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Nullum Crimen and Related Claims

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Unlike many domestic statutes, international instruments setting forth international criminal proscriptions often lack detailed definitional orientations or elements of crimes. Penalties are rarely set forth, the word "crime" often does not appear, and mention of particular fora for prosecution is scarce. It is widely recognized, however, that international criminal laws do not thereby run afoul of the principle *nullum crimen sine lege* or otherwise lack legal validity.[1] Similarly, the fact

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* Editor's Note: This article deals with the principles of legality which are relevant to the drafting of the Statute of the International Criminal Court.

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1. *See, e.g.*, 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 52, 111, 275, 333 (1995); M. CHERIF BASSIOUNI & PETER MANIKAS, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 266 (1996) ("existing international criminal law . . . can satisfy the requirements of the principles of legality"), 267 (prosecution "would be consistent with . . . *nullum crimen sine lege*"), 269 (international criminal conventions "seldom satisfy rigorous standards of legislative clarity"), 289-90; *cf. id.* at 288 (many conventions "do not meet the requirements of the principles of legality" and customary practice "does not include the principle *nulla poena sine lege*"); *but see* Christopher L. Blakesley, *Obstacles to the Creation of a Permanent War Crimes Tribunal*, 18 FLETCHER F. WORLD AFF. no. 2, at 77, 88-90 (1994); Christopher L. Blakesley, *Jurisdiction, Definition of Crimes and Triggering Mechanism*, 25 DENV. J. INT'L L. POL'Y 233 (1997). Professor Blakesley argues that international crimes must have "specific, well defined elements . . . articulated and clear," that "elements . . . [are] required by international criminal and human rights law," that "explicit and specific iteration (promulgation) of the elements to be proved" is required, that the statutes for the ICTs for Former Yugoslavia and Rwanda [*see* JORDAN J. PAUST, CHERIF BASSIOUNI ET AL., INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 763-65, 772-74, 834-36 (1996)] are legally deficient, that "rigid and rigorous requirements of criminal justice" require definitions as well as specific elements and if they are "wanting . . . conviction violates human rights law," and that "the law of virtually all nations requires clear definition and specific material elements." *Id.* at 9-10, 13, 15, 21. Professor Edward Wise also states: "Almost everywhere . . . 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." Edward M. Wise, *General Rules of Criminal Law*, 25 DENV. J. INT'L L. & POL'Y315), adding: "the view was expressed" during a 1995 session of the *Ad Hoc* Committee on the Establishment of an

that new domestic laws incorporate what had been international criminal law at the time of an alleged violation or that new fora (domestic or international) allow prosecution of what had been an international crime does not violate such a principle or a related prohibition of *ex post facto* law.[2]

During the World War II era, in *United States v. Altstoetter*,[3] before the United States' military commission established under Control Council Law No. 10, the Tribunal appropriately denied defense claims that the principle *nullum crimen sine lege* applied:

> Obviously the principle in question constitutes no limitation upon the power or right of the Tribunal to punish acts which can properly be held to have been violations of international law when committed . . . C.C. Law 10, article II, paragraph 1 (*b*), "War Crimes," has by reference incorporated the rules by which war crimes are to be identified. In all such cases it remains only for the Tribunal . . . to determine the content of those rules under the impact of changing conditions.[4]

The Tribunal added that "the *ex post facto* rule, as known to constitutional states," does not apply "to a treaty, a custom, or a common law decision of an international tribunal. . . ."[5] With respect to the principle *nullum crimen*, the Tribunal also stated: "[a]s applied in the field of international law, the principle . . . received its true interpretation in the opinion of the [International Military Tribunal] IMT . . . [at Nuremberg]. . . ."[6] It then quoted the IMT:

International Criminal Court "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*). . . ." *Id.* citing Report of the Ad Hoc Committee, 50 U.N. GAOR, Supp. No. 22, at 12, ¶ 57, U.N. Doc. A/50/22 (1995).

2. On the prohibition of *ex post facto* laws, *see, e.g.*, U.S. CONST. art. I, §9, cl. 3, §10, cl. 1; *Universal Declaration of Human Rights*, art. 11 (2) (". . . which did not constitute a penal offence, under national or international law, at the time when it was committed. . . ."), G.A. Res. 217A, 3 U.N. GAOR at 71, U.N. Doc. A/810 (1948); *International Covenant on Civil and Political Rights*, art. 15, 999 U.N.T.S. 171 (1966); *Geneva Convention Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, art. 99, 75 U.N.T.S. 135; U.S. CONST. art. I, § 9, cl. 3; § 10, cl. 1.

