of commission was not considered criminal under the applicable law.¹⁹⁷⁴ However, this formula has been generally understood as referring to both national and international law.¹⁹⁷⁵

Similarly, international courts and tribunals have generally recognised international law as a valid source of criminalization, establishing that for the legality principle it is irrelevant whether the conduct is criminalised under domestic or international law.¹⁹⁷⁶ Convictions for international crimes are considered in conformity

conclusions on identification of customary international law, with commentaries, conclusion 13 and its commentary.

¹⁹⁷³ See UDHR, Art. 11(2). In the same vein, with an almost identical wording referring to national or international law: ICCPR, Art. 15(1); Convention on the Rights of the Child, Art. 40(2)(a); ECHR, Art. 7(1); ASEAN Declaration, Art. 20(2); Third Geneva Convention, Art. 99; GC Additional Protocol I, Art. 75(4)(c). Section 5.1.2 have examined the possibility of interpreting these provisions as requiring either national or international law to criminalise and punish a conduct independently, meaning that each particular legal system would have to provide its own criminalisation grounds. In this vein, both sources of law would not be interchangeable and, accordingly, a person could be convicted by international tribunal only if the conduct was criminalised by an international norm. However, this interpretation has been dismissed and the interchangeable application of domestic and international criminal law has been accepted allowing crimes to be established in a legal system different to the one where the prosecution takes place.

¹⁹⁷⁴ ACHR, Art. 9; ACHPR, Art. 7(2).

¹⁹⁷⁵ See above, Section 3.1.1.1, Section 3.1.2.1 and Section 3.1.4.

¹⁹⁷⁶ See ECtHR: e.g., *Kononov v. Latvia*, para. 185; *Korbely v. Hungary*, paras 69-71; *Jorgic v. Germany*, paras 101-09; *Streletz, Kessler and Krenz v. Germany*, para. 50; See above, Section 5.1.2. IACtHR: E.g. *Almonacid-Arellano et al v. Chile*, paras 93-101; *International responsibility for the promulgation and enforcement of laws in violations of the Conventions (Arts. 1 and 2 of the American Convention on Human Rights)*, para. 54. See above, Section 5.2.4. *Ad hoc* tribunals: E.g. *Prosecutor v. Tadic*, Decision on Appeal on Jurisdiction, ICTY App. Ch, para. 143; *Prosecutor v. Milan Milutinović, Nikola Sainovic and Dragoljub Ojdanic*, Decision on Ojdanic's Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, ICTY App. Ch., para. 9; *Prosecutor v. Vojislav Seselj*, Decision on jurisdiction and form of indictment, ICTY Trial Ch. II, para. 15; *Prosecutor v. Akayesu*, ICTR, Judgment, para. 617. See above, Section 4.1.2.

with the *nullum crimen* principle even if at the time of commission the conducts were authorized under the domestic legal system.¹⁹⁷⁷ Further evidence of the validity of international law as a source of criminalization under customary international law, is provided by the ICRC. The Rule 101 of its 2005 report “Customary International Humanitarian Law” establishes a definition of the principle of legality explicitly referring to national and international law as legal sources where a conduct can be criminalized.¹⁹⁷⁸

International law is generally understood as not only referring to international treaties and conventions, but also to non-statutory law as international custom or general principles of law.¹⁹⁷⁹ The UDHR and ICCPR’s *travaux préparatoires* show that the explicit acceptance of international law as a source of criminal law compatible with the *nullum crimen* principle was a debated and conscious choice, and that “international law” should be understood as including international custom and general principles of law.¹⁹⁸⁰ Human rights tribunals, as the ECtHR or the IACtHR, have also accepted both written and unwritten law as valid sources of criminalization.¹⁹⁸¹ By its part, the *ad hoc* international criminal tribunals recognized the value of international customary law and general principles as a legal basis for individual criminal responsibility and affirmed their compatibility with the *nullum crimen* requirements.¹⁹⁸² Therefore, as will be subsequently discussed, the principle of legality that has become international customary law does not require *lex scripta*.¹⁹⁸³ However, this does not prevent States or regional legal system to adopt stricter legality approaches.¹⁹⁸⁴

¹⁹⁷⁷ ECtHR: E.g. *Kolk and Kislyiy v. Estonia*, para. 9; *Vasiliauskas v Lithuania*, para. 158; *Streletz, Kessler and Krenz v. Germany*, paras 74 and 77-79; *Kononov v. Latvia*, paras 240-241. IACtHR: e.g., *International responsibility for the promulgation and enforcement of laws in violations of the Conventions (Arts. 1 and 2 of the American Convention on Human Rights)*, Advisory Opinion OC-14/94, para. 54.

¹⁹⁷⁸ ICRC, *Customary International Humanitarian Law*, Vol. I, Rules, 2005, Rule 101, 371-72

¹⁹⁷⁹ Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 32, 48.

¹⁹⁸⁰ See above, Section 3.1.1.2 and Section 3.1.2.1. 5.1.4.5. 5.1.4.6.

¹⁹⁸¹ See above, Section 5.1.4.5, Section 5.1.4.6 and Section 5.2.4.

¹⁹⁸² See above, Section 4.1.2.2.

¹⁹⁸³ See below, Section 6.4.1.

¹⁹⁸⁴ Olásolo, ‘El Principio Nullum Crimen Sine Iure En El Derecho Internacional Contemporáneo’, 21.

6.3.1.2 *Prohibition of analogy and sufficient specificity*

Since the international principle of legality admits criminalization in non-written legal sources, it seems logical to deduce that the principle does not comprise the *lex certa* requirement, as understood in civil law countries. Due to their unwritten nature, non-codified legal norms occasionally might be vague, undetermined and could evolve with time and therefore, cannot meet the highest specificity standards required by the strongest versions of legality.¹⁹⁸⁵ However, despite the international principle of legality does not include *lex certa*, it does require certain degree of specificity. The legality principle is grounded on legal certainty and seeks to guarantee that individuals can act being aware of the legal consequences of their acts. Therefore, the international principle of legality requires criminal conducts to be defined with sufficient precision so their effects are accessible and foreseeable, and the individuals are able to distinguish criminal conducts from those behaviours not involving criminal liability. In other words, the law criminalizing a conduct should be clear enough to allow the individual to know that his/her conduct is forbidden by the law and would involve criminal liability.¹⁹⁸⁶

Besides the specificity requirement regarding the laws criminalising a conduct, the international principle of legality also comprises some conditions regarding their interpretation. The gradual development of criminal law through judicial interpretation is compatible with the principle of legality in domestic and the international legal system.¹⁹⁸⁷ However, the requirement of strict interpretation (*lex stricta*), and in particular the prohibition of analogies *in malam partem* constitutes an entrenched element of the principle of legality and represents a major threshold to courts' discretion. Yet, due to the developing state of many areas of international criminal law and the lack of clarity or specificity of some legal provisions, the requirement of strict interpretation is not applicable in international law as rigorously as in some domestic

¹⁹⁸⁵ Ilias Bantekas, *International Criminal Law* (Oxford: Hart Publishing, 2010), 25; H.G. Van der Wilt, 'Nullum Crimen and International Criminal Law: The Relevance of the Foreseeability Test', *Nordic Journal of International Law* 84, no. 3 (13 July 2015): 520–21; Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 48.

¹⁹⁸⁶ For an analysis of the *lex certa* requirement as understood by the regional human right courts see, above Section 5.1.4.6 Section 5.2.3.1 and Section 5.2.4.2. For an assessment of *lex certa* as applied by international criminal courts, see above Section 4.1.2.3, Section 4.2.2.3 and Section 4.2.3.2.

¹⁹⁸⁷ The ECtHR case law is particularly elaborated on the matter, as explained above, in Section 5.1.4. See, among others, *Rohlena v. the Czech Republic*, ECtHR, para. 93.

legal systems.¹⁹⁸⁸ Therefore, if the *lex stricta* requirement is to be considered as part of the international principle of legality, it should be understood as only requiring sufficient predictability and foreseeability of judicial interpretations, and the prohibition of analogies *in malam partem*.

The prohibition against analogy can be understood as a corollary of the prohibition of retroactive creation of new crimes and punishments.¹⁹⁸⁹ The legality principle bans the punishment of conducts that at the time of commission were not considered criminal. The logic consequence is that judges cannot fill a gap in the criminal law extending by analogy the legal scope of a crime to conducts that when committed were not prohibited.¹⁹⁹⁰ In this sense, the prohibition of analogies is closely related to the non-retroactivity rule, and seems coherent to believe that it enjoys the same legal status. However, analogies can take different forms, and not all of them are forbidden or incompatible with the legality principle.

Despite not being explicitly included in many international instruments, the *lex stricta* requirement and the prohibition of analogies have been generally understood as being implicitly comprised in legality provisions. In fact, despite most human right instruments do not explicitly refer to analogy, they have been interpreted as including at least the prohibition of those analogies retroactively criminalizing conducts that at the moment of commission were not prohibited under the applicable law. A clear example is ECHR Article 7, interpreted by the ECtHR as comprising the obligation of strict interpretation of criminal laws and the prohibition of analogies *in malam partem*.¹⁹⁹¹ According to the European Court, the purpose of the legality provision is to ensure that no one is subject to arbitrary prosecution, conviction or punishment.¹⁹⁹² Therefore, Article 7 not only comprises the prohibition of retroactive application of the

¹⁹⁸⁸ De Souza Dias, 'Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law', 54.

¹⁹⁸⁹ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 357; Kress, 'Nulla Poena Nullum Crimen Sine Lege', para. 28.

¹⁹⁹⁰ Kress, 'Nulla Poena Nullum Crimen Sine Lege', para. 28.

¹⁹⁹¹ Council of Europe, 'Guide on Article 7 of the European Convention on Human Rights - No Punishment without Law: The Principle That Only the Law Can Define a Crime and Prescribe a Penalty', 30 April 2022, para. 2; Kress, 'Nulla Poena Nullum Crimen Sine Lege', 28; Dana, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing', 868,883; Machteld Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes against Humanity, War Crimes* (Antwerpen: Intersentia, 2002), 50–51. In the same vein, ICRC, *Customary International Humanitarian Law*, Vol. I, Rules, 2005, Rule 101, 371-72.

¹⁹⁹² *Streletz, Kessler and Krenz v. Germany*, para. 88; *Kononov v. Latvia*, ECtHR Grand Chamber, para. 185; *Korbely v. Hungary*, paras 69-71. *Jorgic v. Germany*, paras 101-09.

laws, but as well “the principle that the criminal law must not be extensively construed to an accused’s detriment, for instance by analogy.”¹⁹⁹³ This way, the ECtHR has found violations of the foreseeability requirement, and therefore of the legality principle, in cases where national courts had extensively interpreted legal provisions in the accused’s disadvantage, as interpretations incompatible with the crime’s essence or unforeseeable case-law reversals.¹⁹⁹⁴

Similarly, ACHR Article 9 does not explicitly establish the prohibition of analogies, but the Inter-American Court has established that the Convention should be interpreted in that sense.¹⁹⁹⁵ In the same vein, ACHPR Article 7(2) does not include an express reference to the prohibition of analogies, but it has also been interpreted in that way, except when the use of analogies is to the advantage of the accused (analogy *in favorem*).¹⁹⁹⁶ By its part, the Rome Statute expressly establishes the *lex stricta* requirement and the prohibition of analogy in its Article 22(2), stating that “(T)he definition of a crime shall be strictly construed and shall not be extended by analogy.”¹⁹⁹⁷

However, it cannot be understood that all sorts of analogies are prohibited by the Rome Statute or by international law in general. It seems clear that the use of analogies to extend the scope and meaning of a criminal rule to a matter that is not covered by law (*analogia legis*) is prohibited in both domestic and international criminal law.¹⁹⁹⁸ However, analogies can take very different forms, and some categories of analogy are permitted in domestic and international legal systems.¹⁹⁹⁹ As a matter of

¹⁹⁹³ *Kokkinakis v. Greece*, para. 52; *Vasiliauskas v. Lithuania*, para. 154; *Del Río Prada v. Spain*, para. 78; *Cantoni v. France*, para. 29.

¹⁹⁹⁴ *Vasiliauskas v Lithuania*, paras 179-86, cited, with further references in Council of Europe, ‘Guide on Article 7 of the European Convention on Human Rights - No Punishment without Law: The Principle That Only the Law Can Define a Crime and Prescribe a Penalty’, para. 42. As analysed above, in Section 5.1.4.6.

¹⁹⁹⁵ Among other decisions, see *Cantoral-Benavides v. Peru*, para. 155. For further case law references and various concurrent scholarly opinions, see above, Section 5.2.3.2.

¹⁹⁹⁶ Solange Ngono, ‘Article 7.2’, in *La Charte Africaine Des Droits de l’homme et Des Peuples et Le Protocole y Relatif Portant Création de La Cour Africaine Des Droits de l’homme: Commentaire Article Par Article*, by Maurice Kamto, Collection de Droit International 67 (Bruxelles: Editions Bruylant Editions de l’Université de Bruxelles, 2011), 197.

¹⁹⁹⁷ Rome Statute, Art. 12(3). The Article has been already applied by the ICC in *Prosecutor v Lubanga Dyilo*, Decision on the Confirmation of Charges, para. 303. For an analysis of the role of analogies in the ICC system, see Section 4.2.2.4.

¹⁹⁹⁸ Lamb, ‘Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law’, 752–53.

¹⁹⁹⁹ Lamb, 753; Currat, ‘L’interprétation du Statut de Rome’, 152; Cassese, *International Criminal Law*, 34.

fact, the Rome Statute does not specify which sorts of analogies are forbidden.²⁰⁰⁰ In the same vein, the very definition of certain international crimes may require in some situations reasoning by analogy.²⁰⁰¹ Even in the ICC Statute, where a significant effort was made to provide clear and comprehensive crime definitions, different examples can be found requiring recourse to analogical reasoning.

According to some leading scholars, international criminal law bans *analogia legis* but the prohibition of analogies does not reach other kinds of analogies that would be accepted and compatible with the legality principle.²⁰⁰² This would be the case of *analogia iuris* that implies the regulation of an issue not explicitly covered by a specific legal provision by resorting to the legal system's general principles.²⁰⁰³ Similarly, domestic and international norms require in certain cases analogies *ejusdem generis* ("of the same kind").²⁰⁰⁴ In fact, some legal provisions, after the enumeration of precise sorts of persons or things, include a general clause intended to prevent legal gaps concerning elements not included in the enumeration. The clearest example could be the Rome Statute's definition of crimes against humanity that includes among the underlying crimes "other inhumane acts of a similar character (...)." ²⁰⁰⁵ This broad provision, considered a catchall or residual category, applicable when the more specific acts of crimes against humanity do not seem suitable²⁰⁰⁶ has been understood as implicitly authorizing an exception to the *lex stricta* requirement since it necessarily

²⁰⁰⁰ Lamb, 'Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law', 752–53.

²⁰⁰¹ Antonio Cassese et al., *International Criminal Law: Cases and Commentary* (Oxford: Oxford University Press, 2011), 74–75; Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 49; Kress, 'Nulla Poena Nullum Crimen Sine Lege', para. 30.

²⁰⁰² Cassese, *International Criminal Law*, 33–34.

²⁰⁰³ Ibid.

²⁰⁰⁴ Kress, 'Nulla Poena Nullum Crimen Sine Lege', para. 30; Cassese, *International Criminal Law*, 33–34.

²⁰⁰⁵ Rome Statute, Art. 7(1)(k). For references of case law where this provision was used as legal ground for criminal prosecutions, see Kress, 'Nulla Poena Nullum Crimen Sine Lege', para. 30. Other crime definitions in the ICC Statute requiring reasoning by analogy include the crime of apartheid (Art. 7(2)(h)), or other underlying acts of the crimes against humanity (Art. 7(1)(e), (g) and (h)). See Section 4.2.2.4.

²⁰⁰⁶ Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 49; William A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford New York: Oxford university press, 2010), 409; Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 336.

demands reasoning by analogy.²⁰⁰⁷ Analogies *ejusdem generis* can be considered implicitly authorize to implement such provision and apply it to persons or things of the same nature as those enumerated.²⁰⁰⁸

It can be concluded that the *lex stricta* requirement as existing in international law requires the interpretation of legal provisions in a manner that does not render a norm applicable to matters not previously covered by law. The prohibition of judicial interpretation to extend the scope and meaning of a criminal norm to a conduct that was not previously regulated (*analogia legis*) is uncontroversial.²⁰⁰⁹ An analogical interpretation resulting in the retroactive criminalization of a behaviour that at the time of commission was not prohibited, seems a logical and necessary corollary of the non-retroactivity rule. This suggests that *lex stricta*, understood as prohibiting *analogia legis*, can be considered as holding similar international legal status than *lex praevia*.

However, some scholars consider that the principle of strict construction is not currently applicable in general international law.²⁰¹⁰ It is argued that *lex stricta* is not implicitly or explicitly recognized in international instruments or in various domestic legal systems. Therefore, it cannot be considered as a rule of customary international law or a general principle of law. However, such general affirmation is based on a strong notion of the *lex stricta* requirement. The actual state of development of some areas of international criminal law requires rather flexible interpretations of *lex stricta*, but the core rationales of the legality principle constitute a significant threshold. The *lex stricta* version that has become customary international law is a very limited one. It should be understood as an unavoidable corollary of the non-retroactivity rule, limited to the prohibition of *analogia legis* and only banning judicial interpretations expanding the scope of crime definition to conducts not covered by a criminal law.

As a resulting consequence of the *lex stricta* requirements, some authors

²⁰⁰⁷ Cassese et al., *International Criminal Law: Cases and Commentary*, 74–75; Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 49.

²⁰⁰⁸ Cassese, *International Criminal Law*, 33–34; Lamb, ‘Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law’, 753. Kress acknowledges that this “legislative technique is problematic, though not necessarily in breach of the certainty requirement if the statutory context is such as to give sufficient guidance to the judge in clarifying the content of the rule” Kress, ‘Nulla Poena Nullum Crimen Sine Lege’, para. 30.

²⁰⁰⁹ However, it has been noted that in practice the line between interpretation by analogy and law creation is frequently very thin, as shown by the jurisprudence of the *ad hoc* tribunals, Lamb, ‘Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law’, 752–53. It will be up to the international tribunals to define the standards and limits of the acceptable use of interpretative analogies.

²⁰¹⁰ See, with further references De Souza Dias, ‘Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law’, 54.

consider the *favor rei* principle as an element of legality.²⁰¹¹ According to this principle, vague or unclear criminal laws, or undetermined legal concepts or expressions, must be interpreted by tribunals in the most favourable sense for the defendant.²⁰¹² In other words, when a judge faces conflicting interpretations of a rule, the principle impose the most favourable option for the defendant.²⁰¹³ The *favor rei* principle should be distinguished from *in dubio pro reo*. While the first one regards substantive criminal laws, the latter applies to the assessment of evidence.²⁰¹⁴ Both principles have been related to *lex mitior*,²⁰¹⁵ the prohibition of analogy²⁰¹⁶ and the presumption of innocence.²⁰¹⁷ While *favor rei* is an entrenched criminal law principle in domestic legal systems, its applicability in international law is not as settled. Rome Statute Article 22(2) enshrines the principle, together with *lex stricta* and the prohibition of analogies, establishing that in case of ambiguity the ICC shall interpret crime definitions in favour of the accused.²⁰¹⁸ The ICC already had the opportunity to apply this provision but while in some cases it did in fact interpret crime's definitions favourably to the accused,²⁰¹⁹ in other cases it was not as clear.²⁰²⁰ Also the *ad hoc* international criminal

²⁰¹¹ Cassese, *International Criminal Law*, 35; Elena Maculan, *Los crímenes internacionales en la jurisprudencia latinoamericana*, Derecho penal y criminología (Madrid: Marcial Pons Ediciones Jurídicas y Sociales, 2019), 233.

²⁰¹² As explained, with further references in Kai Ambos and Gustavo Emilio Cote Barco, 'El Derecho Penal Internacional Como Derecho Aplicable En La Jurisdicción Especial Para La Paz (JEP) y El Principio de Favorabilidad: ¿legalidad Ante La Concurrencia de Marcos Normativos?', *Reflexión Informada. CAPAZ Instituto Colombo-Alemán Para La Paz*, no. 3 (2021): 22; De Souza Dias, 'Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law', 37; Maculan, *Los crímenes internacionales en la jurisprudencia latinoamericana*, 233.

²⁰¹³ Cassese, *International Criminal Law*, 35.

²⁰¹⁴ Ambos and Cote Barco, 'El Derecho Penal Internacional Como Derecho Aplicable En La Jurisdicción Especial Para La Paz (JEP) y El Principio de Favorabilidad: ¿legalidad Ante La Concurrencia de Marcos Normativos?', 22; Cassese, *International Criminal Law*, 35.

²⁰¹⁵ Ambos and Cote Barco, 'El Derecho Penal Internacional Como Derecho Aplicable En La Jurisdicción Especial Para La Paz (JEP) y El Principio de Favorabilidad: ¿legalidad Ante La Concurrencia de Marcos Normativos?', 22.

²⁰¹⁶ Cassese, *International Criminal Law*, 35.

²⁰¹⁷ Maculan, *Los crímenes internacionales en la jurisprudencia latinoamericana*, 233.

²⁰¹⁸ Rome Statute, Art. 22(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."

²⁰¹⁹ *Prosecutor v Jean-Pierre Bemba Gombo*, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, para. 423; *Lubanga*, Decision on the Confirmation of Charges, para. 303; *Prosecutor v Omar Hassan Ahmad Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against

tribunals affirmed and applied the *favour rei* principle.²⁰²¹ Despite the principle has been applied by some international tribunals and it appears in the Rome Statue, human rights or humanitarian international instruments remain salient regarding *favor rei*, and it seems that there is not enough evidence indicating that it has yet become a rule of general international law as part of the legality principle.²⁰²²

6.3.2 *Nulla poena sine iure*

According to the evidence presented above the principle *nullum crimen, nulla poena sine iure* is a rule of customary international law and has become an *ius cogens* norm. However, the content and scope of the *nulla poena* principle under customary international law is not settled and should be determined analysing state practice and *opinio iuris*, as well as international and regional human rights instruments, the statutes of the modern international criminal tribunals, international case law, and the writing of the most prominent publicist.²⁰²³ Despite the evidence of the customary character of *nulla poena* is almost as strong as the evidence for *nullum crimen*, different scholars question the applicability of the principle in international law. Therefore, the elements and requirements of the international *nulla poena* principle will be first examined. Then, an overview of the doctrinal debates on the applicability and scope of the prohibition of retroactive punishments in international law is provided, together with some conclusions.

Omar Hassan Ahmad Al Bashir, ICC Pre-Trial Ch. I, ICC-02/05-01/09, 4 Mars 2009, paras 133, 160, available at: https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2009_01517.PDF. Cited in Maculan, *Los crímenes internacionales en la jurisprudencia latinoamericana*, 231.

²⁰²⁰ See, with examples in Maculan, 231–32.

²⁰²¹ *Prosecutor v. Akayesu*, ICTR, Judgment, paras 500-01; *Prosecutor v. Delalić et.al.*, ICTY Trial Judgment, para. 413. Comprehensively analyzed, together with further examples, in Cassese, *International Criminal Law*, 35.

²⁰²² Some authors note that the commitment to substantive justice, characteristic of international criminal law at its origins, was based on the *favor societatis* principle, as opposed to *favor rei* that grounds strong notions of legality. See, with further references, in Maculan, *Los crímenes internacionales en la jurisprudencia latinoamericana*, 228. Some rationales of the substantive justice doctrine are still present in the international justice system, as evidenced by the explicit aim to prevent impunity and protect society against international crimes. See for example the Rome Statute Preamble stating: “Determined put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.” The emerging States’ positive obligations to prosecute and punish serious human rights violations can prove the actuality of some of these rationales. See below, Section 7.1.2.

²⁰²³ Lamb, ‘Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law’, 756.

6.3.2.1 *The content and scope of nulla poena as a rule of customary international law*

The *nulla poena* principle in domestic legal systems often requires the previous establishment in a written statute of a precise penalty or a reasonable range of penalties associated to each offence. Particularly in countries belonging to the civil law tradition, the principle includes the *lex praevia*, *scripta*, *stricta* and *certa* requirements. However, this exigent understanding of the principle goes well beyond the requirements of the *nulla poena* version that has become customary international law.²⁰²⁴ The version of *nulla poena* that has reached the status of customary norm only prohibits the imposition of heavier penalties than those applicable at the time of commission.²⁰²⁵ It includes *lex praevia*, but does not comprise further requirements as *lex scripta* or *lex certa*.

This is evidenced by state practice and *opinio iuris*. The prohibition of retroactive punishments is universally adopted in domestic legal system, at least including the *lex praevia* requirements.²⁰²⁶ Domestic legislation is a valid evidence of state practice,²⁰²⁷ but could prove as well *opinio iuris*.²⁰²⁸ The adherence to the prohibition of retroactive punishments in domestic legal systems seems sufficiently general, consistent, widespread and representative to suggest its customary nature. Despite various States, particularly from the civil law tradition, adopt stronger legality versions requiring as well *lex scripta*, *stricta* and *certa*, this is not the case of some other countries, as those of common law.²⁰²⁹ Therefore, the version of the *nulla poena*

²⁰²⁴ Kress, 'Nulla Poena Nullum Crimen Sine Lege', para. 32; Kai Ambos, 'Nulla Poena Sine Lege En Derecho Penal Internacional', in *Estudios de Derecho Internacional. Libro Homenaje al Profesor Santiago Benadava*, ed. Eduardo Picand Albónico, vol. II (Santiago, Chile: Librotecnia, 2008), 34–35.

²⁰²⁵ Kress, 'Nulla Poena Nullum Crimen Sine Lege', para. 32; Ambos, 'Nulla Poena Sine Lege En Derecho Penal Internacional', 34–35; Ferdinandusse, 'Direct Application of International Criminal Law in National Courts', 2005, 252.

²⁰²⁶ A comprehensive study of 192 national constitutions and domestic legal systems conducted by Gallant demonstrates that the *nulla poena* principle, at least requiring *lex praevia*, is universally accepted. Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 378–79. A survey conducted by Bassiouni in 1993 also demonstrated the widespread adherence of States to the *nulla poena* principle. Bassiouni, 'Human Rights in the Context of Criminal Justice', 291.

²⁰²⁷ ILC, *Draft conclusions on identification of customary international law, with commentaries*, conclusions 5 and 6.

²⁰²⁸ Ibid., commentary (5) on conclusion 10.

²⁰²⁹ See above, footnote 1880.

principle that can be considered a norm of general international law is only that comprising the minimum requirements universally shared by States.

As explained above, treaty provisions are considered relevant evidence to identify the existence and content of rules of international customary law.²⁰³⁰ Therefore, the consideration of the *nulla poena* principle as a rule of customary international law is evidenced by the widespread States' adhesion to international instruments comprising the principle. Among others, the prohibition of retroactive penalties is included in human rights instruments as the UDHR, ICCPR, ECHR, ACHR, ACHPR, ArCHR or the ASEAN Declaration,²⁰³¹ but as well in humanitarian law instruments as the Third and Fourth Geneva Conventions and the Additional Protocols I and II to the Geneva Conventions.²⁰³² Furthermore, several universal and regional human rights instruments, as the ICCPR, ECHR, ACHR, or the ArCHR establish that the legality principle, including *nulla poena*, is non-derogable even in times of emergency, what suggest its *ius cogens* character.²⁰³³

All these international instruments establish the prohibition of imposing a penalty heavier than that applicable at the time when the criminal offence was committed. Therefore, they only enshrine the *lex praevia* element of *nulla poena*.²⁰³⁴ Penalties should be previously established by domestic or international law as explicitly recognized in the UDHR, ICCPR, Additional Protocols I and II to the Geneva Conventions and ECHR.²⁰³⁵ The ACHR and the ACHPR do not explicitly refer to national or international law, but they have been interpreted as having the same meaning.²⁰³⁶ As explained regarding *nullum crimen*, international law should be understood as comprising statutory norms, but as well other sources as international customary law or general principles of law. Therefore, the *lex scripta*, requirement in

²⁰³⁰ ILC, *Draft conclusions on identification of customary international law, with commentaries*, conclusions 11 -14 and their commentaries. See above, Section 6.1.1.

²⁰³¹ UDHR, Art. 11(2); ICCPR, Art. 15; ECHR, Art. 7; ACHR, Art. 9; ACHPR, Art. 7(2); ArCHR, Art. 15; ASEAN Declaration, Art. 20(2). See above, Section 3.1.1.4, Section 3.1.2.3, and Section 3.1.3.

²⁰³² Third Geneva Convention, Art. 65; Fourth Geneva Convention, Art. 99; GC Additional Protocol I, Art. 75(4)(c); GC Additional Protocol II, Art. 6(c). See above, Section 3.2.4. Ratifying these instruments, particularly the ICCPR and the regional human rights treaties, most States have accepted the internal application of the *nulla poena* principle as an international obligation.

²⁰³³ ICCPR, Art. 4(2); ECHR, Art. 15(2); ACHR, Art. 27; ArCHR, Art. 4(2).

²⁰³⁴ Ambos, 'Nulla Poena Sine Lege En Derecho Penal Internacional', 30.

²⁰³⁵ See above, Section 3.1.1.4, Section 3.1.2.3, Section 3.1.3, and Section 3.2.4.

²⁰³⁶ See above, Section 3.1.4.2, and Section 3.1.4.3.

not comprised in the international *nulla poena* principle. In the same vein, if non-statutory norms are accepted as valid legal sources for punishments, the *nulla poena* principle cannot require *lex certa*.

The ICRC in its 2005 report “Customary International Humanitarian Law” provides clear evidence that this *nulla poena* version is now customary international law.²⁰³⁷ Its Rule 101 recognises the *nulla poena* principle in similar terms, referring to crimes under national or international law, and being applicable in both international and non-international armed conflicts.²⁰³⁸ The report alludes to extensive evidence to support the customary nature of the norm, referring to domestic civil and military law and practice. The ICRC establishes that the international *nulla poena* principle imposes limits to domestic court’s sentencing regardless of whether the source of law is national or international.²⁰³⁹

The decisions of international courts and tribunals are considered subsidiary means for the determination of rules of customary international law as well as for the identification of *ius cogens* norms.²⁰⁴⁰ Therefore, to determine the content and scope of the international *nulla poena* principle it is relevant to analyse the case law of modern international criminal tribunals and human rights courts. They have generally accepted the applicability of *nulla poena* in the international arena considering, at least, that punishments imposed cannot exceed the maximum penalty established in the law applicable at the time of commission. While some tribunals understand the principle as only requiring *lex praevia*, others adopt stricter versions requiring *lex scripta* or *lex stricta*. However, no tribunal has adopted yet a strong *nulla poena* version comparable to that of civil law systems.

A. The *ad hoc* international criminal tribunals

The diverse understandings of the *nulla poena* principle were particularly evident when drafting and implementing the ICTY and ICTR Statutes.²⁰⁴¹ While the

²⁰³⁷ ICRC, *Customary International Humanitarian Law*, Rule 101, 371-72. The ICRC report is analysed in Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 380–81.

²⁰³⁸ ICRC, *Customary International Humanitarian Law*, Rule 101, 371-72.

²⁰³⁹ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 380–81.

²⁰⁴⁰ ILC, *Draft conclusions on identification of customary international law, with commentaries*, conclusion 13 and its commentary; ILC, *Draft conclusions on identification and legal consequences of peremptory norms of general international law (ius cogens), with commentaries*, conclusion 9 and its commentary.

²⁰⁴¹ See above, Section 4.1.2.10.

States elaborating the statutes upheld a strong version requiring *lex praevia, scripta, stricta* and *certa*, the tribunals themselves adopted a more flexible approach. Likewise, already when drafting the statutes, different visions of the principle were confronted.²⁰⁴² While it was generally accepted that the *nulla poena* principle prohibited the imposition of heavier penalties than those applicable at the time of commission, it was not settled whether the principle included further requirements. Some States proposed a minimalist version claiming that penalties should be based on general principles of law of the worlds' major legal systems, or the case law of previous international criminal tribunals.²⁰⁴³ However, the majority of States considered that the *nulla poena* principle involved other requirements beyond the prohibition of retroactive punishment. They considered that the principle also required codified and clearly established penalties, and these requirements would only be fulfilled limiting the applicable penalties to those existing at the relevant time in the domestic legislation of the country where the crimes were committed. Even if international crimes were not incorporated in these national legislations, the requirements of a strict *nulla poena* version demanded the application of the penalties provided for the underlying domestic ordinary crimes in force at the time of commission. In this way, at the moment of commission the penalties would have been codified and clearly established in the domestic applicable law.²⁰⁴⁴

Finally, a strong version of the *nulla poena* principle prevailed and despite not assigning a defined penalty or a range of penalties to each particular crime, the ICTY and ICTR Statutes established that when determining the penalties, the tribunals "should have recourse to the general practice regarding prison sentences in the courts" of the country concerned.²⁰⁴⁵

However, both *ad hoc* tribunals interpreted such provisions considering that

²⁰⁴² For an overview and an analysis of the different positions in these debates, see William A. Schabas, 'Sentencing by International Tribunals: A Human Rights Approach', *Duke Journal of Comparative & International Law* 7, no. 2 (1997 1996): 469–73; WN Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (Asser the Hague, 2006), 253, 258; Dana, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing', 870–74. Also see above, Section 4.1.2.10.A.

²⁰⁴³ Schabas, 'Sentencing by International Tribunals', 473; Ferdinandusse, 'Direct Application of International Criminal Law in National Courts', 2005, 258.

²⁰⁴⁴ For a comprehensive analysis of the proposals of the different countries, see Dana, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing', 874; Schabas, 'Sentencing by International Tribunals', 469–82; Ferdinandusse, 'Direct Application of International Criminal Law in National Courts', 2005, 253.

²⁰⁴⁵ ICTY Statute Art. 24(1); ICTR Statute Art. 23(1).

recourse to domestic sentencing practice was only a non-binding guideline.²⁰⁴⁶ Notwithstanding declaring the non-binding force of national legislation regarding available punishments, the ICTY generally imposed penalties within the forfeits provided for under the domestic legislation. However, the tribunal exceptionally deviated from pre-established domestic penalties, and even imposed life imprisonment penalties despite it was prohibited and considered cruel and inhumane under Yugoslav laws.²⁰⁴⁷ The Court justified the compatibility of life imprisonment sentences with the *nulla poena* principle claiming that “the accused must have been aware” that his crimes were “punishable by the most severe penalties.”²⁰⁴⁸

Some scholars consider this position contrary to the aim of the statutes’ drafters, and a violation of the *nulla poena* principle.²⁰⁴⁹ They claim that the tribunal understood the legality principle as only comprising the *nullum crimen* rule but not *nulla poena*.²⁰⁵⁰ However, this affirmation is grounded on an understanding of the *nulla poena* principle involving strong requirements. On the contrary, other authors find that the tribunals respected the *nulla poena* principle as understood in international law, since it only requires previous maximum penalties and is compatible with punishments grounded on other legal sources than domestic law.²⁰⁵¹

²⁰⁴⁶ As an example, the ICTY Appeals Chambers established that the “Trial Chamber’s discretion in imposing sentence is not bound by any maximum term of imprisonment applied in a national system”. *Prosecutor v. Tadic*, Judgment in Sentencing Appeals, ICTY App. Ch., para. 21; *Prosecutor v. Erdemovic*, Sentencing Judgment, ICTY Trial Ch., paras 25-40.

²⁰⁴⁷ Dana, ‘Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing’, 870.

²⁰⁴⁸ *Prosecutor v Delalic et al.*, Appeal Judgment, para. 817. For further analysis, references and information on the *nulla poena* principle interpreted and applied by the *ad hoc* tribunals, see Dana, 887–905; Schabas, ‘Sentencing by International Tribunals’, 481–82; Ferdinandusse, *Direct Application of International Criminal Law in National Courts*, 2006, 253. Also see above, Section 4.1.2.10.B.

²⁰⁴⁹ See, with further references Dana, ‘Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing’, 870, 925; Bassiouni and Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia*, 700.

²⁰⁵⁰ Dana, ‘Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing’, 902.

²⁰⁵¹ See, with further references Ferdinandusse, *Direct Application of International Criminal Law in National Courts*, 2006, 253; Schabas, ‘Sentencing by International Tribunals’, 468–82.

B. The International Criminal Court

The different understandings of the *nulla poena* principle were also confronted when negotiating and drafting the Rome Statute.²⁰⁵² The ILC finally opted to establish that “It is, in any event, not necessary for an individual to know in advance the precise punishment so long as the actions constitute a crime of extreme gravity for which there will be severe punishment.”²⁰⁵³ Therefore, the *nulla poena* version reflected in the Statute can be considered somehow intermediate, recognizing the applicability of the principle and some of their requirements, but not reaching the strict demands distinctive of civil law domestic legal systems.

While the Rome Statute includes precise and comprehensive crimes’ definitions allowing the adoption of strict *nullum crimen* principle, it is not the case regarding penalties. The Statute only establishes that the Court may impose penalties provided in the Statute, and those could be “imprisonment for a specified number of years, which may not exceed a maximum of 30 years” or “life imprisonment” for the most serious offenses, along with fines and forfeitures.²⁰⁵⁴ These maximum penalties provided for in the Statute seem to be indistinctly applicable to all crimes under the Court’s jurisdiction, without distinctions based on their injustice and gravity.²⁰⁵⁵ The Statute does not provide for minimum punishments or tariffs of penalties for specific crimes, and the sentencing framework generally rely on general concepts as the “gravity of the offense” without further guiding standards.²⁰⁵⁶

²⁰⁵² For an analysis of the discussions and arguments within the ILC, see above, Section 4.2.1.1.C.

