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General Rules of Criminal Law*

EDWARD M. WISE**

In discussions of the problems connected with the establishment of an international criminal court, attention has naturally turned to the question of the nature of the law to be applied by the proposed court.

In Europe, down through the eighteenth century, criminal as well as civil law was largely based on a common law (*ius commune*) that transcended national boundaries.[1] The situation is described in scathing terms in the opening line of the preface to Beccaria's essay *On Crimes and Punishments*:

> A few remnants of the legislation of a former conquering people compiled by a prince who reigned at Constantinople twelve centuries ago, afterwards mixed up with the customs of the Lombards, and buried in a voluminous muddle of obscure commentaries — these comprise the hotch-potch of opinions to which a large part of Europe has given the name of law; and thus, even today, it is as deplorable as it is common that an opinion of Carpzov, an ancient practice noted by Clarus, a torture proposed with barbaric complacency by Farinacci, provide the rules so confidently administered by men who ought to tremble when they decide on the lives and fortunes of their fellow citizens.[2]

The eighteenth-century movement for penal reform swept all this away. Article 8 of the Declaration of the Rights of Man and of the Citizen of 1789 declared: "no one may be punished except by virtue of a law (*loi*) drawn up and promulgated before the offense is committed"; the first (and only) code adopted during the French Revolution was the penal code of 1791. Almost everywhere (and nowadays, to a large extent, even in countries following English common law), the principle of legality has been taken to require that crimes be specifically proscribed by law in advance of the conduct sought to be punished. The most well-known formulation of the principle is Anselm Feuerbach's maxim: *nullum crimen nulla poena sine lege*. In its classical formula-

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* Parts of this section are taken from a paper on *The Codification of International Criminal Law*, which will appear in the revised second edition of M. Cherif Bassiouni's three-volume compilation, INTERNATIONAL CRIMINAL LAW. Edward M. Wise, *The Codification of International Criminal Law, in* INTERNATIONAL CRIMINAL LAW (forthcoming).

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1. *See* Marc Ancel, *The Collection of European Penal Codes and the Study of Comparative Law*, 106 U. PA. L. REV. 329, 341-42 (1958).

2. Cesare Beccaria, *Dei Delitti e delle Pene* 3 (Franco Venturi ed., 1965).

tions, the principle requires that crimes and punishments be defined in a statute (*loi, lex*) promulgated prior to the offense.

A slightly diluted version of the principle appears in Article 11(2) of the Universal Declaration of Human Rights:

> 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 it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.[3]

Article 15 of the International Covenant on Civil and Political Rights[4] contains virtually the same language:

> No one shall be held guilty of any criminal offense on account of any act or omission which did not constitute a criminal offense, 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. . .

Article 15 of the Covenant then adds the qualification: "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."

In these statements, it is not necessarily required that the offense be proscribed by a pre-existing statute, only by pre-existing law. The weaker formulation of the principle in international instruments preserves the possibility of prosecution for at least pre-existing common law crimes and of prosecution for violations of customary international law.

Article 39 of the International Law Commission's Draft Statute for an International Criminal Court[5] is titled "Principle of legality (*nullum crimen sine lege*)." This article provides:

> An accused shall not be held guilty:
> (a) in the case of a prosecution with respect to a crime referred to in article 20(a) to (d), unless the act or omission in question constituted a crime under international law;

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3. *Universal Declaration of Human Rights*, G.A. Res. 217A, 3 U.N. GAOR, at 17, U.N. Doc. A/810 (1948).

4. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

5. International Law Commission's Draft Statute for an International Criminal Court, *Report of the International Law Commission on the Work of its Forty-Sixth Session*, U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc A/49/10 (1994) [hereinafter *1994 ILC Draft Statute*].

> (b) in the case of a prosecution with respect to a crime referred to in article 20(e), unless the treaty in question was applicable to the conduct of the accused; at the time the act or omission occurred.

Article 39 does not require that the definition of the relevant offense be articulated in a statute, much less a statute promulgated prior to the offense. In this respect, the title of the article includes a misnomer: the principle set out in Article 39 is not precisely the version of the legality principle encapsulated in the maxim *nullum crimen sine lege*.

In any event, there appears to be considerable dissatisfaction with the idea of leaving undefined (as the Commission's Draft does) the offenses over which the proposed court will have jurisdiction. In discussions in the *Ad Hoc Committee on Establishment of an International Criminal Court* in 1995,

> the view was expressed that a procedural instrument enumerating rather than defining the crimes would not meet the requirements of the principle of legality (*nullum crimen sine lege* and *nulla poena sine lege*) and that the constituent elements of each crime should be specified to avoid any ambiguity and to ensure full respect for the rights of the accused.[6]

In further discussions during the April 1996 meetings of the Preparatory Committee on Establishment of an International Criminal Court,[7] it again seemed to be widely accepted that a statute itself should contain offense definitions.