3. III TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 1946-1949, *addressed in* PAUST, BASSIOUNI ET AL., *supra* note 1, at 253 [hereinafter *The Justice Case*].

4. *Id.* at 974; *see also id.* at 966, 975; *In re* Ohlendorf and Others (Einsatzgruppen Trial), 15 I.L.R. 656, 658 (U.S. Military Trib. at Nuremberg 1948), *reprinted in* PAUST, BASSIOUNI ET AL., *supra* note 1, at 722-23 (concerning "*ex post factoism*," "[t]he specific enactments for the trial of war criminals which have governed the Nuremberg trials, have only provided a machinery for the actual application of international law theretofore existing. . . . [Criminals] are amenable to punishment . . . without any prior designation of tribunal or procedure.").

5. *Id.* at 975. *See also* The Prize Cases, 67 U.S. (2 Black) 635, 671 (1862) (criminal cases addressing *ex post facto* principle "cannot be received as authoritative in a tribunal administering . . . international law.").

6. III TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER

> In the first place, it is to be observed that the maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished.[7]

When faced with an argument that an international agreement outlawing war as an instrument of national policy "does not expressly enact that such wars are crimes, or set up courts to try those who make such wars,"[8] and that therefore the principle of *nullum crimen sine lege* is violated, the IMT had also declared:

> To that extent the same is true with regard to the laws of war contained in the [1907] Hague Convention . . . Many of these prohibitions had been enforced long before the date of the Convention; but since 1907 they have certainly been crimes, punishable as offenses against the law of war; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders.[9]

The Tribunal also noted that the law of war "is not static, but by continual adaptation follows the needs of a changing world."[10]

It is doubtful, then, that either the IMT at Nuremberg or the subsequent Tribunal under Control Law No. 10 considered *nullum crimen sine lege* to be a principle of international law. In any event, both clearly considered it just and otherwise appropriate, even in view of such a principle, to prosecute persons for acts that were recognizably criminal "when committed." It was also recognized that international crimes can be incorporated "by reference" in international instruments, that international instruments need not designate infractions as crimes, that such crimes or their elements need not be defined with great particularity, that a tribunal can "determine the content" of relevant international law, that sentences need not be prescribed, and that there need not exist any mention of a forum for prosecution. With respect to penalties, the tribunals imposed various types of sentences within the customary array of possible sentences for international crimes.[11] The customary range of penalties for war crimes, for example,

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CONTROL COUNCIL LAW NO. 10, 1946-1949, *supra* note 3, at 975.

7. *Id.* at 975 (quoting Judgment and Opinion of the Int'l Military Tribunal, at 219 (Nuremberg 1946), *reprinted in* PAUST, BASSIOUNI ET AL., *supra* note 1, at 715).

8. IMT, at 218, *reprinted in* PAUST, BASSIOUNI ET AL., *supra* note 1, at 905.

9. *Id.*

10. *Id.* at 219.

11. *See, e.g.*, PAUST, BASSIOUNI ET AL., *supra* note 1, at 717-21.

had ranged from letters of reprimand to death.[12]

The *Ad Hoc* International Criminal Tribunal (ICT) for the Former Yugoslavia has taken a similar approach to such issues. For example, in the 1995 decision in the *Tadic* case before the Trial Chamber,[13] the ICT recognized that prosecution of war crimes committed in violation of common Article 3 of the Geneva Conventions does not violate the principle of *nullum crimen sine lege*[14] and that prosecution by the Tribunal under its new Statute "does not violate the *ex post facto* prohibition."[15] It also affirmed that "individual criminal responsibility of the violator need not be explicitly stated in a convention for its provisions to entail individual criminal liability," as evident from use of two treaties "at Nuremberg, despite the fact that neither convention contain any reference to penal prosecution or individual liability for breaches."[16] The Trial Chamber also ruled that "common Article 3 is beyond doubt part of customary international law, [and] therefore, the principle of *nullum crimen sine lege* is not violated by incorporating the prohibitory norms of common Article 3 in" the Statute of the ICT.[17]

On appeal, the Appellate Chamber of the Tribunal affirmed jurisdiction and declared that incorporation of crimes against humanity in the Statute of the ICT did not violate the principle of *nullum crimen sine lege*.[18] The Appellate Chamber also recognized with respect to war crimes that there is no violation of such a principle even though "common Article 3 of the Geneva Conventions contains no explicit reference to criminal liability." The Chamber added: "individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches."[19]

In the United States, the only express reference by the Supreme Court to the principle *nullum crimen sine lege* is found in a concurring opinion by Justice Douglas. Douglas' opinion contained the quote of the IMT at Nuremberg noted above and recognized that it had been utilized to support a similar decision of the IMT for the Far East.[20] Addi-

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12. *See, e.g.*, Jordan J. Paust, *My Lai and Vietnam: Norms, Myths and Leader Responsibility*, 57 MIL. L. REV. 99, 113-18, 122, 130-31, 169, 184-85 (1972).