²⁰⁵³ International Law Commission, *Draft Code of Crimes against the Peace and Security of Mankind with commentaries*, Yearbook of the International Law Commission, 1996, vol. II(2), commentary 7 on Art. 3.

²⁰⁵⁴ Rome Statute, Art. 77(1)(a),(b), and 77(2)(a),(b).

²⁰⁵⁵ Ambos, ‘Nulla Poena Sine Lege En Derecho Penal Internacional’, 30–31; Davide Resta, ‘El principio “nullum crimen, nulla poena sine lege” en el Derecho Penal Internacional. En particular en el Estatuto de la Corte Penal Internacional’ (Granada, Universidad de Granada, 2019), 13; Dana, ‘Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing’, 926.

²⁰⁵⁶ Dana, ‘Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing’, 926. See above, Section 4.2.2.6. However, Rule 145 of the Rules of Procedure and Evidence, entitled “Determination of sentence”, includes a non-exhaustive list of mitigating and aggravating circumstances, along with a number of factors that should guide the determination of the penalty to be imposed by the Court. Article 51 of the Rome Statute provides for the forthcoming adoption of the “Rules of Procedure and Evidence” that shall assist the Court when applying the Statute. The Rules were finally adopted in 2002. Assembly of States Parties to the Rome Statute of the International Criminal Court, *Rules of*

Therefore, the strongest *nulla poena* standards (*lex scripta, praevia, certa* and *stricta*) are only partially met in the ICC system. While the requirements of punishments established by a written and previous law are fulfilled, it is not the case of the standards of certainty and strictness.²⁰⁵⁷ Anyhow, compared with all previous international criminal law documents, where no penalties provisions were provided, the Rome Statute takes a significant step towards a stronger *nulla poena* principle.²⁰⁵⁸ In this vein, in cases where an individual is condemned for more than one offence, the Statute requires the ICC to determine the penalty for each crime before issuing an overall sentence.²⁰⁵⁹ This means a significant improvement compared to the generalized practice of single sentencing in international tribunals.²⁰⁶⁰ In any case, the ICC system of penalties complies with the *nullum crimen* principle as understood in international criminal law.²⁰⁶¹

C. Regional human rights courts

The judgments of regional human rights courts regarding *nulla poena* are scarce.²⁰⁶² Only the European Court has studied the issue in depth, adopting a rather flexible approach based on the accessibility and foreseeability of punishments.²⁰⁶³ The Court established that the ECHR enshrines the principle that only the law, within the

Procedure and Evidence, 3-10 September, ICC-ASP/1/3 and Corr.1, part II.A.T., available at: <https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf>.

²⁰⁵⁷ Kai Ambos, 'General Principles of Criminal Law in the Rome Statute', *Criminal Law Forum* 10, no. 1 (1999): 6. The respect of the *nulla poena* principle in situations involving States that were not a party to the Rome Statute at the time the crimes were committed, have been discussed above, in Section 4.2.3.2.

²⁰⁵⁸ Ambos, 6.

²⁰⁵⁹ Dana, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing', 925.

²⁰⁶⁰ Ibid. To assess compliance with the principle of legality as understood in international human rights law, the ICC recently relied on the "foreseeability" and "accessibility" test. See above, Section 4.2.3.2. However, Dana questions the validity of these requirements regarding *nulla poena* in international prosecutions. Dana, 870.

²⁰⁶¹ Ambos, 'General Principles of Criminal Law in the Rome Statute', 6; Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 334; Ferdinandusse, 'Direct Application of International Criminal Law in National Courts', 2005, 252–59.

²⁰⁶² Dana, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing', 871.

²⁰⁶³ See above, Section 5.1.8.

meaning of Article 7, can determine penalties.²⁰⁶⁴ This means that both national and international law are accepted as source of determination of penalties, and that the criminal law defining penalties must be accessible and foreseeable in its effects.²⁰⁶⁵ Therefore, the Court requires certain degree of specificity in the determination of punishments considering that penalties “must be clearly defined in the law.”²⁰⁶⁶ In *Kononov*, for instance, the Court determined that “where international law did not provide for a sanction for war crimes with sufficient clarity, a domestic tribunal could, having found an accused guilty, fix the punishment on the basis of domestic criminal law.”²⁰⁶⁷ However, the rather flexible accessibility and foreseeability test used by the ECtHR to assess compliance with the *nulla poena* principle cannot be equated with the exigent requirement *lex scripta* or *lex certa* in civil law domestic legal systems. For instance, the Court evaluated the *nulla poena* principle in situations where domestic courts had retroactively re-characterized ordinary offences into international crimes, or even aggravating circumstances into separate crimes. In these cases, the Court considered that Article 7 was not infringed if the penalties imposed did not exceed the limits fixed in the law that made the conduct punishable at the time of commission.²⁰⁶⁸ Anyhow, the European Court considers that *nulla poena* comprises the *lex stricta* requirement, understood as the prohibiting criminal sanctions to be extensively construed to the accused’s detriment, for instance by analogy.²⁰⁶⁹

²⁰⁶⁴ *Kokkinakis v. Greece*, para. 52, and *Vasiliauskas v Lithuania*, para. 153, as explained in Council of Europe, ‘The “Quality of Law” Requirements and the Principle of (Non-)Retrospectiveness of the Criminal Law under Article 7 of the Convention’ (Research Division - European Court of Human Rights, 2019), para. 5.

²⁰⁶⁵ *G.I.E.M S.R.L. and Others v. Italy*, para. 242; *Del Río Prada v. Spain*, para. 91.

²⁰⁶⁶ *Başkaya and Okçuoğlu v. Turkey*, para. 36, as cited in Dana, ‘Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing’, 868.

²⁰⁶⁷ *Kononov v Latvia*, para. 212.

²⁰⁶⁸ *Berardi and Mularoni v. San Marino*, para. 55; *Ould Dah v. France*, cited and analyzed with further references in Council of Europe, ‘The “Quality of Law” Requirements and the Principle of (Non-)Retrospectiveness of the Criminal Law under Article 7 of the Convention’, paras 138–40.

²⁰⁶⁹ See *inter alia*, *Başkaya and Okçuoğlu v. Turkey*, paras 36, 42. Dana, ‘Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing’, 868, 883; Council of Europe, ‘Guide on Article 7 of the European Convention on Human Rights - No Punishment without Law: The Principle That Only the Law Can Define a Crime and Prescribe a Penalty’, para. 25; Boot, *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes against Humanity, War Crimes*, 50–51.

6.3.2.2 Doctrinal debates on the applicability and scope of *nulla poena in international law*

Teachings of the most prominent publicist may serve as a subsidiary means for the determination of rules of customary international law and for the identification of *ius cogens* norms.²⁰⁷⁰ Therefore, to determine the content and scope of the international *nulla poena* principle it is relevant to analyse the current doctrinal debates on the issue. The *nulla poena* principle has attracted much less interest from legal literature than *nullum crimen*.²⁰⁷¹ However, scholars do not agree on the content, applicability and status of the principle in the international arena. While some writers argue that the *nulla poena* is not applicable to the prosecution of international crimes,²⁰⁷² other authors consider that it has become a fundamental human right and has reached the status of international customary law,²⁰⁷³ that the evidence of the customary nature of *nulla poena* is almost as consistent as the evidence for *nullum crimen*,²⁰⁷⁴ or even that it has become a peremptory norm of international law.²⁰⁷⁵ Finally, some publicists find that *nulla poena* not only applicable in international law, but also as exigent as in some domestic legal systems.²⁰⁷⁶

²⁰⁷⁰ ILC, *Draft conclusions on identification of customary international law, with commentaries*, conclusion 14 and its commentary; ILC, *Draft conclusions on identification and legal consequences of peremptory norms of general international law (ius cogens), with commentaries*, conclusion 9 and its commentary.

²⁰⁷¹ Dana, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing', 858.

²⁰⁷² Kai Ambos, *La Parte General Del Derecho Penal Internacional*, trans. Ezequiel Malarino (Montivideo, Uruguay: Konrad-Adenauer-Stiftung e. V., 2005), 104; Bassiouni, *Crimes Against Humanity in International Criminal Law*, 158–59, 162; Cassese, *International Criminal Law*, 36; Damien Scalia, *Du Principe de Légalité Des Peines En Droit International Pénal* (Bruxelles: Bruylant, 2011), 11, 183–84, 223–24. For an overview and discussion of these scholarly positions, with further references, see Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 383–89; Ambos, 'Nulla Poena Sine Lege En Derecho Penal Internacional', 34.

²⁰⁷³ Meron, *War Crimes Law Comes of Age*, 244; Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 378–89; Kress, 'Nulla Poena Nullum Crimen Sine Lege', 32; Dana, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing', 878–79; Ferdinandusse, 'Direct Application of International Criminal Law in National Courts', 2005, 252–59.

²⁰⁷⁴ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 379.

²⁰⁷⁵ See above, footnotes 1944 and 1945.

²⁰⁷⁶ See, with reference to other writers sharing his view, in Dana, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing', 869.

A. Minimalistic approaches and discussions on the applicability of *nulla poena*

Despite the evidence of the customary nature of *nulla poena*, some scholars express serious doubts about whether the *nulla poena* principle applies in prosecution of international crimes, either tried in national or international tribunal.²⁰⁷⁷ For instance, Ambos stated that the legality principle in the international arena only requires previous criminalization of a conduct, but not previously established punishment and therefore, the *nulla poena* is not applicable.²⁰⁷⁸ For its part Bassiouni believes that the acceptance of penalties by analogy is a customary rule of international law practice and that *nulla poena* only applies in international criminal law by analogy.²⁰⁷⁹ According to Zappalà in prosecutions for international crimes *nulla poena* is only a principle of equity but does not give rise to a right of the individual.²⁰⁸⁰ In the same vein, Cassese considers that the principle is not applicable at the international level.²⁰⁸¹ Similarly, Scalia holds that penalties in international criminal law and international sentencing practice do not comply with the *nulla poena* principle and its requirements of certainty, accessibility and foreseeability.²⁰⁸²

However, these opinions denying the applicability of *nulla poena* in international crimes prosecutions are mostly grounded on the confusion over the content of the principle.²⁰⁸³ In fact, the *nulla poena* principle has very different meanings and do not

²⁰⁷⁷ For an overview and discussion of these scholarly positions, see Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 383–89.

²⁰⁷⁸ Ambos, *La Parte General Del Derecho Penal Internacional*, 104.

²⁰⁷⁹ Bassiouni, *Crimes Against Humanity in International Criminal Law*, 158–59, 162.

²⁰⁸⁰ Zappalà, Salvatore. *Human Rights in International Criminal Proceedings* (Oxford: Oxford University Press, 2003), 196, as cited in Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 383.

²⁰⁸¹ Cassese, *International Criminal Law*, 36. See other authors supporting this view in Ambos, ‘Nulla Poena Sine Lege En Derecho Penal Internacional’, 34.

²⁰⁸² Scalia, *Du Principe de Légalité Des Peines En Droit International Pénal*, 11, 183–84, 223–24.

²⁰⁸³ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 383–89. The debates get more confusing when scholars do not agree on the meaning of the opinion expressed by other author. For instance, Ambos considers that Cassese’s view in his dissenting opinion in *Tadic*, was that the principle is “still inapplicable in international criminal law”. Ambos, ‘Nulla Poena Sine Lege En Derecho Penal Internacional’, 34. However, De Souza argues that what Cassese considers still inapplicable in international criminal law is only the version of *nulla poena* existing in civil law domestic systems. De Souza Dias, ‘Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International

comprise the same requirements in different legal systems. In many domestic legal systems, particularly in those adhering to a civil law tradition, the principle requires specific tariffs of penalty for each crime. This strong version of the principle includes the *lex scripta*, *certa*, *stricta*, and *praevia* requirements. However, this robust *nulla poena* version goes well beyond the demands under international human rights law.²⁰⁸⁴ Therefore, if the domestic version of the principle and its requirements is the threshold to assess compliance with *nulla poena* in prosecutions for international crimes, it is easy to erroneously deduce the inapplicability of the principle. However, as proved above, the principle applies in international law, though with a rather limited content.

Some authors interpret the lack of specific penalties in international law as evidence of the inapplicability of *nulla poena*. This shows how the reliance on strong *nulla poena* versions is used to assess the applicability of the principle in international law. For instance, Cassese believes that the principle is not applicable at the international level since tariffs relating to sentences for each crime do not exist.²⁰⁸⁵ Similarly, Bassiouni considers that the failure in the ICTY and ICTR Statutes to establish specific penalties for each crime also amounted to a failure to comply with the *nulla poena* principle.²⁰⁸⁶ In the same line, other scholars hold that the refusal of these *ad hoc* tribunals to follow domestic sentencing practices constituted a violation of *nulla poena*.²⁰⁸⁷

However, the lack of specific tariffs only shows the impossibility of applying the strongest versions of the principle, but does not mean that it is not applicable at all. As reflected in international instruments and practice of international tribunals, the international *nulla poena* principle only requires that the penalty imposed is not harsher than the penalty applicable at the time the crime was committed. Therefore, the principle only grants individuals the right to foresee the maximum punishment associated to the crime, but not further specifications. When tribunals do not adopt stricter approaches, at least this *nulla poena* version is generally respected in prosecutions for international crimes.

Criminal Law', 49. Both referring to *Prosecutor v. Tadic*, Judgment in Sentencing Appeals, Separate Opinion of Judge Cassese, para. 4.

²⁰⁸⁴ Kress, 'Nulla Poena Nullum Crimen Sine Lege', para. 32; Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 384; Schabas, 'Sentencing by International Tribunals', 472–78.

²⁰⁸⁵ Cassese, *International Criminal Law*, 36.

²⁰⁸⁶ Bassiouni, *Crimes Against Humanity in International Criminal Law*, 176.

²⁰⁸⁷ See, with further references Dana, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing', 887–905.

Confusion in legal literature is also originated by a misunderstanding of the legal sources where the maximum penalties could be established.²⁰⁸⁸ As evidenced by the legality provisions in humanitarian and human rights international instruments, both domestic and international law are considered valid legal grounds for crimes and punishments. Similarly, international law is understood as comprising both treaty law, but as well non-statutory law. In this vein, it would be inconsistent to understand the international *nulla poena* principle as being more exigent than *nullum crimen*. Therefore, maximum penalties might be established in statutory norms, but as well in customary international law, or in general principles of law.²⁰⁸⁹

Customary international law provides for potential maximum penalties of death or life imprisonment for war crimes, crimes against humanity and genocide.²⁰⁹⁰ Such punishments are applicable at least since World War II, and have not been changed, at least for domestic courts' prosecutions.²⁰⁹¹ While in international tribunals death penalty is not longer available, life imprisonment continues to be applicable.²⁰⁹² At the same time, forfeiture of property and fines have also been available at least since the Second World War.²⁰⁹³ Since death penalty and life imprisonment are considered the potential maximum penalties applicable for the most serious international crimes, all prosecutions imposing those or less severe penalties for these crimes, would respect the international *nulla poena* principle.²⁰⁹⁴ As expressed by Schabas, "can an accused seriously argue that since Nuremberg the possibility of a serious prison sentence for war

²⁰⁸⁸ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 383–84.

²⁰⁸⁹ Schabas, 'Sentencing by International Tribunals', 472–78; Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 384–85.

²⁰⁹⁰ See, with further references Schabas, 'Sentencing by International Tribunals', 474; Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 385–86; De Souza Dias, 'Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law', 205.

²⁰⁹¹ See with various examples and references in Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 385–86; Schabas, 'Sentencing by International Tribunals', 474. Schabas, 474.

²⁰⁹² See above, Section 4.1.2.10 and Section 4.2.2.6. For further information on sentencing practice in domestic and international courts regarding international crimes, see Schabas, 'Sentencing by International Tribunals'; Ferdinandusse, 'Direct Application of International Criminal Law in National Courts', 2005, 255–59; Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 383–89.

²⁰⁹³ See with various examples and references Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 385.

²⁰⁹⁴ Schabas, 'Sentencing by International Tribunals', 472–78; Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 386.

crimes and crimes against humanity, up to and including life imprisonment, was not "accessible and foreseeable?"²⁰⁹⁵

B. Maximalist approaches and discussion on the content of *nulla poena*

Contrary to the scholarly opinions analysed, some authors consider that *nulla poena* is not only applicable in the international arena, but that its requirements are as strong as in some domestic legal system. Certain publicist express their concern about the weak guarantees provided by a *nulla poena* notion only requiring *lex praevia*, and consider that penalties associated to international crimes should be differentiated depending on the specific crime and the modes of participation.²⁰⁹⁶ Given the lack of specific scales of penalties in international law, and aiming to improve the clarity and specificity of penalties in prosecutions for international crimes, some scholars believe that tribunals should resort to the penalties provided by the domestic legislation applicable at the moment of commission.²⁰⁹⁷

Certain writers hold that the *nulla poena* version currently applicable in international law goes beyond the mere prohibition of retroactive increased penalties. For instance, after analysing treaties, custom and general principles of law Dana concludes that the international *nulla poena* principle not only encompasses *lex praevia*, but also *lex scripta*, *lex certa* and *lex stricta*.²⁰⁹⁸ According to this author state practice and *opinio iuris* suggest that customary international law recognizes a *nulla poena* principle including stronger requirements than those reflected in the provisions of the international instruments.²⁰⁹⁹

²⁰⁹⁵ Schabas, 'Sentencing by International Tribunals', 475.

²⁰⁹⁶ Ambos, 'Nulla Poena Sine Lege En Derecho Penal Internacional', 37; Dana, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing'.

²⁰⁹⁷ Explained, with further arguments in favour of applying penalties provided for ordinary crimes in domestic legislations, in Ambos, 'Nulla Poena Sine Lege En Derecho Penal Internacional', 38. Regarding the enforcement of penalties, Scalia considers that the application of the domestic law applicable to each individual would respect *nulla poena* but not the principle of equality. Damien Scalia, 'Légalité et égalité de l'exécution des peines en droit international pénal : un clair-obscur contrasté', *Revue de science criminelle et de droit pénal comparé* 4, no. 4 (2011): 788. See a comprehensive analysis of the challenges raised by sentence's enforcement in international criminal law in relation to these principle in Scalia, 'Légalité et égalité de l'exécution des peines en droit international pénal'.

²⁰⁹⁸ See, with reference to other writers sharing his view, in Dana, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing', 869.

²⁰⁹⁹ Dana, 878–79.

Regarding state practice, Dana reminds that the great majority of States adhere in their national legal systems to strong *nulla poena* versions and that the four legality requirements constitute general principles of law recognized in the majority of legal traditions.²¹⁰⁰ The author considers that States' statements in different international forums also evidence the applicability of a strong *nulla poena* principle since they reflect a generalized *opinio iuris*.²¹⁰¹ The failure of States to reach agreements and to establish concrete penalties in international criminal law is not caused by a lack of interest or *opinio iuris* but by political factors underlying the negotiations. The writer mainly refers to the negotiations leading to the ICTY and ICTR statutes,²¹⁰² where States decided that the *ad hoc* tribunals would ground punishments on the domestic sentencing practice of the country where the crimes were committed. According to Dana, this shows the concern of States regarding the lack of penalty tariffs in international law and their will to assure the respect of strong *nulla poena* requirements.²¹⁰³

While the *lex praevia* element is surely part of the international *nulla poena* principle, the applicability of *lex certa* and *lex scripta* to international crimes' prosecutions seems more doubtful. Statutory specific scales of penalties for each crime cannot be considered yet a requirement of the international *nulla poena* principle.²¹⁰⁴ Humanitarian and human rights instruments do not include any requirement regarding the specificity or form to determine punishments, and for the moment international criminal law does not provide for differentiated penalties for specific crimes.²¹⁰⁵ Similarly, international courts and tribunals do not adhere to strong *nulla poena* versions. However, considering the concern regarding the use of analogies expressed by different international tribunals and reflected in different international instruments, the

²¹⁰⁰ Ibid., 872-73, 925.

²¹⁰¹ Ibid., 924.

²¹⁰² Dana refers as well to the Rome Statute's negotiations where some States demanded the establishment of maximum and minimum penalties for each crime, or to define punishments as precisely as possible. Dana, 878.

²¹⁰³ Dana, 876.

²¹⁰⁴ Ferdinandusse, 'Direct Application of International Criminal Law in National Courts', 2005, 252; De Souza Dias, 'Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law', 49; Ambos, 'Nulla Poena Sine Lege En Derecho Penal Internacional'; Schabas, 'Sentencing by International Tribunals', 468-82; Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 378-89; Kress, 'Nulla Poena Nullum Crimen Sine Lege', para. 32.

²¹⁰⁵ Ferdinandusse, 'Direct Application of International Criminal Law in National Courts', 2005, 252; De Souza Dias, 'Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law', 49.

forthcoming inclusion of *lex stricta* as part of the international *nulla poena* principle seems more conceivable.²¹⁰⁶

6.3.2.3 *Final considerations*

As evidenced by state practice, *opinio iuris*, international instruments, decisions of international courts and tribunals and scholarly opinions, the *nulla poena* principle constitutes a rule of general international law. Despite some domestic legal systems, and certain international instruments adopt stronger versions, the *nulla poena* principle under customary is rather limited. The actual *nulla poena* principle in international law only comprises *lex praevia* and prohibits the imposition of heavier penalties than those applicable at the time of commission. Both domestic and international law are accepted as valid legal grounds for penalties. Despite some States, and certain international instruments as the Rome Statute, require *lex scripta*, the international *nulla poena* principle admits both statutory and non-statutory norms as valid legal sources.²¹⁰⁷

The *nulla poena* version that has become a rule of general international law is in conformity with the actual development of the international criminal justice system. While international criminal law has progressively evolved towards the elaboration of comprehensive criminal provisions precisely defining punishable conducts, this has not been the case of the associated punishments. International criminal law instruments do not provide yet for penalties, or at most they only establish the maximum punishment allowed. For instance, the ICC Statute does not stipulate a scale of penalties for each crime and only establishes a maximum potential penalty of 30 years, or life imprisonment if justified by the extreme gravity of the crime.²¹⁰⁸ States have failed to agree on the appropriate penalties for each international crime. Among other reasons, this results from the fact that States have divergent views about the gravity of the crimes, the seriousness of guilt of each offence and therefore, about the adequate punishments to be imposed.²¹⁰⁹ Consequently, despite domestic legal systems and some international courts, as the ECtHR, require high certainty and specificity standards

²¹⁰⁶ See in particular the position of the ECtHR, analysed above, in Section 5.1.8.

²¹⁰⁷ Kress, 'Nulla Poena Nullum Crimen Sine Lege', para. 32; Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 385–89; Schabas, 'Sentencing by International Tribunals', 474–75.

²¹⁰⁸ Rome Statute, Art. 77. 1(a)(b).

²¹⁰⁹ As explained, with an analysis of these and further reasons, in Cassese, *International Criminal Law*, 36; Ambos, 'Nulla Poena Sine Lege En Derecho Penal Internacional', 28–29, 37–38.

regarding penalties, this is not the case of the *nulla poena* principle under general international law.

The international principle only requires that domestic and international tribunals do not impose heavier punishments than those applicable at the moment of commission. The sentence cannot exceed the maximum penalty established in the law applicable to the individual at the time the crime was committed. As long as the punishment imposed falls within the maximum provided in the applicable law, there would be no violation of the international version of the principle.²¹¹⁰

Despite the international *nulla poena* is rather narrow, in certain situations it imposes relevant limits to judicial discretion. For instance, this is the case when tribunals resort to retroactive re-characterizations. One of the risks of this legal technique is that when re-characterizing a national offence into an international crime, the penalty imposed might be heavier than that applicable in domestic law at the time of commission. This risk flows from the fact that international crimes are considered more serious than ordinary crimes, and tribunals could be tempted to increase punishments in accordance. However, the international *nulla poena* principle requires that the penalty imposed does not exceed the one applicable at the time of commission. Since at that moment the conduct only constituted a crime under domestic law, even if later re-characterized into an international crime, the maximum potential punishment would be the one provided by domestic law at the moment of commission. Therefore, the re-characterization technique would only be compatible with *nulla poena* if it does not involve a harsher penalty than that established by the law criminalizing the conduct at the time of commission.²¹¹¹

The *nulla poena* under general international law does not raise foreseeability issues regarding the main modes of commission of international crimes since customary international law provides for them potential maximum penalties of death or life imprisonment.²¹¹² Therefore, all prosecutions imposing those or less severe penalties for

²¹¹⁰ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 378.

²¹¹¹ De Souza Dias, 'Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law', 11–31, 273–74; Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 323, 389–90. Also see the ECtHR decisions in *Berardi and Mularoni v. San Marino*, para. 55 and *Ould Dah v. France*, cited and analyzed with further references in Council of Europe, 'The "Quality of Law" Requirements and the Principle of (Non-)Retrospectiveness of the Criminal Law under Article 7 of the Convention', paras 138–40. For further information on retroactive re-characterization, the use of this technique by international tribunals, and doctrinal opinions, see above Section 2.2.2.5.C, Section 4.1.2.7 and Section 5.1.6. Also see below, Section 7.1.4.

²¹¹² See, with further references Schabas, 'Sentencing by International Tribunals', 474; Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 385–86; De Souza

these crimes, would respect the international *nulla poena* principle.²¹¹³ However, the guarantees provided by this international principle in some circumstances are questionable. Despite customary law provides for maximum penalties, there are various categories and sub-categories of crimes, and different modes of commission and participation that should receive differentiated sentences in accordance to their gravity.²¹¹⁴ The actual international *nulla poena* principle grants judges a great margin of discretion when determining penalties. Particularly regarding low level perpetrators and the least serious forms of commission and participation, where maximum penalties would not be imposed, limited *nulla poena* requirements provoke a significant diversity in sentencing practice.²¹¹⁵ This lack of foreseeability and consistency might undermine the legitimacy of the international justice system.

However, there is a growing tendency in the international community towards stronger versions of the principle,²¹¹⁶ fostered by the progressive development and codification of international criminal law that is gradually closing the gap with domestic legal systems. Despite in a lesser degree than *nullum crimen, nulla poena* is not alien to this trend. The ECtHR case law, adopting the *lex stricta* requirement is clear example. In the same vein, the Rome Statute constitutes a significant step towards a more exigent *nulla poena* principle. Despite it only provides general maximum penalties, it also includes a non-exhaustive list of mitigating and aggravating circumstances, along with a number of factors that should guide the determination of the penalty to be imposed by the Court. Similarly, when an individual is condemned for multiple offences, the Statute requires the ICC to determine the penalty for each crime before issuing an overall sentence. Compared to the generalized practice of single sentencing in international tribunals, this requirement is a significant move towards more exigent sentencing rules.²¹¹⁷ A stronger *nulla poena* principle would foster a more

Dias, 'Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law', 205.

²¹¹³ Schabas, 'Sentencing by International Tribunals', 472–78; Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 386.

²¹¹⁴ De Souza Dias, 'Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law', 205.

²¹¹⁵ See with examples in Ambos, 'Nulla Poena Sine Lege En Derecho Penal Internacional', 28; Dana, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing', 925.

²¹¹⁶ Ambos, 'Nulla Poena Sine Lege En Derecho Penal Internacional', 30; Ferdinandusse, 'Direct Application of International Criminal Law in National Courts', 2005, 258.

²¹¹⁷ Dana, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing', 925.

foreseeable and consistent sentencing practice in the international justice system. This would improve cohesion, coherence, and justice, and would certainly help increasing the legitimacy of the system and its institutions.²¹¹⁸ However, this would only be possible if the progressive effort of the international community to establish precise and comprehensive definitions of the different categories of crimes, is reflected as well regarding the system of penalties.

6.4 Non-core rules of the legality principle: strong versions of legality

The version of the legality principle that has become customary international law and an *ius cogens* norm only comprises the core elements of the principle, articulated around the non-retroactivity rule. It is the legality notion enshrined in the texts of the UDHR, ICCPR or ECHR, and can be described with the formula *nullum crimen, nulla poena sine iure*. However, stronger versions of legality, comprising further elements or requirements, are applicable in different domestic and international legal systems. Hereinafter, these requirements are individually analysed to assess whether they can be considered to be part of the international principle of legality.

6.4.1 *Lex scripta*

Despite some domestic, regional or international systems require written statutes as legal basis for individual criminal responsibility, *lex scripta* is not generally applicable in international law and cannot be considered to have become a customary international norm. Various domestic legal systems, mainly from the civil law tradition, have adopted a version of the legality principle that only admits the criminalization of conducts in previous statutory texts enacted by a legislature. It means that behaviours can only be punished if at the moment of commission they were defined as criminal in a written statute. Therefore, non-written legal sources as custom, general principles or jurisprudence are not considered in these legal systems as valid sources of criminalization. However, common law States do not adhere to this strong version of legality, and the *nullum crimen* principle is still understood as not requiring statutory laws.²¹¹⁹ Therefore, since the *lex stricta* requirement is not universally recognized in

²¹¹⁸ Dana, 927; Héctor Olásolo, ‘A Note on the Evolution of the Principle of Legality in International Criminal Law’, *Criminal Law Forum* 18 (2007): 312.

²¹¹⁹ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 356; Kress, ‘Nulla Poena Nullum Crimen Sine Lege’, para. 21. For some authors, the common law principle of legality could be defined as *nullum crimen sine lege minus lex scripta*, including non-retroactivity, certainty and the prohibition of analogies but not the requirement of written statutes. See, with further references, Kai Ambos, ‘Common Law y los disparos del muro -

domestic legal systems, it would be difficult to infer a customary international norm or a general principle of law requiring written statutes as the only valid source of criminalization. This conclusion is also endorsed by the fact that human rights instruments, to which most civil law States are parties, include a version of the legality principle that accepts customary law or general principles as valid grounds for individual criminal liability.²¹²⁰

The legality provisions in the UDHR and ICCPR expressly establish international law as a valid source of criminalization, referring to all sources of international law including written and non-written norms. The inclusion of the *lex scripta* requirement was explicitly debated and rejected when drafting both international instruments, and their *travaux préparatoires* show that international law is to be interpreted as comprising international custom or general principles of law.²¹²¹ Similarly, the notion of international law in ECHR Article 7 refers to international treaties, but as well to common law and international customary law.²¹²² The ECtHR has recognised both normative bodies as valid sources of criminalisation if the relevant norm was sufficiently accessible and foreseeable.²¹²³ Despite ACHR Article 9 does not necessarily provide for a strong legality principle, the IACtHR extended the content of the *nullum crimen* principle beyond its understanding in the universal and European human rights systems, and interpreted the provision as including *lex scripta*.²¹²⁴ Therefore, to comply with the requirements of the legality principle in the Inter-American human rights system, both crimes and punishments need to be established by statutory norms. However, in cases concerning serious human rights violations or

Artículo 7 de la Convención Europea de Derechos Humanos’, *Isonomía*, no. 20 (2004): 43. For further information and references on the principle of legality in common law States, see above, Section 1.3.2.

²¹²⁰ Ferdinandusse, ‘Direct Application of International Criminal Law in National Courts’, 2005, 236–37; Olásolo, ‘El Principio Nullum Crimen Sine Iure En El Derecho Internacional Contemporáneo’, 40. According the ILC, *Draft conclusions on identification of customary international law, with commentaries*, conclusion 7 (1), “Account is to be taken of all available practice of a particular State, which is to be assessed as a whole.” Therefore, it seems that even the practice of civil law countries do not indicate that *lex scripta* is becoming a customary international norm.

²¹²¹ For a comprehensive analysis of the UDHR and ICCPR’s negotiations and *travaux préparatoires* regarding *lex scripta*, see above, Section 3.1.1.2 and Section 3.1.2.2.

²¹²² For the notion of law in the ECHR, see above, Section 3.1.4.1.

²¹²³ *H. W. v. Germany*, para. 52.; *K.-H.W. v. Germany*, para. 62. For a comprehensive analysis on the role of non-written legal sources in the European human rights system see above, with further references, Section 5.1.4.5, Section 5.1.4.6.

²¹²⁴ See above, Section 5.2.3.2.

international crimes the position of the Inter-American Court is not as clear. The IACtHR has referred to international law, not excluding customary norms, to ground the inapplicability of amnesty acts or statutory limitations, and to flexibilize the content and applicability of the *nullum crimen* principle in order to enable prosecutions.²¹²⁵ This has been particularly true regarding the binding nature of customary norms prohibiting crimes against humanity.²¹²⁶ By its part, the legality provision in the ArCHR seems to embrace a strong version of legality, requiring written laws as source of criminalization.²¹²⁷ On the contrary, when interpreting the ACHPR, the ACtHPR has adopted a legality version closer to the accessibility and foreseeability standards than to strong notions characteristic of civil law domestic systems.²¹²⁸

The *ad hoc* international criminal tribunals followed the line of the universal and European human rights systems and adopted a rather flexible version of legality based on the accessibility and foreseeability test and did not required *lex stricta*.²¹²⁹ In different occasions, the tribunals recognized the value of international customary law and general principles as legal basis for individual criminal responsibility, and affirmed their compatibility with the requirements of the *nullum crimen* principle.²¹³⁰

²¹²⁵ See above, Section 5.2.4. Some IACtHR judges, in particular judge Cançado Trindade, recurrently referred to international customary norms in their separate opinions. See, with further references, *Blake v. Guatemala*, Merits, IACtHR, Separate Opinion of Judge A. A. Cançado Trindade, para. 24; *Barrios Altos v. Peru*, Merits, IACtHR, , Concurring Opinion of Judges A.A. Cançado Trindade, para. 14.

²¹²⁶ Joan Sánchez Montero, ‘Inter-American Court, Crimes Against Humanity and Peacebuilding in South America’, *International Catalan Institute for Peace*, no. 2 (2010): 23.

²¹²⁷ See above, Section 3.1.4.4.

²¹²⁸ See above, Section 5.3.2.

²¹²⁹ Cassese, *International Criminal Law*, 22–27; Antonio Cassese et al., *The Oxford Companion to International Criminal Justice* (Oxford, New York: Oxford University Press, 2009), 439; Olásolo, ‘El Principio Nullum Crimen Sine Iure En El Derecho Internacional Contemporáneo’, 32; Ferdinandusse, ‘Direct Application of International Criminal Law in National Courts’, 2005, 237.

²¹³⁰ *Prosecutor v. Tadic*, ICTY, Decision on Appeal on Jurisdiction, para. 143; *Prosecutor v. Milan Milutinović, Nikola Sainovic and Dragoljub Ojdanic*, ICTY, Decision on Ojdanic’s Motion Challenging Jurisdiction – *Joint Criminal Enterprise*, para. 9; *Prosecutor v. Akayesu*, ICTR, Judgement, para. 617; *Prosecutor v. Vojislav Seselj*, para. 15. In the *ad hoc* tribunals, as well as in the international prosecution after World War II, the recourse to customary international law was needed in order to comply with the non-retroactivity rule. Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 47.

On the contrary, the Rome Statute establishes a strong notion of legality and its Article 22 enshrines the *lex scripta* requirement.²¹³¹ The crimes under the jurisdiction of the Court are comprehensively defined in its Statute, and since the ICC can only prosecute crimes committed after its entry into force, and the Statute is its primary legal source, *lex scripta* can be generally fulfilled. However, the requirement of written statutes as the only source of criminalization, might be excepted in some particular circumstances where, to avoid retroactivity, customary law would be needed as a basis for prosecution. Together with its ordinary jurisdiction, the ICC can also acquire *extraordinary* jurisdiction involving States that were not a party to the Statute at the time the crimes were committed. These situations occur when a non-State party accepts the jurisdiction of the Court over a crime already perpetrated, or when the UN Security Council refers to the ICC a situation in which crimes have been committed involving a non-member State. In these circumstances, since the Rome Statute was not applicable to the individuals at the moment the crimes were committed, the *nullum crimen* principle would require the ICC to ground its prosecution on other legal sources already applicable to the offenders at the relevant time. The most likely and appropriate source of substantive law applicable to the individual would be customary international law existing at the time of commission.²¹³²

The legality notion adopted by the Rome Statute and the IACtHR, including the *lex stricta* requirement, is not generally applicable in international law and cannot be considered to have become a customary international norm. This can be inferred from the fact that the requirement of written statutes as the only valid source of criminalization is not universally recognized in domestic legal systems. Moreover, most international instruments do not exclude unwritten legal sources as legal basis for individual criminal responsibility.²¹³³ International custom and general principles have been recognized by the international community as valid grounds of criminalization, and have played a central role in domestic and international prosecutions as well as in

²¹³¹ For an analysis of the *lex scripta* requirement in the Rome Statute, see above, Section 4.2.2.5.

²¹³² Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 339; Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 45–46. Also general principles of law, applicable treaties or even domestic laws could be the legal basis for individual criminal responsibility in such situations. The preference of customary law has been explained above, in Section 4.2.3.2, together with an analysis of these particular circumstances when the ICC exercises *extraordinary* jurisdiction.

²¹³³ Kress, ‘Nulla Poena Nullum Crimen Sine Lege’, para. 21; De Souza Dias, ‘Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law’, 54; Olásolo, ‘El Principio Nullum Crimen Sine Iure En El Derecho Internacional Contemporáneo’, 40.

the development of international criminal law.²¹³⁴ Only the Rome Statute and the IACtHR require written statutes, though with significant qualifications. Therefore, the *lex scripta* requirement cannot be considered as generally applicable in international law,²¹³⁵ or as being part of the version of the legality principle that has reached the status of customary international law. In other words, the principle of legality as defined in human rights instruments or under customary international law do not require *lex scripta* and does not exclude unwritten norms as valid grounds of criminalization.²¹³⁶ The formula *nullum crimen, nulla poena sine iure* seems correct to define the actual international principle of legality, since the term *iure* can be understood as comprising unwritten legal sources as common law, customary international law or general principles of law recognized by the community of nations.

