2.3 THE PRINCIPLE OF LEGALITY

2.3.1 The principle of legality in domestic legal systems

To grasp fully the significance of this principle (which is usually described by using the Latin maxim *nullum crimen nulla poena sine lege*) a few words of introduction are necessary.

National legal systems tend to embrace, and ground their criminal law on either the doctrine of *substantive justice* or that of *strict legality*. Under the former doctrine the legal order must primarily aim at prohibiting and punishing any conduct that is socially harmful or causes danger to society, whether or not that conduct has already been legally criminalized at the moment it is taken. The paramount interest is defending society against any deviant behaviour likely to cause damage or jeopardize the social and legal system. Hence this doctrine favours society over the individual (*favor societatis*). Extreme and reprehensible applications of this doctrine can be found in the Soviet legal system (1918–58) or in the Nazi criminal law (1933–45). However, one can also find some variations of this doctrine in modern democratic Germany, where the principles of ‘objective justice’ (*materielle Gerechtigkeit*) have been upheld as a reaction to oppressive governments trampling upon fundamental human rights, and courts have had recourse to the celebrated ‘Radbruch’s formula’. Radbruch, the distinguished German professor of jurisprudence, created this ‘formula’ in 1946. In terms subsequently taken up in some German cases,¹ he propounded the notion that positive law must be regarded as contrary to justice and not applied where the inconsistency between statute law and justice is so intolerable that the former must give way to the latter. This ‘formula’ has been widely accepted in the legal literature.²

In contrast, the doctrine of strict legality postulates that a person may only be held

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¹ The German Federal Constitutional Court referred to that ‘formula’ in its judgment of 24 October 1996 in *Streletz and Kessler*. The question at issue was whether the accused, former senior officials of the former German Democratic Republic (GDR) charged with incitement to commit intentional homicide for their responsibility in ordering the shooting and killing by border guards of persons trying to flee from the GDR, could invoke as a ground of justification the fact that their actions were legal under the law applicable in the GDR at the material time, which did not make them liable to criminal prosecution. The defendants submitted that holding them criminally liable would run contrary to the ban on the retroactive application of criminal law and Article 103(2) of the German Constitution laying down the *nullum crimen* principle. The Court dismissed the defendants’ submissions. Among other things, it noted that the prohibition on retroactive law derived its justification from the special trust reposed in criminal statutes enacted by a democratic legislature respecting fundamental rights.

² Of course, the notion propounded by Radbruch could simply be termed the Natural Justice view that an unjust law is no law and must be disregarded. As such, it might be susceptible to the criticism of positivists that it makes the law subjective, since the sense of justice varies from person to person.
criminally liable and punished if at the moment when he performed a certain act this act was regarded as a criminal offence under the applicable law. Historically, this doctrine stems from the opposition of the baronial and knightly class to the arbitrary power of monarchs, and found expression in Article 39 of Magna Charta libertatum of 1215 (so-called ‘Magna Carta’). One must, however, wait for the principal thinkers of the Enlightenment to find its proper philosophical and political underpinning. Montesquieu and then the great American proclamations of 1774 and of the French revolution (1789) conceived of the doctrine as a way of restraining the power of the rulers and safeguarding the prerogatives of the legislature and the judiciary. As the distinguished German criminal lawyer Franz von Liszt wrote in 1893, the nullum crimen sine lege and nulla poena sine lege principles ‘are the bulwark of the citizen against the state’s omnipotence; they protect the individual against the ruthless power of the majority, against the Leviathan. However paradoxical it may sound, the Criminal Code is the criminal’s magna charta. It guarantees his right to be punished only in accordance with the requirements set out by the law and only within the limits laid down in the law.’