13. The Prosecutor v. Dusko Tadic, Decision on the Defence Motion on Jurisdiction (Aug. 10, 1995), extract *reprinted in* PAUST, BASSIOUNI ET AL., *supra* note 1, at 813.

14. *Id.* at 827-30, paras. 65-74.

15. *Id.* at 830, para. 71.

16. *Id.* at 829, para. 70.

17. *Id.* at 830, para. 72.

18. The Prosecutor v. Dusko Tadic, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72 (Appeals Chamber Oct. 2, 1995) (Cassese, J., opinion) at paras. 139, 141, *reprinted in* PAUST, BASSIOUNI ET AL., *supra* note 1, at 986. *See also id.* at para. 143.

19. *Id.* at para. 128, also citing the IMT at Nuremberg. *See also id.* at paras. 139, 141 of the Separate Opinion of Judge Sidhwa.

20. Hirota v. MacArthur, 338 U.S. 197, 212 n.12 (1948) (Douglas, J., concurring in 1949) (quoting what appears here in the text *supra* note 10).

tionally, the exact phrase is found in only one circuit court, and there in a concurring opinion stating that it "reminds us that courts may not punish conduct as criminal unless that conduct has transgressed the clear, plain, *or fair meaning* of the defined offense."[21] The concurring opinion found that a federal statute incorporating state crimes in terse "descriptive language" posed "no ambiguity," that it was sufficiently "clear" and "defined with specificity" (although incorporation by reference was the mode chosen by the legislature), and that legislative history informed the meaning of certain terms.[22] The judge added:

> Strict interpretation of a penal statute, of course, cannot be applied *in vacuo*; it cannot be utilized to thwart clearly expressed statutory text, or, in the event of ambiguity, the legislative purpose expressed in the statute or its legislative history.[23]

The Supreme Court also addressed a related phrase, "*nullum crimen, nulla poena, sine lege*," in connection with its statement that "the law in criminal cases is to be determined by the court,"[24] the Court quoting a textwriter: "[u]nless there be a violation of law preannounced, and this by a constant and responsible tribunal, there is no crime, and can be no punishment."[25] In this sense, the Supreme Court has agreed with international tribunals that the content of criminal law can be determined by a court, although the quoted material stated that the existence of such a law should be "preannounced."

In one of the rare uses of a similar phrase in a United States district court opinion, the concept was referred to as a "principle" requiring that a state within the United States should have "made the commission of . . . [relevant] acts a crime and . . . authorized punishment to be imposed . . .,"[26] adding that it is expressed in the "principle of legality . . ."[27] that "has historically found expression in the [United States] criminal law rule of strict construction of criminal statutes, and in the [United States] constitutional principles forbidding *ex post facto* operation of the criminal law, vague criminal statutes,"[28] and the

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21. United States v. Davis, 576 F.2d 1065, 1069 (3d Cir. 1978) (Aldisert, J., concurring) (emphasis added). In practice, fair meaning is often less than clear or plain.

22. *See id.* at 1069-70.

23. *Id.* at 1069.

24. Sparf v. United States, 156 U.S. 51, 87-88 (1895) (Harlan, J., opinion).

25. *Id.* at 88 (quoting Wharton, note, 1 CRIM. L. MAG. 51, 56). However, courts have not required that the relevant tribunal be a "constant" tribunal. See *infra* notes 37-41 and accompanying text.

26. United States v. Walker, 514 F. Supp. 294, 316 (E.D. La. 1981).

27. *Id.* (quoting J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 28 (2d ed. 1960)). Hall had stated that "the principle of legality had a vague and checkered ancient history." *Id.* at 30. *See also* BASSIOUNI & MANIKAS, *supra* note 1, at 270-71 (discussing philosophic and other splits regarding the nature and meaning of the principle of legality).

