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THE PRINCIPLE OF LEGALITY IN INTERNATIONAL CRIMINAL LAW

This panel was convened at 10:45 a.m., Thursday, March 26, by its moderator, Sandesh Sivakumaran of the University of Nottingham, who introduced the panelists: Beth Van Schaack of Santa Clara Law School; Darryl Robinson of Queen's University; Brad Roth of Wayne State University; Elisa Massimino of Human Rights First,* and Theodor Meron of the International Criminal Tribunal for the Former Yugoslavia.

INTRODUCTORY REMARKS

By Sandesh Sivakumaran[†]

The principle of *nullum crimen sine lege* is a fundamental principle of criminal law. It has particular resonance at the international level given the relative lack of clarity surrounding certain international legal norms. It was invoked before the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East and continues to be raised today, whether in relation to joint criminal enterprises before the International Criminal Tribunal for the Former Yugoslavia or “child soldiers” before the Special Court for Sierra Leone.

This panel is primarily about the *nullum crimen sine lege* principle; however, it is about more than just that principle. Panelists will consider broader ideas of legality in international criminal law, the legitimacy of international criminal law, and competing tensions within that body of law. They will address these issues from differing perspectives, and I expect they will take sharply contrasting views. In doing so, they will provide us with insight into international legal argumentation, interpretive attitudes of courts and tribunals, and competing philosophies of the nature of international criminal law. My thanks to each of them for taking the time to participate.

LEGALITY & INTERNATIONAL CRIMINAL LAW[‡]

By Beth Van Schaack[§]

The principle of *nullum crimen sine lege* (hereinafter “NCSL”) provides a fundamental defense to a criminal prosecution. In addition to protecting rule of law values, the principle also polices the separation of powers by ensuring legislative primacy, and thus democratic legitimacy, in substantive rulemaking. NCSL has constitutional significance in many national systems and is a feature of all of the omnibus human rights instruments. Nonetheless, starting with the post-World War II proceedings and continuing with the ad hoc international tribunals, international criminal law (ICL) failed to fully implement this principle. A survey of cases reveals the ICL tribunals boldly applying new norms to past conduct. This was not the demure application of a judicial gloss to established doctrine. Rather, these tribunals engaged

* Elisa Massimino did not submit remarks for the *Proceedings*.

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[‡] These remarks are based on a longer article on this topic: Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law & Morals*, 97 Geo. L. J. 119 (2008).

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in a full-scale, if unacknowledged, refashioning of ICL. Notwithstanding this expansive approach, the NCSL jurisprudence does not compromise the fundamental fairness of modern ICL proceedings because it is largely consistent with the international formulations of the principle, authoritative interpretations emerging from institutions charged with enforcing human rights protections, and the purposes underlying the NCSL principle.

Although the invocation of NCSL was ubiquitous in the early ICL proceedings, tribunals repeatedly rejected the defense through a series of interpretive devices, analytical claims, and methodological choices. One response was that the principle simply does not apply in ICL with the same force and effect as it does in the domestic order, given differences in the ways domestic and international law criminalize conduct. In addition, some international crimes existed primarily in customary law, which does not lend itself to a robust NCSL principle. Certain generative provisions (e.g., “other inhumane acts”) constitute delegations to engage in normative judicial creativity within the bounds of *ejusdem generis*. As a result of this persistent indeterminacy in ICL, judges undertook more active judicial interpretation, improvisation, and innovation.

Adopting an expansive teleological approach, judges also characterized the principle of NCSL as a flexible principle of justice that can yield to competing imperatives. Thus, courts balanced considerations of fairness towards an accused against other objectives: the condemnation of brutal acts, ensuring individual accountability, victim satisfaction and rehabilitation, the preservation of world order, and deterrence. Judges employed a complex interplay of arguments about immorality, illegality, and criminality when faced with NCSL defenses. So, where a particular norm clearly gave rise to state responsibility, tribunals had little trouble also ascribing penal consequences to breaches of that norm. They elided immorality and criminality and rejected the defense in the face of *malum in se* conduct. This reasoning was most palatable when applied to mass atrocities and heinous conduct that, for whatever reason, fell outside of extant positive law. These moves were more problematic with respect to morally contested conduct, such as the enlistment of child soldiers.

In considering NCSL defenses, jurists developed rules of recognition that made use of the multiplicity of sources of international law to either identify an applicable rule of decision or to conclude that the defendant was effectively and sufficiently on notice that his conduct was subject to sanctions. Most frequently, courts resorted to customary international law (CIL) to fill gaps in positive law. Courts also relied upon domestic law to reason that the defendant could not have reasonably or plausibly believed that his conduct was lawful.

The principle of legality is formulated in human rights instruments to make important allowances for international law norms and to express the international community’s approval of the legality licenses taken after World War II. In applying the NCSL provision in its constitutive statute, the European Court of Human Rights has developed a methodology that involves several interrelated inquiries of relevance to ICL. According to this methodology, where judicial developments are consistent with the essence of an offense and could have been reasonably foreseen, the prosecution is not arbitrary or unjust. In particular, the Court will find no violation where the basic ingredients of a criminal offense remain unchanged, but non-core elements are added, modified, or abandoned. In addition, the Court will also look to changes in society that might render an old rule anachronistic. Where there is considerable uncertainty in the law, the Court considers the populace essentially on notice that the law is in flux and could be interpreted adversely to them in the future. In terms of determining the accessibility of the relevant rule, the Court will look to domestic and

international law to determine if defendants were on notice that their conduct was potentially subject to sanction.