At present, most democratic civil law countries tend to uphold the doctrine of strict legality as an overarching principle. In these countries the doctrine is normally held to articulate four basic notions: (i) criminal offences may only be provided for in written law, namely legislation enacted by Parliament, and not in customary rules (less certain and definite than statutes) or in secondary legislation (which emanates from the government and not from the parliamentary body expressing popular will); this principle is referred to by the maxim nullum crimen sine lege scripta (criminal offences must be provided for in written legislation); (ii) criminal legislation must abide by the principle of specificity, whereby rules criminalizing human conduct must be as specific and clear as possible, so as to guide the behaviour of citizens; this is expressed by the Latin tag nullum crimen sine lege stricta (criminal offences must be provided for through specific legislation); (iii) criminal rules may not be retroactive; that is, a person may only be punished for behaviour that was considered criminal at the time the conduct was undertaken; therefore he may not be punished on the strength of a law passed subsequently; the maxim referred to in this case is nullum crimen sine proevia lege (criminal offences must be provided for in a prior law); (iv) resort to analogy in applying criminal rules is prohibited (analogy would allow to

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3 ‘It is only through the legal judgment by his peers and on the strength of the law of the land that a freeman may be apprehended or imprisoned or disseised or outlawed or exiled or in any other manner destroyed, nor may we go upon him or send upon him.’


5 The German Federal Constitutional Court set out the principle in admirable terms in its aforementioned decision of 24 October 1996 in Streletz and Kessler. In illustrating the scope of Article 103(2) of the German Constitution, laying down the principle at issue, it stated the following: ‘(1.a) Article 103 §2 of the Basic Law protects against retroactive modification of the assessment of the wrongfulness of an act to the offender’s detriment […] Accordingly, it also requires that a statutory ground of justification which could be relied on at the time when an act was committed should continue to be applied even where, by the time criminal proceedings begin, it has been abolished. However, where justifications are concerned, in contrast to the definition of offences and penalties, the strict reservation of Parliament’s law-making prerogative does not apply. In the sphere of the criminal law grounds of justification may also be derived from customary law or case-law.’
punish, at the whim of courts, conduct similar or approximate to that already prohibited, thereby unduly extending the scope of existing criminal provisions).

Plainly, as stated above, the purpose of these principles is to safeguard citizens as far as possible against both the arbitrary power of government and possibly excessive judicial discretion. In short, the basic underpinning of the doctrine of strict legality lies in the postulate of *favor rei* (in favour of the accused) (as opposed to *favor societatis*, or in favour of society).

However, in common law countries, where judge-made law prevails or is at least firmly embedded in the legal system, there is a tendency to adopt a qualified approach to these principles. For one thing, common law offences (as opposed to statutory offences) result from judge-made law and therefore may lack those requirements of rigidity, foreseeability and certainty proper to written legislation. For another, common law offences are not strictly subject to the principle of non-retroactivity, as is shown by recent English cases contemplating new offences, or at any rate the removal of traditional defences (see, for instance, *R. v. R.* (1992), where a court held that the fact of marriage was no longer a common law defence to a husband’s rape of his wife). It is notable that the European Court of Human Rights did not regard such cases as questionable or at any rate contrary to the fundamental provisions of the European Convention (see *SW and CR v. United Kingdom*, 1995).

### 2.3.2 The principle of legality in ICL

As seen above, the principle of legality in criminal law is not uniformly applied in in common law and civil law countries. Let us now see which of the two aforementioned doctrines is applied in ICL.

One could note that ICL, being also based on customary processes, is more akin to English law than to French, German, Argentinean, or Chinese law. However, this would not be sufficient. The main problem is that for a long period, and until recently, ICL has applied the doctrine of *substantive justice*; it is only in recent years that it is gradually replacing it with the doctrine of *strict legality*, albeit with some important qualifications.

That ICL has long applied the former doctrine is not to be attributed to a totalitarian or authoritarian streak in the international society. Rather, the rationale for that attitude was that states were not prepared to enter into treaties laying down criminal rules, nor had customary rules evolved covering this area. In practice, there only existed customary rules prohibiting and punishing war crimes, although in a rather rudimentary or unsophisticated manner (see *supra*, 1.2 and 2.1, 2.4.1). Hence the need for the international community to rely upon substantive justice when new and extremely serious forms of criminality (crimes against peace, crimes against humanity) suddenly appeared on the international scene.