28. Walker, 514 F. Supp. at 316-17. The *ex post facto* prohibition applies only where there is an offense, punishment, or penalty of a criminal nature. *See, e.g.*, J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 84 (1996).

like. Another district court has stressed that "[o]ne of the essential requirements of fairness in international law is that persons may not be subjected to laws that make criminal, actions which were innocent at the time."[29]

With respect to the prohibition of *ex post facto* criminal laws, it has long been recognized here and abroad that the creation of a new forum or a new jurisdictional competence for prosecution of what was criminal at the time of the alleged offense does not violate the doctrine. In *Cook v. United States*,[30] the United States Supreme Court stated that as long as the crime was proscribed and no "change of punishment therefor" was involved, "[an] *ex post facto* law does not involve, in any of its definitions, a change of the place of trial of an alleged offense after its commission."[31] In an earlier case, *Calder v. Bull*,[32] the Supreme Court had recognized that the constitutionally-based *ex post facto* prohibition applies if an action, "innocent when done," becomes criminal with the creation of new law; if new law "aggravates a crime;" if new law "inflicts a greater punishment;" or if new law "alters the legal rules of evidence, and receives less, or different, testimony, than the law required . . . in order to convict the offender."[33] "Laws, . . . [however], that change the number of appellate judges or enlarge the potential class of competent witnesses do not affect substantive rights and are constitutional."[34]

After the United States Civil War, it was affirmed that

> [w]here an accused is charged with a violation of the laws of war, as laid down in paragraph 86 of General Orders No. 100, of the War Department, of April 24, 1863 [the Lieber Code], it is no defence that the actual offence for which he was tried was committed before the date of the order; the latter being merely a publication and affirmance of the law as it had previously existed.[35]

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29. Handel v. Artukovic, 601 F. Supp. 1421, 1436 (C.D. Cal. 1985), citing the *ex post facto* prohibition in article 15 of the *International Covenant on Civil and Political Rights*.

30. Cook v. United States, 138 U.S. 157 (1891).

31. *Id.* at 183 (citing Gut v. Minnesota, 76 U.S. (9 Wall.) 35, 38 (1869)). *See also* Beazell v. Ohio, 269 U.S. 167, 170-71 (1925) (citing Duncan v. Missouri, 152 U.S. 377, 382 (1894) (change in appellate fora does not violate *ex post facto* prohibition)).

32. Calder v. Bull, 3 U.S. (3 Dall.) 385 (1798).

33. *See id.* at 390. For a recent discussion, see JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 417-18 (4 ed. 1991). On increased punishment, see *id.* at 417 (citing Lindsey v. Washington, 301 U.S. 397 (1937)); *cf. id.* at 418 ("mere change in the type of penalty, however, will not violate the provisions."). The British were less concerned with new punishments. *See, e.g.*, Triquet v. Bath, 3 Burrow 1478, 1480 (K.B. 1764) (act only created new punishment).

34. NOWAK & ROTUNDA, *supra* note 33, at 418, (citing Duncan v. Missouri, 152 U.S. 377, 382 (1894); Hopt v. Utah, 110 U.S. 574, 589 (1884)).

35. DIGEST OF OPINIONS OF JAG, ARMY 244 (1866). *See also* 11 Op. Att'y Gen. 297, 299-300 (1865) (laws of war exist, are binding, and may be prosecuted in military fora "though not defined by any law of Congress" at that time). Those laws generally were not defined with great particularity in the Lieber Code. *See, e.g.*, PAUST, BASSIOUNI ET AL.,

Similarly, in *Demjanjuk v. Petrovsky*,[36] the Sixth Circuit held that "the fact that the State of Israel was not in existence when Demjanjuk allegedly committed the offenses [in violation of international law over which there is universal jurisdiction, including war crimes and crimes against humanity] is no bar to Israel's exercising jurisdiction under the universality principle."[37] Thus, the fact that both the Israeli law and the Israeli fora designed to prosecute international crimes did not exist at the time of the alleged offenses posed no legal problems. These same points had been made in the widely known and well-received Israeli opinions in *Attorney General of Israel v. Eichmann*,[38] the Israeli courts expressly addressing the "principle of legality," *nullum crimen sine lege*, and *ex post facto* claims.[39] Also addressed in *Demjanjuk* was the recognition that creation of an extradition treaty (or a newly listed extraditable offense) with respect to prior conduct that was already criminal at the time of commission does not violate the prohibition of *ex post facto* laws, a point recognized earlier by the Supreme Court.[40]

INCORPORATION BY REFERENCE

As noted above, the incorporation of international criminal law by reference in an international criminal tribunal's statute or charter does not violate the principle *nullum crimen sine lege*. Under the United States Constitution, Congress has the power to "define and punish" offenses against the law of nations.[41] Is it a defense to prosecution in the United States that Congress has not declared a relevant crime to be a crime under international law or that Congress has not actually defined such an offense, but has merely incorporated international crimes by reference?

