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Nullum Crimen and International Criminal Law: The Relevance of the Foreseeability Test

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Abstract

This article traces the development of the foreseeability test in the context of the *nullum crimen* principle. While the European Court of Human Rights has introduced the 'accessibility and foreseeability' criteria long ago in the *Sunday Times* case, the Court has only recently started to apply this standard with respect to international crimes. In the *Kononov* case, judges of the European Court of Human Rights exhibited strongly divergent opinions on the question whether the punishment of alleged war crimes that had been committed in 1944 violated the *nullum crimen* principle. According to this author, the dissension of the judges demonstrates the lack of objective foreseeability, which should have served as a starting point for the assessment of the subjective foreseeability and a – potentially exculpating – mistake of law of the perpetrator. The Court should therefore have concluded that the *nullum crimen* principle had been violated.

Keywords

nullum crimen sine lege – foreseeability – international crimes – *Kononov* – mistake of law

1 Introduction

The dual function of international criminal law – a 'sword' for the victims and larger community and a 'shield' for the accused – implies that the interaction between international criminal law and human rights law is not

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unambiguous.[1] On the one hand, international criminal law aims to end impunity and render justice to the victims; on the other hand, international criminal procedures are expected to meet the highest standards of fair trial, securing the rights of the defendant, which may hamper the very efforts to bring culprits to justice. It raises the question of whose rights are actually at issue and whose rights and interests should prevail.

The tension between the several dimensions of human rights in the realm of criminal law eminently surfaces in the well- known *nullum crimen sine lege* principle. Justice requires that someone can only be held criminally responsible on the basis of a law that was in force at the time of commission. That law should be sufficiently precise (*lex certa*), must be strictly construed, implying the ban on analogous application, and should not be applied retroactively (prohibition of *ex post facto* law).[2] However, the Nuremberg trials demonstrated that adherence to the doctrine of strict legality would have the unacceptable consequence that perpetrators of the most heinous acts would evade liability, either because these crimes transcended the realm of national jurisdictions (crimes against peace), or because no one had envisaged that such 'unimaginable atrocities' could occur.[3] Two lines of argument have been advanced to counter the defence counsels' claims that the charges and convictions of their clients on account of crimes against peace and crimes against humanity violated positive law. For one thing, the General Assembly Resolution 95(1) advocated the point of view that international law prohibiting these crimes had already been in existence and that the judgment of the Nuremberg had been merely declaratory – and not constitutive – of these legal principles.[4] However, the Nuremberg Tribunal itself readily submitted that it inevitably had to apply the law retroactively. In a famous passage of the judgment, the Tribunal 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

1 The succinct epigram is attributed to Judge Christine van den Wyngaert, *see also* F. Tulkens, 'The Paradoxical Relations between Criminal Law and Human Rights', 9 *Journal of International Criminal Justice* (2011) p. 577; K. Ambos, *Treatise on International Criminal Law, Volume I* (*Foundations and General Part*) (Oxford University Press, Oxford, 2013) p. 87.

2 For a clear exposition of the aspects of *nullum crimen*, *see* A. Cassese *et al.*, *Cassese's International Criminal Law* (3rd edition) (Oxford University Press, Oxford, 2013) pp. 22–36.

3 *Cf.* the title of W. Schabas' recent work: *Unimaginable Atrocities; Justice, Politics, and Rights at the War Crimes Tribunals* (Oxford University Press, Oxford, 2011).

4 Affirmation of the Principles of international law recognised by the Charter of the Nuremberg Tribunal, G. A. Res. 95(1), New York 11 December 1946.

> 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. The Nazi leaders must have known that they were acting in defiance of all international law when in complete deliberation they carried out their designs of invasion and aggression.[5]

Hans Kelsen agreed with this perspective when he wrote that "justice required the punishment of these men, in spite of the fact that under positive law they were not punishable at the time they performed the acts made punishable with retroactive force".[6] Undoubtedly inspired by the work of German legal theorist Gustav Radbruch, the doctrine of strict legality had been superseded by the principle of substantive justice.[7] However, after World War II, the *nullum crimen* principle quickly regained the lost ground. The relevant provisions in human rights instruments at least start from the presumption that criminal responsibility is sustained by law at the time of commission of the offence.[8] Section 2 of these provisions acknowledges an exception to the principle of *nullum crimen* by stipulating that "this article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations".[9] However, the reference to 'criminal responsibility

5 *France et al.* v. *Goring et al.* (1948), 22 Trial of the Major War Criminals before the International Military Tribunal, 14 November 1945–1 October 1946 (IMT) 203, p. 462. For a careful analysis of this part of the judgment, *see* G. Acquaviva, 'At the Origins of Crimes Against Humanity; Clues to a Proper Understanding of the "Nullum Crimen" Principle in the Nuremberg Judgment', 9 *Journal of International Criminal Justice* (2011) 881.