The IMT clearly enunciated this doctrine in *Göring and others*. From the outset the Tribunal had to face the powerful objections of German defence counsel that the Tribunal was not allowed to apply *ex post facto* law. These objections were grounded

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6 It would seem that the English law used to be that a man could not rape his wife because, by agreeing to marry, she had implicitly consented to sexual intercourse for all time. This was obviously a somewhat mediaeval approach. The defence existed only as a matter of common law—it was not in any statute. The judge in *R. v. R.* rightly held that societal attitudes had changed and that it was no longer acceptable to hold that a husband could in law never be held guilty of raping his wife; hence he did not allow the old common law defence. In fairness, it was not the introduction of a *new offence*—rape had always been an offence. It was a question of disallowing a (retrograde) common law defence.
in the general principles of criminal law embedded in civil law countries, and also upheld in German law before and after the Nazi period. The French Judge H. Donnedieu de Vabres, coming from a country where the *nullum crimen* principle is deeply ingrained, also showed himself to be extremely sensitive to the principle. As a consequence, when dealing with the crimes against peace of which the defendants stood accused, the Tribunal, before stating that in fact such crimes were already prohibited when they were perpetrated (at 219–23)—a finding that seems highly questionable—noted that in any case it was not contrary to justice to punish those crimes even if the relevant conduct was not criminalized at the time of their commission:

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 neighbouring 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* (219; emphasis added).

In other words, substantive justice punishes acts that harm society deeply and are regarded as abhorrent by all members of society, even if these acts were not prohibited as criminal when they were performed.7

As stated above, after the Second World War the doctrine of substantive justice (upheld in a number of cases, among which one may cite *Peleus* and later on *Eichmann*)8 was gradually replaced by that of strict legality. Two factors brought

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7 In his Dissenting Opinion in the Tokyo trial (*Araki and others*), Judge B. V. A. Röling spelled out the same principle, again with regard to crimes against peace. He noted that in national legal systems the *nullum crimen* principle ‘is not a principle of justice but a rule of policy’; this rule was ‘valid only if expressly adopted, so as to protect citizens against arbitrariness of courts […] as well as arbitrariness of legislators […] the prohibition of *ex post facto* law is an expression of political wisdom, not necessarily applicable in present international relations. This maxim of liberty may, if circumstances necessitate it, be disregarded even by powers victorious in a war fought for freedom’ (at 1059). Judge Röling then delineated two classes of criminal offence: ‘Crime in international law is applied to concepts with different meanings. Apart from those indicated above [war crimes], it can also indicate acts comparable to political crimes in domestic law, where the decisive element is the danger rather than the guilt, where the criminal is considered an enemy rather than a villain and where the punishment emphasizes the political measure rather than the judicial retribution’ (at 1060). Judge Röling applied these concepts to crimes against peace and concluded that such crimes were to be punished because of the dangerous character of the individuals who committed them, hence on *security considerations*. In his view, however, given the novel nature of these crimes, it followed that persons found guilty of them could not be punished by a death sentence (ibid.).

8 In *Peleus*, the Prosecutor, in his closing speech maintained that maxim of *nullum crimen sine lege, nulla poena sine lege*, was “only applicable to municipal and state law, and could never be applicable to International Law” (in LRCWC, vol.1, at 10). In his summing up the Judge Advocate stated: ‘You have heard a suggestion made that this Court has no right to adjudicate upon this case because it is said you cannot create an offence by a law which operates retrospectively so as to expose someone to punishment for acts which at the time he did them were not punishable as crimes. That is the substance of the Latin maxim [*nullum crimen sine lege, nulla poena sine lege*] that has been used so much in this Court. My advice to you is that the maxim and the principle [of legality] that it expresses has nothing whatever to do with this case. It has reference only to municipal or domestic law of a particular State, and you need not be embarrassed by it in your consideration of the problems that you have to deal with here’ (see ibid., at 12; for the full text reported here see J. Cameron [ed.], *Trial of Heinz Eck*, at 132). It should be noted that the defendants had been accused of killing survivors of a sunken merchant vessel, the Greek steamship *Peleus*; they had raised the pleas of ‘operational necessity’ and superior orders.
about this change.  