But would even that be sufficient? In a working system of criminal law, it is not adequate simply to lay down (or point to) the definitional elements of particular offenses. Criminal law does more than define offenses: it lays down detailed rules about what constitutes culpable conduct, about what mental states are requisite for criminal liability, about when particular results will be attributed to a particular actor, about responsibility for the conduct of others and for inchoate crimes, about general justifications for otherwise wrongful conduct that reshape and complicate the boundaries of particular prohibitions, about excuses that entirely or partially exclude culpability, and about the grading of offenses and sanctions according to different levels and degrees of culpability and harm. The rules pertaining to all of these matters vary as between different national systems.

There is no equivalent body of existing international rules applica-

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6. *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 50th Sess., Supp. No. 22, ¶ 57, at 12, U.N. Doc. A/50/22 (1995) [hereinafter *Report of the Ad Hoc Committee*].

7. *See* 1 *Report of the Preparatory Committee on Establishment of an International Criminal Court*, U.N. GAOR, 51st Sess., Supp. No. 22, U.N. Doc A/51/22 (1996) [hereinafter *Preparatory Committee Report*].

ble with respect to international crimes.[8] "Indirect enforcement" by national authorities has meant that the rules governing these matters have been, for the most part, those of the national system of the enforcing state. Trials conducted before "international tribunals" set up in the aftermath of World War II generated some rules about defenses like "superior orders" and "military necessity"; on the whole, however, discussions in these cases of general principles of criminal liability is sparse, superficial, and inconclusive. Partly because of their common roots, some elementary generalizations about the common features of national systems of criminal law may well be possible.[9] But differences in detail make it "very difficult, if not impossible," to devise a workable and universally acceptable system of international criminal law simply by abstracting the common provisions of major domestic systems and treating them as "general principles of law recognized by civilized nations"[10] in the sense in which that expression is used in Article 38(1)(c) of the Statute of the International Court of Justice.[11]

Article 7 of the Statute of the International Criminal Tribunal for Former Yugoslavia[12] sets out the principle of individual responsibility for participation in crimes falling within the Tribunal's jurisdiction, declares that official position does not confer immunity from prosecution, establishes the liability of superiors for negligent supervision of subordinates, and excludes defenses based on obedience to the orders of a superior. This is the only provision in the Statute dealing with substantive principles of criminal liability. The Report of the Secretary-General submitting the draft Statute to the Security Council indicated that "[t]he International Tribunal itself will have to decide on various personal defences which may relieve a person of individual criminal responsibility, such as minimum age or mental incapacity, drawing upon general principles of law recognized by all nations."[13] Article

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8. For painstaking proof of this proposition, see M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW 339-469 (1992). *See also* 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 91-111 (1995).

9. For an effort to construct a system of principles of international criminal liability on the basis of comparative study, see STEFAN GLASER, INFRACTION INTERNATIONALE: SES ELÉMENTS CONSTITUTIFS ET SES ASPECTS JURIDIQUES (1957); Stefan Glaser, *Culpabilité en Droit International Pénal*, 99 RECUEIL DES COURS 467-592 (1960-II); *cf.* STANISLAW PLAWSKI, ÉTUDE DES PRINCIPES FONDAMENTAUX DU DROIT INTERNATIONAL PÉNAL 142-64 (1972).

10. BASSIOUNI, *supra* note 8, at 350. *See also* Albin Eser, *The Need for a General Part*, *in* COMMENTARIES ON THE INTERNATIONAL LAW COMMISSION'S 1991 DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND, at 43, 51 (Cherif Bassiouni ed., Nouvelles Études Pénales vol. 11, 1993).

11. Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1031.

12. Statute of the International Criminal Tribunal for Former Yugoslavia, 32 I.L.M. 1203 (1993).

13. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, 48th Sess., at 5, U.N. Doc. S/25704 (1993).

67(A)(ii)(b) of the Tribunal's Rules of Procedure and Evidence,[14] dealing with pretrial disclosure, requires the defendant to give advance notice of "any special defense, including that of diminished or lack of mental responsibility. . . ." This suggests that the tribunal will recognize defenses based on insanity and diminished mental capacity.