6 H. Kelsen, 'Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?' 1 *International Law Quarterly* (1947) p. 165.

7 G. Radbruch, 'Statutory Lawlessness and *Supra*-Statutory Law' (1946), translated by B.L. Paulson and S.L. Paulson and reprinted in 26:1 *Oxford Journal of Legal Studies* (2006) p. 1.

8 European Convention on Human Rights (ECHR), Article 7(1) and International Covenant on Civil and Political Rights (ICCPR), Article 15(1): "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed".

9 ECHR, Article 7(2). ICCPR, Article 15(2) is slightly differently phrased: '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 recognised by the community of nations'.

according to general principles of law' reveals that a proper legal foundation is considered as highly important.

The European Court of Human Rights puts emphasis on the question of whether the rule prohibiting the offence is knowable to the offender, by requiring that the provision is both "foreseeable" and "accessible".[10] The underlying idea is that human beings can only adapt their behaviour in order to prevent criminal responsibility (by refraining from engaging in offences), if they are privy to the consequences. Surprisingly, the Strasbourg institutions have, until quite recently, paid scant attention to the question of whether the applicant could have foreseen that he would once incur criminal responsibility for war crimes or crimes against humanity. Shifting all issues arising under Article 7 ECHR to section 2 – whether the offence was criminal according to general principles of law – they managed to circumvent the thorny question whether the offender could have known that he would be brought to justice.[11] Possibly, these judgments and decisions were still rendered under the sway of the legacy of Nuremberg. Only recently, the European Court on Human Rights, probably stirred by the International Criminal Tribunal for the former Yugoslavia (ICTY), has embarked on a new course, by applying its *Sunday Times* criteria to international crimes as well.[12] On the other hand, the Pre-Trial Chamber of the ICC in the *Lubanga* case appears to minimise the relevance of the accused's knowledge that he would face a trial for committing international crimes [13]

10 For the first time in *Sunday Times* v. *The United Kingdom*, 26 April 1979, ECtHR, no. 6538/74, para. 49 (in the context of elucidating the term 'prescribed by law') and *Cantoni* v. *France*, 11 November 1996, ECtHR no. 17862/91, paras. 32–35.

11 *See e.g. Touvier* v. *France*, 13 January 1997, ECtHR, no. 29420/95, para. 7. In respect of ECHR, Article 7(1) the Commission simply noted that it 'considers it unnecessary to rule on whether the offence with which the applicant was charged could, at the time it was committed, be classified as such'. In assessing whether Article 7(2) was applicable, the Commission recalled that it was not its function to deal with errors of fact or of law allegedly committed by national courts and dedicated no single word to the question whether the criminal trial was foreseeable for the applicant. *See generally* T. Mariniello, 'The "Nuremberg Clause" and Beyond: Legality Principle and Sources of International Criminal Law in the European Court's Jurisprudence', 82 *Nordic Journal of International* Law (2013) p. 233.

12 Mariniello, *supra* note 11, pp. 234–237. He mentions in particular *Korbely* v. *Hungary*, 19 September 2008, ECtHR, no. 9174/02; *Kononov* v. *Latvia*, 24 July 2007, ECtHR, no. 36376/04, 9 *EHRC*, Vol. 11, 129 with note by H. Van der Wilt; *Kononov* v. *Latvia*, 17 May 2010, ECtHR, no. 36376/04, 11 *EHRC*, Vol. 8, 80, with note by H. Van der Wilt.

13 *Cf. Prosecutor* v. *Lubanga*, 'Decision on the Confirmation of Charges', 29 January 2007, ICC, no. ICC-01/04-01/06, paras. 294–316 and Ambos, *supra* note 1, p. 91.

In this article, I intend to ponder on the place of 'foreseeability' within the wider context of the *nullum crimen* principle. Is it really an essential component of the legality principle and, if so, how can one explain that both the international criminal tribunals and the European Court have oscillated on the issue?