The power of Congress to "define and punish" violations of international law allows Congress to create legislation implementing international criminal law.[42] Yet, it has been recognized that when exercising such a power, Congress need not declare in the legislation that it

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supra note 1, at 1011-13.

36. Demjanjuk v. Petrovsky, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).

37. *Id.* at 582-83. *See also* J. PAUST, *supra* note 28, at 407. On universal jurisdiction, see *id.* at 392-93, 402-08; PAUST, BASSIOUNI ET AL., *supra* note 1, at 95-114.

38. Extracts *reprinted in* PAUST, BASSIOUNI ET AL., *supra* note 1, at 204-09; Covey Oliver, Judicial Decisions, 56 AM. J. INT'L L. 805, 821-24 (1962).

39. *See supra* note 38. Other national courts have reached similar decisions. *See, e.g.*, Irwin Cotler, Current Developments [the *Finta* case], 90 AM. J. INT'L L. 460, 463 (1996) (Canadian Commission Report recognized and ruled similarly with Belgian, French, and German courts that sustained legislation to prosecute prior war crimes or crimes against humanity and that some of these were sustained by the European Commission of Human Rights. *Id.* at 464.).

40. *See, e.g.*, Factor v. Laubenheimer, 290 U.S. 276, 304 (1933); PAUST, BASSIOUNI ET AL., *supra* note 1, at 298.

41. U.S. CONST. art. I, § 8, cl. 10.

42. *Id.* Other bases for incorporation can include § 8, cls. 1, 3, and 18.

is incorporating international law.[43] Further, when United States federal statutes implement international criminal law, they might specify the nature and elements of an offense with as much detail as is found in a treaty or customary law,[44] provide greater detail, or simply incorporate international law by reference.

Incorporation by reference has occurred in connection with the crime of piracy[45] and war crimes.[46] In both cases, the United States Supreme Court upheld the constitutionality of the statutes in the face of claims that federal statutes must identify the types of crimes proscribed and/or set forth detailed elements of offenses as well as punishments.[47] With respect to war crimes, the Supreme Court added:

> From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals. . . . It is no objection that Congress in providing for the trial of such offenses has not itself undertaken to codify that branch of international law or to mark its precise boundaries, or to enumerate or define by statute all the acts which that law condemns. . . . Congress has incorporated by reference . . . all offenses which are defined as such by the law of war. . . . Congress had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or adopting . . . [such law].[48]

It is therefore clear that incorporation of international criminal law by reference can be appropriate and does not run afoul of concepts such

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43. *See, e.g.,* United States v. Arjona, 120 U.S. 479, 488 (1887); United States v. White, 27 F. 200, 202-03 (C.C.E.D. Miss. 1886); *see also* Von Cotzhausen v. Nazro, 107 U.S. 215, 217-19 (1882) (holding that previously existing statutory phrase "contrary to law" incorporates subsequent treaty prohibition although statute does not mention international law). Thus, when Congress implements a non self-executing treaty by legislation, it need not refer to the treaty or to the fact of implementation.

44. *See generally* 18 U.S.C. § 1203 (concerning hostage-taking); *International Convention Against the Taking of Hostages*, Dec. 17, 1979, art. 1, 1316 U.N.T.S. 205, *reprinted in* PAUST, BASSIOUNI ET AL., *supra* note 1, at 1123.

45. *See* 18 U.S.C. § 1651 ("piracy as defined by the law of nations").

46. *See* 10 U.S.C. §§ 818 and 821 ("the law of war"); 18 U.S.C. §2401(a), (c) (1996) (incorporating portions of Geneva law by reference); *see also* PAUST, BASSIOUNI ET AL., *supra* note 1, at 202-03, 215-24; J. PAUST, *supra* note 28, at 409 (such incorporation of the law of war as offenses against the laws of the United States also applies to civilians and allows, with 18 U.S.C. § 3231, concurrent jurisdiction to prosecute law of war violations in the federal district courts).