However, it should not go unnoticed that the use of customary international law or general principles as legal grounds for individual criminal responsibility might raise some issues. Their non-written character prevents the adoption of stronger versions of legality and grants lesser safeguards regarding specificity, accessibility and foreseeability.²¹³⁷ However, these concerns derived from the unwritten character of some legal sources seem to vanish regarding the core international crimes. Their prohibition is considered *ius cogens* and their prosecution has been for a long time well enshrined in international criminal law, resulting in numerous domestic and international convictions. Therefore, at least regarding the main conducts and forms of participation

²¹³⁴ Ferdinandusse, 'Direct Application of International Criminal Law in National Courts', 2005, 237, 239. It has been noted that international criminal law would not exist as we know today if the *lex scripta* requirement had been applicable in the prosecutions after World War II and in modern international criminal tribunals. Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 47.

²¹³⁵ Ferdinandusse, 'Direct Application of International Criminal Law in National Courts', 2005, 236; Kress, 'Nulla Poena Nullum Crimen Sine Lege', para. 21; Meron, *War Crimes Law Comes of Age*, 244; Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 259; Lamb, 'Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law', 735; Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 84.

²¹³⁶ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 359; Olásolo, 'El Principio Nullum Crimen Sine Iure En El Derecho Internacional Contemporáneo', 40; De Souza Dias, 'Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law', 54.

²¹³⁷ Olásolo, 'A Note on the Evolution of the Principle of Legality in International Criminal Law', 318; Hernán Hormazábal Malarée, 'Crímenes Internacionales, Jurisdicción y Principio de Legalidad Penal', in *Derecho Penal, Constitución y Derechos*, ed. Rafael Rebollo Vargas and Fernando Tenorio Tagle (Barcelona: Tirant lo Blanch, 2013), 267–71; Ferdinandusse, 'Direct Application of International Criminal Law in National Courts', 2005, 239.

of such crimes, questions about the specificity, accessibility and foreseeability regarding legal grounds for their prosecution seem unfounded. Anyhow, the progressive codification of international criminal law will lead to the progressive limitation of the role played by unwritten legal sources, enabling the adoption of stricter notions of legality that provide stronger guarantees to the accused.²¹³⁸

6.4.2 *Lex certa*

Lex certa can be understood as the highest specificity standards, usually adopted by States of the civil law tradition, regarding the laws defining criminal conducts. The principle of legality in these domestic legal systems requires criminal conducts to be precisely and comprehensively defined in written statutes. Some regional and international systems also adhere to this strong notion of legality, but the *lex certa* requirement is not applicable in general international law and is not comprised in the *nullum crimen* version that has become customary international law. This can be inferred from the fact that many domestic legal systems recognize non-written norms as valid legal grounds for criminalization. Due to their unwritten nature some of these legal sources, as common law, custom or general principles, cannot always meet high specificity standards.²¹³⁹ At times, the content of non-codified legal norms might be vague, undetermined and could evolve with time.²¹⁴⁰ Therefore, if *lex scripta* is not required in a legal system, it can be deduced that the highest specificity standards (*lex certa*) would be neither demanded regarding substantive criminal laws. As previously explained, the common law principle of legality does not determine written statutes as the only valid ground for criminal responsibility. Consequently, it can be inferred that the high specificity requirements applicable in civil law States (*lex certa*) are not necessarily applicable in common law legal systems. This lack of universal acceptance can be interpreted as a strong indicator that *lex certa* is not a customary international law or a general principle of law. In addition, human rights instruments, to which most civil law States are parties, comprise versions of the legality principle requiring specificity standards hardly compatible with *lex certa*.²¹⁴¹

²¹³⁸ Olásolo, 'A Note on the Evolution of the Principle of Legality in International Criminal Law', 316–18.

²¹³⁹ Bantekas, *International Criminal Law*, 25; Van der Wilt, 'Nullum Crimen and International Criminal Law', 520–21; Rauter, *Judicial Practice, Customary International Criminal Law and Nullum Crimen Sine Lege*, 48. See above, Section 5.1.4.6.

²¹⁴⁰ Bantekas, *International Criminal Law*, 25; Van der Wilt, 'Nullum Crimen and International Criminal Law', 520–21. See above, Section 5.1.4.6.

²¹⁴¹ According the ILC, *Draft conclusions on identification of customary international law, with commentaries*, conclusion 7(1), "Account is to be taken of all available practice of a particular

The principle of legality established in the UDHR and ICCPR admits non-written norms as valid sources of criminalization, and the compatibility of these legal grounds with the highest specificity standards seems doubtful. Therefore, it can be inferred that the legality principle enshrined in these international instruments do not comprise the *lex certa* requirement. By its part, the ECtHR also excludes the adoption of a *lex certa* requirement as understood in civil law systems, and assesses legal certainty based on the foreseeability and accessibility test. According to the European Court certainty is desirable and offences must be clearly defined so their effects are accessible and foreseeable.²¹⁴² However, the ECtHR also recognized that the consequences of a conduct do not need to be foreseeable with absolute certainty, since it would be a requirement impossible to satisfy and would bring excessive rigidity.²¹⁴³ Regarding international law the Court determined that the foreseeability test only requires the accused to be aware of the risk of being prosecuted, and therefore, to have a general sense of international laws and customs. However, whether the particular conduct can be qualified as one or another international crime is for the courts, and not for the perpetrator, to determine. This way, the European Court understands the *nullum crimen* principle as not including *lex certa* and only requires that the individual knew or could have known that his/her conduct was generally forbidden by the law and that it would involve criminal liability.²¹⁴⁴

By its part, the IACtHR grounds its notion of legality on the need of legal certainty and requires domestic criminal laws to clearly describe the prohibited conducts in a manner allowing to easily distinguish criminal conducts from those not involving criminal liability.²¹⁴⁵ It can be considered that the principle of legality developed by the Inter-American Court regarding domestic criminal laws comprises the *lex certa* requirement. However, when it concerns serious human rights violations and prosecutions for international crimes, its position is not as clear.²¹⁴⁶

State, which is to be assessed as a whole.” Therefore, it seems that even the practice of civil law countries do not indicate that *lex certa* is becoming a customary international norm.

²¹⁴² *G.I.E.M S.R.L. and Others v. Italy*, para. 242; *Kokkinakis v. Greece*, para. 52.

²¹⁴³ *Sunday Times v The United Kingdom*, para. 49.

²¹⁴⁴ For an analysis of the *lex certa* requirement as understood by the ECtHR, see above, Section 5.1.4.6.

²¹⁴⁵ Olásolo, ‘El Principio Nullum Crimen Sine Iure En El Derecho Internacional Contemporáneo’, 32. For a comprehensive analysis on the legality principle as understood in the Inter-American human rights system, see above, Section 5.2.

²¹⁴⁶ For an analysis of the IACtHR case law regarding prosecutions of human rights violations and international crimes, see above, Section 5.2.4.

In line with the notion of legality under the universal and European human rights system, the *ad hoc* international criminal tribunals accepted non-statutory legal sources, as customary international law, as valid legal basis to determine individual criminal responsibility. Therefore, the *nullum crimen* principle adopted by these tribunals did not comprise the *lex certa* requirement. On the contrary, the Rome Statute established comprehensive and detailed definitions of the different crimes under the jurisdiction of the ICC. Such precisely defined set of criminal conducts allowed the adoption of a strong legality principle compatible with the *lex certa* requirement. However, it should be reminded that in certain particular circumstances the Court can acquire *extraordinary* jurisdiction over conducts that at the moment of commission were not covered by the Rome Statute. To avoid the retroactive application of the Statute, the ICC need to ground prosecutions on other legal sources already binding the offenders when the crimes took place. As explained above, international customary law, general principles of law, applicable treaties or even domestic laws could be the legal basis for individual criminal responsibility in such circumstances.²¹⁴⁷ The compatibility of some of those alternative legal grounds with the *lex certa* requirements seems doubtful.

Since the *lex certa* requirement is not universally adopted in domestic legal systems, it would be difficult to conclude that such requirement has become customary international law or a general principle of law. At the same time, the adoption, with significant qualifications, of the *lex certa* requirement in the Rome Statute or by the IACtHR cannot be considered applicable under general international law.²¹⁴⁸ The legality principle in the universal and European human rights systems, and in the case law of most international criminal courts, does not exclude criminal prosecutions based on unwritten legal sources. In this way, the guarantees of legal certainty regarding the determination of conducts considered criminal do not extend beyond the accessibility and foreseeability standards.²¹⁴⁹ In other words, it can be concluded that the legality principle that has reached the status of international customary law, does not comprise the *lex certa* requirement.

²¹⁴⁷ The most likely and appropriate source of substantive law would be customary international law as analysed above, in Section 4.2.3.2.

²¹⁴⁸ Olásolo, 'El Principio Nullum Crimen Sine Iure En El Derecho Internacional Contemporáneo', 40.

²¹⁴⁹ Ibid.

6.4.3 Non-retroactivity of courts

The ACHR and some domestic legal systems establish the prohibition of *ex post facto* created courts. Despite international customary law does not preclude the adoption of broader or stricter versions of legality at a regional or national level, the prohibition of retrospective jurisdiction is not part of the international principle of legality. This requirement is not included in other international instruments and in fact, the creation of courts to adjudicate crimes already perpetrated is a common practice in the international legal system. Different international criminal tribunals have been created to exercise retroactive jurisdiction over conducts partially or totally committed before their establishment. For instance, it was the case of the Nuremberg and Tokyo Tribunals, but as well of the international criminal tribunals for the former Yugoslavia and for Rwanda, the Sierra Leone Special Court, the Iraqi Special Tribunal, the Cambodian Extraordinary Chambers and the Special Tribunal for Lebanon.²¹⁵⁰

The international principle of legality does not comprise the prohibition of retrospective jurisdictions. The creation of new courts, either international, national or mixed, to adjudicate crimes committed before their establishment is not prohibited by international customary law.²¹⁵¹ The legality principle is not an obstacle for courts to exercise their jurisdiction over conducts committed before their establishment, as long as the acts were already considered criminal at the moment of commission under some applicable law.²¹⁵² The context of the recent war in Ukraine has provided further evidence of the international acceptance of tribunals created to adjudicate crimes committed before their establishment. Ukraine, Russia and Belarus are not States parties to the ICC Statute and currently no international tribunal has jurisdiction over the alleged crime of aggression committed by Russia against Ukraine.²¹⁵³ To ensure

²¹⁵⁰ See above, Section 4.1.2.9.

²¹⁵¹ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 394; De Souza Dias, 'Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law', 149–50; Ferdinandusse, 'Direct Application of International Criminal Law in National Courts', 2005, 221.

²¹⁵² De Souza Dias, 'Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law', 153, 149–50; Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 394; Ferdinandusse, 'Direct Application of International Criminal Law in National Courts', 2005, 635.

²¹⁵³ As analysed above, in Section 4.2.3.2, the UN Security Council could refer the situation to the ICC Prosecutor, but it is very likely that Russia will block this initiative using its veto. Despite not being a State party to the Rome Statute, Ukraine accepted in 2014 the jurisdiction of the ICC over crimes committed on its territory. In fact, in March 2022 the ICC Prosecutor opened an investigation on the situation in Ukraine, covering war crimes, crimes against humanity and genocide. However, the requirements for the exercise of jurisdiction over the

accountability different actors in the international community have explicitly expressed the desirability of establishing an *ad hoc* tribunal to adjudicate such crime. Among them, it outstands a resolution of the Parliamentary Assembly of the Council of Europe calling for the urgent set up of an *ad hoc* international criminal tribunal with a “mandate to investigate and prosecute the crime of aggression allegedly committed by the political and military leadership of the Russian Federation.”²¹⁵⁴ The forty-six Council of Europe members unanimously adopted the resolution, providing additional evidence of the international acceptance of *ex post facto* created courts.

The principle of legality is also compatible with the extension of jurisdiction of already existing courts to conducts that when committed did not fall within their competence, if at the moment of commission the acts were already prohibited by some applicable law.²¹⁵⁵ In this sense, it is particularly relevant the case of the ICC. As explained, despite the Rome Statute establishes the prospective jurisdiction of the Court, in some particular situations the ICC can also exercise retrospective jurisdiction over conducts that when committed did not fall under its competence.²¹⁵⁶ Significant

crime of aggression are particular and, according to Rome Statute Article 15bis(5), the Court cannot prosecute nationals of non-State parties, as Russia or Belarus, for the crime of aggression.

²¹⁵⁴ Parliamentary Assembly of the Council of Europe, *The Russian Federation’s aggression against Ukraine: ensuring accountability for serious violations of international humanitarian law and other international crimes*, Res. 2436, 28 April 2022, para. 11.6, available at: <https://pace.coe.int/pdf/fa02a5672334527444dc210c5dab03df71864ae0fc169d8a890d751b53efdec1/resolution%202436.pdf>. Since Russia holds veto power, the establishment of an *ad hoc* tribunal by the UN Security Council acting under Chapter VII of the UN Charter, as was the case of the ICTY and ICTR, seems very unlikely. The Council of Europe proposed setting up a tribunal on the basis of a multilateral treaty concluded by a group of States, endorsed by the United Nations General Assembly and supported by the Council of Europe. For a scholarly debate on the desirability, modalities and scope of an *ad hoc* tribunal to prosecute the crime of aggression against Ukraine, see with further references Carrie McDougall, ‘Why Creating a Special Tribunal for Aggression Against Ukraine Is the Best Available Option: A Reply to Kevin Jon Heller and Other Critics’, *Opinio Juris* (blog), 15 April 2022, <https://opiniojuris.org/2022/03/15/why-creating-a-special-tribunal-for-aggression-against-ukraine-is-the-best-available-option-a-reply-to-kevin-jon-heller-and-other-critics/>; Oona Hathaway, ‘The Case for Creating an International Tribunal to Prosecute the Crime of Aggression Against Ukraine’, *Just Security* (blog), 20 September 2022, <https://www.justsecurity.org/83117/the-case-for-creating-an-international-tribunal-to-prosecute-the-crime-of-aggression-against-ukraine/>. For a critical opinion, see Kevin Jon Heller, ‘Creating a Special Tribunal for Aggression Against Ukraine Is a Bad Idea’, *Opinio Juris* (blog), 7 March 2022, <http://opiniojuris.org/2022/03/07/creating-a-special-tribunal-for-aggression-against-ukraine-is-a-bad-idea/>.

²¹⁵⁵ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 394.

²¹⁵⁶ See above, Section 4.2.3.2.

questions regarding the jurisdiction *ratione temporis* of international courts and tribunals are raised by permanent or continuous crimes when the criminal conducts started before their establishment or before the relevant State recognized their competence, but continued after that moment.²¹⁵⁷ While the regional human right courts recognize their jurisdiction over these situations, though with some limitations in the case of the ECtHR, for the ICC the issue remains undecided and it is still uncertain how the Court will tackle it.²¹⁵⁸

Despite some legal systems forbid *ex post facto* created courts, or *ex post facto* extension of jurisdiction of already existing courts, such norms are not comprised in the international legality principle and should not be in the nearest future. The *nullum crimen* principle protects individuals from being convicted for conducts that at the time of commission were not considered criminal. It allows citizens to foresee the legal consequences of their conducts and to act accordingly. If the conducts are previously and sufficiently clearly described as criminal, and the law is strictly interpreted by judges, expanding the content of legality, granting individuals the right to foresee the exact court that would judge them in case they commit a crime, does not seem to significantly increase their substantive safeguards. Such extension of the requirements associated to legality goes beyond the principle's rationales. At the same time, given the actual state of the international criminal system, and as evidenced by the situations above-explained, requiring previously established courts could constitute an insurmountable obstacle to bring criminals to justice. The prohibition of retrospective jurisdictions in the international arena would not significantly improve the accused's safeguards, but would be a major constraint to achieve justice's objectives, to fulfil State positive obligations regarding the fight against impunity, and to give response to victims' rights.

6.4.4 *Lex mitior*

Establishing the mandatory retroactive application of new criminal provisions more lenient to the accused, the *lex mitior* rule constitutes an exception to the general non-retroactivity principle. According to this mercy doctrine, if new criminal provisions more lenient to the accused are passed after the commission of the crime, they should be applied retroactively. Within the trend towards stronger legality versions in international law, the *lex mitior* rule has been progressively accepted as an additional

²¹⁵⁷ For the differences between permanent and continuous crimes, see above footnotes 1638 and 1806.

²¹⁵⁸ For an analysis of the ECtHR case law regarding permanent or continuous crimes, see above, Section 5.1.11. For the IACtHR position on the issue, see above, Section 5.2.4.4.

element of legality in different legal systems. It should be assessed whether the rule has already crystallized into a norm of general international law.

The rationales of this rule are diverse and vary depending on the legal system. While in some countries *lex mitior* is grounded on the respect of the principle of necessity and proportionality of sentences,²¹⁵⁹ in other States it is associated to the *favour rei* principle.²¹⁶⁰ Similarly, in some legal systems the retroactivity of more lenient laws is grounded on equality and fairness concerns and on the idea that the newer legislation is better law, or reflects more accurately the evolving ethical and social conscience regarding certain punishable conducts.²¹⁶¹ The scope and content of the *lex mitior* rule also varies depending on the legal system. State practice is rather diverse regarding the applicability of the principle to changes concerning the criminal consideration of the conduct or to the associated penalties. In order to preserve stability and certainty of legal relations, and also taken into account concerns of procedural economy, numerous States exclude the retroactive application of more lenient laws to cases for which a final judgment has already been issued.²¹⁶² Other legal

²¹⁵⁹ This is the case of many European civil law systems as France, Germany and Spain, as explained with further references in Francesco De Sanctis, 'Reconciling Justice and Legality: A Quest for Fair Punishment in Cases on Bosnian Atrocity Crimes', *Journal of International Criminal Justice* 12, no. 4 (2014): 853. For a comprehensive study on the *lex mitior* rule in different legal systems, see Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 271; De Sanctis, 'Reconciling Justice and Legality: A Quest for Fair Punishment in Cases on Bosnian Atrocity Crimes', 853–54; Trine Baumbach, 'The Notion of Criminal Penalty and the Lex Mitior Principle in the Scoppola v. Italy Case', *Nordic Journal of International Law* 80, no. 2 (2011): 140; Resta, 'El principio "nullum crimen, nulla poena sine lege" en el Derecho Penal Internacional. En particular en el Estatuto de la Corte Penal Internacional', 325.

²¹⁶⁰ De Sanctis, 'Reconciling Justice and Legality: A Quest for Fair Punishment in Cases on Bosnian Atrocity Crimes', 852–53.

²¹⁶¹ Similarly, the legal literature is not unanimous regarding the rationales of the *lex mitior* rule. For an analysis of the scholarly debates and the diverse state practice, see with further references De Sanctis, 853; Christina Peristeridou, 'The Principle of Legality in European Criminal Law' (Antwerp, Maastricht University, 2015), 16; Resta, 'El principio "nullum crimen, nulla poena sine lege" en el Derecho Penal Internacional. En particular en el Estatuto de la Corte Penal Internacional', 324–25; Baumbach, 'The Notion of Criminal Penalty and the Lex Mitior Principle in the Scoppola v. Italy Case'; Marina Mínguez Rosique, 'The Principle of Legality in Criminal Law in the Inter-American System for the Protection of Human Rights', in *Multilevel Protection of the Principle of Legality in Criminal Law*, ed. Juan Antonio Lascuraín Sánchez, Marina Rosique Mínguez, and Mercedes Pérez Manzano (Madrid: Springer, 2018), 107.

²¹⁶² Among others, it is the case of France, Germany, Belgium, Switzerland, New Zealand or China, as analysed in Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 273; De Sanctis, 'Reconciling Justice and Legality: A Quest for Fair Punishment in Cases on Bosnian Atrocity Crimes', 853; Resta, 'El principio "nullum crimen, nulla poena

systems embrace stronger *lex mitior* versions and extend the retroactivity of more favourable laws beyond the date of the final sentence.²¹⁶³ Conversely, some States do not embrace the mercy doctrine, or adopt very restricted versions.²¹⁶⁴ Anyhow, only one third of all UN member States, generally those adhering to the civil law tradition, include the *lex mitior* principle in their domestic legal systems.²¹⁶⁵ Therefore, the adoption of the principle does not seem sufficiently general, consistent, widespread and representative to be considered a rule of customary international law.²¹⁶⁶

Regarding the content and scope of *lex mitior* in international law, the international instruments including the principle usually provide for general definitions, open to interpretation.²¹⁶⁷ However, Article 24 of the Rome Statute limits the retroactive application of more lenient laws to cases prior to a final judgment.²¹⁶⁸ This limitation might raise concerns particularly regarding long-term prison sentences. If a conduct previously considered a crime under international law, is subsequently decriminalized, it seems problematic that individuals serving prison sentences continue to be imprisoned.²¹⁶⁹

However, a strong and unlimited *lex mitior* rule in international law is open to misuse. For example, an authoritarian regime could assure the future impunity of crimes committed by its agents by passing laws consenting or establishing low sentences for international crimes or human rights violations. If later on these crimes are prosecuted based on international criminal law, or on domestic laws approved once the authoritarian regime has been overthrown, the perpetrators could rely on *lex mitior* and argue that the more lenient law should be applied. Therefore, previous more

sine lege” en el Derecho Penal Internacional. En particular en el Estatuto de la Corte Penal Internacional’, 325.

²¹⁶³ It is the case of Spain, Italy, Portugal, Lebanon, Brazil or Cuba among others, as analysed in Resta, ‘El principio “nullum crimen, nulla poena sine lege” en el Derecho Penal Internacional. En particular en el Estatuto de la Corte Penal Internacional’, 325; Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 273.

²¹⁶⁴ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 271–74.

²¹⁶⁵ Ibid.

²¹⁶⁶ ILC, *Draft conclusions on identification of customary international law, with commentaries*, conclusion 8 and its commentary. See above, Section 6.1.1.

²¹⁶⁷ See above, Section 3.1.2.3, Section 3.1.2.4 and Section 3.1.4.4.

²¹⁶⁸ Rome Statute, Art. 24(2): “In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.”

²¹⁶⁹ Resta, ‘El principio “nullum crimen, nulla poena sine lege” en el Derecho Penal Internacional. En particular en el Estatuto de la Corte Penal Internacional’, 325–26.

lenient domestic laws would prevent prosecutions or adequate punishments.²¹⁷⁰ To prevent abuses or undesirable results, the leniency rule in international law is subject to certain limitations. Thus, *lex mitior* is generally understood in international law, particularly in the case law of the ICTY and the ECtHR, as being restricted to changes in the criminal law of the same legal system and therefore, not applicable between different systems or different sources of international law.²¹⁷¹ Given the multitude of sources in international criminal law, often applicable simultaneously, perpetrators might avoid prosecutions relying on other applicable and more beneficial laws.²¹⁷²

The mercy doctrine is widely recognized in humanitarian and human rights instruments. Despite the UDHR and the ECHR did not include the *lex mitior* rule, some years later, the ICCPR legality provision comprised as a novelty the leniency rule. After establishing *nullum crimen* and *nulla poena*, ICCPR Article 15 also includes *lex mitior* stating that “If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.”²¹⁷³ However, it should be noted that while no State made reservations regarding the non-retroactivity principle, some limited or rejected the *lex mitior* doctrine.²¹⁷⁴ Following the novelty introduced by the ICCPR, few years later the ACHR also established the mandatory retroactivity of lighter penalties.²¹⁷⁵ Similarly, the

²¹⁷⁰ As explained referring to Bosnia and Herzegovina, in De Sanctis, ‘Reconciling Justice and Legality: A Quest for Fair Punishment in Cases on Bosnian Atrocity Crimes’, 866–67.

²¹⁷¹ E.g., *Scoppola v Italy (Nº 2)*, ECtHR, paras 105–06, 109; *Prosecutor v. Tadic*, Judgment in Sentencing Appeals, ICTY, para. 21, as analysed with further case law and doctrinal references, in De Souza Dias, ‘Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law’, 53–54.

²¹⁷² De Sanctis proposes an exception to the *lex mitior* rule based on the necessity test, developed by the ECtHR to balance public interest against the interests of individuals. The author argues that a limitation of the leniency rule is needed to ensure a satisfactory balance between justice and legality, as further analysed below, in Section 7.1.4. De Sanctis, ‘Reconciling Justice and Legality: A Quest for Fair Punishment in Cases on Bosnian Atrocity Crimes’.

²¹⁷³ ICCPR, Art. 15(1). For an analysis of the application of the ICCPR *lex mitior* rule, see Aly Mokhtar, ‘Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects’, *Statute Law Review* 26, no. 1 (2005): 49. Also see above, Section 3.1.2.3.

²¹⁷⁴ The Declarations and Reservation to the ICCPR are available at: https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=en&mtdsg_no=IV-4&src=IND.

²¹⁷⁵ ACHR, Art. 9. For an analysis of the IACtHR case law interpreting and applying the *lex mitior* rule see Mokhtar, ‘Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects’, 49; Sergio García Ramírez and Julieta Morales Sánchez, ‘Consideraciones sobre el principio de legalidad penal en la jurisprudencia de la Corte Interamericana de Derechos Humanos’, *Cuestiones constitucionales*, no. 24 (2011): 222; María Luisa Piqué, ‘Artículo 9. Principio de Legalidad y de Retroactividad’, in *La Convención Americana de Derechos Humanos y Su*

ArCHR legality provision also seems to implicitly embrace *lex mitior*.²¹⁷⁶ Regarding humanitarian law, Additional Protocols I and II to the Geneva Conventions also include *lex mitior* in their legality provisions.²¹⁷⁷ Finally, Article 24 of the ICC Statute embraces as well *lex mitior*.²¹⁷⁸ However, the lack of precise penalties in the Rome Statute, and in international criminal law in general, might deprive the international *lex mitior* rule of its content to a large extent.²¹⁷⁹

Despite the *lex mitior* rule is not explicitly included in the ECHR or the ACHPR, the regional human rights tribunals have affirmed its applicability. In this vein, the African Court considers that the non-retroactivity principle is not applicable when an *ex post facto* law is more beneficial for the accused.²¹⁸⁰ For its part, since the ECHR does not explicitly comprise *lex mitior*, the ECtHR interpreted Article 7 as not including the right to a more lenient penalty provided by a law passed after the commission of the offence.²¹⁸¹ However, from 2009 the European Court revised its position and considered that, despite Article 7 does not explicitly embody *lex mitior*, it does not exclude granting the accused the benefit of a subsequent and favourable change in the law applied to an earlier offence.²¹⁸² In this vein, the Court considered *lex mitior* as a non-derogable fundamental principle of criminal law.²¹⁸³ Therefore, ECHR

Proyección En El Derecho Argentino, ed. Enrique M. Alonso Regueira (Buenos Aires, Argentina: La Ley, 2013), 171–72.

²¹⁷⁶ ArCHR, Art. 15. See above, Section 5.3.1.

²¹⁷⁷ GC Additional Protocol I, Art. 75(4)(c); GC Additional Protocol II, Art. 6(c).

²¹⁷⁸ Rome Statute, Art. 24.

²¹⁷⁹ Olásolo, ‘A Note on the Evolution of the Principle of Legality in International Criminal Law’, 312.

²¹⁸⁰ “The only exception where a criminal law may apply retroactively is when its application favours an individual by decriminalizing a previous criminal conduct which he/she is accused of or provides lighter penalty than the law which was in force during the commission of the conduct.” *Ingabire Victoire Umuhoza v. Republic of Rwanda*, ACtHPR Judgment, para. 110, and paras 111–17.

²¹⁸¹ For an analysis and reference of various cases, see Council of Europe, ‘The “Quality of Law” Requirements and the Principle of (Non-)Retrospectiveness of the Criminal Law under Article 7 of the Convention’, paras 146–47.

²¹⁸² *Scoppola v Italy (Nº 2)*, paras 105–06, 109. See a comprehensive explanation of this jurisprudential evolution and its subsequent application, in Council of Europe, paras 148–55; De Sanctis, ‘Reconciling Justice and Legality: A Quest for Fair Punishment in Cases on Bosnian Atrocity Crimes’, 854.

²¹⁸³ As explained, with various case law references, in De Sanctis, ‘Reconciling Justice and Legality: A Quest for Fair Punishment in Cases on Bosnian Atrocity Crimes’, 854; De Souza Dias, ‘Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law’, 53. Some ECtHR’s judges have explicitly stated that

Article 7 is currently understood as not only prohibiting the application of retroactive heavier penalties, but as well granting the right to the retroactive application of a subsequent and more lenient penalty in the accused's favour.

Based on the evidence provided regarding state practice, *opinio iuris*, international instruments and international case law, and despite its adoption by various domestic and international legal systems, it can be concluded that the *lex mitior* rule is not part of the international principle of legality and has not crystallized yet into a customary international norm.²¹⁸⁴ The rule stating the retroactive application of new criminal provisions more lenient to the accused is recognised in different international law instruments but, contrary to other legality elements, some States have formulated reservations limiting or rejecting its applicability. Similarly, only one third of UN member States, generally those adhering to the civil law tradition, include the *lex mitior* principle in their domestic legal systems.²¹⁸⁵ The ICRC in its 2005 report "Customary International Humanitarian Law" confirms this conclusion. It provides a description of the legality principle considered international customary law, and includes *nullum crimen* and *nulla poena*, but not *lex mitior*.²¹⁸⁶ However, as shown by the recent ECtHR case law there is trend in international law towards stronger and broader versions of legality, also including *lex mitior*.²¹⁸⁷ Anyhow, given the characteristics of international criminal law, a strong *lex mitior* can be subject to abuses. As previously explained, to prevent the mercy doctrine from producing impunity or undesirable results, some limitations to its content and scope are needed in international law.

that *lex mitior* is a rule of customary international law, and an *ius cogens* norm. See Maktouf and *Damjanović v. Bosnia and Herzegovina*, concurring opinion of Judge Pinto de Albuquerque joined by Judge Vučinić, para. 9.

²¹⁸⁴ De Souza Dias, 'Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law', 44, 268; Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 356.

²¹⁸⁵ Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 271–74.

²¹⁸⁶ ICRC, *Customary International Humanitarian Law*, Rule 101, 371–72.

²¹⁸⁷ De Sanctis, 'Reconciling Justice and Legality: A Quest for Fair Punishment in Cases on Bosnian Atrocity Crimes', 869.

CHAPTER 7: RECONCILING LEGALITY AND JUSTICE: SPAIN AS A CASE STUDY

The dialectical tension between the demands of justice and legality is a characteristic component of all legal systems that becomes particularly evident when democratic States, governed by the rule of law, try to prosecute atrocities committed in its dictatorial or warring past. Various methods and legal techniques have been found to reconcile these conflicting demands, but their applicability depends on the different notions and interpretations of the principle of legality. Hereinafter, an overview of this conflict between legality and justice is provided together with an assessment of some exploratory solutions. Then, Spain is analysed as a case study since it serves as a shining example of how these conflicting demands can be reconciled, but as well of how the different understandings and implementations of the legality principle can tip the balance towards one side or the other.

7.1 Reconciling legality and justice

The international legal status of each legality element has been examined, concluding that States have the obligation to adopt legality versions comprising, at least, those requirements that have become norms of general international law. It is relevant to assess now if States are allowed to adopt stronger legality versions in their domestic legal system, and if so, to evaluate the consequences and limits to such extension. The general trend, both in domestic and international legal systems, is to strengthen the requirements of the legality principle to, among other reasons, reinforce legal certainty and the guarantees and safeguards of the accused. Simultaneously, the international community has adopted in the last decades an already well-entrenched accountability culture regarding international crimes and human right violations, grounded on the fight against impunity, on the emergence of certain victims' rights, and particularly, on an expanding set of positive duties of States.

While these two parallel trends generally complement and reinforce each other, in some particular circumstances they may also collide. This is particularly the case when domestic courts prosecute past atrocities fitting the definition of an international crime, but that were committed before domestic laws incorporated such legal classifications. In such situations, the implementation of strong legality requirements may appear as an insurmountable obstacle to ensure accountability. In these circumstances the strongest legality versions may conflict the satisfaction of material justice demands and the fulfilment of certain victims' rights and the duty of States to prosecute serious human rights violations.

Hereinafter the situations where the strongest legality version may prevent the prosecution of international crimes and human rights violations will be first analysed. Then the content and legal status of the obligation of States to investigate, prosecute and punish will be generally assessed. Finally, the conflict between the principle of legality and these States obligations will be outlined, together with an overview of some exploratory solutions.

7.1.1 Situations of conflict between justice and legality

All legal systems contain as a characteristic component the dialectical tension between the demands of justice and legality.²¹⁸⁸ Such tension become particularly evident when democratic States, governed by the rule of law, try to prosecute atrocities committed in its dictatorial or warring past that, due to their gravity or their systematic or widespread character, fit the definition of an international crime, but were committed before domestic laws incorporated such legal classifications.²¹⁸⁹ Besides better reflecting the gravity, dimension and structure of the crimes, the interest of domestic courts in classifying the offences as international crimes lies on their associated special legal regime that might facilitate or even constitute the only possibility to enable criminal prosecutions.²¹⁹⁰ Among other characteristic associated to

²¹⁸⁸ George P. Fletcher, *Basic Concepts of Criminal Law* (Cary: Oxford University Press, 1998), 212.

²¹⁸⁹ Various domestic courts throughout the world have dealt with these dilemmas in the last decades reaching very different outcomes. However, this Section is mainly focused on the legal problems and diverse solutions issued by domestic courts when facing the atrocities committed during the Franco regime in Spain (1936-1977), during the dictatorships in various Latin American countries in the 1970s, 1980s and 1990s, (e.g., Argentina, Chile, Peru or Uruguay) or during the armed conflicts occurred in the same area and time (e.g., Colombia). Because of their gravity, their systematic or widespread character, and because they were mostly directed against civilians, these episodes of collective violence seem to fall within the definition of international crimes, and in particular, of crimes against humanity. As analysed hereinafter, the domestic courts of Spain, Argentina or Chile, among others, have faced the dilemma raised by the need to classify the past atrocities as international crimes, despite such criminal offences did not exist in domestic legislation at the time of commission, to overcome legal obstacles as amnesties and statutes of limitations, or to enable prosecutions based on universal jurisdiction. See information on these case in Kai Ambos and Ezequiel Malarino, eds., *Persecución Penal Nacional de Crímenes Internacionales En América Latina y España* (Uruguay: Konrad-Adenauer-Stiftung A.C., 2003); Maculan, *Los crímenes internacionales en la jurisprudencia latinoamericana*; Ellen Lutz and Kathryn Sikkink, 'The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America', *Chicago Journal of International Law* 2, no. 1 (2001): 1–34.

²¹⁹⁰ However, international crimes also require an additional effort in terms of providing evidence of the contextual element that might be challenging for domestic criminal proceedings, as

these criminal categories it is generally understood that statutory limitations cannot prevent their prosecution, they cannot be subject to amnesties or similar legal measures, and they can enable domestic criminal proceedings based on the principle of universal jurisdiction.²¹⁹¹ However, convictions based on criminal classifications that at the time of the events had not been yet incorporated into the domestic legal system, although already existent in international law, raise evident questions regarding different elements of the legality principle, and particularly the *lex praevia* requirement.

At least two situations can be identified where the classification of past atrocities as international crimes seems necessary for their prosecution, but where such categorization raises significant challenges for the legality principle. First, when past atrocities were tolerated or not criminalized under domestic laws at the time of commission.²¹⁹² And second, when the conducts were already considered criminal under domestic laws as ordinary offences, such as murder, torture, or sexual offences, but they are covered by amnesty laws, or the passage of too much time without judicial proceeding render the crimes time barred. This is particularly the case of States that reached democracy through agreed or negotiated transitions and where the political, judicial and social elites holding the power were not replaced with the change of regime and, for different reasons, would oppose any attempt to prosecute past crimes.²¹⁹³ This aim to guarantee immunity to those responsible of the past crimes can be legally

explained in Elena Maculan, ‘International Crimes or Ordinary Crimes? The “Dual Classification of the Facts” as an Interpretive Method’, *International Criminal Law Review* 21, no. 3 (22 April 2021): 409–10.

²¹⁹¹ Maculan, «International Crimes or Ordinary Crimes?», 406-7; Bassiouni, «International Crimes», 65-66; Xavier Philippe, «The Principles of Universal Jurisdiction and Complementarity: How Do the Two Principles Intermesh?», *International Review of the Red Cross* 88, n.º 862 (2006): 377-79. Ollé Sesé classify these crimes as first degree international crimes, as explained in Manuel Ollé Sesé, *Justicia universal para crímenes internacionales*, Temas La Ley (Las Rozas (Madrid): La Ley, 2008), 184-200.

²¹⁹² These problems were faced, among others, by German courts after the Second World War when trying Nazi crimes, and again after the reunification, when prosecuting some crimes committed under the G.D.R. As analysed above, in Section 5.1.4.4. See, among others Gerhard Werle, “‘We Asked for Justice and Got the Rule of Law’: German Courts and the Totalitarian Past”, *South African Journal on Human Rights* 11, no. 1 (1995): 70–83.

²¹⁹³ Ruti G. Teitel, ‘Transitional Justice Genealogy’, *Harvard Human Rights Journal* 16 (2003): 77. The Spanish case provides a telling example. The active role of the judiciary in the Francoist repression, and the lack of renewal with the arrival of the democracy, constitutes a fundamental element explaining the resistance to any judicial accountability. As explained, compared with the Argentinean and Chilean case in Paloma Aguilar, ‘Jueces, Represión y Justicia Transicional En España, Chile y Argentina’, *Revista Internacional de Sociología* 71(2) (2013): 281–308. In the same vein, see Elin Skaar, ‘¿Puede La Independencia Judicial Explicar La Justicia Postransicional?’, *América Latina, Hoy* 61 (2012): 14–48.

articulated through amnesty acts or similar legal mechanisms preventing criminal prosecutions. However, in transitional justice contexts amnesties can respond as well to other objectives or interests that might be endangered by judicial inquiries of the past, as securing stability, consolidating the democratic regime, preserving peace, or achieving reconciliation.²¹⁹⁴ Anyhow, the passage of too much time without judicial proceeding might render the crimes time barred.²¹⁹⁵ Due to their special legal regime, the classification of past atrocities as international crimes provides an useful response to overcome the obstacles of amnesty acts and statutes of limitations. However, these crime categories have been belatedly incorporated in domestic legal systems.