Article 33 of the International Law Commission's Draft Statute for a permanent court directs the proposed court to base its decisions on (a) the statute itself; (b) "applicable treaties and the principles and rules of general international law"; and, (c) "to the extent applicable, any rule of national law." Like the Secretary-General's Report that led to establishment of the Yugoslavia Tribunal, the Commission's commentary recognizes that the proposed court will have to develop its own rules of substantive criminal law. It is somewhat vague, however, as to whether the court's power to do so should more properly be referred to (b) or to (c), and also as to how a particular body of national law, *e.g.*, that of the place of commission of the offense, might be relevant in an international prosecution.[15]

It has been urged that Article 33 of the International Law Commission's Draft Statute

> should not be interpreted to permit the Court to substitute the laws of any nation or general international law for a proper "general part" of an applicable substantive criminal law. Accordingly, such a General Part must be elaborated, and to be suitable for international use, it should reflect principles from the major criminal law systems of the world in language that is as neutral or universal as possible.[16]

Indeed, broad agreement seems to be emerging that not only offense definitions and penalties, but also the general rules of liability and exoneration to be applied by the court, cannot be left to national law, or otherwise permitted to vary from case to case, but must be settled in advance.[17] The *Report of the Ad Hoc Committee* contains in Annex II a checklist of substantive matters that might or might not be covered in the court's statute and rules. This list has served as a guide to focus subsequent discussion. There does not yet seem to be, however, much agreement on exactly what general rules should be included in the statute, much less on how they should be formulated.

It is sometimes suggested that fixing substantive rules in advance may be required by the principle of legality. However, if not required

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14. Tribunal's Rules of Procedure and Evidence, 33 I.L.M. 484 (1994).

15. *1994 ILC Report*, *supra* note 5, at 103-04.

16. Committee of Experts on International Criminal Law, *Draft Statute for an International Criminal Court - Alternative to the ILC Draft (Siracusa Draft)* 38 (July 1995); *Draft Statute for an International Criminal Court: Suggested Modifications to the 1994 ILC Draft (Updated Siracusa Draft)* 44 (Jan. 1996).

17. *See Report of the Ad Hoc Committee*, *supra* note 6, ¶¶ 86-89, at 18-19; *Preparatory Committee Report*, *supra* note 7, ¶¶ 187-88, at 43.

by the principle of legality itself, the requirements of precision and certainty expected in criminal proceedings may so necessitate. In fact, precisely what the principle of legality requires to be determined in advance depends on the relative importance ascribed to the various *desiderata* underlying the principle.[18] How much weight attaches to these various factors has to be sorted out in order to determine whether there is a principled basis for insisting that particular kinds of substantive rules need be laid down in the court's statute.

A central reason for insisting that punishment be imposed only by virtue of a law enacted prior to the offense is the sense that fairness requires giving due notice of what constitutes prohibited conduct and of what will happen if the line between permissible and prohibited conduct is crossed. Insofar as the object is to indicate where this line lies, and therefore to provide a practicable guide to permissible conduct, it would follow that the law should not only define offenses but also specify in advance the kind of justifications that will render otherwise prohibited conduct permissible. Equally, the law should define the kind of justifications that modify and complicate specific offense definitions by creating privileged exceptions, and by stipulating conditions under which what would otherwise constitute wrongdoing is licensed.

If the only object of the principle of legality is to give fair warning of where the line between permissible and prohibited conduct lies, it should not require setting out in advance the conditions under which criminal conduct will be excused, the circumstances under which wrongdoing will not be punished because the wrongdoer is not regarded as culpable or blameworthy.

At the same time, there are reasons for insisting on the principle of legality other than the desire to give potential offenders fair warning of what the law prohibits. The principle rests in part on the judgment that it is for legislators (or their international equivalent) rather than judges to settle questions about what kinds of conduct will be proscribed. In this aspect, the legality principle is a *congener* of the political doctrine of separation of powers. The principle rests in part on a sense that fixed rules are required if we are to realize the ideal of treating like cases alike, and that this ideal is particularly important when it comes to imposing criminal penalties. It rests in part on the sense that, especially in criminal cases, it is important to apply impersonal rules articulated beforehand without regard to the particular persons to whom they will be applied.

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18. On this question, see GEORGE FLETCHER, RETHINKING CRIMINAL LAW 569-74 (1978); Eric Colvin, *Criminal Law and the Rule of Law*, *in* CRIME, JUSTICE & CODIFICATION 124 (P. Fitzgerald ed., 1986); Peter Alldridge, *Rules for Courts and Rules for Citizens*, 10 OXFORD J. LEGAL STUDIES 487, 490-92 (1990); Paul H. Robinson, *Rules of Conduct and Principles of Adjudication*, 57 U. CHI. L. REV. 729 (1990).

If full weight were given to all of these converging considerations, the principle of legality would require that not only offense definitions, but all significant principles of the applicable system of criminal law, be laid down as definitely as possible in advance. It would practically require a complete criminal code.[19]

Absent a developed body of law on liability for international crimes, the alternative to a proper code is likely to be reliance on a hotch-potch of rules and principles plucked from hither and yon — the very kind of situation against which eighteenth-century reformers like Beccaria reacted. At the same time, there is no guarantee that a code drafted under the auspices of the United Nations, in an age that seems to lack the vocation for coherent criminal policy, will be any less of a hotch-potch.

19. It might further preclude prosecutorial discretion as well as the kind of doctrinal and judicial development of new justifications and excuses that even codified systems of criminal law tolerate. This suggests that no legal system carries out in full all of the implications of the principle of legality.