First, states agreed upon and ratified a number of important human rights treaties which laid down the *nullum crimen* principle as legal standard for national courts. The same principle was also set out in such important treaties as the Third and Fourth Geneva Conventions of 1949, respectively, on Prisoners of War and on Civilians. The expansive force and striking influence of these treaties could not but impact on international criminal proceedings, leading to the acceptance of the notion that also in such proceedings the *nullum crimen* principle must be respected as a fundamental part of a set of basic human rights of individuals. In other words, the principle came to be seen from the viewpoint of the human rights of the accused, and no longer as essentially encapsulating policy guidelines dictating the penal strategy of states at the international level.

The second factor is that gradually the network of ICL expanded both through a number of international treaties criminalizing conduct of individuals (think of the 1948 Convention on Genocide, the 1949 Geneva Conventions, the 1984 Convention on Torture, and the various treaties on terrorism) and by dint of the accumulation of case law. In particular, case law contributed to either the crystallization of customary international rules of criminal law (for instance, on the mental element of crimes against humanity) or to clarifying or specifying elements of crimes, defences, and other important segments of ICL. As a consequence, the principle of strict legality was laid down first, albeit implicitly, in the two ad hoc Tribunals (ICTY and ICTR), and then, explicitly, in the Statute of the ICC, Article 22(1) of which provides that ‘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.’

The conclusion is therefore warranted that nowadays this principle must be complied with also at the international level, albeit subject to a number of significant qualifications, which we shall presently consider.

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The British Judge Advocate in *Burgholz (No. 2)* took a clearer stand. After noting that the Allies had set up tribunals in Germany and Japan ‘with the object of bringing to justice certain persons who have outraged the basic principles of decency and humanity’, he pointed out: ‘It may well be that no particular concrete law can be pointed to as having been broken, and you remember what Defence Counsel Dr. Meyer-Labastille said yesterday on the principle of “no punishment without pre-existing law”. That principle I agree with but to this extent, that I do not regard it as limiting punishment of persons who have outraged human decency in their conduct’ (at 79).

As for *Eichmann*, see the judgment of the Supreme Court of Israel, at 281.

9 See, for instance, Article 15 of the UN Covenant on Civil and Political Rights, Article 7 of the European Convention on Human Rights, or Article 9 of the American Convention on Human Rights.

10 See Article 99(1) of the Third Convention and Article 67 of the Fourth Convention. See also Article 75(4)(c) of the First Additional Protocol of 1977.

11 See for instance Articles 1–8 of the ICTY Statute, as well as §29 of the UN Secretary-General’s Report to the Security Council for the establishment of the Tribunal (S/25704) (‘It should be pointed out that, 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’).

2.4 ARTICULATIONS OF THE PRINCIPLE OF LEGALITY

2.4.1 THE PRINCIPLE OF SPECIFICITY

Under this principle criminal rules must be as detailed as possible, so as to clearly indicate to their addressees the conduct prohibited, namely, both the objective elements of the crime and the requisite mens rea. The principle is aimed at ensuring that all those who may fall under the prohibitions of the law know in advance which specific behaviour is allowed or proscribed. They may thus foresee the consequences of their action and freely choose either to comply with, or instead breach, legal standards of behaviour. Clearly, the more accurate and specific a criminal rule, the greater is the protection accorded to the agent from arbitrary action of either enforcement officials or courts of law.