In order to get answers to my queries, I first will more generally explore the rational for the foreseeability test and analyse case law of international criminal tribunals and judgments of the European Court in comparative perspective (Section 2). Next, I will focus on a specific case – *Kononov* v. *Latvia* – in which the Chamber and Grand Chamber assessed the *nullum crimen* principle in depth and reached diametrically opposed conclusions (Section 3).[14] In Section 4 I will reflect on the consequences of the divergent conclusions by the judges in *Kononov* for the foreseeability test in case of international crimes. At first blush, the *nullum crimen* principle in respect of international crimes seems only to require an objective assessment of the existence of a prohibitive norm. After all, most, if not all international crimes are by their nature manifestly unlawful, leaving no room for a subjective appraisal by the perpetrator of the lawfulness of one's own behaviour. The outcome of the *Kononov* case, however, demonstrates that this conclusion may be too rash. If judges have different opinions on the question of whether certain conduct constituted an international crime at the time of commission, the objective ascertainability is seriously cast into doubt. Moreover, *Kononov* sheds some light on the proper relationship between the objective *nullum crimen* principle and the subjective excuse of mistake of law. My hypothesis is that the distinction between the two is only warranted when (international) law has crystallised and has been codified. The very fact that judges strongly differ on the question whether the *nullum crimen* principle has been violated proves the lack of an objective standard against which their – and the perpetrator's – 'erroneous judgment' can be gauged and shows that the principle indeed is at peril. In Section 5, I will contend that while dramatic challenges of the *nullum crimen* principle will soon extinguish in view of the codification of international criminal law, developments in customary international law and erratic implementation of international standards in domestic legislation will compel courts to face the foreseeability question.

2 The Rationale of the Foreseeability Test

The *nullum crimen* principle nowhere explicitly requires that the offender knew or could have known that his behaviour would induce criminal liability.

14 *Kononov* v. *Latvia*, *supra* note 12.

It merely prescribes that the offence is prohibited by (criminal) law. Whether the principle silently or implicitly encompasses foreseeability can only be ascertained when we inquire into its rationale. In the *Sunday Times* v. *United Kingdom* case, the European Court most eloquently elaborated on this issue:

> Secondly, a norm cannot be regarded as "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.[15]

This is an allusion to the doctrine of *contrainte morale,* which sustains the theory of general prevention as advanced by von Feuerbach. People can only be deterred from crime if they can calculate the effects of their actions.[16] But beyond the realm of utilitarianism 'foreseeability' is a wider requirement of justice. Hart has observed that *mens rea* refers to voluntary (and knowing) action, rather than the voluntary commission of a moral wrong, because otherwise the punishment of morally neutral behaviour (*mala prohibita*) could not be justified.[17] That is correct, but the bottom line is that the offender must know, or could have known, that his actions are forbidden by law. In that sense, there is no difference between *mala in se* and *mala prohibita*.

The need for foreseeability is particularly urgent if criminal responsibility is predicated on international (customary) law. While the European Court has accepted that, for the purposes of Article 7, section 1, the notion of "law" includes written and unwritten law,[18] it cannot be denied that the content of customary international law is often nebulous. It may therefore easily strain

15 *Sunday Times* v. *United Kingdom*, *supra* note 10, para. 49.

16 P.J.A. Ritter von Feuerbach, *Lehrbuch des Gemeinen in Deutschland Gültigen Peinliches Rechts*, 11th edition (Giessen, Heyer, 1832), translated extracts in 5 *Journal of International Criminal Justice* (2007) p. 1006: "All transgressions have their psychological origin in the sensory sphere [*Sinnlichkeit*], in so far as the human capacity for desire is driven by pleasure at the action, or from the action, towards transgression. These impulses [*sinnlicher Antrieb*] can be set aside if everyone knows that *their deed will inexorably be followed by an evil that is greater than the displeasure consequent upon non-satisfaction of the impulse to the deed*". Emphasis in original.

17 H.L.A. Hart, *Punishment and Responsibility; Essays in the Philosophy of Law*, 2nd edition (Oxford University Press, Oxford, 2008) p. 40.