Applying this methodology to ICL, it is apparent that key developments prior to the establishment of the two ad hoc criminal tribunals effectively put defendants on fair notice of the possibility of criminal liability for abusive practices and expansive forms of participation committed within a range of circumstances. The near-universal acceptance of international human rights concepts in the global consciousness was foremost among these developments. The changing nature of armed conflict, coupled with the human rights regime's incursions into state sovereignty, gave notice of the likelihood that the well-developed norms and penal proscriptions governing international armed conflicts would eventually extend to non-international armed conflicts.

In terms of foreseeability, many international crimes are, in effect, umbrella crimes containing heterogeneous constitutive offenses that find analogs in domestic crimes of murder and mayhem. Where the conduct is already forbidden by independent sources of law reflecting a clear social consensus, identifying these acts as international crimes simply triggers international jurisdiction. The reinvigoration of the International Law Commission's project on establishing a permanent international criminal court also contemplated more expansive definitions of international crimes than had been employed during World War II. In short, between analogous prohibitions contained in domestic penal law, extant international law, and the human rights treaties, anyone in the Former Yugoslavia, Rwanda, or Sierra Leone was capable of honestly attempting to conform his or her behavior to the law.

The NCSL jurisprudence is also consistent with the animating purpose behind the principle. Unfairness clearly results when an individual is held liable under a new rule that could never have been anticipated. Where conduct is *malum in se* by brutally intruding on the rights and legitimate interests of others, perpetrators cannot be excused from blame when international legal rules are underdeveloped. Blameworthiness is not negated when an individual is sanctioned in the absence of positive law under these circumstances.

There is no question that the lines of reasoning employed by the ad hoc tribunals occasionally produced substantive justice at the expense of strict legality. A meta-critique of this jurisprudence is that judges were insufficiently self-conscious about their forays into judicial lawmaking. Where judges engage in lawmaking, they should acknowledge the dilemmas inherent in doing so and proceed in a rational and principled fashion with the recognition that there are certain institutional responsibilities attendant to this process. A more calibrated approach would be to adopt narrower rulings with respect to conduct that approaches the boundary between legality and illegality. By contrast, judges should feel freer to develop ICL where no one could credibly believe the conduct was acceptable. In addition, the courts should tread more carefully when applying novel and expansive forms of liability without clear analogs in domestic law. In these tough cases, courts should consider announcing new rules in dicta for prospective application.

The rate of change in ICL is slowing significantly. As a maturing system of law, most of the next phase of the evolution of ICL will happen at the outer edges of doctrine, where the implications of new ideas are perhaps less dramatic. Unlike its ad hoc brethren, the International Criminal Court is governed by a robust NCSL provision that prohibits not only the retroactive application of law but also mandates strict construction in favor of the defendant. In addition, Article 21 sets forth a sources hierarchy that may limit the Court's ability to refer to more expansive customary international law prohibitions. It remains to be seen to

what extent the NCSL provisions will truly cabin the ability and proclivity of the Court to advance expansive or novel rules in the face of legality deficits in its Statute.

Innovative judges and expansive legal interpretations are not unique or endemic to ICL. This line of cases presents a model of ICL formation and evolution that finds resonance in the origins and gradual demise of the Anglo-American common law crime. And yet, in contradistinction to the common law, ICL's integration and stabilization have been driven less by assertions of legislative primacy and more by international courts taking action in the face of legislative debility. Impatient in the face of continued atrocities and states' unwillingness to better align law with morality, and pressed with the need to take principled action, modern international judges sacrificed the strict application of NCSL to fashion the moral universe that was envisioned during the momentous postwar period. This process has been largely ratified by the community of states, and positive law—in the form of the ICC Statute and domestic penal codes worldwide—now reflects developments in the law made at the expense of perfect legal certainty.

LEGALITY AND OUR CONTRADICTORY COMMITMENTS: SOME THOUGHTS ABOUT HOW WE THINK*

By Darryl Robinson[†]

It is probably common ground on this panel that international decisions have refashioned and expanded international criminal law (ICL). Various arguments have been advanced to justify such expansion. The question is: are those arguments convincing?

For example, one argument is the Nuremberg proposition that *formal* justice, enshrined in the principle of legality, must give way to the *substantive* justice of the need to convict these particular accused for reprehensible acts. However, if we are not convicting them for breaking *law*, then how can we be sure the process is justice? There must be some unstated limit, other than moral intuition, to this principle.

Another example is the proposition that the accused has notice of “foreseeable judicial innovation.” Judge Shahabuddeen and others have seized on this proposition as authority for continued progressive development. The proposition has doctrinal support, but does it make sense? In light of past trends of ambitious interpretation in ICL, does a “foreseeable innovation” test *exclude* anything?

What makes the legality issue so challenging is that on some level, we all—myself included—*love* these innovations. I think that confusion arises because we are trying to be human rights lawyers and criminal lawyers at the same time. As human rights lawyers, we support progressive interpretation and expanding protection for victims. Then, as criminal lawyers, we remember that our first principle was that we only apply existing law—there can be no expansion. So we simultaneously *praise* and *deny* the expansions.

I think that human rights thinking and criminal law thinking permeate international criminal law discourse, creating confusion and contradiction. My contribution to this topic of legality will focus only on our *reasoning habits*: habits that lead us to breach our fundamental principles, such as legality.

* These remarks draw from Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 LEIDEN J. INT'L L. 925 (2008). The article provides additional explanation and illustrations.

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