The 20th century has been marked by numerous episodes of collective violence committed in warring or dictatorial contexts. However, domestic legal systems were often unprepared to face atrocities of such magnitude and lacked criminal classifications adapted to the gravity of the events. After World War II, international criminal law emerged to give responses to these situations, providing criminal categories such as genocide, crimes against humanity or war crimes. Despite being well entrenched in the international legal system, only in recent years these international crimes have been broadly incorporated in domestic systems, often encouraged by the need to implement the 1998 Rome Statue at the national level.²¹⁹⁶ The problems faced by democratic systems when prosecuting past crimes are often originated by such late incorporation of international crimes in their domestic legal system.

In the above-mentioned situations when domestic laws did not criminalize past atrocities at the time of commission, or their persecution is time barred or covered by an amnesty law, the competing demands of legality and justice appear incompatible

²¹⁹⁴ As explained, with further references in Maculan, ‘International Crimes or Ordinary Crimes?’, 407. For further information on the debates on the desirability of certain amnesty laws in transitional justice contexts, see above, Section 5.1.10 and Section 5.2.4.3.

²¹⁹⁵ Even where criminal trials have been possible, the great number of crimes, victims or offenders, or the length, volume and complexity of these proceedings, might cause that when the limitation periods end, many crimes will not have been yet investigated. Maculan, 408.

²¹⁹⁶ However, many States have not incorporated yet in their domestic legislation some international crimes. For a comprehensive database of the domestic implementation of the core international crimes, providing access on a country-by-country basis to the relevant domestic legislation and judicial decisions, see <https://www.derechos.org/intlaw/>. An analysis of further reasons behind the difficulties to sanction international crimes, and in particular international humanitarian law violations, is provided, together with some exploratory, in Xavier Philippe, «Sanctions for violations of international humanitarian law: the problem of the division of competences between national authorities and between national and international authorities», *International review of the Red Cross* 90, n.º 870 (2008): 359-70.

and States face what has been called the "rule of law dilemmas".²¹⁹⁷ The strict respect of the fundamental safeguards associated to the legality principle and the non-retroactivity rule may render the prosecution of past atrocities impossible. On the contrary, impunity can only be avoided if the fundamental guarantees of the rule of law are not fully respected. In other words, if domestic courts chose to classify the facts as ordinary crimes, already established at the time of commission in domestic legislation and therefore, compatible with the strongest versions of legality, prosecutions may be hampered since ordinary offences can be subject to statutory limitations or amnesty acts. On the contrary, if the courts opt for the classification of the events as international crimes, provided that their characteristic elements are present, it would avoid legal obstacles for prosecutions, but it would conflict with fundamental guarantees derived from the legality principle as enshrined in the constitutional legal order of many States.

This dilemma seems more pressing in transitional justice contexts. New democracies desire to prove a substantial change with respect to the previous authoritarian regime, scrupulously respecting the rights of all citizens, including those who may have committed serious atrocities under the previous regime.²¹⁹⁸ A new democracy that fails to respect the basic principles, procedures and guarantees of the rule of law when dealing with past crimes, risks undermining the credibility of its legal system and of the democracy itself since its actions would remind the abusive practices of the previous regime.²¹⁹⁹ Nevertheless, the rigorous respect of strong legality requirements may prevent criminal accountability, the satisfaction of material justice demands and the fulfilment of certain victims' rights and States obligations.

However, the conflict is only irresolvable if the legality principle is understood as requiring *lex certa, praevia, scripta* and *stricta*. Only the requirements associated to the strongest versions of legality would prevent in these situations accountability through criminal law. More limited or flexible legality notions, in accordance with general international law, would enable to ground criminal prosecution on international law even if the conducts were not domestically considered criminal at the time of commission, and to classify the acts as international crimes even if when committed such offences were only contemplated in international law. The adoption of less stringent legality notions means a reduction of the accused's guarantees at the same time it enables the fulfilment of other rights, objectives and obligations. If the

²¹⁹⁷ Teitel, 'Transitional Justice Genealogy', 77.

²¹⁹⁸ Eric A. Posner and Adrian Vermeule, 'Transitional Justice as Ordinary Justice', *Harvard Law Review*, no. 117 (2003): 792.

²¹⁹⁹ Ibid.

prosecution of past atrocities is based on non-written international legal sources, as international custom or general principles, the conflict with strong legality versions, and in particular with the *lex scripta* and *lex certa* requirements, seems more severe. However, as assessed throughout this work, the international legality principle preserves the fundamental rationales of the principle and provides substantial guarantees to the accused.

Nothing in international law prevents States from adopting in their domestic legal systems stronger legality versions beyond the requirements of customary international law. However, when applied in practice the *nullum crimen*, as all legal principles, interacts and sometimes conflicts with other principles or rights. Therefore, when a country decides to broaden the requirements and scope of the legality principle exceeding the requirements of general international law, it has to consider other conflicting principles, rights and obligations. In particular, the strictest legality versions provide stronger guarantees to the accused, but as well they might involve some difficulties to provide accountability for past human rights violations and therefore, to fulfil certain rights of the victims and obligations of States that are emerging in international law. Despite the content, scope and legal status of these new rights and obligations are beyond the purpose of this study, a general overview is needed to outline the possible outcomes in case of conflict with certain legality elements, and to contour some conciliatory solutions.

7.1.2 The obligation of States to investigate, prosecute and punish

The *ius puniendi* has always been considered as a prerogative of States and a fundamental element of their sovereignty.²²⁰⁰ Based on the premise that individuals need to be protected against potential abuses in the exercise of such power, efforts have always focused on setting negative obligations or limits to this punitive right of States. The relationship established in the normal exercise of criminal jurisdiction is in between an individual that has allegedly committed an offence and the courts of justice, as neutral States' organs. However, when the main international crimes come into play, such logic is inverted since they are normally committed by the State, or under its protection. Consequently, in these circumstances State's organs will possibly be reluctant to effectively exercise its *ius puniendi*. Given such extremely uneven relation between victim and perpetrator, domestic legal systems might lack sufficient tools to

²²⁰⁰ Ana Messuti, *Un Deber Ineludible: La Obligación Del Estado de Perseguir Penalmente Los Crímenes Internacionales*, 1^a (Buenos Aires, Argentina: Ediar, 2013), 499.

efficiently provide a remedy and guarantee the fulfilment of the victims' rights.²²⁰¹ Over the last few decades the international community has developed a series of States obligations to provide responses to these situations ensuring the effective protection of victims' rights and fighting impunity to prevent the future commission of similar crimes. These obligations include the duty of States to investigate, prosecute and punish international crimes or human rights violations committed on its territory. Therefore, the *ius puniendi*, initially conceived as a right or a prerogative of States, has become in some circumstances, an international obligation, *officium puniendi*.²²⁰²

As analysed hereinafter, the international obligation of the State to investigate, prosecute and punish international crimes or human rights violations committed on its territory flows from the *ius cogens* character of the prohibition of some international crimes but it is also explicitly recognized in different international instruments. Human rights courts have developed as well these duties based on human rights instruments. As analysed hereinafter, the legal literature is not unanimous regarding the scope and content of this obligation of States, but its existence is generally recognized,²²⁰³ being considered by some authors as a rule of customary international law,²²⁰⁴ and even an *ius cogens* norm.²²⁰⁵

²²⁰¹ Luigi Ferrajoli, *Derecho y Razón. Teoría Del Garantismo Penal*, 9th ed. (Madrid: Trotta, 2009), 937; Messuti, *Un Deber Ineludible: La Obligación Del Estado de Perseguir Penalmente Los Crímenes Internacionales*, 499–500; Carmen Tomás-Valiente Lanuza, 'Deberes positivos del Estado y Derecho penal en la jurisprudencia del TEDH', *Indret: Revista para el Análisis del Derecho*, no. 3 (2016): 29.

²²⁰² See, with further references, Elena Maculan and Alicia Gil Gil, 'The Rationale and Purposes of Criminal Law and Punishment in Transitional Contexts', *Oxford Journal of Legal Studies* 40, no. 1 (2020): 134.

²²⁰³ The works of N. Roth-Arriaza and D. Orentlicher in 1990 and 1991 can be considered the firsts relevant scholarly opinions on the obligation of States to investigate and prosecute: Naomi Roht-Arriaza, 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law Comment', *California Law Review* 78, no. 2 (1990): 449–514; Diane F. Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime', *Yale Law Journal* 100, no. 8 (1991): 2537–2615.

²²⁰⁴ Kai Ambos, *La Parte General Del Derecho Penal Internacional*, trans. Ezequiel Malarino (Montivideo, Uruguay: Konrad-Adenauer-Stiftung e. V., 2005), 15; Ward Ferdinandusse, 'Direct Application of International Criminal Law in National Courts' (Amsterdam, University of Amsterdam, 2005), 188, 207.

²²⁰⁵ Gerhard Werle, *Principles of International Criminal Law*, 3rd ed. (Oxford: OUP, 2014), 80; Messuti, *Un Deber Ineludible: La Obligación Del Estado de Perseguir Penalmente Los Crímenes Internacionales*, 295–432; John A. E. Vervaele, 'Violations graves des droits de l'homme et crimes internationaux. Du jus (non) puniendi de l'État nation à un deber puniendi impératif tiré du jus cogens', *Revue de science criminelle et de droit pénal comparé* 3, no. 3 (2014): 519; Bassiouni, 'International Crimes', 65–66. For a contrary opinion, denying the *ius cogens*

7.1.2.1 Legal grounds and international status

The obligation of States to investigate, prosecute and punish international crimes and human rights violations can find different legal grounds. It can flow from the *ius cogens* character of the prohibition of some international crimes but it is also explicitly recognized in various international treaties and conventions. However, this positive obligation of States has been developed as well based on human rights instruments and the need to take active measure to assure the effective respect of the rights enshrined therein. The international legal status of this obligation is not settled, but it seems that it is emerging as a rule of international customary law and even as an *ius cogens* norm.

A. Obligations of States streaming from international criminal law

The obligation to prosecute flows from the *ius cogens* character of the prohibition of some international crimes as, among others, genocide, crimes against humanity or war crimes.²²⁰⁶ While the customary nature of the obligation to prosecute is generally recognized, it is still uncertain whether the duty has already become a peremptory norm. It is claimed that the *ius cogens* status of core international crimes entails certain obligations *erga omnes*, as the non-applicability of statutes of limitations, amnesties and immunities, and the activation of the principle of universal jurisdiction, but as well, among others, the duty to prosecute or extradite.²²⁰⁷ It has

character of the duty to prosecute, see with further references Elena Maculan, 'Derecho Penal, Obligaciones Internacionales y Justicia de Transición', *Revista Penal*, no. 4 (2018): 120.

²²⁰⁶ For further information on international crimes considered *ius cogens* see, with further references, ILC, *Draft conclusions on identification of customary international law, with commentaries*, conclusion 23 and its commentary; *Prosecutor v. Furundzija*, ICTY Trial Ch., paras 155-7; Bassiouni, 'International Crimes', 63, 68; Antonio Cassese, 'For an Enhanced Role of Jus Cogens', in *Realizing Utopia: The Future of International Law*, ed. Antonio Cassese (Oxford: Oxford University Press, 2012), 162; Andrea Bianchi, 'Human Rights and the Magic of Jus Cogens', *European Journal of International Law* 19, no. 3 (1 June 2008): 493; Elena Maculan, *Los crímenes internacionales en la jurisprudencia latinoamericana*, Derecho penal y criminología (Madrid: Marcial Pons Ediciones Jurídicas y Sociales, 2019), 71-87.

²²⁰⁷ See, with further references, ILC, Third report on peremptory norms of general international law (*jus cogens*) by Dire Tladi, Special Rapporteur, paras 79, 115-20; Bassiouni, 'International Crimes', 63, 65-66; Sosa, 'Aut Dedare Aut Judicare, Crimen de Lesa Humanidad y Corte Penal Internacional', 361-456; Messuti, *Un Deber Ineludible: La Obligación Del Estado de Perseguir Penalmente Los Crímenes Internacionales*, 153-430; Vervaele, 'Violations graves des droits de l'homme et crimes internationaux. Du jus (non) puniendi de l'État nation à un deber puniendi impératif tiré du jus cogens', 491-98. For a discussion, with further references, on the duty to

been argued that if a crime has *ius cogens* character, the associated obligation to prosecute it will be of the same nature, and contrary, if the duty to prosecute a crime is not considered to be a peremptory norm, the norms prohibiting and punishing it would lose such character as well.²²⁰⁸ The consequences of an *ius cogens* norm are *obligations erga omnes*, and not optional rights. Therefore, the *ius cogens* character of the prohibition of international crimes does not only entail the right of States to prosecute them, but an international non-derogable obligation.²²⁰⁹ Similarly, there is widespread recognition for the argument that punishment of *ius cogens* crimes is an intrinsic and necessary element for their prevention and therefore, the duty to prosecute is as well a peremptory norm.²²¹⁰ However, some questions have been raised regarding the customary or *ius cogens* character of the obligation to prosecute core international crimes. It is uncertain whether state practice is sufficiently consistent²²¹¹ and some

prosecute as a consequence of the *ius cogens* character of the prohibition international crimes, see Thomas Kleinlein, 'Jus Cogens Re-Examined: Value Formalism in International Law', *European Journal of International Law* 28, no. 1 (1 February 2017): 308–9. By its part, Ferdinandusse explains that the primary obligation flowing from the *ius cogens* character of the prohibition of core international crimes is the duty to not contribute, by act or omission, to the commission of such crimes. According to the author this obligation has surely *ius cogens* status. Ferdinandusse, 'Direct Application of International Criminal Law in National Courts', 188.

²²⁰⁸ Messuti, *Un Deber Ineludible: La Obligación Del Estado de Perseguir Penalmente Los Crímenes Internacionales*, 432.

²²⁰⁹ Bassiouni, 'International Crimes', 65–66. However, Maculan denies the customary or *ius cogens* character of the obligation to prosecute arguing that state practice and *opinio iuris* is not sufficiently consistent. Maculan, 'Derecho Penal, Obligaciones Internacionales y Justicia de Transición', 120. Ferdinandusse recognises the customary nature of the obligation to prosecute, but considers that the fact that the core international crimes are *ius cogens* does not mean that the duty to prosecute is also a peremptory norm. Ferdinandusse, 'Direct Application of International Criminal Law in National Courts', 188–89.

²²¹⁰ As explained, with further references in Ferdinandusse, 'Direct Application of International Criminal Law in National Courts', 188.

²²¹¹ The lack of sufficiently consistent and widespread state practice is suggested by the fact that numerous States have refused to domestically prosecute international crimes. Maculan, 'Derecho Penal, Obligaciones Internacionales y Justicia de Transición', 120. For a study on state practice regarding the duty to prosecute international crimes, see Ferdinandusse, 'Direct Application of International Criminal Law in National Courts', 200–205. However, many of those States have ratified international instruments explicitly establishing the duty to prosecute, and they are part of international organisations that issue resolutions and declaration in the same vein. This can be understood as evidence of state practice and *opinio iuris* (see above, Section 6.1.1) suggesting the customary nature of the obligation. Ferdinandusse has convincingly argue that the question of "whether general human rights law imposes a duty to prosecute territorial core crimes is primarily one of interpretation of existing customary rights and obligations, rather than an assessment of a brand new customary rule. (...) There is little doubt that States are under a customary obligation to respect and ensure human rights like the right to life, freedom of

exceptions to the general obligation to prosecute have been identified, questioning its non-derogable character, and therefore its *ius cogens* status.²²¹²

The international obligation to prosecute those international crimes also flows from various international treaties and conventions. Among others, the obligation is explicitly recognized in the Geneva Conventions,²²¹³ the Genocide Convention²²¹⁴ and the Convention against Torture.²²¹⁵ By ratifying these international instruments States

torture and access to court. If States and human right bodies alike interpret those rights as encompassing a duty for the State to prosecute territorial core crimes, which they generally do, violations of that duty cannot easily change that conclusion. In other words, the customary status of the broader international norms that give rise to the duty to prosecute (...) is not dependent on the practice of actual prosecutions. It seems numerous commentators fail to take this point into account in their assessment of State practice.” Ferdinandusse, 205.

²²¹² Ferdinandusse, ‘Direct Application of International Criminal Law in National Courts’, 188–89. However, the trend in last decades is leading to a progressive removal of obstacles or exceptions to the obligations to prosecute, as amnesties, immunities, statutes of limitations, and this can suggest that the obligation is at least emerging as an *ius cogens* norm.

²²¹³ In particular, First Geneva Convention Art. 49: “(...) Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a 'prima facie' case.” Article common to the Geneva Conventions (GC II, Art. 50; GC III, Art. 129; GC IV, Art. 146).

²²¹⁴ *Convention on the Prevention and Punishment of the Crime of Genocide*, Art. 4: “Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.” In the same vein, Art. 6: “Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”

²²¹⁵ *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, in particular Art. 4(2): “Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.” Art. 5: “Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 (...).” According to Messuti, the obligation to prosecute also flows from the *Convention on Enforced Disappearances*, Arts. 7 and 10. UN General Assembly, *International Convention for the Protection of All Persons from Enforced Disappearance*, 20 December 2006, 2716 UNTS 3, available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-convention-protection-all-persons-enforced>. In the same vein, and despite not being explicitly recognized in any provision, this author considers that the ICCPR should be interpreted as including the State obligation to prosecute. In fact, it seems that the Human Rights Committee has interpreted the ICCPR accordingly: “The Committee notes that it is not sufficient for the implementation of article 7 to prohibit such treatment or punishment or to make it a crime.

undertake the obligation to prosecute those responsible for the commission of the crimes, either trying them in their domestic courts, or transferring them to another State, in conformity with the principle *aut dedere aut iudicare*.²²¹⁶ The obligation of States to prosecute international crimes is also enshrined in various UN declarations and resolutions.²²¹⁷ The obligation of States to prosecute international crimes can be also inferred from the wording and the functioning of the Rome Statute. After expressing the determination “to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”²²¹⁸ the Preamble recalls that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”.²²¹⁹ The whole conception of the Statute and the functioning of the Court are based on the complementarity principle and the idea that criminal prosecutions are a primary task of States.²²²⁰ In fact, the duty to prosecute and punish conforms the grounds of ICC’s legitimacy to intervene, since the Court can only

States parties should inform the Committee of the legislative, administrative, judicial and other measures they take to prevent and punish acts of torture and cruel, inhuman and degrading treatment in any territory under their jurisdiction.” UN Human Rights Committee (HRC), *CCPR General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 10 March 1992, para. 8, available at: <https://www.refworld.org/docid/453883fb0.html>. As explained in Messuti, *Un Deber Ineludible: La Obligación Del Estado de Perseguir Penalmente Los Crímenes Internacionales*, 174–76.

²²¹⁶ Ambos, *La Parte General Del Derecho Penal Internacional*, 98; Maculan, *Los crímenes internacionales en la jurisprudencia latinoamericana*, 59. For a comprehensive analysis of the principle *aut dedere aut iudicare*, see Sosa, ‘Aut Dedere Aut Judicare, Crimen de Lesa Humanidad y Corte Penal Internacional’. By ratifying international treaties prohibiting certain human rights violations, States undertake as well the obligation to criminalize the prohibited conducts in their domestic legal system. For instance, the Genocide Convention (Art. 5), the Convention against Torture (Art. 4) or the Convention on Enforced Disappearances (Art. 4), explicitly establishes such obligation.

²²¹⁷ Already, in 1973 the UN General Assembly established that “War crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment.” UN General Assembly, *Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity*, 3 December 1973, A/RES/3074 (XXVIII), para. 1, available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/principles-international-co-operation-detection-arrest>. For further UN Resolutions and Declarations on the State duty to prosecute international crimes, see Messuti, *Un Deber Ineludible: La Obligación Del Estado de Perseguir Penalmente Los Crímenes Internacionales*, 177–79.

²²¹⁸ Rome Statute, Preamble, para. 5.

²²¹⁹ *Ibid.*, para. 6.

²²²⁰ For further information on the complementary principle and the functioning and jurisdiction of the ICC see above, with further references, Section 4.2.

take action when a State fails to comply with its obligation to prosecute international crimes under its jurisdiction.²²²¹

B. Obligations of States streaming from human rights law

Positive obligations of States have also been developed by the progressive interpretation of human rights instruments and the need to take active measure to assure the effective respect of the rights enshrined therein. In fact, the case law of the Inter-American Court, and subsequently, of its European counterpart have been fundamental for the development and consolidation of the obligations of States to prosecute international crimes and human rights violations.²²²² Despite human rights instruments do not explicitly enshrine these positive obligations for States, human rights courts have interpreted them in that vein. As studied in Chapter 5, the case law of regional courts shows in recent years a progressive tendency to require the intervention of States *ius puniendi* to face human rights violations. In cases of serious violations of the fundamental rights enshrined in the conventions the courts have developed a number of positive obligations as the criminalization of the conducts and the so-called procedural obligations, including the duty to investigate, prosecute and punish those responsible.

These obligations are not based on the traditional approach of guaranteeing the rights of the defendant, but from the perspective of the due protection to potential or actual victims.²²²³ In other words, the regional human rights courts acknowledge the classical “negative obligation” of States to refrain from interfering with individuals’ rights and to avoid potential punitive excesses.²²²⁴ But at the same time, recognising the possibility of States failing to guarantee the effective enjoyment of the rights of the victims, the courts consider that the implementation of fundamental rights included in the conventions requires positive action by States parties.²²²⁵

²²²¹ Maculan, *Los crímenes internacionales en la jurisprudencia latinoamericana*, 77.

²²²² Other human rights protection bodies, as well as some international and hybrid criminal courts, have also elaborated on the States duty to prosecute and punish serious human rights violations, as analysed, with further references in Maculan, ‘Derecho Penal, Obligaciones Internacionales y Justicia de Transición’, 120–21.

²²²³ Tomás-Valiente Lanuza, ‘Deberes positivos del Estado y Derecho penal en la jurisprudencia del TEDH’, 3.

²²²⁴ Ibid.

²²²⁵ For a critical opinion on this conceptual construction, see Tomás-Valiente Lanuza, 3, 6, 48–52. For an overview of international organs that have developed and implemented the doctrine of States’ positive obligations aiming to ensure the effective enjoyment of human rights, and in particular the duty to prosecute, see International Commission of Jurist, *The Right to a Remedy*

The Inter-American Court took the leading role in the development and establishment of such positive obligations to ensure the conventional rights and to fight impunity.²²²⁶ Already in 1988 the Court established for the first time the States duty to investigate and punish human rights violations. Based on the obligation of States to guarantee to all persons subject to their jurisdiction the free and full exercise of the conventional rights, the IACtHR established the duty to prevent, investigate and punish any violation of the rights recognized by the ACHR, and to provide sufficient compensation.²²²⁷ The Inter-American Court also grounded these positive duties of States, particularly the obligation to investigate and prosecute, on the right to truth held by the victims and by the society where the serious human right violations took place. Based on this right to truth the Court established that States must effectively investigate the crimes to identify, try and punish the perpetrators and accessories, and that the outcome of the proceeding must be made known to the public for the society to know the truth.²²²⁸

This case law of the Inter-American Court significantly influenced its European counterpart.²²²⁹ Contrary to the IACtHR, partially relying on the fight against impunity and on the rights of the victims, the ECtHR has traditionally maintained a

and Reparation for Gross Human Rights Violations - A Practitioners' Guide (Geneva, 2018), 226–39; Mattia Pinto, ‘Awakening the Leviathan through Human Rights Law – How Human Rights Bodies Trigger the Application of Criminal Law’, *Utrecht Journal of International and European Law* 34, no. 2 (1 November 2018): 174–75; Tomás-Valiente Lanuza, ‘Deberes positivos del Estado y Derecho penal en la jurisprudencia del TEDH’, 6.

²²²⁶ Ferdinandusse, ‘Direct Application of International Criminal Law in National Courts’, 192; Vervaele, ‘Violations graves des droits de l’homme et crimes internationaux. Du jus (non) puniendi de l’État nation à un deber puniendi impératif tiré du jus cogens’, 489. The notion of impunity and the doctrines on the fight against impunity are comprehensively analysed, with further references, in Jesus María Silva Sánchez, ‘Una crítica a las doctrinas penales de “la lucha contra la impunidad” y del “derecho de la víctima al castigo del autor”’, *Revista de Estudios de la Justicia*, no. 11 (1 January 2009): 36–46. For an analysis of the rationales and basis of the duty to prosecute in international law, see with further references Ferdinandusse, ‘Direct Application of International Criminal Law in National Courts’, 192–200.

²²²⁷ *Velásquez-Rodríguez v. Honduras*, para. 66. As analysed above, in Section 5.2.4.1, the Inter-American Court infers States positive obligations from ACHR, Articles 1(1) and 2.

²²²⁸ *Myrna Mack Chang v. Guatemala*, para. 275. For an analysis of the right to truth as implemented by the IACtHR see above, with further case law references, footnote 1746. More generally, on the right to truth, see footnote 1744.

²²²⁹ For further information on the influence of the IACtHR decisions on the ECtHR case law, particularly regarding the elaboration and development of positive obligations of States, see above, footnote 1547.

more restrained position, mainly based on procedural guarantees.²²³⁰ However, in the last years the European Court is arguably in the path of closing this gap.²²³¹ The ECtHR development of States positive obligations is grounded on ECHR Article 1 that establishes the States shall secure to everyone within their jurisdiction the rights and freedoms defined in the Convention.²²³² According to the Court the recognition of rights and freedoms in the ECHR involves the guarantee of their effective protection, and consequently the duty of States to be actively involved in their protection.²²³³ Among other duties, the ECtHR case law shows a progressive tendency to require the intervention of States *ius puniendi* to face human rights violations.²²³⁴ In cases of serious violations of the fundamental rights enshrined in the Convention, as killing, torture, inhuman or degrading treatment or punishment, or slavery and forced labour²²³⁵ the Court has established a series of positive obligations as the criminalization of the conducts and the so-called procedural obligations, including the duty to investigate, prosecute and punish those responsible.²²³⁶

²²³⁰ Tomás-Valiente Lanuza, ‘Deberes positivos del Estado y Derecho penal en la jurisprudencia del TEDH’, 12. See above, Section 5.1.9.

²²³¹ See above, footnote 1547, with evidence suggesting that the fight against impunity of serious human rights violations is becoming a fundamental concern in the European human rights system.

²²³² ECHR, Art. 1, “Obligation to respect Human Rights”.

²²³³ See above, Section 5.1.9. In this regard, it shouldn’t go unnoticed the significant influence on the ECtHR of the doctrine previously developed in some domestic legal systems regarding different positive obligations of States, as explained in Tomás-Valiente Lanuza, ‘Deberes positivos del Estado y Derecho penal en la jurisprudencia del TEDH’, 12; Maculan, ‘Derecho Penal, Obligaciones Internacionales y Justicia de Transición’, 124; Alejandro Lerena García, ‘Reconciliar justicia y legalidad en contextos de justicia transicional: (Reconciling justice and legality in transitional justice contexts)’, *Oñati Socio-Legal Series*, 27 January 2022, 14. However, the ECtHR’s arguments are progressively evolving and, particularly in recent decisions, the Court also considers that the investigation, prosecution and punishment of serious human rights violations is essential to maintain public adherence to the rule of law, avoid impunity and prevent future human rights abuses. E.g., *Al Nashiri v. Romania*, para. 641; *Kopylov v. Russia*, para. 140.

²²³⁴ See above, Section 5.1.9. Only some of the positive obligations developed by the ECtHR to protect and effectively guarantee the conventional rights of the individuals are related to criminal law. See above, footnote 1550.

²²³⁵ ECHR, Arts. 2, 3 and 4.

²²³⁶ William A. Schabas, ‘Synergy or Fragmentation?: International Criminal Law and the European Convention on Human Rights’, *Journal of International Criminal Justice* 9, no. 3 (1 July 2011): 618; Ryszard Piotrowicz, ‘States’ Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations’, *International Journal of Refugee Law* 24, no. 2 (1 May 2012): 181–201. The IACtHR and ECtHR case law regarding positive obligations of States have been criticized by some scholars

C. Differentiating the obligations of States and the rights of the victims

States have an obligation towards the victims to provide sufficient and appropriate reparation as well as to meet their demands for justice, ensuring individuals' right to an effective legal remedy. However, the obligation of States to prosecute international crimes and human rights violations should be understood as different and independent from the duty to fulfil the rights of the victims. Both duties are treated as one by some international instruments, and the differentiation is not always clear in the case law of international courts. However, it is important to draw a line between both obligations. Grounding States positive duties on victims' rights might involve several shortcomings. Firstly, it would entail that if for whatever reason the victims do not exercise their rights, the State would not be compelled to fulfil the associated obligations.²²³⁷ In this vein, the IACtHR has emphasised the continuation of States obligations to investigate and sanction irrespectively of what the victim does.²²³⁸ Another limitation of linking individual rights to positive duties is that the very existence of the later is based on the assumption that the victim is a victim, something that cannot be really established until the investigation has been carried out.²²³⁹

However, the main flaw appears if the obligations of States are grounded on an alleged right of the victim to the punishment of the perpetrator. Recognizing such right would challenge the very foundations of the criminal law system. Criminal law appeared when the bilateral relation victim-victimizer was replaced by a trilateral relationship in which a judicial authority was placed in the position of a third and impartial party.²²⁴⁰ The progressive evolution of criminal law involved the reduction of

who consider it as an example of judicial activism, establishing rules exceeding the content of the Conventions, or as an unjustified intromission in the functions of domestic courts and the sovereignty of domestic legislative bodies. See above, footnotes 1550, 1754 and 1756.

²²³⁷ Messuti, *Un Deber Ineludible: La Obligación Del Estado de Perseguir Penalmente Los Crímenes Internacionales*, 163.

²²³⁸ The Court established that "even though the aggrieved party may pardon the author of the violation of his human rights, the State is nonetheless obliged to sanction said author (...)." *Garrido and Baigorria v. Argentina*, Reparation and Costs, IACtHR, 27 August 1998, para. 72, available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_39_ing.pdf.

²²³⁹ Silva Sánchez, 'Una crítica a las doctrinas penales de "la lucha contra la impunidad" y del "derecho de la víctima al castigo del autor"', 359–60.

²²⁴⁰ The first historical document of this shift dates back to Ancient Greece, when Draco's laws prohibited private vengeance, and founded the passage from domestic justice to the justice of the city. Ferrajoli, *Derecho y Razón. Teoría Del Garantismo Penal*, 33.

the victims' role in criminal proceedings to mere witnesses.²²⁴¹ However, in recent years the place of victims in domestic and international criminal trials has significantly changed and is progressively gaining in importance.²²⁴² However, the resurgence of the victim in criminal proceedings cannot entail the attribution of a right to the punishment of the perpetrator, as affirmed by some authors.²²⁴³ Accepting that the victim has the right to punish the author would be an unjustified setback, the recognition of the right to revenge and the disappearance of one of the foundation of criminal law.²²⁴⁴ Therefore, the duty of States to prosecute international crimes should be conceptually and legally differentiated from the rights of the victims. As previously explained, international law provides multiple and sufficient legal grounds for States positive duties to be construed as autonomous and independent international obligations.

7.1.2.2 Scope and content of the obligations of States

The positive obligations of States related to criminal law include the duty to criminalize, investigate, prosecute and punish. Despite the scope and content of States

²²⁴¹ Christoph Safferling, 'The Role of the Victim in the Criminal Process – A Paradigm Shift in National German and International Law?', *International Criminal Law Review*, no. 11 (2011): 183–84; Messuti, *Un Deber Ineludible: La Obligación Del Estado de Perseguir Penalmente Los Crímenes Internacionales*, 165.

²²⁴² See, with further references, Cornelius Prittwitz, «The Resurrection of the Victim in Penal Theory», *Buffalo Criminal Law Review* 3, n.º 1 (1999): 109-29; Safferling, «The Role of the Victim in the Criminal Process – A Paradigm Shift in National German and International Law?», 183-86; Messuti, *Un Deber Ineludible: La obligación del Estado de perseguir penalmente los crímenes internacionales*, 165; Silva Sánchez, «Una crítica la las doctrinas penales de “la lucha contra la impunidad” y del “derecho de la víctima al castigo del autor”», 52; Alicia Gil Gil y Elena Maculan, «La Justicia penal en los escenarios posconflicto», *Revista UNISCI*, n.º 51 (2019): 230; Xavier Philippe, «Vers une reconnaissance accrue de la place de la victime dans le procès pénal international? De Nuremberg au Statut de Rome.», 2008, 117, <https://shs.hal.science/halshs-00541034>.

²²⁴³ For a critical review of the doctrinal opinions recognising a right of the victim to the punishment of the perpetrator, see Silva Sánchez, 'Una crítica la las doctrinas penales de “la lucha contra la impunidad” y del “derecho de la víctima al castigo del autor”', 52–54; Tomás-Valiente Lanuza, 'Deberes positivos del Estado y Derecho penal en la jurisprudencia del TEDH', 4, 27–29; Maculan and Gil Gil, 'The Rationale and Purposes of Criminal Law and Punishment in Transitional Contexts', 136–40.

²²⁴⁴ Silva Sánchez, 'Una crítica la las doctrinas penales de “la lucha contra la impunidad” y del “derecho de la víctima al castigo del autor”', 50–56; Messuti, *Un Deber Ineludible: La Obligación Del Estado de Perseguir Penalmente Los Crímenes Internacionales*, 165–67; Gil and Maculan, 'La Justicia penal en los escenarios posconflicto', 231.

duties regarding *ius puniendi* may lack sufficient precision and clear limits,²²⁴⁵ it seems that the general trend is leading to a progressive expansion. For instance, the ECtHR construction on positive duties started with the obligation to criminalize and provide for sufficient penalties for certain conventional breaches. However, it progressively expanded the scope of the obligations to include the duty to investigate, prosecute and punish violations of the most fundamental ECHR rights.²²⁴⁶ Each of these duties operate independently of the substantive conventional obligations and despite the fulfilment of one obligation may facilitate fulfilling the other ones, they should be assessed as a set of separate, autonomous, complementary and non-substitutable duties.²²⁴⁷ In other words, States cannot choose which obligations to meet since the fulfilment of one obligation does not justify non-compliance with the rest.²²⁴⁸ The differentiation and autonomy of each of them have not always been clear and sometimes they have been mixed or referred to as interchangeable, hence diluting the clarity of the obligations. An effort should be made to better elaborate their individual and distinct rationales, legal grounds, content, scope, effects and the consequences of non-compliance. This is particularly true regarding States obligations grounded on peremptory norms of general international law. While human rights tribunals have had numerous opportunities to examine the issue, and already exists a significant body of jurisprudence in this regard, only recently a renewed interest has been placed on *ius cogens* norms, and the case law and doctrine is not yet as elaborated.²²⁴⁹

²²⁴⁵ For a critical analysis, showing that the case law that has shaped these duties is not sufficiently clear nor uniform regarding their scope and specific content, see Maculan, 'Derecho Penal, Obligaciones Internacionales y Justicia de Transición', 122–24.

²²⁴⁶ As analysed above, with examples and references, in Section 5.1.9. Compare the ECtHR progressive evolution with the IACtHR case law that initiated its development already establishing the duty to “prevent, investigate and punish any violation of the rights recognized by the Convention”. *Velásquez-Rodríguez v. Honduras*, para. 66. See above, Section 5.2.4.1.

²²⁴⁷ *Varnava and Others v. Turkey*, para. 147. The different organs of the State, including judges and courts, are bound by these international obligations, as explained above, in Section 5.1.9.

²²⁴⁸ Javier Chinchón Álvarez, *Derecho internacional y transiciones a la democracia y a la paz: hacia un modelo para el castigo de los crímenes pasados a través de la experiencia iberoamericana* (Madrid: Ediciones Parthenon, Parthenon, 2007), 327; Messuti, *Un Deber Ineludible: La Obligación Del Estado de Perseguir Penalmente Los Crímenes Internacionales*, 159.

²²⁴⁹ See above, footnote 1903. For an opinion highlighting the vagueness surrounding *ius cogens*, and in particular the core international crimes, see Ferdinandusse, 'Direct Application of International Criminal Law in National Courts', 170–78, 187–90.

Firstly, States have the duty to create particular criminal offences and provide for sufficient penalties.²²⁵⁰ Regarding the obligation to investigate, it has been understood as the duty to perform a prompt and impartial investigation of the alleged violations of human rights capable of leading to the identification and punishment of those responsible.²²⁵¹ The obligation to investigate has been grounded on the right to an effective remedy,²²⁵² on the right to truth,²²⁵³ or as an essential element, together with the duty to prosecute and punish, to render effective in practice fundamental human rights.²²⁵⁴ The obligation to investigate has been understood as an obligation of means and not of results, and therefore the duty is not satisfied with the achievement of particular results, but with the implementation of all necessary actions to obtain the most satisfactory possible result.²²⁵⁵

²²⁵⁰ E.g., *X and Y v. Netherlands*, ECtHR, para. 27, *Osman v. The United Kingdom*, ECtHR, para. 115. See above, Section 5.1.9.1 and Section 5.2.4.1. For an analysis of the emergence and development of the criminalization duty of States see, with further references, Kai Ambos and María Laura Bohm, ‘Tribunal Europeo de Derechos Humanos y Corte Interamericana de Derechos Humanos: ¿tribunal Tímido y Tribunal Audaz?’, in *Sistema Interamericano de Protección de Los Derechos Humanos y Derecho Penal Internacional*, ed. Christian Steiner, vol. II (Montevideo, Uruguay: Konrad-Adenauer-Stiftung e. V., 2011), 54–59; Pinto, ‘Awakening the Leviathan through Human Rights Law – How Human Rights Bodies Trigger the Application of Criminal Law’, 171. For a critical view on the foundations and scope of this duty, see Tomás-Valiente Lanuza, ‘Deberes positivos del Estado y Derecho penal en la jurisprudencia del TEDH’, 12–15; Pinto, ‘Awakening the Leviathan through Human Rights Law – How Human Rights Bodies Trigger the Application of Criminal Law’, 172.