47. *See, e.g.,* United States v. Smith, 18 U.S. (5 Wheat.) 153, 158-60 (1820) (re: piracy); *Ex parte* Quirin, 317 U.S. 1, 27-30 (1942) (re: law of war); PAUST, BASSIOUNI ET AL., *supra* note 1, at 200-03, 216-17. With respect to civil sanctions under 28 U.S.C. § 1350 for violations of treaty-based or customary international law, see, e.g., Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980) (holding that incorporation of international law by reference is "sufficiently determinate" and "sufficiently and constitutionally defined").

48. *Ex Parte Quirin*, 317 U.S. at 27-28.

as void for vagueness, *nullum crimen*, or otherwise involve an undue process of law.

Some statutes, like that addressing genocide,[49] have even provided greater detail than that found in the Genocide Convention,[50] but detail of an erroneous and abnegative nature that generally precludes the ability of the United States to effectuate its obligations under the Genocide Convention if prosecution can only be based on the federal statute (which may not be the case).[51] In any event, a new federal statute mirroring the definition of genocide in the treaty or incorporating the treaty and/or the customary prohibition of genocide by reference is preferable.[52]

The laws of many other states also incorporate international crimes by reference, define offenses without great detail, or provide the same sort of detail found generally in international treaties. Canada, for example, incorporates piracy[53] and war crimes[54] by reference much like the United States. In Canada, the definition of crimes against humanity is quite general[55] and the offense of aircraft hijacking reads like the treaty forming a base for Canada's jurisdictional competence.[56] Like Canada and the United States, the 1991 British War Crimes Act incorporates the law of war by reference.[57] The Australian War Crimes Act is nearly the same;[58] however, the Australian War Crimes Amendment Act[59] provides only minimal additional detail concerning "serious" war crimes[60] and in one section lists general factors similar to those found in customary definitions of crimes against humanity and genocide.[61] The Netherlands Law of 1947 incorporated by reference war

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49. 18 U.S.C. §§ 1091-1093, *reprinted in* PAUST, BASSIOUNI ET AL., *supra* note 1, at 1107-09.

50. 78 U.N.T.S. 277, art. II.

51. *See* PAUST, BASSIOUNI ET AL., *supra* note 1, at 1109-12 (might also prosecute directly and alternatively under the treaty, without abnegative reservations, etc., or under customary international law); J. PAUST, *supra* note 28, at 297-98, 310.

52. *See* J. PAUST, *supra* note 28, at 297, 309.

53. Criminal Code of Canada, Sec. 74, III Revised Statutes of Canada, 1985, at 38, *reprinted in* PAUST, BASSIOUNI ET AL., *supra* note 1, at 1230-31.

54. Criminal Code R.S.C. 1985 (3rd Supp.), c.30, §7 (3.71 to 3.77)(Can.), *reprinted in* PAUST, BASSIOUNI ET AL., *supra* note 1, at 277-79.

55. *See id.* at 277-78.

56. Criminal Code of Canada, § 76; Hague Convention for the Supression of Unlawful Seizure of Aircraft, art. 1, 860 U.N.T.S. 105, 1972 Can. T.S. No. 23, 22 U.S.T. 1641 (1971).

57. 1991 Ch. 13, 1. (1)(b) ("a violation of the laws and customs of war"), in the Public General Acts and General Synod Measures 1991, pt. I, at 101.

58. War Crimes Act 1945, § 3 (a) ("violation of the laws and usages of war").

59. War Crimes Amendment Act 1988, 1989 Aust. Act 3.

60. *Id.* §§ 6 & 7. For example, section 6 (1) lists murder, manslaughter, causing grievous bodily harm, wounding, rape, indecent assault, abduction, and so forth, without defining these categories of crime.

61. *See id.* § 7(3)(a)(i),(ii). Concerning such customary definitions, see PAUST, BASSIOUNI ET AL., *supra* note 1, at 1028-29, 1031, 1035, 1075-78, 1081-82, *passim.*

crimes and crimes against humanity as defined in the Charter of the IMT at Nuremberg,[62] and such incorporation by reference was upheld in the face of defense claims that it violated the double plea of *nullum crimen, nulla poena sine lege*.[63]