18 *K. H. W.* v. *Germany*, 22 March 2001, EtCHR, no. 37201/97, para. 52.

the principle of *lex certa*.[19] Moreover, customary international law is not stable; it develops over time. It may therefore be rather difficult to reconstruct the content of customary international law at the time of commission of the offence.[20] In the *Vasiljević* case, the International Criminal Tribunal for the former Yugoslavia (ICTY) acknowledged the special character of customary international law, when called upon to decide whether the crime of "violence to life and person" met the exigencies of the *nullum crimen* principle.[21] First, the Trial Chamber alluded to a possible cause of the vagueness of customary international law: "For criminal liability to attach, it is not sufficient, however, merely to establish that the act in question was illegal under international law, in the sense of being liable to engage the responsibility of a state which breaches that prohibition".[22] Indeed, rules of international humanitarian law which have served as legal basis for international crimes have been developed within the framework of state responsibility and frequently lack the degree of precision required in criminal law.[23] Next, and after having confirmed that the Court indeed had to inquire whether the offence was customary, the Trial Chamber submitted that this was not enough:

> the Trial Chamber must satisfy itself that this offence with which the accused is charged was defined with sufficient clarity under customary international law for its general nature, its criminal character and its

19 *Cf.* S. Lamb, '*Nullum Crimen, Nulla Poena Sine Lege* in International Criminal Law', in A. Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, Oxford, 2002) p. 743, "the *nullum crimen* principle, which relies on expressed prohibitions and is based explicitly upon the value of legal certainty, sits uneasy with the very nature of customary international law, which is unwritten and frequently difficult to define with precision".

20 In their joint dissenting opinion in *Kononov*, Judges Fura-Sandström, Björgvinsson and Ziemele acknowledged this problem and quoted Judge Huber in the *Island of Palmas* case: 'A judicial fact must be appreciated in the light of the law contemporary with it and not of the law at the time such a dispute in regard to it arises or fails to be settled'. *Kononov*, *supra* note 12, 'Joint issenting opinion', para. 6. On this topic, *see also* Mariniello, *supra* note 11, p. 246: "By interpreting the law applicable at the time of the events consistently with a normatively desirable human rights regime *ex post facto*, the Court (ECHR) seems to provide an ideal interpretation of past law which radically diverged from the interpretation of the law in place in the legal system at the material time".

21 *Prosecutor* v. *Vasiljević*, 29 November 2002, ICTY Trial Chamber (TC), no. IT-98-32-T.

22 *Ibid.*, para. 199.

23 *See also* Mariniello, *supra* note 11, p. 248: "the international sources accepted by the Court as a valid basis for the applicants' convictions were intended to create obligations only upon states, rather than individuals".

> approximate gravity to have been sufficiently foreseeable and accessible. When making that assessment, the Trial Chamber takes into account the specificity of international law, in particular that of customary international law. The requirement of sufficient clarity of the definition of a criminal offence is in fact part of the *nullum crimen sine lege* requirement, and it must be assessed in that context.[24]

The Trial Chamber's reasoning was fully in line with the "foreseeability and accessibility test" as initially developed by the European Court, in fact, the previous citation was amply substantiated with earlier judgments by the ECHR. These references may have something to do with the particular legal situation which the ICTY faced at the time. The ICTY and its Statute were established in a period when international criminal law had not fully matured. As a consequence, the Trial Chambers had to apply rather vague and imprecise concepts. The Chambers tested these concepts against the more rigid legality principle and found them wanting. Interestingly, the ICTY inspired the European Court of Human Rights that had hitherto forsaken its own principles by ignoring the question whether the applicant could have known that he would be brought to justice in cases regarding the alleged commission of international crimes. According to Mariniello this presents a nice example of 'cross-fertilisation' between courts which has been conducive of a (temporal) alignment of approaches.[25] The new course of the European Court became particularly visible in the *Kononov* case.

3 The *Kononov* Case

In the *Kononov* case, the European Court was seized to decide whether Latvian courts had violated Article 7, § 1 by convicting the applicant (in 2004) for war crimes that he allegedly had committed in 1944. While the applicant was sentenced pursuant to the former Latvian Criminal Code, Article 68–3 of that Code contained a blanket *renvoi* to international law, by directly referring to the "relevant legal conventions". The Court therefore held that the impugned conviction should primarily be examined from the perspective of international law.[26] The Court identified the two steps in the inquiry: first it should determine *objectively* whether a plausible legal basis existed on which to convict the

24 *Vasiljević*, *supra* note 21, para. 201.

25 Mariniello, *supra* note 11, pp. 240–241.

26 *Kononov* (2007), *supra* note 12, para. 117.

applicant of a war crime. Next, it should find out "*subjectively*, whether at the material time the applicant could reasonably have foreseen that his conduct would make him guilty of such an offence".[27]

The facts were rather straightforward. The applicant had been in charge over a bunch of Red Partisans who had entered the village of Mazie Bati on 27 May 1944 in German uniform and had executed, by way of reprisal, six men and three women, one of whom had been pregnant. These people had been suspected of having betrayed and turned in to the Germans another group of Red Partisans under the command of Chugunov.