The principle is still far from being fully applicable in international law, which still includes many rules that are loose in their scope and purport. In this regard, suffice it to mention, as an extreme and conspicuous instance, the provision first enshrined in the London Charter of 1945 and then restated in many international instruments (Control Council Law no. 10, the Statutes of the Tokyo Tribunal, the ICTY, the ICTR and the SCSL), whereby crimes against humanity encompass ‘other inhumane acts’. Similarly, the provisions of the four 1949 Geneva Conventions on grave breaches among other things enumerate, as ‘grave breaches’, ‘torture or inhuman treatment’. In addition, many rules contain notions that are not defined at the ‘legislative’ level, such as ‘rape’, ‘torture’, ‘persecution’, ‘enslavement’, etc. Furthermore, most international rules proscribing conduct as criminal do not specify the subjective element of the crime. Nor are customary rules on defences crystal clear: they do not indicate the relevant excuses or justifications in unquestionable terms.

Given this indeterminacy and the consequent legal uncertainty for the possible addressees of international criminal rules, the contribution of courts to giving precision to law, not infrequent even in civil law systems, and quite normal in common law countries, becomes of crucial importance at the international level, as has already been pointed out above (1.4.7). Both national and international courts play an immensely important role in gradually clarifying notions, or spelling out the objective and subjective ingredients of crimes, or better outlining such general legal concepts as excuses, justifications, etc.

Thus, for instance, the District Court of Tel Aviv, in Ternek spelled out, by way of construction, the notion of ‘other inhumane acts’ in a manner that seems acceptable (at 540, and §7). Similarly, in defining the concept of ‘rape’ a TC of the ICTY in

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13 The ICC Statute fleshes the notion out, by providing that crimes against humanity may include ‘other inhumane acts of a similar character [to the other, specifically enumerated, classes of such crimes] intentionally causing great suffering, or serious injury to body or to mental or physical health’ (Art. 7(1)(k)).

14 The Court stated that: ‘The defence counsel argue, secondly, that the words “other inhumane acts” which appear in the definition of “crimes against humanity” should be interpreted subject to the principle of ejusdem generis. That is, that an “other inhumane act” should be of the type of the specific action mentioned before it, in the same definition, which are “murder, extermination, enslavement, starvation and deportation” [. . .] We believe that there is truth in the defence counsel’s second claim. The punishment determined in Article 1 of the [Israeli] Law [of 1950 on the Doing of Justice to Nazis and their Collaborators] for “crimes against humanity” is death (subject to extenuating circumstances pursuant to Article 11(b) of the Law), and it can be assumed that the legislator intended to inflict the
Furundžija had recourse to general principles of ICL as well as general principles common to the major legal systems of the world, and general principles of law.\textsuperscript{15}

One should not underestimate, however, another drawback of ICL: the lack of a central criminal court endowed with the authority to clarify for the whole international society the numerous hazy or unclear criminal rules. To put it differently: the contribution of courts to the gradual specification and precision of legal rules, emphasized above, suffers from the major shortcoming that such judicial refinement is ‘decentralized’ and fragmentary. In addition, when such process is effected by national courts, it suffers from the another flaw: each court tends to apply the general notions of criminal law proper to the legal system within which such court operates. Hence, the possibility frequently arises of a contradictory or ‘cacophonic’ interpretation or application of international criminal rules.

Fortunately, the draftsmen of the ICC Statute made a significant contribution when they endeavoured to define as precisely as possible the various categories of crimes. (However, as the Statute is not intended to codify international customary law, one ought always to take it with a pinch of salt, for in some cases it may go beyond current law, whereas in other instances it is narrower in scope than rules of customary international law. Furthermore, formally speaking that Statute is only binding on the ICC).

For the time being, international criminal rules still make up a body of law in need of legal precision and some major refinement at the level of definitions and general principles. To take account of these features and at the same time safeguard the right of the accused, currently some notions play a role that is far greater than in most national systems: the defence of mistake of law (see infra, 13.5), the principle of strict interpretation (barring extensive or broad constructions of criminal rules; see infra, 2.4.3), the principle of favor rei (imposing that in case of doubt a rule should be interpreted in such a manner as to favour the accused; see infra, 2.4.4). These notions act as countervailing factors aimed at compensating for the present flaws and lacunae of ICL.