When Israel incorporated international laws proscribing genocide, crimes against humanity, and war crimes in the Nazi Collaborators (Punishment) Law, some of the crimes mirrored international standards and some portions were incorporated more generally by reference.[64] Israel also denied the *nullum* pleas made by defense counsel.[65] Professor Bassiouni adds with respect to portions of the "Islamic criminal justice system" that they can be very "flexible," even allowing identification of criminal content by analogy.[66] The 1973 Bangladesh International Crimes (Tribunals) Act primarily mirrored international definitions of crimes against humanity, crimes against peace, genocide, and certain war crimes, thereby providing in many instances merely a list of sub-types of crime or factors.[67] The Act also incorporated violations of the 1949 Geneva Conventions merely by reference.[68] One also reads in the *Tadic* appellate decision of the ICT for Former Yugoslavia that a Yugoslavian Criminal Code of 1990 incorporated Geneva Convention violations.[69] The Code actually incorporated many war crimes, including many violations of Geneva law (and most of the "grave breach" provisions of the Conventions), by listing types of crimes in general language found in international law.[70] A few war crimes articles also contained phrases implementing international law by reference.[71] The prohibition of genocide was contained in an article that generally mirrored the definition in the Genocide Convention.[72]

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62. Netherlands Law of 1947, *quoted in* PAUST, BASSIOUNI ET AL., *supra* note 1, at 206 (from the *Eichmann* case).

63. *Id.* at 206-07.

64. Nazis and Nazi Collaborators (Punishment) Law, 5710-1950, sec. 1 (b), sec. 2; Attorney General of Israel v. Eichmann, *supra* note 38, *reprinted in* 56 AM. J. INT'L L. at 805, 812 (mirroring the Charter of the IMT at Nuremberg).

65. *See, e.g.*, PAUST, BASSIOUNI ET AL., *supra* note 1, at 206-09.

66. *See* BASSIOUNI & MANIKAS, *supra* note 1, at 279.

67. Act No. XIX of 1973, § 3 (2) (a)-(d), *reprinted in* PAUST, BASSIOUNI ET AL., *supra* note 1, at 744.

68. *See id.* § 3 (e).

69. The Prosecutor v. Dusko Tadic, *supra* note 18, at para. 132 (addressing articles 142-143 of the Federal Criminal Code of Yugoslavia of 1990).

70. The Criminal Code of the Socialist Federal Republic of Yugoslavia, ch. 16 ("Crimes Against Humanity and International Law"), arts. 142-155c, Official Gazette No. 44/1976, *reprinted in* Lawyers Committee for Human Rights, "Prosecuting War Crimes in the Former Yugoslavia" 22-23, 25-33 (May 1995) [hereinafter *Report*].

71. *See, e.g., id.* art. 148 ("The Employment of Unlawful Means of Warfare") *reprinted in Report, supra* note 70, at 32 (proscribing methods and means "prohibited by the rules of international law").

72. *Id.* art. 141, *reprinted in Report, supra* note 70, at 24-25 (noting that the article also added certain actions not expressed in the Convention).

The *Tadic* decision also mentioned the Belgian law of 1993 that simply "listed" grave breach violations of the Geneva Conventions as crimes.[73] The Penal Code of Mexico generally mirrors the international definitions of piracy[74] and genocide,[75] while incorporating certain violations of humanitarian law by reference.[76] The Penal Code of Finland generally mirrors the definition of genocide,[77] lists certain war crimes with general words or phrases found in the law of war,[78] and also incorporates certain war crimes by reference.[79] The Penal Code of Ethiopia also incorporates the crime of genocide by generally mirroring the definition found in international law.[80] It incorporates certain war crimes with a provision referring to the need for conduct to be "in violation of the rules of public international law and of international humanitarian conventions"[81] and then by listing certain proscribed acts such as "inhuman treatment"[82] and "compulsion to acts of prostitution, debauchery, or rape."[83] The Penal Code of Sweden has broad coverage of what is termed a "crime against international law" arising during war in a section addressing certain war crimes and incorporating others by reference, including the proscription of "acts in a manner contrary to existing treaties . . . or to generally recognized principles of international law. . . ."[84] The German Penal Code also incorporates the crime of genocide by generally mirroring the definition under international law.[85] France has failed to follow international law concerning genocide and other crimes against humanity, but the definitions in its Criminal Code are generally no more specific than those found in

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73. The Prosecutor v. Dusko Tadic, *supra* note 18, at para. 132 (addressing article 1 of the Belgian *Loi de 16 juin 1993 relative a la repression des infractions graves aux Conventions internationales de Geneve du 12 aout 1949 et aux Protocoles I et II du juin 1977, additionnels a ces Conventions,* Moniteur Belge (5 Aug. 1993)).