While the facts may have been clear, the law was not, at least not in the opinion of the Chamber. The crucial question was whether the six men killed could reasonably be considered as 'civilians'. The Court expressed its doubts. It was true that the Additional Protocols of 1977 introduced a neat division between combatants and civilians, implying that everyone who was not a combatant must be a civilian and should be treated as such. But this Protocol could not be applied retrospectively in order to sustain the conviction of Kononov. Rather, the executed people had occupied the twilight zone of collaborators:

> The instant case concerned a *targeted* military operation consisting in the *selective* execution of *armed collaborators* of the Nazi enemy who were suspected *on legitimate grounds* of constituting a threat to the Red partisans and whose acts had already caused the deaths of their comrades.[28]

The Court therefore concluded that it had not been demonstrated that the attack had *per se* violated the laws and customs of war as codified in the Hague Convention of 1907.[29] The Court separately discussed the killing of the women, but the conclusion was no different. In providing assistance to the men, they had forfeited their civilian status and should be considered on the same par as the men. Arguably, the killing of the women could qualify as a military crime or an offence under domestic law, but their prosecution had been definitely statute barred since 1954.[30]

The Grand Chamber reached a different conclusion. It started by expounding a normative framework that was considerably more stringent and demanding than the one accepted by the colleagues of the Chamber. By 1944 the

27 *Ibid.*, para. 122.

28 *Ibid.*, para. 134. Emphasis added.

29 *Ibid.*, para. 138.

30 *Ibid.*, para. 146.

statuses of "civilians" and of combatants were already mutually exclusive and it was decreed by customary international law that civilians could only be attacked for as long as they took a direct part in hostilities. Moreover, if it would transpire that civilians, while partaking in hostilities, had violated the laws and customs of war (by for instance committing treason) they would still be subject to criminal law enforcement and could not be executed on the spot.[31] Next, the Grand Chamber systematically addressed the relevant legal issues, moving from the general to the particular. First, the Grand Chamber had to ascertain whether individual criminal responsibility for war crimes under international law existed at all in 1944. Referring to a host of conventions and other legal instruments prohibiting violations of the laws and customs of war (Hague and Geneva Conventions, Martens clause, Lieber Code) and pointing at the burgeoning prosecutions and trials of war criminals during and shortly after the Second World War, the Grand Chamber answered that question affirmatively.[32] Secondly, the Grand Chamber had to inquire whether the specific war crimes for which the applicant was convicted had already materialised in 1944 in international law. The Grand Chamber identified a number of offences that matched the actions performed by Kononov *cum suis*: the murder and ill treatment of an enemy rendered *hors de combat*, treacherously killing or wounding individuals belonging to the hostile nation or army (prohibited in Article 23(b) of the 1907 Hague Regulations) and the burning of a pregnant woman (a blatant violation of the Lieber Code of 1863 that stressed their special protection during war). The Grand Chamber concluded that all these actions had been considered war crimes under international law and added that criminal responsibility pertained, irrespective of whether the victims were combatants or civilians.[33] Thirdly and finally, the Court had to assess whether the applicant could have foreseen at the material time that his actions constituted war crimes and that he would once have to account for them. The Grand Chamber submitted that the 1926 Criminal Code did not contain a reference to the laws and customs of war and that these international laws had not been formally published. However, individual criminal responsibility for the alleged crimes had been recognised in 1944 in international law and that was sufficient. The Grand Chamber emphasised the "flagrantly unlawful nature of the ill-treatment and killing of the villagers" and invoked the *Garantenstellung* of the applicant: as a commander he bore an aggravated duty of special caution and he must have been aware that he would incur criminal responsibility.[34]

31 *Ibid.*, paras. 203–204.

32 *Ibid.*, para. 213.

33 *Ibid.*, para. 227.

34 *Ibid*, paras. 235–238.

The Grand Chamber therefore concluded that the applicant's conviction did not constitute a violation of Article 7(1) of the Convention.