2.4.2 THE PRINCIPLE OF NON-RETROACTIVITY

A. General

As stated above, a logical and necessary corollary of the doctrine of strict legality is that criminal rules may not cover acts performed prior to their enactment, unless such rules are more favourable to the accused. Otherwise the executive power, the

\textsuperscript{15} It is worth citing the relevant passage, for that TC proved alert to the principle of specificity. It stated the following: ‘This TC notes that no elements [for defining rape] other than those emphasised may be drawn from international treaty or customary law, nor is resort to general principles of international criminal law or to general principles of international law of any avail. The TC therefore considers that, to arrive at an accurate definition of rape based on the criminal law principle of specificity (\textit{Bestimmtheitgrundsatz}, also referred to by the maxim “\textit{nullum crimen sine lege stricta}”), it is necessary to look for principles of criminal law common to the major legal systems of the world. These principles may be derived, with all due caution, from national laws’ (§177).
judiciary, or even the legislature could arbitrarily punish persons for actions that were allowed when they were carried out.

In contrast, the ineluctable corollary of the doctrine of substantive justice is that, for the purpose of defending society against new and unexpected forms of criminality, one may go so far as to prosecute and punish conduct that was legal when taken. These two approaches lead to contrary conclusions. The question is: which approach has been adopted in international law?

It seems indisputable that the London Agreement of 1945 provided for two categories of crime that were new: crimes against peace and crimes against humanity. The IMT did act upon the Charter provisions dealing with both categories. In so doing, it applied *ex post facto* law; in other words, it applied international law retroactively, as the defence counsel at Nuremberg rightly stressed.\(^\text{16}\)

Many tribunals sitting in judgment over Germans in the aftermath of the Second World War,\(^\text{17}\) as well as the German Supreme Court in the British Occupied Zone,\(^\text{18}\) endorsed the legal approach taken by the IMT, for all its deficiencies. This stand, while having scant persuasive force with regard to the past, nonetheless contributed to the slow consolidation of the principle of non-retroactivity in ICL.

Subsequently, as a logical consequence of the emergence of the *nullum crimen sine lege* principle a general rule prohibiting the retroactive application of criminal law gradually evolved in the international society. Thus, the principle of non-retroactivity of criminal rules is *now* solidly embedded in ICL. It follows that courts may only apply substantive criminal rules that existed at the time of commission of the alleged crime. This, of course, does not entail that courts are barred from refining and elaborating upon, by way of legal construction, *existing* rules. The ICTY AC clearly set out this notion in *Aleksovski* (AJ).\(^\text{19}\)

**B. Expansive adaptation of some legal ingredients of crimes laid down in international rules to new social conditions**

One should duly take account of the nature of ICL, to a large extent made up of customary rules that are often identified, clarified or spelled out, or given legal determinacy by courts. In short, that body of law to a large extent consists of judge-made law (with no doctrine of precedent). Consequently, one should reconcile the principle of non-retroactivity with these inherent characteristics of ICL. In this respect some important rulings of the European Court of Human Rights may prove of great assistance. In particular, in *CR v. United Kingdom*\(^\text{20}\) the Court held that the European

\(^\text{16}\) See the Motion adopted by all defence counsel on 19 November 1945, in *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg 14 November 1945–1 October 1946* (Nuremberg, 1947), vol. I, at 168–9.

\(^\text{17}\) See in particular the *Justice* case (at 974–85), *Einsatzgruppen* (at 458–9), *Flick and others* (at 1189), *Krauch and others* (I. G. *Farben* case) (at 1097–8, 1125), *Krupp* (at 1331), *High Command* (at 487), *Hostages* (at 1238–42).

\(^\text{18}\) See the *Bl.* case (at 5), the *B. and A.* case (at 297), the *H.* case (at 232–3), the *N.* case (at 335), and *Angeklagter H.* (at 135).

\(^\text{19}\) After commenting on the significance and legal purport of the *nullum crimen* principle, the AC added that this principle ‘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’ (§127).