74. *See* Código Penal para el Distrito Federal en Materia de Fuero Comun (C.P.D.F.), para Toda la República en Materia de Fuero Federal (18 Aug. 1931), título segundo, capítulo I, art. 146.

75. *Id.*, título tercero, capítulo II, art. 149 Bis.

76. *Id.*, capítulo I, art. 149.

77. THE PENAL CODE OF FINLAND AND RELATED LAWS 49, ch. 13, On Offenses Against Humanity, Sec. 4 (Matti Joutsen, trans., 1987).

78. *Id.* at 48-49, §§ 1-2.

79. *Id.*

80. Penal Code of Ethiopia, Proc. No. 158 of 1957, art. 281 (however, adding political groups to the list unlike the international definitions), *reprinted in* Stuart H. Deming, *War Crimes and International Crimnal Law,* 28 AKRON L. REV. 421, 424, 428 n.17 (1995).

81. *Id.* art. 282.

82. *Penal Code of Ethopia, supra* note 80, art. 282(a), *reprinted in* Deming, *supra* note 80, at 425-26 n.17.

83. *Penal Code of Ethiopia, supra* note 80, art. 282 (f).

84. The Penal Code of Sweden ch. 22, Articles of War, § 11, *reprinted in* 17 THE AMERICAN SERIES OF FOREIGN PENAL CODES, SWEDEN 71-72 (Thorsten Sellin, trans., 1972).

85. German Penal Code of 1871, § 220a (of 1954), *reprinted in* 4 THE AMERICAN SERIES OF FOREIGN PENAL CODES, GERMANY 115 (Gerhard O.W. Mueller & Thomas Buergenthal, trans., 1961).

customary international legal instruments.[86] An older French Code of Military Justice had covered some war crimes by fairly broad language.[87]

From this brief survey of United States and foreign laws, it is extremely doubtful that most countries (or any) require more than incorporation by reference or a mirrored incorporation when implementing international criminal law by domestic legislation. At times, some have even incorporated international law directly for purposes of criminal sanctions.[88] It is also clear that there need not always be definitions or elements of crimes set forth in implementing legislation, and when they do exist they can be quite general. The crime of rape is but one more example of a crime that is merely listed as such[89] or one that is set forth with very few elements.[90] It would be improper to argue, however, that conviction for rape would violate a functioning "principle of legality," the principle *nullum crimen sine lege*, or international law.[91]

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86. *See* PAUST, BASSIOUNI ET AL., *supra* note 1, at 1062-63; *see also id.* at 1047-61, 1075-80.

87. *See* James W. Garner, *Punishment of Offenders Against the Laws and Customs of War*, 14 AM. J. INT'L L. 70, 73-74 (1920).

88. *See, e.g.*, PAUST, BASSIOUNI ET AL., *supra* note 1, at 191-97, 199-200, 210-14, 1233-37, 1379.

89. *See, e.g., id.* at 24, 744, 765, 1012, 1016, 1020-21; *see also supra* text accompanying note 80. The Criminal Code of the Socialist Republic of Yugoslavia, *supra* note 70, had prohibited the war crime of "enforced prostitution and rape" in article 142. Rape as a war crime has a long history of prohibition. *See, eg.*, WOMEN & ICLIP, *supra* note 11; Jordan J. Paust, *Applicability of International Criminal Laws to Events in the Former Yugoslavia*, 9 AM. U.J. INT'L L. & POL'Y 499, 516-17 n.61 (1994).

90. *See, e.g.*, 10 U.S.C. § 920. Sections 933 and 934 contain even broader language incorporating several types of offenses with an imprimatur of constitutionality. *See. eg.*, Parker v. Levy, 417 U.S. 733 (1974) (upholding the constitutionality of sections 933 and 934). Concerning use of these sections for war crimes, see PAUST, BASSIOUNI ET AL, *supra* note 4, at 247 (including an example of a conviction for "cutting off an ear . . ., which conduct was of a nature of being a discredit upon the Armed Forces")(quotation marks omitted).

91. There is no indication in Professor Cherif Bassiouni's work that this would be the case. *See* Cherif Bassiouni & Marcia McCormick, *Sexual Violence—An Invisible Weapon of War in the Former Yugoslavia* (DePaul Occas. Paper No. 1, 1996); *see also* PAUST, BASSIOUNI ET AL., *supra* note 1, at 7; BASSIOUNI & MANIKAS, *supra* note 1; *cf.* M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY 320 *ff.* (1992).