²²⁵¹ E.g., *Aksoy v. Turkey*, ECtHR, para. 98; *Kaya v Turkey*, ECtHR, para. 107. See above, Section 5.1.9.1 and Section 5.2.4.1.

²²⁵² E.g., *Aksoy v. Turkey*, ECtHR, para. 98; *Kaya v Turkey*, ECtHR, para. 107.

²²⁵³ *Barrios Altos v. Peru*, IACtHR, para. 48; *Myrna Mack Chang v. Guatemala*, IACtHR, para. 275. See above, Section 5.2.4.1. For a comprehensive analysis on the notion, content and reliability of the truth issued from judicial procedures (procedural or formal truth) as opposed to substantial truth, see Ferrajoli, *Derecho y Razón. Teoría Del Garantismo Penal*, 45, 62. For an opinion critical with the right to truth being satisfied through criminal law, see Silva Sánchez, ‘Una crítica a las doctrinas penales de “la lucha contra la impunidad” y del “derecho de la víctima al castigo del autor”’, 44–45.

²²⁵⁴ *Kopylov v. Russia*, para. 140; *Nikolova and Velichkova v. Bulgaria*, para. 62; *Yeter v Turkey*, para. 67, with further case law references.

²²⁵⁵ See with examples and references in Messuti, *Un Deber Ineludible: La Obligación Del Estado de Perseguir Penalmente Los Crímenes Internacionales*, 524–29. For a critical analysis of the foundations, content and scope of this duty, particularly in the ECtHR case law, see Tomás-Valiente Lanuza, ‘Deberes positivos del Estado y Derecho penal en la jurisprudencia del TEDH’, 15–17.

Concerning the duty to prosecute, it has been grounded on the substantive guarantees associated to the most fundamental human rights,²²⁵⁶ but also on the right to an effective remedy.²²⁵⁷ To fulfil this obligation, States must ensure that procedural obstacles, amnesties, pardons or statutes of limitations do not hinder prosecutions.²²⁵⁸ The obligation to prosecute could be understood as an obligation of means and not of results, meaning that prosecutions do not necessarily need to have actual convictions as an outcome.²²⁵⁹ In fact, some ECtHR decisions do not provide for an express duty to punish, and only require States to carry out effective investigations.²²⁶⁰ However, particularly when facing serious human rights violations, it seems that the ECtHR is evolving in the last years towards stronger positions closer to its Inter-American counterpart. In this vein, the European Court is expressly requiring States to provide for a sufficient and proportionate punishment and to ensure its effective implementation.²²⁶¹ The ECtHR admits that there is no absolute obligation for all prosecutions to result in convictions, but considers that domestic courts should not allow those responsible to go unpunished under any circumstances.²²⁶² It seems that the content of the obligation to punish has been expanded to include the duty to ensure the effective execution of penalties,²²⁶³ a requirement that also appears incompatible with amnesties, pardons or similar legal measures.

If the content, scope and limits of the positive obligations of States need more elaboration, precision and clarity, the same can be affirmed regarding the determination of which human rights violations might activate such States duties. As

²²⁵⁶ E.g., *Osman v. The United Kingdom*, ECtHR, para. 116; *Aksoy v. Turkey*, ECtHR, para. 98; *Velásquez-Rodríguez v. Honduras*, IACtHR, para. 66. See above, Section 5.1.9.2 and Section 5.2.4.1.

²²⁵⁷ E.g., *Vasil Petrov v. Bulgaria*. See further case law references in International Commission of Jurist, 225.

²²⁵⁸ For an analysis of the conflict between the obligation to prosecute and different procedural obstacles or limitation periods, focused on the ECtHR case law, see Tomás-Valiente Lanuza, ‘Deberes positivos del Estado y Derecho penal en la jurisprudencia del TEDH’, 17–21.

²²⁵⁹ See above, footnote 1578.

²²⁶⁰ *Kaya v. Turkey*, para. 107. See also *Al Nashiri v. Romania*, para. 638. As explained in Pinto, ‘Awakening the Leviathan through Human Rights Law – How Human Rights Bodies Trigger the Application of Criminal Law’, 172.

²²⁶¹ *Öneryıldız v. Turkey*, para. 91; *Kopylov v. Russia*, para. 140; *Yeter v Turkey*, paras 67–69; *Okkali v. Turkey*, ECtHR, para. 68. See above, Section 5.1.9.2.

²²⁶² *Kopylov v. Russia*, para. 140. For a critical analysis of the obligation to punish, particularly in the ECtHR, see Tomás-Valiente Lanuza, ‘Deberes positivos del Estado y Derecho penal en la jurisprudencia del TEDH’, 22–25.

²²⁶³ Tomás-Valiente Lanuza, 25–26.

explicitly established in different international instruments, it seems clear that human rights violations amounting to the main international crimes entails the duty of States to prosecute and punish.²²⁶⁴ However, human rights tribunals consider that the obligations also arise from serious human rights violations, not necessarily constituting international crimes. However, the notion of serious human rights violations is quite broad and its limits are sometimes uncertain.²²⁶⁵ It seems that human rights courts have progressively lowered the gravity threshold of the violations giving rise to States obligations²²⁶⁶ and are applying its case law on positive duties of States to an increasing number of scenarios.²²⁶⁷

The implementation of States positive obligations, particularly regarding the duty to prosecute and punish, may imply significant costs for the fundamental rights and safeguards of the accused. The establishment of these obligations seems justified in extreme and exceptional situations as the commission of international crimes or serious human rights violations, and in particular when the State refuses to exercise its *ius puniendi* aiming to cover up its own abuses. However, lowering excessively the gravity threshold of conducts giving rise to such States obligations might entail their trivializations and the danger of potential abuses. The behaviours and circumstances giving rise to States obligations related to criminal law should be well defined and cautiously implemented to prevent misuses and misinterpretations that could lead to the disarticulation of rights and fundamental guarantees of the accused and to an excessive and unrestrained *ius puniendi* that might compromise the fundamental values of the rule of law.²²⁶⁸ The lack of control and limits to the monopoly of the use of force

²²⁶⁴ While the content and *ius cogens* character of the prohibition of the main international crimes do not raise doubts, this is not the case of some other crimes, which content, classification as an international crime or *ius cogens* nature is debated. Outlined, with further references in Maculan, ‘Derecho Penal, Obligaciones Internacionales y Justicia de Transición’, 122.

²²⁶⁵ As explained, with examples and references in Maculan, 122.

²²⁶⁶ In some decisions, the IACtHR even omitted the seriousness requirement, as in *Velásquez-Rodríguez v. Honduras*, para. 166 or *Bulacio v. Argentina*, paras 116-17.

²²⁶⁷ For a comprehensive and critical analysis, see Tomás-Valiente Lanuza, ‘Deberes positivos del Estado y Derecho penal en la jurisprudencia del TEDH’, 31–32, 48–58.

²²⁶⁸ See the opinion of some scholars warning of the potential harmful consequences of the States’ positive obligations doctrine in Marina Mínguez Rosique, ‘The Principle of Legality in Criminal Law in the Inter-American System for the Protection of Human Rights’, in *Multilevel Protection of the Principle of Legality in Criminal Law*, ed. Juan Antonio Lascaraín Sánchez, Marina Rosique Mínguez, and Mercedes Pérez Manzano (Madrid: Springer, 2018), 106–7, 117; Silva Sánchez, ‘Una crítica a las doctrinas penales de “la lucha contra la impunidad” y del “derecho de la víctima al castigo del autor”’; Tomás-Valiente Lanuza, ‘Deberes positivos del Estado y Derecho penal en la jurisprudencia del TEDH’, 26–59; Ezequiel Malarino, ‘Activismo Judicial, Punitivización y Nacionalización. Tendencias Antidemocráticas y Antiliberales de La

facilitates abuses. The policies that are currently on the rise in the name of the fight against terrorism can serve as a useful reminder of the dangers of unchecked powers.²²⁶⁹ The *ultima ratio* nature of criminal law, as well as the dangers of excessive recourse to punitive measures shouldn't be forgotten.

7.1.3 Reconciling the principle of legality and States obligations

When the prosecution of international crimes is deterred by some legality requirements, the conflict between the obligations of States to investigate, prosecute and punish, and the principle of legality is evident. Intending to reconcile the principle of legality and the international obligations of States, this section provides an overview of some general notions, conceptual frameworks and guiding principles that might underpin the concrete legal techniques analysed in the following section.

The principle of legality has become a rule of customary international law, and even an *ius cogens* norm.²²⁷⁰ Therefore, States are compelled to adopt and respect the elements and requirements of the international legality principle. However, the content

Corte Interamericana de Derechos Humanos', in *Sistema Interamericano de Protección de Los Derechos Humanos y Derecho Penal Internacional*, ed. Gisela Elsner (Montevideo, Uruguay: Konrad-Adenauer-Stiftung e. V., 2010), 29–45, 57; Roberto Gargarella, 'La Corte Interamericana de Derechos Humanos y La "conversación Entre Iguales"', *International Journal of Constitutional Law* 19, no. 4 (1 October 2021): 1223–28; Maculan and Gil Gil, 'The Rationale and Purposes of Criminal Law and Punishment in Transitional Contexts', 134–35; Maculan, 'Derecho Penal, Obligaciones Internacionales y Justicia de Transición', 124–25. More generally, for some critical reflexions on the foundations, purpose and utility of criminal law in transitional justice contexts or as a response to human rights violations, see Maculan y Gil Gil, «The Rationale and Purposes of Criminal Law and Punishment in Transitional Contexts»; Mirjan Damaska, «What Is the Point of International Criminal Justice?», *Chicago-Kent Law Review* 83, n.º 1 (2008): 329–65; Xavier Philippe, «La mémoire et l'oubli : la place de la justice transitionnelle», *Les Cahiers Portalis* 3, n.º 1 (2016): 39–41. Particularly regarding the interpretation and implementation of these international obligations in transitional contexts, two opposing positions have emerged in international jurisprudence and doctrine. On one side, the so-called *human righters* argue for a *strict interpretation* and consider the obligations broader and applicable in a larger number of circumstances. On the other side, the so-called *peacemakers* claim for a *flexible interpretation* and, while recognising the existence of a general duty to prosecute and punish at least international crimes, argue that in certain extraordinary circumstances there may be valid reasons to limit criminal prosecutions. See an overview of these positions, with examples and references in Maculan, 'Derecho Penal, Obligaciones Internacionales y Justicia de Transición', 126–30.

²²⁶⁹ Shahram Dana, 'Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing', *Journal of Criminal Law and Criminology* 99 (2009): 924.

²²⁷⁰ See above, Chapter 6.

and scope of the principle in many domestic legal systems, particularly those of the civil law tradition, go beyond the requirements of the legality version under general international law. Nothing in international law prohibit *ex ante* the adoption of stronger or reinforced versions of the principle.²²⁷¹ However, States must ensure that the legality requirements exceeding the *nullum crimen, nulla poena sine iure*, do not prevent the fulfilment of their international obligations, and in particular those regarding the investigation, prosecution and punishment of serious human rights violations. Hereinafter, different arguments are outlined evidencing that the notion or the practical implementation of those legality element preventing the prosecution of international crimes, should be adapted in a manner allowing the State to comply with its international obligations.

Similarly, nothing in international law prevents a State from limiting the exercise of its jurisdiction, since there is no a general obligation to prosecute every possible crime.²²⁷² However, since the Second World War, and particularly in the last decades, the trend has been to remove obstacles hindering the prosecution of serious human rights violations, as amnesty laws or statutory limitations. This general movement, largely based on the development on the obligation of States to investigate, prosecute and punish, should affect as well how States interpret and implement their domestic version of the legality principle.

The need to adapt the notion or implementation of strong legality versions firstly arises from a conflict of rules, in this case of distinct hierarchical level. As explained above, strong legality versions could obstruct in certain circumstances the prosecution of serious human rights violations and therefore, the fulfilment of the States positive obligations. The international principle of legality is a rule of customary international law and possibly an *ius cogens* rule, and therefore it is hierarchically superior to other norms of international law. Significant evidence suggests that the obligation of States to investigate, prosecute and punish international crimes is also becoming a rule of customary international law, and it is arguably emerging as a peremptory norm. However, in the circumstances analysed earlier the requirements of the international legality principle do not hinder the fulfilment of the obligation to prosecute international crimes, and therefore, no conflict would arise in between these norms.

²²⁷¹ Héctor Olásolo, 'El Principio Nullum Crimen Sine Iure En El Derecho Internacional Contemporáneo', *Anuario Iberoamericano de Derecho Internacional Penal* I (2013): 21; Kenneth S. Gallant, *The Principle of Legality in International and Comparative Criminal Law* (Cambridge: Cambridge University Press, 2008), 394, 398.

²²⁷² Gallant, *The Principle of Legality in International and Comparative Criminal Law*, 398–99.

The conflict appears when States adopt stronger versions of legality including requirements as *lex scripta* or *lex certa* that go beyond the requirements of the international principle. In the circumstances previously analysed, these additional requirements constitute a legal obstacle hindering the domestic prosecution of international crimes and therefore, preventing the State from fulfilling its international obligations. A conflict arises between these customary obligations of States, and the requirements of strong legality versions exceeding the content of the international principle, and therefore, not considered a rule of general international law. As a result of the conflict of norms, those legality elements hindering prosecutions should yield, being interpreted or applied in a manner compatible with the satisfaction of the international obligations of the State.

The *pacta sunt servanda* principle and the rule establishing that States cannot invoke domestic legal provisions to justify the violation of international obligations provides an additional reason for States to adapt the notion or implementation of their internal legality principle. This norm flows from the fundamental principle establishing that international law prevails over domestic law.²²⁷³ It entails the duty of State's organs to prioritise international obligations, ensuring their effective satisfaction even if they conflict with municipal law.²²⁷⁴ The norm is enshrined in VCLT Article 27 that establishes that a State may not invoke the provisions of its internal law as a justification for its failure to comply with treaty obligations.²²⁷⁵ The duty to investigate, prosecute and punish international crimes and human rights violations is mandatory for States parties to the international treaties establishing the obligation, but as well for

²²⁷³ *Applicability of the Obligation to Arbitrate Under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, 1988 ICJ Reports 12, para. 57, available at: <https://www.icj-cij.org/public/files/case-related/77/077-19880426-ADV-01-00-EN.pdf>. Analyzed, together with further international case law and scholarly opinions, in Malcolm N. Shaw, *International Law*, 5th edition (Cambridge New York: Cambridge university press, 2003), 125–27.

²²⁷⁴ Ferdinandusse, 'Direct Application of International Criminal Law in National Courts', 151–52; Shaw, *International Law*, 124–25, 847.

²²⁷⁵ VCLT, Art. 27, "Internal law and observance of treaties". For a comprehensive study on the origins, content and interpretation of this Article see, with further references, Mark E. Villiger, 'Article 27: Internal Law and Observance of Treaties', in *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill Nijhoff, 2008), 369–76. For an analysis of different domestic court's decisions, particularly from Latin-American countries, using VCLT Art. 27 to determine the supremacy of international law over national legal provisions, see Ferdinandusse, 'Direct Application of International Criminal Law in National Courts', 151–54. In the same vein, see ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*. Its Article 32 "Irrelevance of internal law" establishes that "The responsible State may not rely on the provisions of its internal law as justification for failure to comply with its obligations under this part."

the rest of countries as a matter of general international law. Therefore, States cannot justify failures to perform these duties relying on domestic provisions. Closely related, but slightly different, is the principle establishing that States should not take any measures that could endanger the fulfilment of their international obligations regarding the prosecution of international crimes.²²⁷⁶

Domestic and international courts have considered amnesties, statutes of limitations and other domestic legal provisions inapplicable if they constituted an obstacle for the satisfaction of the obligation to prosecute international crimes. Significantly, the IACtHR has repeatedly declared that States cannot rely on domestic legal provisions to justify the breach of their international obligation to prosecute human rights violations.²²⁷⁷ In particular, the Inter-American Court considers that a State “may not invoke the statute of limitations, the non-retroactivity of criminal law or the *ne bis in idem* principle to decline its duty to investigate and punish those responsible.”²²⁷⁸ In the same vein, various domestic courts, mainly from Latin-American countries, have relied on VCLT Art. 27 to justify the inapplicability of domestic legal provisions as amnesty laws hindering the prosecution of human rights violations.²²⁷⁹

Based on the foregoing, it seems logical that the prohibition to rely on municipal provisions to avoid compliance with international obligation may also have an impact on domestic legality provisions if they constitute an obstacle to the prosecution of international crimes. The inapplicability of the legality requirements included in the customary principle would be problematic. However, this does not seem

²²⁷⁶ “States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.” UN General Assembly, *Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity*, 3 December 1973, A/RES/3074 (XXVIII), para. 8, available at: <https://digitallibrary.un.org/record/191220>. In the same vein, the ICTY highlighted the contradiction of recognising the *ius cogens* character of the prohibition of torture and at the same time allowing States to take domestic measures authorizing or condoning torture or absolving its perpetrators. *Prosecutor v. Furundzija*, Judgement, ICTY Trial Ch., para. 155.

²²⁷⁷ *Almonacid-Arellano et al v. Chile*, para. 125, referring to *International responsibility for the promulgation and enforcement of laws in violations of the Conventions (Arts. 1 and 2 of the American Convention on Human Rights)*, para. 35.

²²⁷⁸ *Almonacid-Arellano et al v. Chile*, para. 151.

²²⁷⁹ Ferdinandusse, ‘Direct Application of International Criminal Law in National Courts’, 216; Javier Chinchón Álvarez, *El Tratamiento Judicial de Los Crímenes de La Guerra Civil y El Franquismo En España. Una Visión de Conjunto Desde El Derecho Internacional* (Bilbao: Deusto Digital. Instituto de Derechos Humanos Pedro Arrupe, 2012), 123; Orentlicher, ‘Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime’, 2553.

to be necessary since the legality elements that could obstruct the prosecution of international crimes are usually those surpassing the requirements of the international principle. Therefore, it appears that States are under the obligation to interpret or apply their legality provisions in a manner that allows criminal accountability for serious human rights violations and international crimes.

Within the framework of the rule of law States are compelled to adapt the notion or the application of their domestic legality principle also due to coherence and consistency requirements flowing from the principles' rationales. The legality principle emerged with the aim of equilibrating the structural imbalance between the powerful State and the powerless individual, setting limits to the States powers and granting rights to the individuals. Thus, the primary rationale of the principle is to protect individuals against the abusive or arbitrary use of the States *ius puniendi*. However, when international crimes come into play, such logic is reversed since in some circumstances strong legality versions can prevent the prosecution of the crimes committed by the State or under its protection. To be coherent to its profound rationales grounded on the protection of the citizens against the abuses of the State, the principle cannot become a tool for the State to protect itself from the demands of justice of the victims of its abuses.

An additional argument for the adjustment of strong legality requirements when they prevent the prosecution of international crimes can be founded on the potential desirability to balance the accused rights with other rights and interests at stake. For the reasons explained above, it is preferable to conceptually dissociate and to avoid grounding States obligation to prosecute international crimes on victims' rights. However, when prosecuting atrocities committed in the dictatorial or warring past, domestic courts should take into account all rights and interests involved. And this is particularly true regarding the interpretation and implementation of the legality principle due to its determining role for the viability of the criminal proceedings. Different rights of the victims, as those to a judicial and effective remedy, to judicial protection, truth or reparation may be directly affected in these proceedings, interacting and often conflicting the accused's rights. Similarly, stronger legality requirements enhancing the accused's safeguards and rights, but leading to the impunity of past atrocities might collide with general principles and interests. Trying to reach equilibrium balancing all the rights and interests involved might be an attractive input for domestic courts when facing serious human right violations committed in the past.²²⁸⁰

²²⁸⁰ According to Ambos, the underlying rationale of the ECtHR when interpreting ECHR Art. 7 is a balance between general interests and fundamental rights, between the safeguards flowing from the legality principle and the rights of the victims. This was particularly evident in

Finally, it is interesting to recall the interpretative framework proposed by legal hermeneutics to find solutions to the tensions between justice and legality, and that could underpin the legal techniques, methods and possible interpretations explained above.²²⁸¹ This current of thought proposes understanding the legal norm beyond its literal meaning, taking into account the overall legal system, composed by domestic and international law.²²⁸² Therefore, legal hermeneutics proposes solutions that are consistent with the legal system as a whole, and that respect its spirit and fundamental norms and values, beyond the literal meaning of a particular rule. For instance, if domestic laws contemplate criminal offences as murder or torture, but it does not include aggravated forms of commission as international crimes, legal hermeneutics proposes interpreting the law teleologically to avoid unreasonable results. This way, it seems absurd to believe that the intention of the legislator was to punish an ordinary crime, while leaving its more serious forms of commission unpunished.²²⁸³ It would be incongruous that the principle of legality, underpinning the guarantees of citizens against the power of the State, ends up preventing the prosecution of crimes committed by the State or under its protection and becoming a shield against the demands of justice of its citizens. Therefore, according to hermeneutics' postulates the principle of legality should be interpreted in a manner coherent with the legal system as a whole, rendering it compatible with the rest of values and principles of the rule of law.

Streletz, Kessler and Krenz v. Germany. Kai Ambos, 'Nulla Poena Sine Lege En Derecho Penal Internacional', in *Estudios de Derecho Internacional. Libro Homenaje al Profesor Santiago Benadava*, ed. Eduardo Picand Albónico, vol. II (Santiago, Chile: Librotecnia, 2008), 33–34. Other authors also refer to the need to balance conflicting interests when applying the legality principle, as the need of justice against fairness for the accused in the contest of the rule of law M. Cherif Bassiouni and Peter Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Irvington on Hudson, New York: Transnational publishers, 1996), 268.

²²⁸¹ Legal hermeneutic, mainly based on the hermeneutic philosophy of Gadamer, seeks to overcome the natural law - positivism duality through legal interpretation and the study of the real meaning of legal texts. For an approach to this current of thought, see Giuseppe Zaccaria, 'Dimensiones de La Hermenéutica e Interpretación Jurídica', in *Razón Jurídica e Interpretación*, ed. Ana Messuti (Madrid: Civitas, 2004), 62–124; Francisco Viola and Giuseppe Zaccaria, *Derecho e interpretación: Elementos de teoría hermeneutica del derecho*, trans. Gregorio Robles Morchon, Edición: Tra (Madrid: Dykinson, 2007); Oswaldo Zavala Blas, 'Hermenéutica y Argumentación Jurídica' (Getafe, Universidad Carlos III de Madrid, 2015).

²²⁸² Ana Messuti, 'El Principio de Legalidad y El Derecho Penal Internacional: Posible Conciliación a Través de La Hermenéutica', *Derecho Penal Contemporáneo. Revista Internacional* 41 (2012): 22–23.

²²⁸³ Messuti, 25.

7.1.4 Some exploratory solutions

Different elements, as the development and consolidation of States obligation to prosecute international crimes, the difficulties encountered by international tribunals and the principle of complementarity governing the functioning of the International Criminal Court, are giving domestic courts an increasing role in the international criminal justice system.²²⁸⁴ Particularly from the 1980s criminal trials have been used, among other transitional justice mechanisms, to address past human rights violations.²²⁸⁵ Prosecutions in domestic courts are playing a key role in this global trend towards individual accountability that has been called the justice cascade or revolution in accountability.²²⁸⁶

When facing the atrocities committed in a dictatorial or warring past domestic courts have often faced the above-explained “rule of law dilemmas”. The strict respect of the fundamental safeguards associated to the legality principle might render the prosecution of past crimes impossible and, on the contrary, impunity seems to only be avoidable if the fundamental guarantees of the accused are not fully respected. However, within the framework of a democratic rule of law different legal techniques and interpretative proposals are available to reconcile or equilibrate the competing

²²⁸⁴ Naomi Roht-Arriaza, ‘Just a “Bubble”? Perspectives on the Enforcement of International Criminal Law by National Courts’, *Journal of International Criminal Justice*, no. 11 (2013): 537–38; Maculan, ‘International Crimes or Ordinary Crimes?’, 404. For an analysis of the relationship between the principles of universal jurisdiction, grounding many of these domestic prosecutions, and complementarity see, with further references, Philippe, «The Principles of Universal Jurisdiction and Complementarity».

²²⁸⁵ Kathryn Sikkink and Carrie Booth Walling, ‘The Impact of Human Rights Trials in Latin America’, *Journal of Peace Research* 44, no. 4 (2007): 427–28; Dustin N. Sharp, ‘Interrogating the Peripheries: The Preoccupations of Fourth Generation Transitional Justice’, *Harvard Human Rights Journal* 26 (2013): 153.

²²⁸⁶ Ellen Lutz and Kathryn Sikkink, ‘The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America’, *Chicago Journal of International Law* 2, no. 1 (2001); Hunjoon Kim and Kathryn Sikkink, ‘Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries’, *International Studies Quarterly* 54, no. 4 (2010): 939–63; Chandra Lekha Sriram, *Globalizing Justice for Mass Atrocities: A Revolution in Accountability*, 1st edition (London ; New York: Routledge, 2005). For further information of domestic criminal prosecutions in the context this justice cascade or revolution in accountability see, among others, Naomi Roht-Arriaza, ‘The Pinochet Effect: Transnational Justice in the Age of Human Rights’, *Revue québécoise de droit international* 21, no. 1 (2008): 485–87; James D. Meernik, Angela Nichols, and Kimi L. King, ‘The Impact of International Tribunals and Domestic Trials on Peace and Human Rights After Civil War: Impact of Transitional Justice’, *International Studies Perspectives* 11, no. 4 (2010): 309–34; Chinchón Álvarez, *Derecho internacional y transiciones a la democracia y a la paz*; Aguilar, ‘Jueces, Represión y Justicia Transicional En España, Chile y Argentina’.

demands of justice and legality, providing solutions to minimise or to avoid the conflict between the principle of legality and the obligation of States to prosecute international crimes. Domestic courts have applied many of these techniques and interpretations that often have been subsequently assumed as well by human rights courts.²²⁸⁷

Firstly, domestic courts have grounded convictions on legal classifications adopted in the domestic legal system after the commission of the crimes, but that incorporated international criminal norms already applicable to the accused at the moment of the facts. Therefore, despite the domestic legal provisions are formally applied retroactively, the substantive law is not, since the conduct was already considered criminal under international law. The ECtHR considers this method compatible with the legality principle enshrined in ECHR Article 7 reasoning that when “domestic criminal law refers to international law for the definition of the offence, the domestic and international provisions form, in practice, a single criminal norm.”²²⁸⁸ According to the European Court, if the applicable international norm criminalizing the conduct at the moment of commission was sufficiently accessible and foreseeable, convictions based on *ex post facto* domestic laws incorporating the international norm in the internal legal system are compatible with the legality principle.²²⁸⁹ The IACtHR and some international criminal tribunals, as the ICTY and the STL, have also upheld in different cases the retroactive application of domestic criminal laws if at the time of commission the conducts were already considered criminal under international law.²²⁹⁰

This legal technique can also be considered a retroactive re-characterization of crimes in cases where the conduct was already prohibited under domestic law as an ordinary offence. For example, if at the time of commission a conduct could be classified under domestic law as murder, torture or unlawful detention, it could be later prosecuted under the classification of crimes against humanity once this offence is incorporated in the domestic legal system. Of course, only those killings, tortures or

²²⁸⁷ The following overview of possible legal techniques and interpretative proposals is partly based on a previous work of the author: Lereña García, ‘Reconciliar justicia y legalidad en contextos de justicia transicional’, 14-24.

²²⁸⁸ *Kononov v. Latvia*, ECtHR Chamber, para. 119.

²²⁸⁹ See, among others *Kononov v. Latvia*, ECtHR GC, analysed above, in Section 5.1.4.5.B.

²²⁹⁰ See above, Section 4.1.2.8 and Section 5.2.4.2.B. The doctrine is divided regarding the compatibility of this technique with the legality principle. For a favourable position, see Margalida Capellà, *La tipificación internacional de los crímenes contra la humanidad*, Monografías 359 (Valencia: Tirant lo Blanch, 2005); Manuel Ollé Sesé, «Principio de legalidad y crímenes del franquismo», en *Las huellas del franquismo: pasado y presente*, ed. Jara Cuadrado (Madrid: Comares, 2019), 1420-21. For a contrary opinion see Gil Gil, *La justicia de transición en España. De la amnistía a la memoria histórica*, 114; Fernandez Liesa, «La Guerra Civil Española y el Derecho Internacional», 86.

unlawful detentions committed as part of a widespread or systematic attack directed against a civilian population, and therefore meeting the additional contextual requirements of crimes against humanity, could be considered as such. Thus, a conduct that when committed was considered a domestic ordinary crime can be later retroactively re-characterize as an international crime. The prosecution of a criminal behaviour under a different legal classification would respect the main rationale of the legality principle since no one would be prosecuted or punished for conducts that were not criminal at the time of commission. Therefore, the offender could foresee that his/her conduct was prohibited and would involve criminal liability. The only element the offender would not anticipate was the exact legal classification grounding his/her conviction. Anyhow, in order to respect the *nulla poena* principle, the punishment imposed should not exceed the penalty established for the ordinary offence under domestic laws at the time of commission.²²⁹¹

The ECtHR has considered this technique compatible with ECHR Article 7 establishing that what is important is the substantive law and not the formal classification or names given to criminal offences in domestic law.²²⁹² Therefore, to fulfil the legality principle requirements, it suffices that when committed the behaviour constituted, in its substance, a criminal offence, either under domestic or international law, irrespectively of the different legal names by which that offence was referred to over time.²²⁹³ In other words, the criminal label applicable at the moment of commission can be later re-characterized in conformity with the legality principle.²²⁹⁴ Some international criminal tribunals, as the ICTY and SCSL, also considered consistent with the legality principle the technique of re-characterizing offences already existent in domestic laws into international crimes.²²⁹⁵

²²⁹¹ The technique of retroactive re-characterization is not without risks and may involve various substantively detrimental effects on the accused, as analysed above, with further references, in Section 2.2.2.5.C, Section 4.1.2.7 and Section 5.1.6. De Souza Dias provides a comprehensive study on retroactive re-characterization, explaining and analysing the phenomenon and its relationship with the principle of legality and the principle of fair labelling in international law. Talita De Souza Dias, 'Retroactive Recharacterisation of Crimes and the Principles of Legality and Fair Labelling in International Criminal Law' (University of Oxford, 2019), 11–143.

²²⁹² Council of Europe, 'The "Quality of Law" Requirements and the Principle of (Non-)Retrospectiveness of the Criminal Law under Article 7 of the Convention' (Research Division - European Court of Human Rights, 2019), 138.

²²⁹³ Ibid.

²²⁹⁴ The limits and conditions for the application of this technique set by the ECtHR are analysed above, in Section 5.1.6.

²²⁹⁵ See above, Section 4.1.2.7. See as well, on the possibility of the ICC using this technique, Section 4.2.3.2. Some domestic and international tribunals also retroactive re-characterized

Domestic courts may also choose to prosecute the crimes committed in the dictatorial or warring past applying the legal classifications in force in the domestic legal system at the time of commission. Classifying the facts as ordinary offences of murder, torture, illegal detention or sexual offences would allow courts to comply with the stricter versions of legality, since the law grounding convictions would be *praevia*, *scripta*, *certa* and *stricta*. However, statutes of limitations or amnesty laws might hinder prosecution based on ordinary crimes. A solution to this problem has been found through the method of dual classification of facts.²²⁹⁶ While domestic laws would provide for crime definitions and punishments, the existence of contextual elements characteristic of international crimes would be taken into account to render amnesties and limitation periods inapplicable.²²⁹⁷ This way the stronger legality requirements would be met since crimes and penalties would be provided by previous written domestic laws.

The obstacle of statutes of limitations could be also overcome considering that during the dictatorial regime the rule of law was not respected and therefore, limitation

national crimes into international crimes after World War II, as analyzed above, in Section 2.2.4.

²²⁹⁶ For a comprehensive and critical assessment of this method, together with an analysis of its implementation by various domestic courts, see Maculan, ‘International Crimes or Ordinary Crimes?’

²²⁹⁷ The dual classification of facts has also been used by some domestic courts to underpin their jurisdiction over crimes committed abroad based on the principle of universal jurisdiction. While convictions were based on ordinary crimes, the factual context in which they were committed, characteristic of crimes against humanity, was used to ground the activation of the universal jurisdiction principle. Particularly, the Spanish Supreme Court followed this line of reasoning in the *Scilingo* case. Spanish Supreme Court (*Tribunal Supremo*), Criminal Chamber, Judgement 798/2007, Appeal in Cassation Nº 10049/2006P, 1 October 2007, sixth legal ground (*fundamento de derecho sexto*), available at: <http://www.derechos.org/nizkor/espana/juicioral/doc/sentenciats.html>. See below, Section 7.2.2.2. Analysed, with further references in Manuel Ollé Sesé, *Justicia Universal Para Crímenes Internacionales* (Madrid: La Ley, 2008), 64-67, 161-183; Alicia Gil Gil, ‘Principio de legalidad y crímenes internacionales. Luces y sombras en la sentencia del Tribunal Supremo en el caso Scilingo’, in *Nuevos desafíos del derecho penal internacional: terrorismo, crímenes internacionales y derechos fundamentales*, ed. A Cuerda Riezu and Francisco Jiménez García (Madrid: Tecnos, 2009), 391-410; Maculan, ‘International Crimes or Ordinary Crimes?’, 410-11; Chinchón Álvarez, *El Tratamiento Judicial de Los Crímenes de La Guerra Civil y El Franquismo En España. Una Visión de Conjunto Desde El Derecho Internacional*, 55-62. For an overview of the principle of universal jurisdiction as applied by Spanish domestic courts, and the evolution of its codification, see with further references Manuel Ollé Sesé, «A vueltas con la justicia universal», *Política Exterior* 28, n.º 160 (2014): 96-104; Manuel Ollé Sesé, «El principio de Jurisdicción Universal. Especial referencia a España», en *Derecho penal internacional*, ed. Alicia Gil Gil y Elena Maculan (Madrid, Spain: Dykinson, 2016), 136-50.

periods could not run and were temporarily suspended.²²⁹⁸ Finally, a third solution to get over the obstacles posed by limitation periods, but as well by amnesties and even strong legality requirements, is based on the permanent or continuous character of some crimes, as enforced disappearances.²²⁹⁹ The commission of these offences does not cease as long as the perpetrators continue to conceal the fate and the whereabouts of the persons who have disappeared, and until that moment the limitation periods will not start running.²³⁰⁰ Similarly, the crimes that continue after the enactment of an amnesty law might not be covered by it. In the same vein, if their commission had not ceased once international crimes have been included in the domestic legal system, they might be prosecuted based on these criminal classifications, easing the application of strong legality requirements as *lex scripta* or *lex certa*.²³⁰¹

Some domestic courts employed the so-called “Radbruch formula” in criminal proceedings to avoid extremely unfair outcomes. According to Gustav Radbruch, positive laws that are intolerably contrary to justice and extremely unfair cannot be considered as valid law and therefore, are not applicable.²³⁰² However, only those norms

²²⁹⁸ For an assessment of this line of reasoning and its implementation by different domestic courts, see Maculan, ‘International Crimes or Ordinary Crimes?’, 439–41; Posner and Vermeule, ‘Transitional Justice as Ordinary Justice’, 796.

²²⁹⁹ As comprehensively analysed in Alfredo Liñán Lafuente, ‘Vías de Las Víctimas (in)Directas En El Delito de Desaparición Forzada de Personas Para Solicitar Justicia y Reparación’, in *Las Huellas Del Franquismo: Pasado y Presente*, ed. Jara Cuadrado (Madrid: Comares, 2019), 1333–50.

²³⁰⁰ International Convention for the Protection of All Persons from Enforced Disappearance, Arts. 2 and 8(b). For further information on the notion of continuous crimes and their relation with the legality principle, see above, Section 5.1.11 and Section 5.2.4.4.

²³⁰¹ This line of reasoning underpins the decision of the Spanish National Court in 2008 declaring that enforced disappearances committed between 1936 and 1952 could not be considered time barred nor covered by the 1977 Spanish Amnesty Law. Moreover, the Court found that the permanent character of the crimes justified its classification as crimes against humanity despite Spanish Criminal Code only incorporated such legal classification in 2003. Spanish National Court (*Audiencia Nacional*), Criminal Chamber, Fifth Section, Decision Pre-trial case N° 399/2006V, 16 October 2008, ninth and eleventh legal reasoning (*razonamiento jurídico noveno* and *undécimo*), available at: <http://www.derechos.org/nizkor/espana/doc/compet.html>. However, the Court’s decisions was later overruled by the Spanish Supreme Court (*Tribunal Supremo*), Criminal Chamber, Judgment 101/2012, appeal in cassation 20048/2009, 27 February 2012, available at: <https://vlex.es/vid/prevaricacion-crimenes-franquismo-injusticia-356948146>.