\(^\text{20}\) In 1989 a British national went back to see his estranged wife, who had been living for some time with her parents, and attempted to have sexual intercourse with her against her will; he also assaulted her, squeezing her neck with both hands. He was charged with attempted rape and assault.
Convention could not be read ‘as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resulting development is consistent with the essence of the offence and could reasonably be foreseen’ (§34). In a subsequent case, Cantoni v. France, the Court insisted on the notion that, in order for criminal law (that is, a statutory provision or a judge-made rule) to be in keeping with the nullum crimen principle, it is necessary for the law to meet the requirements of accessibility and foreseeability. It added two important points. First, a criminal rule may be couched in vague terms. When this happens, there may exist ‘grey areas at the fringe of the definition’:

This penumbra of doubt in relation to borderline facts does not in itself make a provision incompatible with Article 7 [of the European Convention on Human Rights, laying down the nullum crimen principle], provided that it proves to be sufficiently clear in the large majority of cases. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain, taking into account the changes in everyday practice. (§33.)

The second point related to the notion of foreseeability. The Court noted that the scope of this notion:

depends to a considerable degree on the content of the text in issue, the field it is designed to cover, and the number and status of those to whom it is addressed […] A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail […] This is particularly true in relation to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risk that such activity entails (§35).

It would seem that the following legal propositions could be inferred from the occasioning actual bodily harm, and convicted. Before the European Court he repeated the claim already advanced before British courts, that at the time when the facts occurred, marital rape was not prohibited in the UK. Indeed, at that time a British Statute only prohibited as rape sexual intercourse with a woman who did not consent to it if such intercourse was ‘unlawful’ (see section 1(1) of the Sexual Offences (Amendment) Act 1976); hence the question turned on determining whether forced marital intercourse was ‘unlawful’. Various English courts had ruled, until 1990, that a husband could not be convicted of raping his wife, for the status of marriage involved that the woman had given her consent to her husband having intercourse with her during the subsistence of the marriage and could not unilaterally withdraw such consent. In contrast, Scottish courts had first held that that view did not apply where the parties to a marriage were no longer cohabiting, and then ruled, in 1989, that the wife’s implied consent was a legal fiction, the real question being whether as a matter of fact the wife consented to the acts complained of. The word ‘unlawful’ in the Act referred to above was deleted in 1994 by the Criminal Justice and Public Order Act. This being the legal situation in the UK, before the European Court the applicant argued that the British courts had gone beyond a reasonable interpretation of the existing law and indeed extended the definition of rape in such a way as to include facts that until then had not constituted a criminal offence.

Both the European Commission and the European Court held instead that the British courts had not breached Article 7(1) of the European Convention on Human Rights (‘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’).

21 See also S.W. v. United Kingdom, §§37–47.
22 In the case at issue the applicant was the owner of a supermarket, convicted of unlawfully selling pharmaceutical products in breach of the Public Health Code. In his application he had contended that the definition of medicinal product contained in the relevant provision of that Code was very imprecise and left a wide discretion to the courts.
Court’s reasoning. First, while interpretation and clarification of existing rules is always admissible, adaptation is only compatible with legal principles subject to stringent requirements. Secondly, such requirements are that the evolutive adaptation, by courts of law, of criminal prohibitions, namely the extension of such legal ingredients of an offence as actus reus, in order to cover conduct previously not clearly considered as criminal must (i) be in keeping with the criminal rules relating to the subject matter, more specifically with the rules defining ‘the essence of the offence’; (ii) conform with, and indeed implement fundamental principles of ICL or at least general principles of law; and (iii) be reasonably foreseeable by the addressees. In other words the extension, although formally speaking it may turn out to be detrimental of the accused, could have been reasonably anticipated by him, as consonant with general principles of criminal law.23

To put it differently, courts may not create a new criminal offence, with new legal ingredients (a new actus reus or a new mens rea). They can only adapt provisions envisaging criminal offences to changing social conditions (for instance, by broadening the actus reus or, possibly, lowering the threshold of the subjective element, i.e. from intent to recklessness, or from recklessness to culpable negligence) as long as this adjustment is consonant with, or even required by, general principles.