It is remarkable, if not astounding that a certain constellation of facts can give rise to such divergent assessments. In this respect, it bears emphasis that three judges dissented from the Grand Chamber's judgment and sided with the Chamber's conclusions.[35] They found that the Nuremberg Trials had yielded a "leap in quality" in the codification and specification of international criminal law and that, therefore, in 1944 the legal state of the art was insufficiently clarified: "these considerations lead us to conclude that, at the material time, neither domestic nor international law was sufficiently clear in relation to war crimes, or the distinction between war crimes and ordinary crimes, however serious such crimes may have been".[36]

The Grand Chamber apparently employed strong expressions – "flagrantly unlawful" – in order to argue that the prohibited nature of the activities was obvious for all to behold. But that point is scarcely convincing in view of the fact that sensible people would sixty years after the facts fundamentally disagree on the question whether the applicant could have known that he would once have to account for his actions before a criminal court. In light of the principle that in case of doubt, the decision should benefit the accused *favor rei*, the mere fact that the question of foreseeability aroused so much turmoil and disagreement amongst the judges should have induced the Court to find a violation of the *nullum crimen* principle.

4 The Tenacity of 'Foreseeability'

The previous sections have demonstrated that foreseeability as an explicit requirement of the *nullum crimen* principle has only gradually been accepted in respect of international crimes. It is perhaps possible to distinguish between no less than four phases. First, shortly after World War II, the Nuremberg Tribunal and its progenies were not concerned whether the accused had known that the atrocities he had committed were prohibited under international law or not. The Nuremberg Tribunal itself acknowledged that it had applied the law retroactively, suggesting that the conduct had not formally been prohibited, even not under international law. And one cannot be abreast of something that does not exist. But we should beware not to take this expla-

35 *Ibid.*, 'Dissenting opinion of Judge Costa joined by Judges Kalaydjieva and Poalelungi', EHRC, n. 12, pp. 997–1001.

36 *Ibid.*, para. 16.

nation at face value. In the famous passage, quoted above, the Tribunal emphasised that the attacker "must know that he was doing wrong", alluding to an inner knowledge of right and wrong and a (fading) voice of human conscience. There is no need to rehash the famous Fuller-Hart discussion on the relationship between law and morality to acknowledge that these concepts are not to be conflated. A sense of inner morality is not tantamount to a rule of positive law. However, the Tribunal's choice of words demonstrates the strong inclination of courts to appeal, absent a clear positive law, to the accused' cognitive framework of normativity.

During the second phase, the European Court of Human Rights introduced the foreseeability and accessibility test, but it refrained from applying these criteria in the case of international crimes. The Court was confronted with war crimes and crimes against humanity that had been committed during or shortly after World War II and it closely followed the Nuremberg line by confirming that such atrocities had been criminal according to the "general principles of law recognized by civilized nations".[37] The scant attention for the question of whether the perpetrator could have foreseen that he once would be prosecuted is neatly captured in the words of Antonio Cassese:

> It follows that even if an act is lawful under national law, but punishable under international rules, its perpetrator may be prosecuted by a foreign or international court (or his own national court, after a change in regime or legislation) though at the time of the commission he did not, *or could not*, know that the act was proscribed by international rules".[38]

During the third phase, the European Court, probably spurred by the ICTY, extended the application of its foreseeability and accessibility test to cover international crimes as well. While it is a bit speculative to ponder on the question of what prompted the Court to change its course rather suddenly, one of the reasons might be the growing gap between the current codification of elements of crimes and the legal nebulosity of the past. The more one has succeeded in devising a comprehensive framework of well-defined normative standards, the more one may realise that it is not entirely fair to hold someone criminally responsible who was at the time devoid of such knowledge. Simultaneously, the *Kononov* case demonstrates that the assessment of foreseeability is by no means an easy affair. One of the problems that may have

37 It has often been proclaimed that ECHR Article 7(2) and ICCPR Article 15 have been inserted in order to vindicate the Nuremberg trial.

38 A. Cassese, 'Balancing the Prosecution of Crimes against Humanity and Non-Retroactivity of Criminal Law', 4 *Journal of International Criminal Justice* (2006) p. 417. Emphasis added.

troubled the judges is the proper relationship between the global knowledge of a legal rule prohibiting activities inimical to proper warfare and the applicability to the particular behaviour of the accused. At first blush, the distinction is rather clear. The foreseeability test merely requires that the accused has a general sense of the laws and customs of war and that his behaviour possibly constitutes a serious violation of those standards, amounting to a war crime. Whether the concrete behaviour indeed qualifies as a war crime is ultimately for a court of law – and not for the perpetrator – to decide. And courts may – within reasonable boundaries – come to different conclusions, because application of the law inevitably involves an element of judicial interpretation. For that very reason, the European Court usually defers to domestic courts and refrains from deciding on an individual applicant's criminal responsibility.[39] In cases of vague law, however, the distinction becomes blurred, because the very lack of precision impedes the accused to predict whether his activities fit the standards or not. The *Kononov* case demonstrates that the Court has laboured under the tension of two phenomena that pull in different directions. On the one hand, the introduction of the foreseeability test has been conducive of a convergence between the objective existence of a legal norm and the subjective awareness of both its existence and applicability. On the other hand, the lingering imprecision of previous law entails the risk that people, including judges, may have different opinions on their content and application. The protracted discussions and ensuing charged atmosphere that surrounded the *Kononov* case may thus be attributed to the anachronistic application of the doctrine of strict legality to a time when the notion was not at the height of everybody's concern.