²³⁰² G. Radbruch, *Gesetzliches Recht und übergesetzliches Unrecht* (Süddeutschen Juristenzeitung, 1946), 105, as cited in Russell Miller, ‘Rejecting Radbruch: The European Court of Human Rights and the Crimes of the East German Leadership’, *Leiden Journal of International Law* 14, no. 3 (September 2001): 654.

going beyond the threshold of extreme injustice will lose their legal character and validity. The formula has been particularly applied by German courts when facing the legacy of its authoritarian regimes after World War II and after the fall of the Berlin Wall.²³⁰³ The Federal Constitutional Court recognized the conflict between justice and the constitutional principles of legal certainty and criminal legality, and considered that the latter must give way if the outcome is intolerably contrary to objective justice, a notion comprising the respect for generally recognized human rights.²³⁰⁴ The ECtHR allegedly upheld this position when established that a State practice cannot be considered as *law* if it is openly contrary to the applicable domestic and international norms, flagrantly infringing human rights and in particular the right to life, the supreme value in the international hierarchy of human rights.²³⁰⁵

Another legal tool to reconcile the demands of justice and legality would be the so-called human rights test.²³⁰⁶ A new interpretation and meaning for Articles ECHR 7(2) and ICCPR 15(2) is suggested in the sense of authorising limitations to certain aspects of the legality principle under very specific and well-defined conditions, similarly to the restrictions accepted regarding other fundamental rights. In fact, the ECHR recognises a number of human rights, but as well their limits and the circumstances under which they may be restricted. This is the case of Articles 8, 9, 10 and 11 regarding the right to respect for private and family life, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association. After the recognition of the rights, each Article also establishes the circumstances and requirements under which the exercise of the rights might be restricted. According to the ECHR, restrictions must generally meet three requirements: (i) they must be prescribed by law, (ii) pursue a legitimate aim and (iii) be necessary in a democratic society (necessity test).²³⁰⁷ Therefore, like the fundamental rights of ECHR Articles 8 to 11, the scope of the principle of legality could be restricted under the same conditions and requirements to ensure a balance between justice and legality, or between the public interest and individual rights. The legality principle could be restricted under specific circumstances established by law, pursuing legitimate objectives such as the prevention of crime, public security or the effective protection of the rights and

²³⁰³ As explained above, in Section 5.1.4.4.

²³⁰⁴ Federal Constitutional Court, Judgement of 24 October 1996, cited end reproduced in *Streletz, Kessler and Krenz v. Germany*, ECtHR, para. 22.

²³⁰⁵ *Streletz, Kessler and Krenz v. Germany*, para. 87. As analysed above, in Section 5.1.4.4.

²³⁰⁶ As proposed and explained in Francesco De Sanctis, 'Reconciling Justice and Legality: A Quest for Fair Punishment in Cases on Bosnian Atrocity Crimes', *Journal of International Criminal Justice* 12, no. 4 (2014): 864.

²³⁰⁷ As explained, with further references in De Sanctis, 865.

freedoms of citizens. Moreover, these limitations would only be acceptable if they meet the necessity test, for instance, if they respond to a pressing social need and are proportionate to the legitimate aim pursued.²³⁰⁸

Last but not least, it cannot be ignored the capacity of domestic parliaments to enact measures to temper the tension between justice and legality in the above-mentioned situations. Among many other options, a State can establish by law that the legality principle shall not prejudice the prosecution of human rights violations, in line with the provisions of Articles 7(2) ECHR and 15(2) ICCPR. Parliaments can also retroactively extend the limitation periods for certain categories of crimes.²³⁰⁹ Furthermore, the legislature may also enact interpretative statutes establishing a particular understanding of the laws of the previous authoritarian regime, either determining that they did not authorize or that they prohibited the relevant prosecuted behaviours.²³¹⁰

Different arguments have been provided demonstrating that States should adapt the content or the implementation of those legality requirements that exceed the international legality principle that prevent the fulfilment of their obligation to investigate, prosecute and punish international crimes and serious human rights violations. Those arguments have been accompanied with the proposal of different specific and concrete legal techniques easing the reconciliation of the competing demands of justice and legality, and solving, reducing or avoiding the conflict between the principle of legality and the international obligations of States. Despite the methods proposed might certainly involve some shortcomings since they just represent compromise solutions, they evidence the legal viability of reconciling the principle of legality with the demands of justice and the international obligations of States. If States chose to overlook them and preserve disequilibrium in between the competing

²³⁰⁸ De Sanctis, 867. The author recognises the risk of potential abuses of these exceptions. However, he argues that ECtHR's necessity test and the legality principle are sufficiently sophisticated and refined to prevent such results. De Sanctis, 866. Moreover, the actual need to except some legality requirements to prosecute past human rights violations is progressively diminishing due to the development of international criminal law and the incorporation of its legal classifications in domestic legal systems. The establishment of precise and stable criteria and requirements to limit the scope of the legality principle, mirroring other fundamental rights, would prevent domestic courts from excepting the principle without a clear legal framework, or based on *ad hoc* requirements and conditions. Setting precise and well-defined limits to the principle will actually strengthen legal certainty and the legality principle itself. Lerena García, 'Reconciliar justicia y legalidad en contextos de justicia transicional', 22.

²³⁰⁹ As explained, together with an assessment of different examples, in Posner and Vermeule, 'Transitional Justice as Ordinary Justice', 795–96.

²³¹⁰ Explained with some examples in Posner and Vermeule, 795.

rights and interests at stake, it would be based on motivations exceeding mere legal reasons.

7.2 Spain as a case study

As other countries of the civil law tradition, the Spanish legal system adheres to a strong notion of legality articulated in the requirements *lex scripta*, *lex praevia*, *lex stricta* and *lex certa*. However, when prosecuting past serious human rights violations committed abroad, Spanish Courts found different interpretations and legal techniques to reconcile the principle of legality with the prosecution of international crimes. Conversely, when Spain faced the atrocities committed in its dictatorial past, the courts adopted a strong and exclusively domestic approach of the legality principle that for the moment have hindered the implementation of any criminal investigation on these events. Therefore, Spain provides a paradigmatic example of how the conflicting demands of justice and legality can be reconciled, and how the different notions and interpretations of the principle of legality can tilt the balance one way or another.

7.2.1 The principle of legality in the Spanish legal system

The principle of legality constitutes a cornerstone of the Spanish legal system, and the 1978 Constitution enshrines the principle in two different Articles. First, Article 9(3) recognises the principle in a general manner, together with some associated guarantees and requirements:

“The Constitution guarantees the principle of legality, the hierarchy of legal provisions, the publicity of legal enactments, the non-retroactivity of punitive measures that are unfavourable to or restrict individual rights, the certainty that the rule of law will prevail, the accountability of the public authorities, and the prohibition against arbitrary action on the part of the latter.”²³¹¹

Further on, Article 25(1) establishes a more developed definition of the legality principle regarding criminal law:

²³¹¹ Spanish Constitution, 29 December 1978, Art. 9(3), available at: <https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf>. In Spanish, Art. 9(3):

“La Constitución garantiza el principio de legalidad, la jerarquía normativa, la publicidad de las normas, la irretroactividad de las disposiciones sancionadoras no favorables o restrictivas de derechos individuales, la seguridad jurídica, la responsabilidad y la interdicción de la arbitrariedad de los poderes públicos.”

“No one may be convicted or sentenced for any act or omission which at the time it was committed did not constitute a felony, misdemeanour or administrative offence according to the law in force at that time.”²³¹²

Article 25 is included in Section 1 of Chapter Two on “Fundamental Rights and Public Liberties”, protected by special guarantees. This way, the principle of legality is not only recognised as a legal principle but also as a fundamental right protected by extraordinary safeguards. These special guarantees include a preferential and summary procedure before ordinary courts, or the possibility for citizens to submit an individual appeal for protection (*recurso de amparo*) to the Constitutional Court.²³¹³ The Spanish Criminal Code also enshrines the *nullum crimen, nulla poena sine lege* principle. Article 1 establishes the legality principle regarding crimes,²³¹⁴ and Article 2 concerning punishments, as well as *lex mitior* principle.²³¹⁵

²³¹² Spanish Constitution, Art. 25(1), in Spanish:

“*Nadie puede ser condenado o sancionado por acciones u omisiones que en el momento de producirse no constituyan delito, falta o infracción administrativa, según la legislación vigente en aquel momento.*”

²³¹³ Spanish Constitution, Art. 53(2). In different occasions the Constitutional Court have overturned decisions of ordinary courts due to infringements of the legality principle. For an overview and analysis of these decisions of the Constitutional Court, see Davide Resta, ‘El principio “nullum crimen, nulla poena sine lege” en el Derecho Penal Internacional. En particular en el Estatuto de la Corte Penal Internacional’ (Granada, Universidad de Granada, 2019), 34–35.

²³¹⁴ Spanish Criminal Code, Organic Law 10/1995, 23 November 1995, Art. 1, available at: https://www.mjusticia.gob.es/es/AreaTematica/DocumentacionPublicaciones/Documents/Criminal_Code_2016.pdf:

“1. No deed or omission that is not defined as a criminal offence by Law prior to it being committed shall be punishable.

2. Security measures may only be applied if the cases previously established by the Law concur.”

²³¹⁵ Spanish Criminal Code, Art. 2:

“1. No criminal offence shall be punishable by a punishment that is not foreseen by Law prior to it being committed. Likewise, the Laws establishing security measures shall not have retroactive effect.

2. Notwithstanding this, criminal laws that favour the person found guilty shall have retroactive effect, even though final judgement may have been handed down and the convict is serving a prison sentence at the time of them coming into force. If doubt arises in determining the most favourable law, the prisoner shall be heard. However, criminal offences committed while a temporary Law is in force shall be judged pursuant thereto, except for express provisions to the contrary.”

In the Spanish legal system, the principle of legality is considered at the same time an essential element for democracy and the rule of law, and a fundamental individual right. In this vein, the principle, particularly regarding criminal law, not only constitutes a guideline and a limit for the legislator and the judiciary, but as well a subjective individual right.²³¹⁶ The Constitutional Court and the legal doctrine consider that the principle of legality has a double legal grounding, protecting at the same time legal certainty and individual freedom.²³¹⁷ Regarding legal certainty, the *nullum crimen* principle seeks to ensure that citizens know and understand criminal laws, that their wording is sufficiently clear and certain, and that the decisions of the judges are adequately foreseeable.²³¹⁸ In other words, the principle protects the right of the citizens to know at all times which conducts are considered criminal and the legal consequences they might entail. Concerning individual freedom, the legality principle ensures that the State *ius puniendi* is not exercised arbitrarily. In the same vein, it is argued that individual freedoms cannot be granted if the judiciary is not separated from the legislative and the executive.²³¹⁹ Therefore, the principle of legality constitutes an expression of the separation of powers theory. Similarly, individual freedoms require criminal laws to be issued from a democratic parliament.²³²⁰

According to some authors and to the case law of the Constitutional Court, the guarantees associated to the legality principle can be divided into material and formal elements.²³²¹ The formal or democratic element requires the laws establishing crimes and punishment to be issued by a democratically elected parliament.²³²² For their part,

²³¹⁶ Luis María Díez-Picazo, *Sistema de Derechos Fundamentales*, 3^a (Pamplona (Navarra): Civitas, 2008), 465.

²³¹⁷ Ibid., 463–64; Santiago Mir Puig, *Derecho Penal: parte general*, 8^a ed. (Barcelona: Reppertor, 2008), 106; Rodrigo Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’ (Madrid, Spain, Universidad Carlos III de Madrid, 2015), 71–72.

²³¹⁸ Díez-Picazo, *Sistema de Derechos Fundamentales*, 464.

²³¹⁹ Ibid.

²³²⁰ See above, Section 1.2.2.

²³²¹ Francisco Muñoz Conde and Mercedes García Arán, *Derecho Penal, Parte General*, 8^a (Valencia: Tirant lo Blanch, 2010), 99; Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’, 59–60.

²³²² As explained with further doctrinal and jurisprudential references in Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’, 71–73.

the material elements are the requirements regarding legal certainty and are articulated as *lex scripta*, *lex praevia*, *lex stricta* and *lex certa*.²³²³

The legal doctrine generally considers that in the Spanish legal system the *nullum crimen* principle includes (i) the prohibition of retroactive laws unfavourable for the accused (ii) the requirement of crimes and punishments to be established by laws issued from the Parliament, and therefore, to be established by written statutes, (iii) the requirement of crimes and punishments to be clearly and precisely established by laws that (iv) should be strictly interpreted avoiding analogies.²³²⁴ In other words, the principle of legality is articulated in the formula *lex scripta*, *lex praevia*, *lex stricta* and *lex certa*, as has repeatedly affirmed the Constitutional Court in a consolidated case law.²³²⁵ Lacking better grounds in the 1978 Constitution, Spanish courts and scholars include the *non bis in idem* principle as an additional element of legality, despite conceptually is a rather different principle.²³²⁶

7.2.1.1 Lex scripta

It is generally understood that the *lex scripta* requirement includes two elements.²³²⁷ First, that crimes and punishments can only be established by statutory laws, excluding non-written legal sources as custom, general principles of law, or case-law.²³²⁸ And second, that only parliamentary laws can create crimes and penalties

²³²³ Muñoz Conde and García Arán, *Derecho Penal, Parte General*; Mir Puig, *Derecho Penal*, 106; Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional', 60; Díez-Picazo, *Sistema de Derechos Fundamentales*, 464.

²³²⁴ Díez-Picazo, *Sistema de Derechos Fundamentales*, 464–65; Alicia Gil Gil, 'The Flaws of the Scilingo Judgement', *Journal of International Criminal Justice*, no. 3 (2005): 1085; Muñoz Conde and García Arán, *Derecho Penal, Parte General*, 98; Mir Puig, *Derecho Penal*, 107.

²³²⁵ Among others see, with further references, Constitutional Court, Judgment 11/1993, 25 Mars 1993, legal ground (*fundamento jurídico*) 6, available at: <https://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/2240>; Constitutional Court, Judgment 133/1987, 21 July 1987, legal ground 4, available at: <https://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/865>; Constitutional Court, Judgment 75/2002, 8 April 2002, legal ground 7, available at: <https://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/4611>.

²³²⁶ Muñoz Conde and García Arán, *Derecho Penal, Parte General*, 106; Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional', 60.

²³²⁷ Díez-Picazo, *Sistema de Derechos Fundamentales*, 465.

²³²⁸ Mir Puig, *Derecho Penal*, 107; Muñoz Conde and García Arán, *Derecho Penal, Parte General*, 100–101, 113; Díez-Picazo, *Sistema de Derechos Fundamentales*, 465. However, an important qualification could be observed regarding international customary norms, as

(*reserva de ley*), excluding other legal norms not issued by the parliament, as governmental or administrative regulations.²³²⁹ It has been argued that, contrary to other legal sources, written statutes provide certainty, objectivity, stability, communicability and impartiality, since when a legal norm is codified it detaches from those who drafted it and acquires its own entity.²³³⁰ Therefore, contrary to other legal areas where custom or general principles of law might be considered as valid legal sources, in criminal law only statutory norms are accepted.²³³¹

It should be noted that *lex scripta* is not explicitly required by the Constitution. Article 25 generally refers to the “law in force at the time” (“*según la legislación vigente*”). However, the Spanish term *legislación* is generally understood as including any written legal rule deliberately and imperatively produced by a competent authority.²³³² In the same vein, the Constitutional Court and Spanish legal literature consider that individual freedom, taken as a ground of the legality principle, implicitly requires offences and punishments to be exclusively established by laws emanated from a democratically elected parliament.²³³³ However, the constitutional case law has not always been uniform regarding the sort of parliamentary law required. In general, the regulation and development of fundamental rights and freedoms require laws approved by a qualified majority (“organic law” or *ley orgánica*). However, the position of the Constitutional Court has evolved regarding the scope of this requirement and currently,

comprehensively analysed, with further references in Fernández Liesa, «La aplicabilidad de la costumbre internacional en el derecho penal español».

²³²⁹ Mir Puig, *Derecho Penal*, 107; Mir Puig, 186; Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’, 61; Carmen Lamarca Pérez, ‘Legalidad Penal y Reserva de Ley En La Constitución Española’, *Revista Española de Derecho Constitucional* 7, no. 20 (1987): 104–18; Resta, ‘El principio “nullum crimen, nulla poena sine lege” en el Derecho Penal Internacional. En particular en el Estatuto de la Corte Penal Internacional’, 42.

²³³⁰ See, with further references Resta, ‘El principio “nullum crimen, nulla poena sine lege” en el Derecho Penal Internacional. En particular en el Estatuto de la Corte Penal Internacional’, 38.

²³³¹ Mir Puig, *Derecho Penal*, 107; Muñoz Conde and García Arán, *Derecho Penal, Parte General*, 100–101, 113; Díez-Picazo, *Sistema de Derechos Fundamentales*, 465.

²³³² Díez-Picazo, *Sistema de Derechos Fundamentales*, 465; Lamarca Pérez, ‘Legalidad Penal y Reserva de Ley En La Constitución Española’, 102.

²³³³ Díez-Picazo, *Sistema de Derechos Fundamentales*, 465; Mir Puig, *Derecho Penal*, 107; Muñoz Conde and García Arán, *Derecho Penal, Parte General*, 101. The Constitutional Court has repeatedly required crimes and punishments to be established by parliamentary laws. For an overview of the decision of the Constitutional Court on the issue, see Resta, ‘El principio “nullum crimen, nulla poena sine lege” en el Derecho Penal Internacional. En particular en el Estatuto de la Corte Penal Internacional’, 39.

only crimes punishable with deprivation of liberty need to be regulated by organic laws.²³³⁴

This formal or political guarantee derived from the legality principles has been also used to justify the exclusion of any other legal source, as custom, general principles of law, jurisprudence, or governmental regulations. It is argued that the limitation of fundamental rights can only be determined by a democratically elected body representing the people's will.²³³⁵ However, despite these sources cannot establish crimes and punishment, they have a certain value and are used as means to interpret, supplement and implement criminal law.²³³⁶

Questions regarding the *lex scripta* requirement may arise concerning the use of “blank penal laws” (*leyes penales en blanco*). These incomplete laws do not define comprehensively the criminal conduct and refer to other norms to do so. Therefore, the description of the punishable behaviour is a combination of the criminal law and the complementary norm. To assure the respect of the legality principle, the Constitutional Court requires “blank penal laws” to meet certain conditions. Thus, the referral to a non-criminal law should be explicit and justified, and the criminal law should include at least the description of the basic elements of the prohibited conduct as well as the associated penalty.²³³⁷

²³³⁴ Díez-Picazo, *Sistema de Derechos Fundamentales*, 466; Mir Puig, *Derecho Penal*, 108. For an overview of the doctrinal and jurisprudential debates on the issue, see Carmen Lamarca Pérez, ‘Principio de Legalidad Penal’, *Eunomia. Revista En Cultura de La Legalidad*, no. 1 (2011): 159; Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’, 61–62; Lamarca Pérez, ‘Legalidad Penal y Reserva de Ley En La Constitución Española’, 118–35. Despite having democratically elected parliaments, the different Autonomous Regions (*Comunidades Autónomas*) cannot enact criminal laws since, according to Spanish Constitution Art. 149(1)(vi), the State holds exclusive competence over criminal and penitentiary legislation, as analysed with case-law references in Díez-Picazo, *Sistema de Derechos Fundamentales*, 467; Resta, ‘El principio “nullum crimen, nulla poena sine lege” en el Derecho Penal Internacional. En particular en el Estatuto de la Corte Penal Internacional’, 45–46.

²³³⁵ Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’, 62; Mir Puig, *Derecho Penal*, 107.

²³³⁶ As explained, with various examples and references, in Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’, 63; Resta, ‘El principio “nullum crimen, nulla poena sine lege” en el Derecho Penal Internacional. En particular en el Estatuto de la Corte Penal Internacional’, 40.

²³³⁷ For an overview of the Constitutional Court’s case law on the issue, see in Díez-Picazo, *Sistema de Derechos Fundamentales*, 466–67; Resta, ‘El principio “nullum crimen, nulla poena sine lege” en el Derecho Penal Internacional. En particular en el Estatuto de la Corte Penal Internacional’, 44–46.

A significant legality issue appears regarding crimes established by international instruments. The legal doctrine does not agree on whether the requirement of crimes and punishments established by parliamentary laws is respected in such circumstances. Some commentators consider that the democratic element, inherent in the principle of legality, is not sufficiently observed during the drafting and ratification process of international treaties.²³³⁸ However, these authors consider that this argument is only valid regarding international instruments establishing new crimes, but not when they determine the decriminalisation of illegal behaviours.²³³⁹ On the contrary, other scholars remind that the Constitution does not exclude any subject from possible regulations by international treaties. Article 96 establishes that once officially published and validly concluded, international treaties become part of the domestic legal system.²³⁴⁰ In this vein, Article 94 requires international instruments affecting fundamental rights, as would those establishing new crimes, to be previously authorised by the Parliament.²³⁴¹ Therefore, the requirement of crimes and punishments to be only established by parliamentary laws would be met.²³⁴² However, for some authors it is uncertain to what extend this parliamentary authorization diminishes the guarantees of democratic participation if compared to a regular legislative procedure.²³⁴³ The question becomes more complicated regarding crimes established by international *ius cogens* norms, since they create *erga omnes* obligations binding upon all States, including those that have not ratified the relevant treaty or included the norm in their domestic legal system.²³⁴⁴

7.2.1.2 Lex praevia

The *lex praevia* requirement implies that a conduct can only be punished based on a criminal law in force at the moment of commission. Consequently, retroactive laws, or retroactive application of criminal laws detrimental for the accused are

²³³⁸ As explained, with further references in Díez-Picazo, *Sistema de Derechos Fundamentales*, 467.

²³³⁹ As analysed, with some examples and further references in Díez-Picazo, 467; Resta, ‘El principio “nullum crimen, nulla poena sine lege” en el Derecho Penal Internacional. En particular en el Estatuto de la Corte Penal Internacional’, 47.

²³⁴⁰ Spanish Constitution, Art. 96.

²³⁴¹ Ibid., Art. 94.

²³⁴² Resta, ‘El principio “nullum crimen, nulla poena sine lege” en el Derecho Penal Internacional. En particular en el Estatuto de la Corte Penal Internacional’, 48.

²³⁴³ Díez-Picazo, *Sistema de Derechos Fundamentales*, 468.

²³⁴⁴ See above, Section 7.1.2.

prohibited.²³⁴⁵ The fundamental purpose of the non-retroactivity rule is the protection of legal certainty, enabling individuals to foresee the legal consequences of their conducts, and therefore, to adapt their behaviour to current legality.²³⁴⁶ The non-retroactivity rule is expressly enshrined in Article 9(3) of the Spanish Constitution and Article 25 has been interpreted by the Constitutional Court as also including the *lex praevia* requirement and therefore, recognising it as a fundamental right protected by the associated extraordinary guarantees.²³⁴⁷ The prohibition of retroactive laws is also established in Articles 1 and 2 of the Spanish Criminal Code, regarding crime definitions and punishments.²³⁴⁸

Spanish legal doctrine has extensively debated whether the non-retroactivity rule reaches or not judicial interpretations. The majority opinion and the case law of the Spanish Supreme Court considered compatible with the legality principle the retroactive modification of an established line of case law, even if such variation was detrimental to the accused.²³⁴⁹ However, in 2013 the ECtHR determined that the legality principle comprises the prohibition of retroactive interpretations detrimental to the accused.²³⁵⁰ The European Court found that a decision of the Spanish Supreme Court adopting the so-called “Parot doctrine” infringed the non-retroactivity rule. This new system of calculation of maximum terms of imprisonment led to reduced remissions of sentences for work done in prison. The ECtHR found that this legal interpretation of Spanish sentencing rules constituted an unforeseeable retroactive

²³⁴⁵ Muñoz Conde and García Arán, *Derecho Penal, Parte General*, 105; Resta, ‘El principio “nullum crimen, nulla poena sine lege” en el Derecho Penal Internacional. En particular en el Estatuto de la Corte Penal Internacional’, 49.

²³⁴⁶ Díez-Picazo, *Sistema de Derechos Fundamentales*, 469; Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’, 63; Mir Puig, *Derecho Penal*, 107.

²³⁴⁷ For general analysis of the case law of the Constitutional on the issue, see Díez-Picazo, *Sistema de Derechos Fundamentales*, 469. However, the legal literature disagrees on whether Article 25 should be interpreted as including the non-retroactivity rule. For an overview of this doctrinal debate, see Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’, 63.

²³⁴⁸ Spanish Criminal Code, Arts. 1 and 2.

²³⁴⁹ For a comprehensive analysis of this matter, see Rosario De Vicente Martínez, *El Principio de Legalidad Penal* (Valencia, Spain: Tirant lo Blanch, 2004), 72–75. For further references and examples, see Juan Antonio García Amado, ‘Sobre algunas consecuencias de la Sentencia del TEDH en el caso “Del Río Prada contra España”: irretroactividad de la jurisprudencia penal desfavorable y cambios en las fuentes de producción del Derecho penal’, *El Cronista del Estado Social y Democrático de Derecho*, no. 41 (2014): 54.

²³⁵⁰ *Del Río Prada v. Spain*.

redefinition of the sentence previously imposed.²³⁵¹ In other words, the “departure from the case-law had the effect of modifying the scope of the penalty imposed, to the applicant’s detriment” and therefore infringed ECHR Article 7.²³⁵² Consequently, the European Court determined that the principle of legality bans retroactive unfavourable interpretations of both the law establishing crimes and penalties, and the norms regulating its execution.²³⁵³

Another interesting and debated issue concerns the scope and imperative force of the *lex mitior* principle. Article 2(2) of the Criminal Code establishes that “criminal laws that favour the person found guilty shall have retroactive effect.”²³⁵⁴ In the same vein, the Constitutional Court established that Article 9(3) of the Constitution imposes *sensu contrario* the retroactivity of favourable criminal laws.²³⁵⁵ However, this Court considers that Article 25 does not contain *lex mitior*, and therefore cannot be a considered a fundamental right enjoying the associated exceptional safeguards.²³⁵⁶

7.2.1.3 Lex certa

The *lex certa* requirement, also known in Spanish legal literature as the specificity principle (*principio de taxatividad*) or certainty mandate, is a constitutional instruction to the legislative to produce clear, precise and determined criminal laws.²³⁵⁷

²³⁵¹ As explained in ‘Spain: ICJ Welcomes European Court Ruling in Del Rio Prada Case’, *International Commission of Jurists* (blog), 21 October 2013, <https://www.icj.org/spain-icj-welcomes-european-court-ruling-in-del-rio-prada-case/>.

²³⁵² *Del Río Prada v. Spain*, paras 117-18.

²³⁵³ Amado, ‘Sobre algunas consecuencias de la Sentencia del TEDH en el caso “Del Río Prada contra España”’, 54. For a comprehensive analysis of the “Parot doctrine”, including different scholarly opinions, see Mercedes Pérez Manzano, Juan Antonio Lascaraín Sánchez, and Marina Mínguez Rosique, *Multilevel Protection of the Principle of Legality in Criminal Law* (Springer, 2017), 123–233.

²³⁵⁴ Spanish Criminal Code, Art. 2(2).

²³⁵⁵ See with further references Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’, 64.

²³⁵⁶ For an overview of the doctrinal debates on the rationales, scope and enforceability of *lex mitior* in Spanish legal system, together with an analysis with the most relevant case law, see Resta, ‘El principio “nullum crimen, nulla poena sine lege” en el Derecho Penal Internacional. En particular en el Estatuto de la Corte Penal Internacional’, 51–55; Díez-Picazo, *Sistema de Derechos Fundamentales*, 469–70.

²³⁵⁷ Díez-Picazo, *Sistema de Derechos Fundamentales*, 470–71; Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’, 68; Muñoz Conde and García Arán, *Derecho Penal, Parte General*, 103; Resta, ‘El principio “nullum crimen, nulla poena sine lege” en el Derecho Penal Internacional. En particular en el Estatuto de la Corte Penal Internacional’, 35.

In order to ensure compliance with legal certainty, citizens should be able to know, with a reasonable margin of certitude, which conducts are prohibited and what are the associated penalties.²³⁵⁸ Therefore, laws defining criminal conducts and punishment should meet a minimum standard of clarity, precision and specificity.

According to Spanish commentators, the *lex certa* requirement is not only linked to legal certainty, but as well to the democratic element of the legality principle and the guarantee of equal application of the law. If the criminal laws are sufficiently clear, precise and specific, the judges will have a very limited margin of discretion.²³⁵⁹ Otherwise, courts will have wide discretionary powers and the democratic requirement of crimes and punishments being established by the Parliament, would not be satisfied. At the same time, compliance with *lex certa* results in an equal application of the laws since their core meaning and scope will not depend on the subjective discretion of the judges.²³⁶⁰

However, absolute clarity and specificity in the laws are impossible to reach. Legal provisions cannot precisely describe all possible criminal conducts and enumerate all possible behaviours, particularly taking into account the prospective nature of the laws.²³⁶¹ When drafting a criminal provision, the legislator must inevitably use relatively broad terms that would be subsequently implemented by judges, adapting its application to specific situations.²³⁶² Therefore, the lawmaker should find an equilibrated middle ground but practice shows that such intermediate point is sometimes difficult to find. According to some writers, this would be the reason why the Constitutional Court has always been particularly cautious when referring to the *lex certa* requirement.²³⁶³

Anyhow, despite absolute clarity and precision are impossible to reach, minimum standards are constitutionally required. Therefore, criminal laws should avoid excessively vague wordings or indeterminate and general clauses.²³⁶⁴ If the scope of punishable conducts is not sufficiently defined, legal certainty is seriously threatened.²³⁶⁵

²³⁵⁸ Díez-Picazo, *Sistema de Derechos Fundamentales*, 470.

²³⁵⁹ *Ibid.*, 471.

²³⁶⁰ See, with further references Díez-Picazo, 471.

²³⁶¹ Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional', 69–70.

²³⁶² Muñoz Conde and García Arán, *Derecho Penal, Parte General*, 103–4; Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional', 70; Mir Puig, *Derecho Penal*, 206–7.

²³⁶³ Muñoz Conde and García Arán, *Derecho Penal, Parte General*, 104; Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional', 70.

²³⁶⁴ Mir Puig, *Derecho Penal*, 107.

²³⁶⁵ Muñoz Conde and García Arán, *Derecho Penal, Parte General*, 103; Lledó, 'El Principio de

For instance, the *lex certa* requirement entails a constitutional prohibition of open criminal classifications (*tipos abiertos*). They are considered to be too vague and ambiguous, letting to the subjective appreciation of a judge the determination of whether a conduct falls or not within the criminal classification.²³⁶⁶

7.2.1.4 Lex stricta

The principle of legality also requires the judges to strictly interpret criminal laws. Spanish commentators consider that, even if a legal provision can be understood in several ways according to the different criteria and hermeneutic rules, it cannot be interpreted beyond its possible literal meanings.²³⁶⁷

The *lex stricta* requirement also results in a prohibition of analogy in criminal matters when it goes against the interests of the accused, the so-called analogy *in malam partem*.²³⁶⁸ In other words, the legality principle prevents legal provisions to be extensively interpreted to the extent to consider criminal conducts that were not covered by the law. Otherwise, the judges would become legislators, being able to create new crimes and punishments.²³⁶⁹ In this vein, Article 4 of the Spanish Criminal Code establishes that “Criminal Law shall not apply to cases other than those specifically included therein” and that if “a Judge or Court of Law, (...) have

Legalidad En El Derecho Penal Internacional’, 69.

²³⁶⁶ See an analysis with examples and case law in Díez-Picazo, *Sistema de Derechos Fundamentales*, 471. For further information on how the Constitutional Court has interpreted and applied the *lex certa* requirement, together with an overview of the doctrinal opinions on the issue, see Resta, ‘El principio “nullum crimen, nulla poena sine lege” en el Derecho Penal Internacional. En particular en el Estatuto de la Corte Penal Internacional’, 56–67.

²³⁶⁷ See, with further references Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’, 66; Resta, ‘El principio “nullum crimen, nulla poena sine lege” en el Derecho Penal Internacional. En particular en el Estatuto de la Corte Penal Internacional’, 72–73. For an overview of doctrinal opinions on the role of the judges in the Spanish legal system, and the limits to their interpretative authority, see Resta, 67–69.

²³⁶⁸ Mir Puig, *Derecho Penal*, 107. For further general information on the concept of analogy and its different sorts, see Resta, ‘El principio “nullum crimen, nulla poena sine lege” en el Derecho Penal Internacional. En particular en el Estatuto de la Corte Penal Internacional’, 69–71. Also see above Section 4.2.2.4 and Section 6.3.1.2. According to some scholars, the use of analogy in favour of the accused or *in bonam partem* would not infringe the legality principle. On the contrary, other commentators and the Spanish Supreme Court also consider this sort of analogy unacceptable. As explained with further doctrinal and case-law references in Muñoz Conde and García Arán, *Derecho Penal, Parte General*, 121–22; Mir Puig, *Derecho Penal*, 107; Resta, ‘El principio “nullum crimen, nulla poena sine lege” en el Derecho Penal Internacional. En particular en el Estatuto de la Corte Penal Internacional’, 72–73.

²³⁶⁹ Lledó, ‘El Principio de Legalidad En El Derecho Penal Internacional’, 65.

knowledge of any deed or omission that, without being punishable by law, may be deemed worthy of repression, the Judge or Court shall abstain from all pronouncements thereon (...).²³⁷⁰

However, a significant complexity related to the *lex stricta* requirement is to draw a clear line between analogy and interpretation. Despite it is conceptually possible to distinguish them, in practice the difference is not as evident.²³⁷¹ This is particularly the case regarding broad or extensive interpretation (*interpretación extensiva*).²³⁷² However, the differentiation is important since, while analogy is clearly prohibited, the legality of broad interpretation is uncertain.²³⁷³ According to some authors and the Spanish Supreme Court, the principle of legality prohibits extensive interpretation when it is detrimental to the accused.²³⁷⁴ Conversely, for other sector of the doctrine, extensive interpretation does not infringe the legality principle as long as it remains within the limits of the possible literal meanings of the legal provision.²³⁷⁵ These authors consider that extensive interpretations conflict with the *in dubio pro reo* principle, but it is only applicable concerning rules of evidence in criminal proceedings, but not to other interpretative matters.²³⁷⁶

²³⁷⁰ Spanish Criminal Code, Art. 4(1) and 4(2). Lamarca considers that the constitutional drafters missed the opportunity to enshrine in the Constitution the prohibition of analogical reasoning and therefore, now it can only be inferred from the generic clause on legal certainty of Article 9(3). Lamarca Pérez, 'Principio de Legalidad Penal', 159.

²³⁷¹ Muñoz Conde and García Arán, *Derecho Penal, Parte General*, 106.

²³⁷² For further information on this sort of interpretation and the different criteria to differentiate it from other kinds of interpretations, see Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional', 66–67; Resta, 'El principio “nullum crimen, nulla poena sine lege” en el Derecho Penal Internacional. En particular en el Estatuto de la Corte Penal Internacional', 74–79.

²³⁷³ Díez-Picazo, *Sistema de Derechos Fundamentales*, 472.

²³⁷⁴ As explained, with further references in Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional', 67; Resta, 'El principio “nullum crimen, nulla poena sine lege” en el Derecho Penal Internacional. En particular en el Estatuto de la Corte Penal Internacional', 74–79.

²³⁷⁵ For a comprehensive overview of the doctrinal and jurisprudential debates, see Resta, 'El principio “nullum crimen, nulla poena sine lege” en el Derecho Penal Internacional. En particular en el Estatuto de la Corte Penal Internacional', 74–79; Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional', 67.

²³⁷⁶ As explained, with further references in Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional', 67.

7.2.2 Domestic prosecutions of international crimes committed abroad: the *Scilingo case*

Despite the Spanish legal system adhere to a strong version of legality, articulated as *lex scripta*, *lex praevia*, *lex stricta* and *lex certa*, Spanish courts have found different legal techniques and interpretations to conciliate the legality requirements with the prosecution of international crimes committed abroad. In particular, the judicial proceedings against former Argentine lieutenant commander Adolfo Scilingo are of significant relevance. Both the Trial Court of the *Audiencia Nacional* (Spanish National Court) and later the Supreme Court (*Tribunal Supremo*) found different legal solutions compatible with the legality principle that allowed the prosecution of conducts that could be classified as crimes against humanity committed before the incorporation of this criminal label in the domestic legal system. It is particularly interesting to compare these legal approaches to the opposite outcome reached by the same tribunals regarding crimes of similar nature and partially committed in the same time periods, but committed in Spain under the Franco regime.

7.2.2.1 The Trial Court judgment

The judicial proceedings against Adolfo Scilingo started in 1996, and he was accused of participating in illegal acts of repression of political opposition during the Argentinean dictatorship of the military *Junta* between 1976 and 1983. The criminal investigations, based on the principle of universal jurisdiction, concluded with a heavy prison sentence, but the legal arguments employed by the Trial Court and subsequently by the Supreme Court were significantly different, particularly regarding the *nullum crimen* principle. It should be noted that at the time, the crimes against humanity had not been incorporated yet into domestic laws, and it was only in 2003 when this legal classification was adopted in Article 607bis the Spanish Criminal Code.²³⁷⁷ Therefore, at different stages of the proceedings the Pre-Trial Court (*Juzgado de Instrucción*) and the prosecutor proposed classifying the conducts as genocide, based on a broad interpretation of the concept of protected national group.²³⁷⁸

²³⁷⁷ Organic Law 15/2003, 25 November 2003, modifying the Spanish Criminal Code, Organic Act 10/1995, 23 November 1995. The Organic Law 15/2003 entered into force the 1 October 2004.

²³⁷⁸ Maculan, 'International Crimes or Ordinary Crimes?', 411; Margalida Capellà i Roig, 'Los Crímenes Contra La Humanidad En El Caso Scilingo', *Revista Electrónica de Estudios Internacionales* 10 (2005): 2.