This process, particularly if it proves to be disadvantageous to the accused (which is normally the case) must presuppose the existence of a broad criminal prohibition (for instance, the proscription of rape) and no clear-cut and explicit enumeration, in law, of the acts embraced by this definition. It is in the penumbra left by law around this definition that the adaptation may be carried out. Admittedly, the frontier between such adaptation process and the analogical process, which is instead banned (see below), is rather thin and porous. It falls to courts to proceed with great caution and determine on a case-by-case basis whether the ‘adaptation’ under discussion is legally warranted and consonant with general principles, and in addition does not unduly prejudice the rights of the accused.

An instance of this process of ‘adaptation’ of existing law can be seen in the judgment delivered by the ICTY AC in Tadić (IA), where the AC unanimously held that some customary rules of international law criminalized certain categories of conduct in internal armed conflict (see §§94–137).24 It is well known that until that decision many commentators, states as well as the ICRC, had held the view that violations of the humanitarian law of internal armed conflict did not amount to war crimes proper, for such crimes could only be perpetrated within the context of an

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23 The notions of foreseeability and accessibility were taken up by the ICTY AC in Hadzihasanović and others (Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility), at §34.

24 Before pointing to practice and opinio juris supporting the view that some customary rules had evolved in the international community criminalizing conduct in internal armed conflict, the AC emphasized the rationale behind this evolution, as follows: ‘A State-sovereignty-oriented approach has been gradually supplanted by a human-being-oriented approach. Gradually the maxim of Roman law hominum causa omne jus constitutum est (all law is created for the benefit of human beings) has gained a firm foothold in the international community as well. It follows that in the area of armed conflict the distinction between interstate wars and civil wars is losing its value as far as human beings are concerned. Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted “only” within the territory of a sovereign State? If international law, while of course safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight’ (§97).
international armed conflict. The ICTY AC authoritatively held that the contrary was true and clearly identified a set of international customary rules prohibiting as criminal certain classes of conduct. Since then this view has been generally accepted.

Similarly, contrary to the submission made by defence counsel in Hadzihasanović and others, an ‘adaptation’ of existing rules (corroborated by a logical construction) warrants the contention that persons may be held accountable under the notion of command responsibility even in internal armed conflicts. Two arguments support this proposition. First, generally speaking the notion is widely accepted in international humanitarian law that each army or military unit engaging in fighting either in an international or in an internal armed conflict must have a commander charged with holding discipline, ensuring compliance with the law, and executing the orders from above (with the consequence that whenever the commander culpably fails to ensure such compliance, he may be called to account). The notion at issue is crucial to the existence and enforcement of the whole body of IHL, because without a chain of command and a person in control of each military unit, anarchy and chaos would ensue and no one could ensure compliance with law and order. Secondly, and with specific regard to the Statute of the ICTY, Article 7(3) of this Statute is couched in sweeping terms and clearly refers to the commission by subordinates of any crime falling under the jurisdiction of the Tribunal: any time such a crime has been perpetrated involving the responsibility of a superior, this superior may be held accountable for criminal omission (of course, if he is proved to have the requisite mens rea: see infra, 11.4.4). If this is so, it is sufficient to show that crimes perpetrated in internal armed conflicts fall under the Tribunal’s jurisdiction, as held in 1995 in Tadić (IA), for inferring that as a consequence the Tribunal has jurisdiction over a commander who failed to prevent or punish such crimes.  

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25 See the ICTY TC Decision on Joint Challenge to Jurisdiction, on 7 December 2001, §§15–39.

26 The notions set out in the text are to a large extent coincident with the rulings in Hadzihasanović and others made in 2002 by the ICTY TC (Decision on Joint Challenge to Jurisdiction), at §§150–79, and later, in 2003, by the AC (Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility), at §§10–36.