The conundrum of the objective versus subjective assessment surfaces similarly in the relationship between the *nullum crimen* principle and the concept of mistake of law. Again, the distinction seems to be obvious at first sight. The existence in reality of a sufficiently clear legal rule does not obviate the possibility that the perpetrator was excusably ignorant of the rule. However, they cannot always be easily separated. In her excellent dissertation, Van Verseveld observes that, in the *German Border Guard* case, the European Court of Human

39 *See* very clearly in *Korbely*, *supra* note 12, paras. 72–73: "Furthermore, the Court would reiterate that, in principle, it is not its task to substitute itself for the domestic jurisdictions. It is primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. This also applies where domestic law refers to rules of general international law or general agreements … In the light of the above principles concerning the scope of its supervision, the Court notes that it is not called upon to rule on the applicant's individual criminal responsibility, that being primarily a matter for assessment of the domestic courts".

Rights conflated the principle of legality and the defence of mistake of law, by presuming that the shooting of East German citizens who tried to escape to West Germany was "manifestly unlawful".[40] Indeed, the Court had opined that

> although the applicant was not directly responsible for the … State practice, and although the event in issue took place in 1972, and therefore before ratification of the International Covenant, he should have known, as an ordinary citizen, that firing on unarmed persons who were merely trying to leave their country infringed fundamental and human rights, as he could not have been unaware of the legislation of his own country.[41]

Van Verseveld argues that the manifest unlawfulness was too easily assumed. The fact that activities are usually not manifestly unlawful leaves room for a distinction between the legality principle and the defence of mistake of law and entails that foreseeability for the purpose of assessing the *nullum crimen* principle is different from foreseeability in case of mistake of law.[42] Although I generally concur with this subtle analysis, I would add that an increase in the clarification of the law reduces the room for both the claim that the legality principle has been violated and the defence of mistake of law. That takes me to the fourth and final phase.

In the *Lubanga* case, counsel for the defence invoked the legality principle by claiming that his client could not have foreseen that he would incur criminal responsibility for recruiting and enlisting children under the age of fifteen years.[43] After having elucidated that the terms of enlisting, conscripting and using children to participate in hostilities were defined with sufficient precision in Articles 8(2)(b)(xxvi) and 8(2)(e)(vii) to sustain criminal responsibility, the Pre-Trial Chamber found that a principle of the legality principle was not at stake, but that the defendant relied on a mistake of law. Subsequently, the Pre-Trial Chamber found that Lubanga had not erred as to the law, because the evidence did not indicate that he had been unaware of a normative element of the crime.[44]

The decision demonstrates that a comprehensive codification of the elements of crime not only strengthens the *nullum crimen* principle, but also minimises the scope for a successful defence of mistake of law. The rejection of the latter defence is subsumed under the prior conclusion that the rule is sufficiently clear. Foreseeability lingers in the defence of mistake of law, as the

40 A. van Verseveld, *Mistake of Law; Excusing perpetrators of International Crimes* (Asser Press, The Hague, 2012) p. 43.

41 *K. H. W.*, *supra* note 18, para. 104.

42 Van Verseveld, *supra* note 40, p. 75.

43 *Lubanga*, *supra* note 13, para. 296.

44 *Ibid.*, para. 316.

Pre-Trial Chamber demonstrated by discussing that aspect in the context of the defence: "there was 'sufficient evidence' … to believe that, at the time, Thomas Lubanga Dyilo was aware that voluntarily or forcibly recruiting children under the age of fifteen years and using them to participate actively entailed his criminal responsibility under the Statute".[45] Ambos has reproached Lubanga's defence counsel for confusing the legality principle and mistake of law, by precisely pointing at the issue of foreseeability: "*nullum crimen* is not about the perpetrator's state of mind as to the existence of the offence, but only requires the offence to exist at the time of commission".[46] In case of a mature and codified system such as the Rome Statute's, that observation is correct, but in general it is too sweeping. After all, one should not forget that *nullum crimen* in *Lubanga* was actually not at issue and was rejected forthwith. If the legality principle is really contested, 'foreseeability' is the major yardstick, as it turned out in the *Kononov* case. And then the objective and subjective assessment converge, at the point of merging.