In 2005 the Trial Court sentenced Scilingo to 640 years of imprisonment, classifying the conducts as crimes against humanity based on the new Article 607bis.²³⁷⁹ The Court considered that the previous broad interpretation of the crime of genocide was only justified in the absence of a more accurate criminal label, but since in 2005 the Criminal Code already included crimes against humanity, this would be the most appropriate legal classification.²³⁸⁰ It was the first time the new Article 607bis was implemented and the Court was aware that its application to crimes committed more than twenty years before its entry into force constituted a significant challenge to the principle of legality. Therefore, the issue was expressly addressed.

The main argument of the Court was that despite Article 607bis is a domestic legal provision law, it is not a fully autonomous rule since it incorporates a pre-existent *ius cogens* international norm having *erga omnes* binding force on all States.²³⁸¹ Because of this particular nature, the Court recognized that its codification in domestic law involves major dilemmas, since its universal applicability cannot be hindered by temporal or territorial limits. Therefore, a radical rethinking of the classical penal principles is required, though respecting their essence, as well as a reinterpretation of their traditional effects.²³⁸² The Court reminded that in international law the principle of legality is articulated as *nullum crimen sine iure* and entails more flexible requirements. Similarly, it was set that the existence of an international crime is not determined by their incorporation in written domestic statutes.²³⁸³

In this vein, the *ius cogens* nature of the rule requires the adoption of a legal solution taking into account its previous international applicability.²³⁸⁴ Therefore, the norm did not enter into force until it was incorporated in domestic law, but long before when it emerged in international law. Since the Court considered that the crimes against humanity were already prohibited under general international law between 1976

²³⁷⁹ *Scilingo case*, Spanish National Court (*Audiencia Nacional*), Criminal Chamber, Third Section, Judgment N° 16/2005, *Scilingo Manzorro, Adolfo*, Summary 19/1997, 19 April 2005, available at: <http://www.derechos.org/nizkor/espana/juicial/doc/sentencia.html>. For a comprehensive analysis of the judgment, see Capellà i Roig, 'Los Crímenes Contra La Humanidad En El Caso Scilingo'; Gil Gil, 'The Flaws of the Scilingo Judgement'; Carlos Castresana Fernández, 'De Nüremberg a Madrid: la sentencia del caso Scilingo', *Jueces para la Democracia*, no. 54 (2005): 3–11.

²³⁸⁰ *Scilingo case*, Spanish National Court, legal ground (*fundamento de derecho*) 1.

²³⁸¹ *Ibid.*, legal ground 1(B).

²³⁸² *Ibid.*, legal ground 1(B)(1).

²³⁸³ *Ibid.*, legal ground 1(B)(4).

²³⁸⁴ *Ibid.*, legal ground 1(B)(1).

and 1983, convictions based on subsequent domestic provision incorporating such international norm would be consistent with the non-retroactivity rule.

The Trial Court also argued that no one could legitimately allege to be unaware that the murders, illegal detentions, torture or violations, constituted a massive and systematic attack on the most elementary human rights.²³⁸⁵ In this vein, the Court considered that the applicability of Article 607bis to these facts was in conformity with Spanish Constitution and with international law, and that only a superficial understanding of the principle of legality, contrary to its own rationale, would question the applicability of the Article.²³⁸⁶ Moreover, in order to respect *nulla poena*, the penalties applied were those existent at the time of commission for the ordinary crimes underlying the crimes against humanity, as murder, illegal detention and torture.²³⁸⁷

The ECtHR, among other international courts, has considered the legal reasoning of the Trial Court in the Scilingo case compatible with the legality principle.²³⁸⁸ Indeed, the European Court has recognized the conformity with the *nullum crimen* principle of convictions grounded on criminal labels adopted in the domestic legal system after the commission of the crimes, but that incorporated international criminal norms already applicable to the accused at the moment of the facts.²³⁸⁹ However, the Spanish doctrine is divided when assessing the Trial Court's arguments. While some scholars consider generally correct the reasoning of the Court,²³⁹⁰ other writers, upholding a stronger, more formalistic and exclusively domestic version of legality, consider that the Court infringed the *nullum crimen* principle as should be understood in the Spanish legal system.²³⁹¹

²³⁸⁵ Ibid., legal ground 1(B)(4).

²³⁸⁶ Ibid.

²³⁸⁷ Ibid., *Fallo* 1.

²³⁸⁸ See above, Section 4.1.2.8 and Section 5.2.4.2.B.

²³⁸⁹ *Kononov v. Latvia*, ECtHR Chamber, para. 119. See above, Section 4.1.2.8, Section 5.1.4.5 and Section 5.2.4.2.B.

²³⁹⁰ Chinchón Álvarez, *El tratamiento judicial de los crímenes de la Guerra Civil y el franquismo en España. Una visión de conjunto desde el Derecho internacional*, 55; Capellà i Roig, «Los crímenes contra la humanidad en el caso Scilingo»; Ollé Sesé, «Principio de legalidad y crímenes del franquismo», 1431; Carlos Castresana Fernández, «De Nüremberg a Madrid: la sentencia del caso Scilingo», *Jueces para la Democracia*, n.º 54 (2005): 3-11; Fernández Liesa, «La aplicabilidad de la costumbre internacional en el derecho penal español», 82-89.

²³⁹¹ Gil Gil, 'The Flaws of the Scilingo Judgement'; Carmen Lamarca Pérez, 'Jurisprudencia aplicada a la práctica. Internacionalización del Derecho Penal y principio de legalidad: el Caso Scilingo', no. 34 (2007): 69-77.

7.2.2.2 *The Supreme Court judgment*

The Trial Court judgment was appealed and the Spanish Supreme Court upheld Scilingo's conviction and increased the sentence imposed from 640 to 1084 years of imprisonment.²³⁹² However the legal grounds, and particularly the interpretation of the legality principle, were significantly different. The Court based its position on a strong notion of legality, requiring *lex scripta*, *lex praevia*, *lex certa* and *lex stricta*.²³⁹³ Consequently, it refused to label the prosecuted conducts as crimes against humanity arguing that Article 607bis was adopted long after the events took place and its application would entail a violation of the non-retroactivity rule. The Court considered that the legality principle required convictions to be based on domestic legal provisions in force at the time of commission. Therefore, the facts were classified as ordinary crimes of murder and illegal detention, as existent in both Spanish and Argentinean domestic criminal laws. However, the Court considered that the context of widespread and systematic violence against the civilian population in which the crimes had been committed, had to be taken into account. This way, the Court considered that in 1976 such contextual element, characteristic of crimes against humanity, was internationally recognised, being defined with sufficient clarity.²³⁹⁴ Therefore, despite considering contrary to legality the classification of the facts as crimes against humanity, the Court grounded on the contextual element the exercise of its jurisdiction, in application of universal jurisdiction. In other words, the particular circumstances in which the crimes had been committed could be taken into account to justify their universal prosecution, even if the conducts are classified as ordinary crimes.²³⁹⁵

Significantly, the Supreme Court considered that customary international law and the international instruments adopted by Spain should be taken into account when interpreting and applying domestic legal provisions, in a manner compatible with the effective protection of human rights.²³⁹⁶ The Court also argued that at the time of commission, the accused could have foreseen the criminal nature of his acts and the possibility of being punished since the facts were extraordinarily serious and were considered criminal under Spanish and Argentinean laws.²³⁹⁷

²³⁹² *Scilingo case*, Spanish Supreme Court (*Tribunal Supremo*), Criminal Chamber, Judgment 798/2007, appeal in cassation N^o 10049/2006P, 1 October 2007, available at: <http://www.derechos.org/nizkor/espana/juicioral/doc/sentenciats.html>.

²³⁹³ *Ibid.*, legal ground 6(1).

²³⁹⁴ *Ibid.*, legal ground 6(10).

²³⁹⁵ *Ibid.*, legal ground 6(9).

²³⁹⁶ *Ibid.*, legal ground 8.

²³⁹⁷ *Ibid.*, legal ground 6.

The line of reasoning followed by the Supreme Court is a variant of the above-analysed method of dual classification of facts.²³⁹⁸ While domestic laws provide for crime definitions and punishments, the existence of contextual elements characteristic of crimes against humanity was used to ground the activation of the universal jurisdiction principle. This way, the stronger legality requirements would be met since crime definitions and penalties are established by previous written domestic laws.

The Spanish doctrine is also divided assessing the legal arguments employed by the Supreme Court. Those authors analysing the issue from a domestic point of view and upholding stricter notions of legality, celebrated the Court's refusal to retroactively apply Article 607bis, but at the same time considered contrary to the legality principle the decision to ground the Court's jurisdiction on the contextual element of crimes against humanity.²³⁹⁹ On the contrary, those scholars that had supported the Trial-Court decision and that upheld a more flexible notion of legality concerning international crimes, criticized the Supreme Court's refusal to classify the conducts as crimes against humanity.²⁴⁰⁰

7.2.3 Domestic prosecutions of international crimes committed in Spain

Despite Spanish courts had found different legal formulas to reconcile the principle of legality with the prosecution of international crimes, when few years later they were faced to the crimes committed by the Franco regime, the legal arguments and the outcomes varied substantially. To understand these legal proceedings and the legal reasoning employed, it is necessary to provide a general overview of the Franco regime, the crimes committed during that period and how Spain recovered democracy. Similarly, the attempts to prosecute the crimes committed during the dictatorship should be understood within the wider framework of the fight against impunity, and the implementation of other mechanisms of transitional justice.

²³⁹⁸ See above, Section 7.1.4 and footnotes 2297 and 2298.

²³⁹⁹ Gil Gil, 'Principio de legalidad y crímenes internacionales. Luces y sombras en la sentencia del Tribunal Supremo en el caso Scilingo'; Lamarca Pérez, 'Jurisprudencia aplicada a la práctica. Internacionalización del Derecho Penal y principio de legalidad'; Maculan, 'International Crimes or Ordinary Crimes?', 410–11; Lledó, 'El Principio de Legalidad En El Derecho Penal Internacional', 315–16.

²⁴⁰⁰ Ollé Sesé, *Justicia universal para crímenes internacionales*, 64-67; Chinchón Álvarez, *El tratamiento judicial de los crímenes de la Guerra Civil y el franquismo en España. Una visión de conjunto desde el Derecho internacional*, 55-62; Fernández Liesa, «La aplicabilidad de la costumbre internacional en el derecho penal español», 83-85.

7.2.3.1 *The Franco regime, international crimes and the transition to democracy*

Franco's regime in Spain was one of the longest and most dreadful dictatorships of the twentieth century (1936-1977). From the *coup d'état* that led to the Spanish Civil War (1936-1939),²⁴⁰¹ until the death of Franco in 1975 and the celebration of the first democratic elections in 1977, the regime implemented a repression and terror policy against all forms of opposition to the regime. During that period, the crimes committed included enforced disappearances, torture, executions carried out without trial or after summary trials before courts-martial murders, illegal and arbitrary detentions, slave labour, sexual violence, infants-stealing and appropriation of identities.²⁴⁰² The typology and intensity of the crimes committed evolved and the height of the violence occurred during the war and the post-war years when between 130.000 and 150.000 civilians were killed outside of conflict zones.²⁴⁰³ For instance, in

²⁴⁰¹ The 1936-1939 armed conflict in Spain is generally known as "Spanish Civil War". However, as proposed by authors as David De Jorge, it would be more appropriate to use the term "Spanish War". This is a broader term that reflects the existence of a civil war, but also comprises the decisive international factors. The press of the time referred to the conflict as the Spanish War, but the use of the expression Civil War began to be widespread, especially in the Anglo-Saxon countries, with the intention of detaching the Spanish War from World War II, and to justify the non-intervention policy and the decision of not overthrowing Franco at the end of war in Europe. In French, the term 'Guerre d'Espagne' is still used. David De Jorge, *Inseguridad Colectiva* (Valencia, España: Tirant lo Blanch, 2016). For a comprehensive analysis of the contributions of the Spanish Civil War to the development of international law in different areas, see Carlos R. Fernandez Liesa, «La Guerra Civil Española y el Derecho Internacional», *Revista española de derecho internacional* 61, n.º 1 (2009): 75-98.

²⁴⁰² For an overview of the crimes committed and their evolution from 1936 to 1977, see, with further references Paul Preston, *El holocausto español: Odio y exterminio en la Guerra Civil y después*, 5th ed. (Barcelona: Penguin Random House, 2011); Javier Rodrigo, *Hasta la raíz: violencia durante la Guerra Civil y la dictadura franquista* (Madrid: Alianza, 2008); Alejandro Lerena García and Gustavo de la Orden Bosch, 'Obstáculos y Avances de La Justicia Transicional En España: Del Olvido a La Memoria Democrática', in *Las Deudas Pendientes de Iberoamérica En Materia de Memoria, Justicia y Reparación*, ed. Joaquín A. Mejía Rivera (Honduras: Editorial Guaymuras, 2022), 31-38.

²⁴⁰³ Paul Preston, *El holocausto español: Odio y exterminio en la Guerra Civil y después*, 5th ed. (Barcelona: Penguin Random House, 2011), 193-306; Javier Rodrigo, *Hasta la raíz: violencia durante la Guerra Civil y la dictadura franquista* (Madrid: Alianza, 2008); Laura Martín-Chiappe, 'De La Fosa al Cementerio: El Complicado Camino de La Reparación Para Los Represaliados/as Por El Franquismo', in *Construyendo Memorias Entre Generaciones*, ed. Ana Messuti (Madrid: Postmetropolis, 2019), 128; Aguilar, 'Jueces, Represión y Justicia Transicional En España, Chile y Argentina', 285; Francisco Ferrándiz, 'Exhuming the Defeated: Civil War Mass Graves in 21st-Century Spain', *American Ethnologist* 40 (1 February 2013). Historians

the period between 1939 and 1942, once the war had ended, more than 50.000 people were executed without trial or as a result of courts martial or summary trials.²⁴⁰⁴

Despite the intensity decreased in the following years, the repression continued in a widespread and systematic manner during all the dictatorship period. After almost 40 years in power, Franco's death in 1975 opened a period of political compromises towards the restoration of democracy, known as the Spanish Transition (*la Transición española*). In the Spanish public imagination, this period is conceived as a peaceful time, in which the different political forces negotiated the foundations of the current democratic system without violence.²⁴⁰⁵ However, recent studies are proving the inaccuracy of this narrative. Between 1975 and 1982 political violence, institutional repression and terrorism provoked hundreds of deaths, as well as countless cases of torture in a context of widespread and institutionalised repression.²⁴⁰⁶

Democracy returned to Spain through a transitional process that was praised and taken as a model for many years. Despite successfully achieving the main objective of restoring a democratic regime, Spanish transition also had important shortcomings, the consequences of which persist today. Among others, it stands out the lack of response to the widespread human rights violations committed during the dictatorship, and a significant lack of effective measures to ensure truth, justice and reparation for the victims.²⁴⁰⁷ The Spanish transition was grounded on the unspoken '*pacto del olvido*'

consider that in the Republican rear-guard more than 50.000 people were executed during the war as a result of outbreaks of violence that, in general, were sporadic and not very organized. In contrast, in the rebel rear-guard repression and terror were carried out in an organized and institutionalized manner, being part of the strategy of conquest and submission. For a study on the quantitative and qualitative differences of the repression in the Republican and rebel rear-guard, see Rodrigo, *Hasta la raíz*, 38.

²⁴⁰⁴ José Luis De la Cuesta and Miren Odriozola, 'Marco Normativo de La Memoria Histórica En España: Legislación Estatal y Autonómica', *Revista Electrónica de Ciencia Penal y Criminología*, no. 20-08 (2018): 4.

²⁴⁰⁵ Eve Fourmont Giustiniani, 'Répression dictatoriale, justice transitionnelle et mémoire historique. Le cas espagnol au miroir argentin (1975-2018)', *Cahiers d'études romanes, Centre aixois d'études romanes*, no. 41 (2020): 3.

²⁴⁰⁶ Sophie Baby, *El mito de la transición pacífica: Violencia y política en España (1975-1982)*, 1er édition (Madrid: Akal, 2018); Fourmont Giustiniani, 'Répression dictatoriale, justice transitionnelle et mémoire historique. Le cas espagnol au miroir argentin (1975-2018)'; Rafael Escudero, '¿Por Qué No Se Extradita a Los Torturadores Franquistas?', *Eldiario.Es*, 4 May 2014; Aguilar, 'Jueces, Represión y Justicia Transicional En España, Chile y Argentina', 295; Francisco Gor, 'De La Justicia Franquista a La Constitucional', in *Memoria de La Transición* (Madrid, España: Taurus, 1996), 332-35; Alicia Gil Gil, *La Justicia de Transición En España. De La Amnistía a La Memoria Histórica* (Barcelona: Atelier, 2009).

²⁴⁰⁷ There were some limited economic reparations for certain victims of the Spanish Civil War,

(pact of forgetting) agreed by the political elites and legally articulated by the still in force 1977 Amnesty Law.²⁴⁰⁸ This way the impunity of the crimes committed during the Franco regime was institutionalized, and subsequently consolidated by the passage of time and the death of many of those responsible. The *pacto del olvido* remained unchallenged for more than twenty years.

It was only in the 2000s when Spanish civil society started to get organized asking to collectively address the legacy of past atrocities. The grandchildren of those killed during the Civil War and the first years of the dictatorship initially led the demands, but they were soon followed by many other groups of victims. From that moment different transitional justice mechanisms have been implemented, timidly at first and more decisively in recent years. Several factors can explain the emergence of this social movement, but a significant influence can be attributed to the prosecutions conducted by the Spanish Court concerning the crimes committed by dictatorial regimes in Latin America, such as the *Pinochet* and *Scilingo* cases. These proceedings had a great international and domestic impact, revealing to Spanish society the realities of Latin American countries and permitting the victims of the Franco regime to recognize themselves in the victims of those countries.²⁴⁰⁹ In the context of a global trend to implement transitional justice mechanisms and recognize the rights of the victims of human rights violation, these prosecutions acted as a catalyst in Spanish society. The similarities of the prosecuted crimes and the atrocities committed under

as explained in Josep Tamarit Sumalla, 'Memoria Histórica y Justicia Transicional En España: El Tiempo Como Actor de La Justicia Penal', *Anuario Iberoamericano Derecho Internacional Penal* 2, no. 1 (4 November 2014): 46–47. For further general information on the Spanish transition, see, among others Paloma Aguilar, *Memoria y Olvido de La Guerra Civil Española* (Madrid, España: Alianza Editorial, 1996); Josep M Colomer, *La Transición a La Democracia: El Modelo Español* (Barcelona: Anagrama, 1998); Santos Juliá, *Transición: Historia de una política española* (Barcelona: Galaxia Gutenberg, 2017).

²⁴⁰⁸ Amnesty Law, Law 46/1977, 15 October 1977, BOE-A-1977-24937.

For further information on the “*pacto del olvido*” and the political and legal consequences of the 1977 Amnesty Law, see Gor, ‘De La Justicia Franquista a La Constitucional’, 332; Aguilar, ‘Jueces, Represión y Justicia Transicional En España, Chile y Argentina’, 281–308; Madeleine Davis, ‘Is Spain Recovering Its Memory? Breaking the Pacto Del Olvido’, *Human Rights Quarterly* 27.3 (2005): 858–80; Araceli Manjón-Cabeza Olmeda, ‘2012: Las posibilidades legales de la memoria histórica’, *Revista electrónica de ciencia penal y criminología*, no. 14 (2012): 24–29.

²⁴⁰⁹ Fourmont Giustiniani, ‘Répression dictatoriale, justice transitionnelle et mémoire historique. Le cas espagnol au miroir argentin (1975-2018)’, 6–8.

Franco's regime became evident, and the model of impunity and oblivion that had been in place since the transition began to be questioned.²⁴¹⁰

7.2.3.2 *The prosecution of the crimes of the Franco regime*

In 2006 various individuals and victim associations presented before the Spanish National Court different criminal complaints for crimes committed during the Civil War and the Franco regime.²⁴¹¹ In 2008 Judge Baltasar Garzón, in charge of the Pre-Trial Court (*Juzgado de Instrucción*) Nº 5 of the Spanish National Court, initiated investigations on the alleged crimes against humanity committed in Spain between 1936 and 1952.²⁴¹² The Judge referred to the Supreme Court decision in the *Scilingo case*, and employed the same lines of reasoning. Despite at the time of commission the crimes against humanity were not included in Spanish legislation, according to the Judge they already existed in international law,²⁴¹³ and the underlying offences were considered ordinary crimes under the Criminal Code of the time. Therefore, the Pre-Trial Court grounded its jurisdiction on the contextual element, characteristic of crimes against humanity.²⁴¹⁴ Similarly, this contextual element justified the inapplicability of the 1977 Amnesty Act.²⁴¹⁵ Regarding statutes of limitations, despite the crimes had

²⁴¹⁰ Nina Elsemann, 'Discursos y Políticas de La Memoria En España: Una Perspectiva Transnacional', in *Políticas de Memoria y Construcción de Ciudadanía*, ed. Ariel Jerez and Emilio Silva (Madrid: Postmetropolis, 2015), 55–60; Davis, 'Is Spain Recovering Its Memory? Breaking the Pacto Del Olvido', 866–71; Tamarit Sumalla, 'Memoria Histórica y Justicia Transicional En España', 47–48.

²⁴¹¹ For further information on the judicial situation prior to the presentation of these complaints, see with further references, Chinchón Álvarez, *El Tratamiento Judicial de Los Crímenes de La Guerra Civil y El Franquismo En España. Una Visión de Conjunto Desde El Derecho Internacional*, 43–50.

²⁴¹² Spanish National Court, Central Investigative Chamber (*Juzgado Central de Instrucción*) Nº 5, Decision (*Auto*), Preliminary Proceedings Nº 399/2006V, 16 October 2008, available at: <http://www.latinreporters.com/espagneGarzonFrancoLorca16102008M.pdf>. For a detailed analysis of this decision, see Chinchón Álvarez, 50–72. The decision provoked numerous and divided reactions in the legal doctrine. For an overview of these scholarly opinions, see Chinchón Álvarez, 75–76.

²⁴¹³ The doctrine is divided regarding the existence of crimes against humanity in international law of the time. For an affirmative position see, among others, Margalida Capellà, *La tipificación internacional de los crímenes contra la humanidad*, Monografías 359 (Valencia: Tirant lo Blanch, 2005). For a contrary opinion see Alicia Gil Gil, *La justicia de transición en España. De la amnistía a la memoria histórica* (Barcelona: Atelier, 2009), 114; Fernandez Liesa, «La Guerra Civil Española y el Derecho Internacional», 86.

²⁴¹⁴ Decision 16 October 2008, Spanish National Court, legal ground 9.

²⁴¹⁵ *Ibid.*, legal ground 11.

been committed more than fifty years before the proceedings started, the Judge took into account the permanent nature of the enforced disappearances to determine that their prosecution was not time barred.²⁴¹⁶

However, few months after the Pre-Trial Court had decided to initiate the proceeding, the Criminal Chamber of the Spanish National Court blocked the investigation considering that the judge had no powers to investigate these facts.²⁴¹⁷ Not long after, a criminal proceeding started against Judge Garzón accused of knowingly issuing an illegal decision (*prevaricación*) when starting investigations about the crimes committed during the Civil War and the dictatorship. Despite the Judge was acquitted in 2012 by the Spanish Supreme Court, his legal reasoning was qualified as erroneous and the Court ruled that the crimes of the Franco regime could not be prosecuted in Spain.²⁴¹⁸

The Supreme Court grounded its decision on a strict and exclusively domestic notion of legality. It established that since at the time of commission Spanish laws did not include crimes against humanity, this label could not be used to classify the conducts, regardless of whether it existed or not in international law. Similarly, the Tribunal determined that the contextual element characteristic of crimes against humanity could not be used to avoid the application of the 1977 Amnesty Act or the limitation periods. It was argued that the very concept of crimes against humanity

²⁴¹⁶ Ibid., legal grounds 9, 11 and 12.

²⁴¹⁷ Spanish National Court, Criminal Chamber Plenary Session (*Pleno de la Sala de lo Penal*), Decision (*Auto*), Proceeding N^o N53/08, 2 December 2008, available at: <http://www.derechoshumanos.net/jurisprudencia/procesos/archivos/2008-12-02-Auto-incompetencia-AN.pdf>.

²⁴¹⁸ Spanish Supreme Court, Criminal Chamber, Judgment 101/2012, appeal in cassation N^o 20048/2009, 27 February 2012, available at: <http://www.derechos.org/nizkor/espana/doc/garzon184.html>. For a comprehensive analysis of the criminal proceedings against Judge Garzón, see Javier Chinchón Álvarez, 'La Actuación de La Audiencia Nacional En La Investigación y Juicio de Los Crímenes Contra La Humanidad Cometidos En La Guerra Civil y El Franquismo: Del Auto de 16 de Octubre a La Decisión Del Pleno de La Sala de Lo Penal de 2 de Diciembre de 2008', *La Ley. Revista Jurídica Española de Doctrina, Jurisprudencia y Bibliografía* 7102, no. 1 (2009): 1415–24; Alicia Gil Gil, 'Los Crímenes de La Guerra Civil Española: ¿Responsabilidad Del Estado Español Por Infracción Del Convenio Europeo de Derechos Humanos?', *InDret, Revista Para El Analisis Del Derecho*, no. 4 (2012): 1–28; Zapico Barbeito, 'La investigación de los crímenes del franquismo: entre el procesamiento por prevaricación abierto contra el juez Baltasar Garzón y la querrela presentada en Argentina en virtud del ejercicio de la jurisdicción universal', *Anuario da Facultade de Dereito da Universidade da Coruña*, no. 14 (2010): 37; Manjón-Cabeza Olmeda, '2012', 7–9, 19–24. For a comprehensive and critical assesment of arguments employed by the Supreme Court, see Chinchón Álvarez, *El Tratamiento Judicial de Los Crímenes de La Guerra Civil y El Franquismo En España. Una Visión de Conjunto Desde El Derecho Internacional*, 97–130.

could not be invoked, even to refer to the contextual element, since at the time of commission such legal notion was unknown, and any use of it would not be accessible or foreseeable for the accused. However, it seems that this reasoning conflicts with the argument used by the same court some years before in the *Scilingo case* when it grounded its jurisdiction on the contextual element. In that occasion, the Tribunal affirmed that the accused could not ignore that, at least from the establishment of the Nuremberg Charter, his conducts would be qualified in international law as crimes against humanity.²⁴¹⁹ Anyhow, in 2012 the Supreme Court considered that since the crimes committed during the Franco regime could only be classified as ordinary crimes as existent at the time of commission, their prosecution would be both time barred and covered by the 1977 Amnesty Act.²⁴²⁰ Similarly, the Court rejected the argument on the permanent nature of enforced disappearances.²⁴²¹

In 2010, given the obstruction to the investigation in the Spanish National Court, and the inactivity of territorial courts having jurisdiction over the crimes, two victims of the Franco regime filed a criminal complaint before Argentine courts seeking the justice that was being denied in Spain. Based on the principle of universal jurisdiction, Judge María Servini de Cubría, head of the Federal Criminal Court N°1 of Buenos Aires, initiated a criminal investigation of the generalized and systematic human rights violations, classified as crimes against humanity, committed in Spain from 1936 to 1977.²⁴²²

²⁴¹⁹ *Scilingo case*, Spanish Supreme Court, legal ground 6. As analysed in Chinchón Álvarez, *El Tratamiento Judicial de Los Crímenes de La Guerra Civil y El Franquismo En España. Una Visión de Conjunto Desde El Derecho Internacional*, 102.

²⁴²⁰ Judgment 27 February 2012, Spanish Supreme Court, legal ground 3. For a different approach on how the 1977 Amnesty Law could be implemented permitting the investigation of the crimes committed during the Francoism, see Human Rights Council, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff. Mission to Spain*, 22 July 2014, A/HRC/27/56/Add.1, available at: <https://digitallibrary.un.org/record/780680>.

²⁴²¹ Judgment 27 February 2012, Spanish Supreme Court, legal ground 3. For an analysis on how the Spanish Constitutional Court has addressed the crimes during the Civil War and the Franco regime, see Itziar Gómez Fernández, ‘Jurisdicción Constitucional y Memoria Democrática en España’, in *Claves jurídicas para la recuperación de la memoria democrática en España*, by Carmen Pérez González (Navarra: Aranzadi, 2022), 225–44.

²⁴²² Federal Criminal and Correctional Court N°1 (Argentina), Decision, Proceeding N° 4591/2010, 18 September 2013. For further information on this proceeding, so-called *Querella Argentina*, see Ana Messuti, ‘Aplicación Del Derecho Penal Internacional En La Argentina. A Propósito de La Querella Para Investigar Los Crímenes Del Franquismo’, *Revista de Derecho Penal y Criminología*, no. 1 (2011): 89–103; Marina Montoto Ugarte, ‘Las víctimas del franquismo en “La Querella Argentina”: luchas por el reconocimiento y nuevas desigualdades’, *Papeles del CEIC* 1, papel 164 (2017): 1–25; Alejandro Lerena García, ‘Overview of the

In 2013 and 2014, Judge Servini ordered the arrest and extradition of 20 high-ranking officials, including former Francoist ministers Rodolfo Martín Villa and José Utrera Molina. However, the Spanish Council of Ministers and various courts denied the requests of the Argentine Judge. With few exceptions, Spain has provided very limited cooperation to the Argentinean Court. However, the proceedings are still ongoing, and in September 2020 former minister Martín Villa, who is under investigation for crimes against humanity, testified before Judge Servini from the Argentine embassy in Madrid.

The argument employed by Spanish judicial and political organs to refuse cooperating with the Argentinean proceedings, mirrored those of the 2012 Supreme Court judgement. However, as a novelty, some courts also argued that the alleged tortures committed in the last years of the dictatorship were isolated conducts and therefore, they could not be qualified as crimes against humanity, deeming them time-barred. However, it seems that denying the context of generalized repression against civil society and democratic opposition during Franco regime can only be explained by an absolute ignorance of the situation of the time, or by an express intention to prevent the prosecution of these crimes.²⁴²³

7.2.4 Reconciling legality and justice in Spain?

Spain provides a clear example of how the opposing requests of justice and legality can be reconciled, and how the different ways of interpreting and implementing the *nullum crimen* principle can lead to contrasting outcomes. When prosecuting international crimes committed abroad, Spanish courts found several solutions and implemented various legal techniques based on different notions of legality that enable prosecutions in conformity with the *nullum crimen* principle. Conversely, when Spain tried to address the serious human rights violations committed during the Franco regime, the courts implemented a stringent and excessively formalistic version of legality, and refused to adopt any of the legal methods available to satisfy the

Argentine Lawsuit against the Crimes of the Franco Regime: Outcomes and Challenges', *Journal of Political Sciences & Public Affairs* 9, no. 12 (2021).

²⁴²³ Escudero, '¿Por Qué No Se Extradita a Los Torturadores Franquistas?' Evidence of the violent repression during the last years of the dictatorship and the transition period is provided, among others by Baby, *El mito de la transición pacífica*; Fourmont Giustiniani, 'Répression dictatoriale, justice transitionnelle et mémoire historique. Le cas espagnol au miroir argentin (1975-2018)'; Aguilar, 'Jueces, Represión y Justicia Transicional En España, Chile y Argentina', 295; Gor, 'De La Justicia Franquista a La Constitucional'; Gil Gil, *La Justicia de Transición En España. De La Amnistía a La Memoria Histórica*.

conflicting demands of justice and legality, tilting the balance exclusively in favour of the later.

Spanish tribunals have implemented rigorous interpretations of legality exclusively taking into account a domestic point of view, declining the solutions proposed at the international level, and ignoring the international background and the *ius cogens* nature of norms tardily incorporated in domestic legal provisions. Spanish courts have disregarded the different legal techniques endorsed by the ECtHR and employed by other domestic courts to prosecute crimes having the same characteristics, and committed in similar periods, than the Francoist repression. In this sense, Spain has shown for the moment a noticeable lack of commitment to its international obligations regarding the investigation, prosecution and punishment of international crimes, as well as concerning the fulfilment certain rights of the victims.

However, since transitional justice issues emerged in the Spanish public debate in the 2000s, significant advancements have been made, particularly regarding truth and reparation policies. They have been articulated mainly through the 2007 Historical Memory Law, followed by different regional regulations, and the 2022 Democratic Memory Law. However, these improvements are intertwined in time with the various failed attempts to investigate and prosecute the crimes committed during the dictatorship. Somehow, the negative results of these judicial proceedings have favoured the advancement of other transitional justice measures, since they have highlighted the existing shortcomings, not only in terms of justice, but also in terms of truth, reparation and guarantees of non-repetition.

In this vein, the prosecution of Judge Garzón for his attempt to investigate the crimes, the subsequent Supreme Court decision closing the door to criminal prosecutions, the limited collaboration of Spain with the Argentine proceeding, as well as the repeated refusal of the main Spanish political parties to repeal or modify the 1977 Amnesty Law, have had great repercussion both domestically and internationally. In the last years fifteen years, various international bodies have visited Spain and have issued different reports and recommendations, including, among others, those of the United Nations Human Rights Committee, the Committee on Enforced Disappearances, the Committee against Torture and the Special Rapporteur on the promotion of Truth, Justice and Reparation.²⁴²⁴ Among other recommendations, these bodies have required

²⁴²⁴ Human Rights Committee, *Concluding observations on the sixth periodic report of Spain*, 14 August 2015, CCPR/C/ESP/6, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/181/10/PDF/G1518110.pdf?OpenElement>; Committee on Enforced Disappearances, *Concluding observations on the report submitted by Spain under article 29, paragraph 1, of the Convention*, 12 December 2013, CED/C/ESP/CO/1, available at: [https://documents-dds-](https://documents-dds-ny.un.org/doc/UNDOC/GEN/G13/181/10/PDF/G1318110.pdf?OpenElement)

Spain to repeal or to not apply the 1977 Amnesty Law, to not consider time barred the crimes against humanity committed during the Franco regime, to set up a Truth Commission and to fully cooperate with the Argentine courts.²⁴²⁵

This way, the social and international reaction to the lack of progress regarding criminal proceedings has favoured, to a certain extent, the development of other transitional justice measures and the adoption of different relevant legislation. However, it seems that the main political parties, and the Spanish legislature did not show greater interest than the judiciary to facilitate the prosecutions. The subsequent laws addressing the dictatorial past have not introduced significant changes that might promote judicial investigations, and the Spanish Parliament has repeatedly refused in the last years to amend or repeal the 1977 Amnesty.²⁴²⁶

First, in 2007 the Historical Memory Law was adopted intending to provide a comprehensive response to the consequences of the Civil War and the dictatorship, focusing on truth and reparation measures.²⁴²⁷ In this respect, the Law presents

ny.un.org/doc/UNDOC/GEN/G13/496/05/PDF/G1349605.pdf?OpenElement; Committee on Enforced Disappearances, *Concluding observations on the additional information submitted by Spain under article 29 (4) of the Convention*, 4 November 2021, CED/C/ESP/OAI/1, available at: <https://shorturl.at/koBV0>; Committee Against Torture, *Concluding observations on the sixth periodic report of Spain*, 29 May 2015, CAT/C/ESP/CO/6, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/108/23/PDF/G1510823.pdf?OpenElement>; HRC, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff. Mission to Spain*, UN Doc. A/HRC/27/56/Add.1, 22 July 2014; HRC, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Fabián Salvioli on his visits to Tunisia, Uruguay and Spain*, 5 August 2021, A/HRC/48/60/Add.1, available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G21/215/89/PDF/G2121589.pdf?OpenElement>.

²⁴²⁵ For an analysis of the recommendations of these international bodies, see with further references Carmen Pérez González, ‘Memoria democrática y Derecho internacional: Una reflexión sobre su encaje tardío e inacabado en España’, in *Claves jurídicas para la recuperación de la memoria democrática en España*, by Carmen Pérez González (Navarra: Aranzadi, 2022), 57–72; Ramón Sáez Valcárcel, ‘La Impunidad de Los Crímenes de La Dictadura y La Ideología Jurídica Del Olvido’, *Historia Actual Online*, no. 56 (2021): 156.

²⁴²⁶ In July 2011 Spanish Parliament voted a proposal to modify the 1977 Amnesty Act so it could not be used to hinder the prosecution of crimes against humanity. The proposition was rejected with 320 votes against and 8 in favour. In 2016 and 2018 similar proposals were refused in the Parliament, though with smaller margins of votes.

²⁴²⁷ Historical Memory Law, Law 52/2007, *Por la que se reconocen y amplían derechos y se establecen medidas a favor de quienes padecieron persecución o violencia durante la guerra civil y la dictadura*, BOE-A-2007-22296, 26 de diciembre, available at: <https://www.boe.es/buscar/act.php?id=BOE-A-2007-22296>. For a detailed analysis of the Law,

important advances, including the explicit condemnation of the dictatorship and the recognition of the "radically unjust" nature of all convictions, sanctions and other forms of violence based on political, ideological or religious reasons during the Civil War or the dictatorship.²⁴²⁸ The Law also declared the illegitimacy of all Francoist courts and their sentences, and it required the removal of all public symbols and monuments commemorating the military uprising, the Civil War and Francoism repression.²⁴²⁹

However, the measures adopted arrived too late and seemed insufficient. The Law focused on symbolic actions and left the implementation of important measures to the initiative of the victims, as was particularly the case of the exhumation of the remains of those killed during the Civil War and the post-war period.²⁴³⁰ Similarly, the Law did not include any modification of the 1977 Amnesty Law, or provide for any legal change that could foster judicial prosecutions.²⁴³¹ Given the shortcomings and the difficulties to implement the 2007 Historical Memory Law, some Spanish regions adopted, within the limits of their competences, different regulations that often were more ambitious than the State level legislation.²⁴³²

In 2022, the Spanish Parliament adopted the Democratic Memory Law that represented a significant improvement, formally recognising the principles of truth, justice, reparation and guarantees of non-repetition.²⁴³³ However, important

see, among others, Manjón-Cabeza Olmeda, '2012', 30–39; De la Cuesta and Odriozola, 'Marco Normativo de La Memoria Histórica En España: Legislación Estatal y Autonómica'.