5 Final Reflections: Why the Foreseeability Test is Here to Stay

It has been observed that, in view of the codification of international crimes in the Rome Statute and other instruments, violations of the *nullum crimen* principle in international criminal law will gradually extinguish.[47] By and large this is correct, although it is open to doubt whether they will completely vanish. Article 22, paragraph 3 of the Rome Statute clarifies that the *nullum crimen* principle should not serve as a straightjacket, by stipulating that it shall not affect the characterisation of any conduct as criminal under international law independently of the Statute. In other words, the Statute should not stifle the development of customary international law and that will raise new issues in respect of *nullum crimen*.

Another reason why courts will remain being called upon to decide on complaints that the *nullum crimen* principle has been infringed is the sometimes erratic implementation of international crimes in the domestic legal order. While the content of prohibitive norms is gradually solidifying, the punishment for international crimes may still follow whimsical patterns. An example

45 *Ibid.*, para. 306.

46 Ambos, *supra* note 1, p. 91.

47 *Cf.* W.A. Schabas, 'Synergy or Fragmentation? International Criminal Law and the European Convention on Human Rights', 9 *Journal of International Criminal Justice* (2011) p. 615.

in kind is the case of *Maktouf and Damjanović* v. *Bosnia and Herzegovina* before the European Court of Human Rights.[48] Both applicants had been convicted for war crimes against civilians during the Balkan Wars under provisions of the 2003 Criminal Code of Bosnia Herzegovina. The applicants asserted that they had been exposed to a harsher regime that had been applied retroactively. Although the death penalty for very serious war crimes had been abolished in 2003, the new legislation had raised the minimum punishment, compared to the 1976 Criminal Code that had been in force when the crimes had been committed. While the Court admitted that the applicants' sentences had been within the latitude of both criminal codes, it considered it crucial that the applicants could have received lower sentences if the state Court had applied the 1976 Code.[49] The Court therefore held that Article 7, section 1 ECHR had been violated.

My main argument in this essay has been that, as long as potential violations of *nullum crimen* persist, the foreseeability test will be the main indicator. In the previous section, the question came up whether foreseeability should be understood in an objective, or rather in a subjective sense. The question presupposes that it is possible to distinguish between such approaches in the first place. The current process of codification aspires to a conflation. A comprehensive enumeration of clearly defined offences involves their "manifest unlawfulness", leaving no room for anyone's defence that he or she could not have known that his or her conduct was prohibited under international law.[50] Now it is interesting to note that in the situation of the exact opposite of "manifest unlawfulness" – nascent law – the objective and subjective assessment of foreseeability equally coincide. In the *Kononov* case, the judges of the European Court of Human Rights took great pains to inquire whether the applicant could, at the material time, have known that he would once be prosecuted for his offences. These evaluations depended to a large degree on their own views on the development of the law of war and its applicability on the fact pattern. In other words, the objective assessment informed the subjective assessment and vice versa. It is only in the twilight zone between the two extremes that a distinction between an objective and a subjective evaluation of foreseeability is apposite. While in general, the law is sufficiently clear to counter the claim that it violates the legality principle, an individual person may be excused for

48 *Maktouf and Damjanović* v. *Bosnia and Herzegovina*, 18 July 2013, ECtHR, nos. 2312/08 and 34179/08.

49 *Ibid.*, para. 70.

50 Let us recall that van Verseveld's ardent plea for the conservation of defence of law is predicated on the assumption that not all international crimes are 'manifestly unlawful'!

being ignorant of its applicability. Such a distinction is conducive to a separation between the *nullum crimen* principle and the defence of mistake of law.

The *nullum crimen* principle serves both the function of checking arbitrary exercise of state power and as a normative guideline for the individual, offering the guarantee that he will not be punished as long as he abides by the law. The combination of a more general assessment whether the legislator or executive has trespassed citizen's rights and a subjective evaluation whether this person could have known that he violated criminal law is therefore inherent to the application of the principle. International criminal law adds another dimension: one is torn between being appalled by horrendous crimes and the nagging question how one would have performed in a similar situation. The need to balance all these aspects makes the judge's job very complicated and probably accounts for the fact that courts may strongly disagree when they are confronted with *nullum crimen* issues.