²⁴²⁸ Historical Memory Law, Art. 2.

²⁴²⁹ Ibid., Arts. 3 and 15.

²⁴³⁰ For comprehensive analysis of the regulation on enforced disappearances in the Historical Memory Law, see Manjón-Cabeza Olmeda, '2012', 16–19. For a recent study on the right of the victims to financial reparation and on the right to know the fate or whereabouts and to recover their remains of civilians disappeared during the Civil War, see Margalida Capellà i Roig, 'El derecho a interponer recursos y a obtener reparación de los familiares de personas desaparecidas durante la guerra civil española', *EUNOMÍA. Revista en Cultura de la Legalidad*, no. 20 (25 March 2021): 104–40.

²⁴³¹ For a critical analysis of the Historical Memory Law, see Tamarit Sumalla, 'Memoria Histórica y Justicia Transicional En España', 47–51; De la Cuesta and Odriozola, 'Marco Normativo de La Memoria Histórica En España: Legislación Estatal y Autonómica', 7–13; Manjón-Cabeza Olmeda, '2012', 16–19; Rafael Escudero Alday, 'La ley española de memoria histórica: ¿caso fallido de justicia transicional?', in *La justicia de transición: concepto, instrumentos y experiencias*, 1st ed. (Editorial Universidad del Rosario, 2013).

²⁴³² For a detailed analysis by regions, see Tamarit Sumalla, 'Memoria Histórica y Justicia Transicional En España', 51; De la Cuesta and Odriozola, 'Marco Normativo de La Memoria Histórica En España: Legislación Estatal y Autonómica', 17–31.

²⁴³³ Democratic Memory Law, Law 20/2022, BOE-A-2022-17099, 19 October 2022, available at: <https://www.boe.es/buscar/act.php?id=BOE-A-2022-17099>.

shortcomings can be identified in each of these areas, and at times it seems that they are no more than a declaration of intentions without entailing practical and effective policies. Among the relevant novelties, a census of victims and a DNE bank were created, and the State finally assumed the responsibility to search and exhume the remains of those killed during the Civil War and the dictatorship.²⁴³⁴ Conversely, the most important shortcomings concern justice. For instance, a Human Rights and Democratic Memory Prosecutor was established to investigate the crimes committed during the Franco regime.²⁴³⁵ However, it seems insufficient that a single prosecutor is entrusted with the investigation of widespread crimes committed during a period of time of more than forty years. Furthermore, and more significantly, the law does not include any amendment to the 1977 Amnesty Law or any significant legal change that might facilitate criminal prosecutions.²⁴³⁶

²⁴³⁴ Ibid., Arts. 9 and 23.

²⁴³⁵ Ibid., Art. 28.

²⁴³⁶ For a comprehensive analysis of the Democratic Memory Law Draft, that was subsequently adopted by the Parliament without major changes, see Carlos Castresana Fernández, ‘Justicia transicional: Derecho internacional y comparado. La experiencia española’, in *Claves jurídicas para la recuperación de la memoria democrática en España*, by Carmen Pérez González (Navarra: Aranzadi, 2022), 34–56; José Antonio Sendín Mateos, ‘Sobre verdad, historia y memoria democrática’, in *Claves jurídicas para la recuperación de la memoria democrática en España*, by Carmen Pérez González (Navarra: Aranzadi, 2022), 162–72; Sabela Oubiña Barbolla, ‘Los caminos procesales del Proyecto de Ley de Memoria Democrática: ¿lo jurídicamente asequible o lo políticamente posible?’, in *Claves jurídicas para la recuperación de la memoria democrática en España*, by Carmen Pérez González (Navarra: Aranzadi, 2022), 179–220; Pérez González, ‘Memoria democrática y Derecho internacional: Una reflexión sobre su encaje tardío e inacabado en España’.

CONCLUSIONS

The legality principle emerged with the aim of equilibrating the structural imbalance between the powerful State and the powerless individual, setting limits to States powers and granting rights and legal certainty to the individuals. Thus, the primary rationale of the principle is to protect individuals against the abusive or arbitrary use of the States *ius puniendi*. However, when international crimes and human rights violations come into play, special care should be taken to not reverse such logic since in certain circumstances the strongest legality versions might prevent the prosecution of crimes committed by the State or under its protection. Similarly, the raise of certain international rights of the victims and the transformation of the *ius puniendi*, from a right or a prerogative of States into an international obligation, has involved a significant paradigm shift that is shaking some of the foundations of the international justice system. The evolution of the legality principle is not stranger to these changes.

The legality principle, as understood today in international law, is the result of more than a century of progressive legal developments. The full understanding of the current notion, rationales, scope and requirements of the *nullum crimen* principle demanded an analysis of this evolving process. Therefore, a comprehensive study of the interlinked evolution of international criminal law and the legality principle, from the beginning of the 20th century to our days, has been provided. International instruments, their implementation by international courts and the most relevant legal literature have been assessed. The study of human rights and international criminal law instruments, alongside the analysis of the case law of modern international criminal tribunals and human rights courts, reveals that the notion of legality adopted by the post-World War II tribunals gradually gave way to stricter approaches, closer to those adopted in civil law countries.

A comprehensive study of international instruments and jurisprudence, individually analysing each legality element, permitted the determination of the actual scope, content and legal status of the legality principle in international law. The widespread adherence to the principle of legality, its presence in the most relevant human rights and humanitarian international instruments, and its implementation by human rights and international criminal tribunals, suggested that the principle had become a rule of general international law.

The methods to identify rules of international customary law have been first examined, and then implemented, to assess the international legal status of the principle of legality, concluding that, indeed, state practice and *opinio iuris* evidence that it has become an international customary rule. Since all but two UN member

States currently adhere to the non-retroactivity rule, it seems that the adhesion to the principle in domestic legal systems is sufficiently general, consistent, widespread and representative to suggest its customary nature. Similarly, the consideration of the principle as a norm of general international law is evidenced by the widespread States' adhesion to numerous international instruments comprising the principle. Among others, it is enshrined in the UDHR, ICCPR, ECHR, ACHR and ACHPR, as well as in the Third and Fourth Geneva Conventions and their Additional Protocols I and II, and in the statutes and organic documents of most international and internationalized courts.

Once the international customary character of the principle proven, it was relevant to examine as well if it had become an *ius cogens* norm. The quasi-universal adherence to international instruments where the legality principle is considered as non-derogable, such as the ICCPR, ECHR, ACHR, or ArCHR, evidences that it is considered by the international community as a norm from which no derogation is permitted. Its customary nature, its consideration as a non-derogable norm, the lack of opposition to the rule, and the international *opinio iuris*, reflected in the case law of international tribunals and in pronouncements of various international subjects, suggest that the legality principle as become an *ius cogens* norm.

However, only a limited version comprising the core legality rules, and that can be defined as *nullum crimen, nulla poena sine iure*, is currently considered a rule of general international law, despite the Rome Statute, the ICC or the IACtHR adopted stronger notions. Therefore, it appears that the current international principle only comprises the non-retroactivity rule, the prohibition of analogies *in malam partem*, the requirement of sufficient specificity or legal certainty, and a very limited version of *nulla poena*. However, it does not reflect stronger legality versions requiring criminal conducts and penalties to be established by written laws or meeting high specificity standards, the prohibition of retrospective jurisdictions, or the *lex mitior* rule.

The recent rapprochement between contemporary international criminal law and domestic criminal law permits to broaden the scope of the legality principle and to adopt stricter and more exigent versions to better protect the accused's rights. This trend is expected to naturally continue, following the development of international criminal law. Indeed, it cannot be excluded that the legality version considered a rule of general international law might adopt stricter notions in the future. However, the expansion of the legality requirements is being confronted with the emergence of certain victims' rights and States' obligations, that will influence as well the shaping of the international legality principle in the future.

In parallel with the general trend to strengthen the requirements of the legality principle, both in domestic and international legal systems, the international community has developed in the last decades an expanding set of positive duties of States including the obligation to investigate, prosecute and punish international crimes and serious human right violations. In the context of a strengthening accountability culture, those obligations have been developed based on the effective protection of human rights, on the emergence of certain victims' and collective rights, and on the fight against impunity to prevent the future commission of similar crimes. While these two parallel trends generally complement and reinforce each other, in some circumstances they may also collide. This is particularly the case when strong legality requirements prevent the prosecution of past atrocities, and therefore, the fulfilment of these States' international obligations.

The principle of legality is placed at the core of this conflict, working as a balance between opposing rights and interests, and depending on how the principle is understood and implemented, the results can be radically different. The requirements associated to the strongest versions of the principle might prevent criminal investigations and lead to impunity. On the contrary, the laxest or most flexible notions could entail prosecutions without fair trial guarantees. However, within the framework of a democratic rule of law different legal techniques and interpretative proposals are available to reconcile or equilibrate the competing demands of justice and legality, providing solutions to minimise or to avoid the conflict between the principle of legality and these rising international rights and obligations. Similarly, these legal methods, based on tempered notions of legality, permit overcoming the obstacles posed by amnesties or statutes of limitations.

Domestic courts have explored different legal formulas to prosecute and punish those responsible for the numerous atrocities committed during the 20th century. For instance, they have grounded convictions on legal categories, such as crimes against humanity, adopted in the domestic legal system years after the commission of the crimes, but that incorporated international criminal norms already applicable to the accused at the moment of the facts. Domestic courts have also retroactively re-characterized as international crimes, ordinary offences already existent at the time of commission in the domestic legal system. Prosecutions of past atrocities have also been grounded on domestic legal classifications in force at the time of commission, but considering contextual elements characteristic of international crimes to render amnesties and limitation periods inapplicable. The obstacles of statutes of limitations or amnesties laws have also been overcome based on the permanent or continuous character of some crimes, or considering that limitation periods did not run during dictatorial regimes.

These prosecutions of past crimes involved important challenges for the legality principle and the prohibition of retroactive laws and punishments. However, regional human rights courts have generally upheld domestic prosecutions of past human rights violations, applying a notion of legality capable of marrying the respect of the core legality principle granting the respect of the fundamental rights of the accused, with the prosecution of past atrocities. The ECtHR, for instance, considered that convictions based on retroactive domestic laws incorporating international norm are respectful with the legality principle if, at the moment of commission, the international norm was already applicable to the accused, and was sufficiently accessible and foreseeable. The European Court has also upheld convictions based on retroactive re-characterization of crimes, considering that what matters is the substantive law, and not the formal classification or criminal labels by which the offence was referred to over time. The IACtHR has interpreted and applied the legality principle ensuring that it does not prevent the prosecution and punishment of serious human rights violations. In some cases, the Court considered acceptable the retroactive application of domestic laws incorporating international norms provided that at the time of commission the conducts were already considered criminal under international law. In other occasions the Inter-American Court implemented a sort of balance between the respect of the legality principle and other individual rights and State obligations.

Modern international criminal tribunals have also adopted modulated notions of legality, exploring different formulas to combine the respect of the basic rights of the accused with the prosecutions of international crimes grounded on a still developing international criminal law system. In this vein, the *ad hoc* international criminal tribunals considered retroactive re-characterization of crimes, or retroactive applications of domestic laws, respectful with the rationales of the *nullum crimen* principle if at the time of commission the conducts were already considered criminal under domestic or international law.

The core content of the legality principle is the threshold for such modulations, and consequently the punishment of conducts not considered criminal at the moment of commission should never be accepted. These tempered notions of legality give an opportunity to reconcile justice and legality admitting equilibrium between the respect of the core elements of the legality principle and the fulfilment of the victims' rights and State positive obligations to prevent impunity. Similarly, these *nullum crimen* versions permit the principle to be coherent to its profound rationales. Since the legality is grounded on the protection of the citizens against the abuses of the State, the principle cannot become a tool for the State to protect itself from the demands of justice of the victims of its abuses.

The development of international criminal law and the inclusion of international crimes in domestic legal systems will lead to a progressive diminution of these conflictual situations. However, strict *nullum crimen* notions may still prevent the investigation and punishment of crimes committed before their international codification or their inclusion in domestic legal systems. Among other factors, the existence of many unpunished past atrocities or the emergence of new international classifications, evidence that compromise solutions will still be necessary in the following years. Since it provides a better protection for the defendant, a strong version of legality has proved desirable and should be the rule. However, an assessment of its impact on other individual rights or State obligations should be conducted when applied in the abovementioned situations. In those particular circumstances a certain modulation of the principle might be desirable to reconcile all the principles, rights and obligations at stake.

CONCLUSIONES (Español)

El principio de legalidad surgió con el objetivo de compensar el desequilibrio estructural entre el poder del Estado y el individuo indefenso, estableciendo límites a los poderes estatales y otorgando derechos y seguridad jurídica a los ciudadanos. Así, el fundamento primero del principio es proteger a los individuos contra el uso abusivo o arbitrario del *ius puniendi* de los Estados. Sin embargo, cuando entran en juego los crímenes internacionales y las violaciones de los derechos humanos, debe tenerse especial cuidado en no invertir dicha lógica, ya que en determinadas circunstancias las versiones más exigentes del principio de legalidad pueden impedir la persecución de los crímenes cometidos por el Estado o bajo su protección. Asimismo, la aparición de ciertos derechos de las víctimas a nivel internacional y la transformación del *ius puniendi* de los Estados, pasando de ser un derecho o prerrogativa estatal a convertirse en una obligación internacional, ha supuesto un cambio de paradigma sustancial que está sacudiendo algunos fundamentos del sistema de justicia internacional. La evolución del principio de legalidad no es ajena a estos cambios.

El principio de legalidad, tal y como se entiende hoy en el derecho internacional, es el resultado de más de un siglo de progresivos desarrollos legales. La plena comprensión de la noción, los fundamentos, el alcance y los requisitos actuales del principio *nullum crimen* exige un análisis de este proceso evolutivo. Por ello, en este trabajo de investigación se ha realizado un estudio exhaustivo de la evolución paralela del derecho penal internacional y del principio de legalidad, desde principios del siglo XX hasta nuestros días. Se han analizado los principales instrumentos internacionales, su aplicación por parte de los tribunales internacionales, y la literatura jurídica más relevante. El estudio de los convenios y tratados de derechos humanos y de derecho penal internacional, junto con el análisis de la jurisprudencia de los tribunales penales internacionales y de los tribunales de derechos humanos, revela que la noción de legalidad aplicada en los juicios posteriores a la Segunda Guerra Mundial ha dado paso a versiones del principio más exigentes y más próximas a las adoptadas en los países de tradición jurídica romanista.

El examen detallado de los instrumentos y jurisprudencia internacionales, analizando individualmente cada elemento y exigencia asociada al principio de legalidad, ha permitido determinar su contenido y estatus jurídico actual en el derecho internacional. La adhesión estatal generalizada al principio de legalidad, su presencia en los principales instrumentos de derecho internacional humanitario y de derechos humanos, y su aplicación por los tribunales penales internacionales y de derechos humanos, sugieren que el principio constituye una norma de derecho internacional general.

Tras examinar los métodos generalmente aceptados para identificar normas de derecho internacional consuetudinario, éstos se han aplicado para evaluar la naturaleza jurídica internacional del principio de legalidad, concluyendo que, efectivamente, la práctica de los Estados y la *opinio iuris* demuestran que se ha convertido en una norma de derecho internacional general. Dado que todos los Estados miembros de la ONU, salvo dos, observan actualmente el principio de no retroactividad penal, parece que la adhesión al principio en los ordenamientos jurídicos nacionales es lo suficientemente general, uniforme, extendida y representativa como para afirmar su carácter consuetudinario. Del mismo modo, la consideración del principio como norma de derecho internacional general queda de manifiesto por la amplia adhesión de los Estados a numerosos instrumentos internacionales que lo recogen. Entre otros, el principio de legalidad está consagrado en la DUDH, el PIDCP, el CEDH, la CADH y la CADHP, así como en el Tercer y Cuarto Convenio de Ginebra y sus Protocolos Adicionales I y II, y en los estatutos y documentos orgánicos de la mayoría de los tribunales internacionales e internacionalizados.

Una vez demostrado el carácter consuetudinario del principio de legalidad, ha sido pertinente examinar también si éste se había convertido en una norma de *ius cogens*. La adhesión casi universal a los instrumentos internacionales en los que el principio de legalidad se considera inderogable, como el PIDCP, el CEDH o la CADH, demuestra que la comunidad internacional lo considera una norma que no admite excepciones. Su carácter consuetudinario, su consideración como norma inderogable, la ausencia de oposición y la *opinio iuris* internacional, reflejada en la jurisprudencia de los tribunales internacionales y en los pronunciamientos de diversos organismos internacionales, sugieren que el principio de legalidad se ha convertido en una norma imperativa de derecho internacional general.

Sin embargo, a pesar de que el Estatuto de Roma, la CPI o la Corte IDH hayan adoptado nociones más exigente, sólo una versión limitada del principio, que únicamente comprende sus elementos fundamentales y que puede definirse como *nullum crimen, nulla poena sine iure*, constituye actualmente una norma de derecho internacional general. De esta forma, el principio de legalidad internacional sólo comprende en la actualidad el principio de no retroactividad, la prohibición de analogías *in malam partem*, el requisito de suficiente especificidad o seguridad jurídica, y una versión muy limitada del principio *nulla poena*. Sin embargo, no refleja versiones de legalidad más estrictas que exigen que los delitos y las penas se establezcan mediante leyes escritas o que cumplan criterios muy exigentes de especificidad, así como tampoco incluye la prohibición de tribunales creados *ex post facto* o el principio de *lex mitior*.

El desarrollo del derecho penal internacional contemporáneo y su aproximación a los derechos penales internos permite ampliar el alcance del principio de legalidad y adoptar versiones más estrictas y exigentes del mismo para mejorar la protección y los derechos del acusado. Se espera que esta tendencia continúe de forma natural, siguiendo la evolución del derecho penal internacional. De hecho, no puede excluirse que la versión del principio de legalidad que constituye actualmente una norma de derecho internacional general evolucione incluyendo requisitos más exigentes en el futuro. Sin embargo, la extensión del principio de legalidad internacional puede verse afectada por la emergencia de determinados derechos internacionales de las víctimas y de ciertas obligaciones de los Estados, que influirán en la configuración del principio de legalidad internacional en el futuro.

De forma paralela a la tendencia general proclive a reforzar los requisitos del principio de legalidad, tanto en los ordenamientos jurídicos nacionales como en los internacionales, la comunidad internacional ha desarrollado en las últimas décadas un conjunto cada vez más amplio de deberes positivos de los Estados, que incluyen la obligación de investigar, perseguir y castigar los crímenes internacionales y las violaciones graves de los derechos humanos. En un contexto internacional de fortalecimiento de la cultura de rendición de cuentas, el desarrollo de esas obligaciones se ha fundamentado en la protección efectiva de los derechos humanos, en la aparición de ciertos derechos colectivos y de las víctimas, y en la lucha contra la impunidad. Aunque estas dos tendencias paralelas suelen complementarse y reforzarse mutuamente, en algunas circunstancias también pueden entrar en conflicto. Esto ocurre en particular cuando los requisitos asociados a versiones estrictas del principio de legalidad imposibilitan el enjuiciamiento de violaciones graves de los derechos humanos cometidas en el pasado y, por tanto, impiden el cumplimiento de las obligaciones internacionales de estos Estados.

El principio de legalidad se sitúa en el centro de este conflicto, funcionando como balanza entre derechos e intereses opuestos, ya que dependiendo de cómo se interprete e implemente, los resultados pueden ser radicalmente distintos. Los requisitos asociados a las versiones más estrictas del principio pueden impedir los enjuiciamientos penales y generar impunidad. Por el contrario, las nociones más laxas o flexibles podrían permitir enjuiciamientos sin las debidas garantías procesales. Sin embargo, en el marco de un Estado democrático de derecho existen diferentes técnicas jurídicas y propuestas interpretativas que permiten conciliar o equilibrar las exigencias contrapuestas de justicia y legalidad, facilitando soluciones para minimizar o evitar el conflicto entre el principio de legalidad y estos derechos y obligaciones internacionales en auge. Del mismo modo, estas técnicas jurídicas, basadas en nociones atemperadas

del principio de legalidad, permiten superar los obstáculos que plantean las amnistías o los plazos de prescripción.

Los tribunales nacionales han explorado diferentes fórmulas jurídicas para enjuiciar y castigar a los responsables de las numerosas atrocidades cometidas durante el siglo XX. Por ejemplo, han aplicado retroactivamente tipos penales, como los crímenes contra la humanidad, adoptados en el ordenamiento jurídico interno años después de que ocurrieran los hechos enjuiciados, pero que incorporaban normas penales internacionales ya aplicables a los acusados en el momento de los hechos. Los tribunales internos también han recalificado retroactivamente como crímenes internacionales, delitos ordinarios ya existentes en el momento de la comisión en el ordenamiento jurídico nacional. Los enjuiciamientos de atrocidades pasadas también se han basado en tipos penales ordinarios vigentes en el momento de los hechos, pero recurriendo a los elementos contextuales característicos de los crímenes internacionales para evitar la aplicación de amnistías y la prescripción. También se han superado los obstáculos relacionados con los plazos de prescripción y las amnistías en base al carácter permanente o continuado de algunos crímenes, o considerando que los plazos de prescripción no podían correr mientras durara un régimen dictatorial.

Estos enjuiciamientos de crímenes del pasado suponen importantes desafíos para el principio de legalidad y la prohibición de delitos y penas retroactivos. Sin embargo, los tribunales regionales de derechos humanos han respaldado en general los enjuiciamientos de violaciones de derechos humanos cometidas en el pasado, y han recurrido a nociones de legalidad capaces de conjugar el respeto a los elementos esenciales del principio de legalidad y la garantía de los derechos fundamentales de los acusados, con el enjuiciamiento de atrocidades cometidas en el pasado. El TEDH, por ejemplo, consideró que las condenas basadas en la aplicación retroactiva de leyes nacionales que incorporan normas internacionales, son compatibles con el principio de legalidad si en el momento de la comisión la norma internacional ya era aplicable al acusado, y era suficientemente accesible y previsible. El Tribunal Europeo también ha confirmado condenas basadas en la recalificación jurídica de los hechos, considerando que lo relevante es el derecho sustantivo, y no la clasificación formal o las nombres penales con los que se ha denominado al delito a lo largo del tiempo. A su vez, la Corte IDH ha interpretado y aplicado el principio de legalidad asegurando que no impidiera el enjuiciamiento y castigo de graves violaciones de los derechos humanos. En algunos casos, la Corte ha considerado aceptable la aplicación retroactiva de leyes internas que incorporaban normas internacionales, siempre que en el momento de su comisión las conductas ya fueran consideradas delictivas por el derecho internacional. En otras ocasiones, la Corte Interamericana ha realizado una ponderación entre el respeto del principio de legalidad, y otros derechos individuales y obligaciones estatales en juego.

Los tribunales penales internacionales modernos también han adoptado nociones moduladas del principio de legalidad, explorando diferentes fórmulas para combinar el respeto de los derechos fundamentales de los acusados con el enjuiciamiento de crímenes internacionales basados en un sistema de derecho penal internacional aún en desarrollo. En esta línea, los tribunales penales internacionales *ad hoc* consideraron la recalificación retroactiva de los crímenes o la aplicación retroactiva de leyes internas, respetuosas con los fundamentos del principio de legalidad si en el momento de la comisión las conductas ya eran consideradas delictivas por el derecho interno o internacional.

El límite para tales modulaciones se encuentra en la noción fundamental del principio de legalidad, por lo que nunca sería aceptable el castigo de conductas no consideradas delictivas en el momento de su comisión. Estas versiones atemperadas del principio brindan la oportunidad de conciliar justicia y legalidad, admitiendo el equilibrio entre el respeto de los elementos centrales del principio, y el cumplimiento de los derechos de las víctimas y de las obligaciones positivas del Estado. Asimismo, estas nociones moduladas permiten que el principio sea coherente con sus fundamentos más profundos. Dado que el razón primera del principio la legalidad es la protección de los ciudadanos frente a los excesos del Estado, el principio no puede convertirse en una herramienta para que el Estado se proteja de las demandas de justicia de las víctimas de sus abusos.

El desarrollo del derecho penal internacional y la inclusión de los crímenes internacionales en los ordenamientos jurídicos nacionales conducirán a una disminución progresiva de estas situaciones conflictivas. Sin embargo, las versiones más estrictas del principio de legalidad pueden seguir impidiendo la investigación y el castigo de crímenes cometidos antes de su codificación internacional o de su inclusión en los sistemas jurídicos nacionales. Entre otros factores, la existencia de muchas atrocidades pasadas aún impunes o la aparición de nuevas clasificaciones internacionales, evidencian que las soluciones de compromiso seguirán siendo necesarias en los próximos años. Ya que proporciona mayor protección y garantías al acusado, las versiones más exigentes del principio de legalidad son deseables y deberían ser la norma. Sin embargo, cuando se apliquen en las situaciones conflictivas mencionadas, se debe valorar su impacto respecto a otros derechos individuales y obligaciones estatales. En esas circunstancias particulares, podría ser deseable una cierta modulación del principio para conciliar todos los principios, derechos y obligaciones en juego.

CONCLUSIONS (Français)

Le principe de légalité est apparu dans le but de compenser le déséquilibre structurel existant entre l'État, fort, et l'individu, impuissant, en fixant des limites aux pouvoirs des États et en accordant des droits et une sécurité juridique aux individus. La principale raison d'être du principe est de protéger les individus contre l'utilisation abusive ou arbitraire de l'*ius puniendi* de l'État. Cependant, lorsque des crimes internationaux et des violations des droits de l'Homme entrent en jeu, il faut veiller à ne pas inverser cette logique, car dans certaines circonstances, les versions les plus exigeantes du principe de légalité pourraient entraver la poursuite de crimes commis par l'État ou sous sa protection. Par ailleurs, l'émergence de certains droits des victimes au niveau international et la transformation de l'*ius puniendi*, d'un droit ou d'une prérogative des Etats en une obligation internationale, a impliqué un changement de paradigme significatif qui ébranle certains des fondements du système de justice internationale. L'évolution du principe de légalité n'est pas étrangère à ces changements.

Le principe de légalité, tel qu'il est compris aujourd'hui en droit international, est le résultat de plus d'un siècle de développements juridiques progressifs. La compréhension de la notion actuelle du principe *nullum crimen*, de ses fondements, de sa portée et de ses exigences, nécessite une analyse de ce processus évolutif. Par conséquent, ce travail proposait une étude globale portant sur l'évolution interdépendante du droit pénal international et du principe de légalité, du début du 20ème siècle à nos jours. Les instruments internationaux mis en jeu, leur application par les tribunaux internationaux, et la doctrine juridique portant sur ce sujet, ont été analysés. L'étude de la jurisprudence des tribunaux pénaux internationaux modernes et des cours régionales des droits de l'Homme, révèlent que la notion de légalité adoptée par les tribunaux de l'après-Seconde Guerre mondiale a progressivement cédé la place à des approches plus strictes, plus proches de celles adoptées par les pays de tradition romaniste.

L'étude approfondie des instruments internationaux et de la jurisprudence internationale, examinant individuellement chaque élément du principe de légalité, a permis de déterminer la portée, le contenu et le statut juridique actuel du principe en droit international. L'adhésion largement répandue des Etats au principe de légalité, sa constance au sein des instruments internationaux de droits de l'Homme et de droit humanitaire, et sa mise en œuvre par ces mêmes tribunaux, suggèrent que le principe est devenu une règle du droit international général.

Les méthodes permettant d'identifier les règles de droit international coutumier ont d'abord été observées, puis appliquées, afin d'évaluer le statut juridique

international du principe de légalité. Cela a permis de conclure que le principe est devenu une règle de droit international coutumier comme le démontre la pratique des États et *l'opinio iuris*. En effet, tous les États membres des Nations Unies, à l'exception de deux, adhèrent actuellement à la règle de non-rétroactivité. L'acceptation du principe dans les systèmes juridiques nationaux est suffisamment générale, uniforme, répandue et représentative pour suggérer sa nature coutumière. De même, l'acceptation du principe comme étant une norme de droit international général est attestée par l'adhésion généralisée des États à de nombreux instruments internationaux comprenant le principe. Il est notamment inscrit dans la DUDH, le ICCPR, la CEDH, la CADH et le CADHP, ainsi que dans les troisième et quatrième Conventions de Genève et dans leurs Protocoles additionnels I et II, et dans les statuts et documents organiques de la plupart des tribunaux pénaux internationaux et internationalisés.

Après avoir établie l'acquisition du caractère de droit international coutumier du principe de légalité, il était pertinent d'analyser si ce dernier était également devenu une norme de *ius cogens*. L'adhésion quasi-universelle aux instruments internationaux où le principe de légalité est considéré comme indérogeable, tels que l'ICCPR, la CEDH, ou la CADH, montre que, pour la communauté internationale, le principe est considéré comme une norme à laquelle aucune dérogation n'est permise. Sa nature coutumière, son appréciation en tant que précepte indérogeable, l'absence d'opposition à la règle et *l'opinio iuris* internationale, reflétée dans la jurisprudence des tribunaux internationaux et dans les déclarations de divers sujets internationaux, suggèrent que le principe de légalité est devenu une norme *ius cogens*.

Cependant, seulement une version limitée comprenant les règles fondamentales du principe de légalité et pouvant être défini comme *nullum crimen, nulla poena sine iure*, est actuellement considérée comme étant une règle du droit international général, bien que le Statut de Rome, la CPI ou la Cour IDH aient adopté des interprétations plus strictes. Il semble donc que le principe de légalité international ne comprenne actuellement que la règle de non-rétroactivité, l'interdiction d'analogies *in malam partem*, l'exigence de spécificité ou de sécurité juridique suffisante, et une version très limitée du principe *nulla poena*. Néanmoins, cela ne reflète pas les interprétations plus strictes de la légalité qui exigent que les conduites et les sanctions pénales soient établies par des lois écrites ou répondant à des critères sévères de spécificité, ou qui interdisent les juridictions rétrospectives, ou encore la règle de la *lex mitior*.

Le rapprochement récent entre le droit pénal international et le droit pénal interne permet d'élargir la portée du principe et d'adopter des interprétations plus strictes et exigeantes du principe afin de mieux protéger les droits de l'accusé. Cette tendance devrait naturellement se poursuivre, selon l'évolution du droit pénal international. En effet, il ne peut être exclu que la version du principe de légalité

considérée actuellement comme une règle de droit international général se tourne vers des concepts plus stricts à l'avenir. Toutefois, l'extension du principe de légalité est confrontée à l'apparition de certains droits des victimes au niveau international et à l'obligation des États d'enquêter, de poursuivre et de punir les auteurs de crimes internationaux, ce qui jouera également dans le futur sur le façonnage du principe international de légalité.

Parallèlement à la tendance générale qui est de renforcer les exigences du principe de légalité, tant dans les systèmes juridiques nationaux qu'internationaux, la communauté internationale a développé au cours des dernières décennies un ensemble croissant de devoirs positifs des États, notamment l'obligation d'enquêter, de poursuivre et de punir les crimes internationaux et les violations graves des droits de l'Homme. En effet, dans un contexte où une mise en responsabilité des auteurs de crimes internationaux est attendue, ces obligations ont été développées afin d'assurer la protection effective des droits de l'Homme, de respecter certains droits émergents des victimes et droits collectifs, et de lutter contre l'impunité. Si ces deux tendances peuvent généralement se compléter et se renforcer, elles peuvent aussi, dans certaines circonstances, se heurter. Cela est notamment le cas lorsque des exigences associées aux versions strictes du principe de légalité empêchent la poursuite d'atrocités passées, et donc le respect des obligations internationales des États.

Le principe de légalité est placé au cœur de ce conflit, en équilibre entre droits et intérêts opposés, puisque selon la manière dont le principe est interprété et appliqué, les résultats peuvent être radicalement différents. Les requêtes découlant des interprétations les plus strictes du principe peuvent empêcher les enquêtes criminelles et conduire à l'impunité. Au contraire, les interprétations les plus laxistes, ou plus souples, pourraient entraîner des poursuites sans garanties d'un procès juste et équitable. Toutefois, dans le cadre d'un État de droit démocratique, différentes techniques juridiques et interprétations sont disponibles afin de concilier ou d'équilibrer les exigences distinctes de la justice et de la légalité, en proposant des solutions qui visent à minimiser voire éviter le conflit entre le principe de légalité et d'autres droits et obligations internationales croissantes. Par ailleurs, ces méthodes juridiques, fondées sur des interprétations modérées du principe de légalité, permettent de surmonter les obstacles posés par les lois d'amnisties ou la prescription.

Les tribunaux nationaux ont exploré différentes formules juridiques afin de poursuivre et punir les auteurs de nombreuses atrocités commises au cours du XXe siècle. Ils ont, par exemple fondé ces condamnations sur des catégories juridiques, telles que les crimes contre l'humanité, adoptées dans le système juridique national des années après la commission des crimes, mais qui incorporaient des normes pénales internationales déjà applicables à l'accusé au moment des faits. Des tribunaux

nationaux ont également requalifié rétroactivement en crimes internationaux des crimes ordinaires qui existaient déjà au moment de leur commission dans le système juridique national. Afin de rendre inapplicable les amnisties et les délais de prescription, certaines poursuites pour des atrocités passées ont également pu s'appuyer sur des classifications juridiques nationales en vigueur au moment de la commission des faits, tout en tenant compte des éléments contextuels caractéristiques des crimes internationaux. Les obstacles relatifs à la prescription ou aux lois d'amnistie ont également été surmontés en se basant sur le caractère permanent ou continu de certains crimes, ou en admettant que les délais de prescription ne n'étaient pas à prendre en compte lors de régimes dictatoriaux.

Ces poursuites de crimes passés ont supposé des défis importants pour le principe de légalité et l'interdiction des lois et des punitions rétroactives. Cependant, les cours régionales des droits de l'Homme ont généralement soutenu les poursuites nationales, en appliquant une interprétation du principe de légalité permettant d'allier le respect du principe qui garantit les droits fondamentaux de l'accusé, avec la poursuite d'atrocités passées. La CEDH, par exemple, a considéré que les condamnations fondées sur des lois nationales rétroactives incorporant des normes internationales, respectent le principe de légalité si, au moment de la commission, la norme internationale était déjà applicable à l'accusé, et était suffisamment accessible et prévisible. La Cour européenne a également confirmé des condamnations fondées sur la requalification rétroactive de crimes, considérant que le droit substantiel était primordial, et non la classification formelle ou les étiquettes pénales par lesquelles l'infraction était désignée au fil du temps. La Cour IDH a interprété et appliqué le principe de légalité en veillant à ce qu'il n'empêche pas la poursuite et la sanction de violations graves des droits de l'Homme. Dans certains cas, la Cour a considéré comme acceptable l'application rétroactive de lois nationales incorporant des normes internationales, à condition qu'au moment de la commission des actes, ceux-ci aient déjà été considérés comme criminels en vertu du droit international. La Cour interaméricaine a également mis en œuvre, en d'autres circonstances, une sorte d'équilibre entre le respect du principe de légalité et d'autres droits individuels et obligations étatiques.

Les tribunaux pénaux internationaux modernes ont également adopté des interprétations ajustées du principe de légalité, explorant différentes formules afin de combiner le respect des droits fondamentaux de l'accusé avec les poursuites de crimes internationaux fondées sur un système de droit pénal international encore en développement. Les tribunaux pénaux internationaux *ad hoc* ont envisagé la requalification rétroactive des crimes ou l'application rétroactive des lois nationales, dans le respect du principe *nullum crimen* si, au moment de la commission des actes,

ceux-ci étaient déjà considérés comme criminels en vertu du droit national ou international.

Le contenu principal du principe de légalité est le seuil de ces adaptations et, par conséquent, la sanction de comportements qui n'étaient pas considérés comme criminels au moment de leur commission ne devrait pas être acceptée. Ces interprétations mesurées du principe permettent de réconcilier la justice et la légalité en s'assurant un équilibre entre le respect des éléments essentiels du principe de légalité, les droits des victimes et les obligations positives des États. De même, ces interprétations permettent au principe d'être cohérent avec ses racines, puisqu'il est fondé sur la protection des citoyens contre les abus de l'État. Le principe ne peut donc devenir un outil permettant à l'État de protéger ses abus face à des demandes de justice de la part des victimes.

Le développement du droit pénal international et l'incorporation des crimes internationaux dans les systèmes juridiques nationaux conduiront à une diminution progressive de ces situations conflictuelles. Cependant, les versions les plus strictes du principe de légalité empêchent encore parfois l'enquête et la punition de crimes commis avant leur codification internationale ou leur inclusion dans les systèmes juridiques nationaux. L'existence de nombreuses atrocités passées encore impunies, tout comme l'apparition de nouvelles classifications internationales, montre que des solutions de compromis seront encore nécessaires dans les années à venir. Parce qu'elle offre une meilleure protection à l'accusé, une interprétation stricte du principe de légalité s'est avérée souhaitable et devrait être la règle. Toutefois, une évaluation de son impact sur d'autres droits individuels ou obligations étatiques devrait être effectuée lorsqu'elle est appliquée dans les situations susmentionnées. Dans ces circonstances particulières, une certaine modulation du principe pourrait être souhaitable afin de concilier tous les principes, droits et obligations mis en jeu.

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