

## How to Read International Criminal Law: Strict Construction and the Rome Statute of the International Criminal Court

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# HOW TO READ INTERNATIONAL CRIMINAL LAW: STRICT CONSTRUCTION AND THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT

CAROLINE DAVIDSON<sup>†</sup>

## INTRODUCTION

The Rome Statute of the International Criminal Court (“ICC”)<sup>1</sup> espouses a commitment to the principle of *nullum crimen sine lege* (no crime without law)<sup>2</sup> including the guarantees that crime definitions will be strictly construed and not be extended by analogy, and ambiguities will be construed in favor of the defendant. Gone are the days of watered down legality in the face of horrendous crimes, or so it seems on the face of the document.<sup>3</sup> At the same time that the Rome Statute announces its commitment to legality, it also provides a hierarchy of legal sources judges are to consider. These sources are many and

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<sup>1</sup> Rome Statute of the International Criminal Court art. 9, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

<sup>2</sup> See generally Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119, 121 (2008) (describing the history of *nullum crimen sine lege* and how this principle is applied today).

<sup>3</sup> See *id.* at 192 (“Positive law, in the form of the ICC Statute, now reflects developments in the law made at the expense of perfect legal certainty. Now that the universe of international criminal law has settled in, the need for expansive interpretation is diminishing and the full complement of the principle of legality can take root.”).

varied and include not only the Rome Statute and other ICC documents but also general principles of international law and general principles derived from national legal systems.

These provisions on strict construction and sources of law are hard to reconcile. The abundance of often-divergent sources of law seems to assure that ambiguity is either everywhere or nowhere. Add to this picture the backdrop of the Vienna Convention on the Law of Treaties ("Vienna Convention"), which potentially adds yet another set of sources and tools judges are to turn to when interpreting the Rome Statute's crimes definitions.

The ICC's commitment to legality and strict construction is unprecedented in international criminal law ("ICL"). The Nuremberg trials were notoriously lax on the principle of *nullum crimen sine lege*, particularly with the invention of the new crimes of crimes against the peace and crimes against humanity, and therefore, unsurprisingly, the notion of strict construction gained no traction.<sup>4</sup> The *ad hoc* tribunals<sup>5</sup> contained nothing in their statutes related to *nullum crimen sine lege*, but largely voiced support for the principle in their judgments.<sup>6</sup>

Despite a professed commitment to legality, the *ad hoc* tribunals eschewed strict construction in all but a few cases where the cost of recognizing the principle was low.<sup>7</sup> The judges

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<sup>4</sup> The big legality concern at Nuremberg was that crimes against the peace and crimes against humanity had not previously been defined as crimes in international law. The Nuremberg judges both dodged the issue by saying that it was not jurisdictional and argued that the conduct had been condemned, albeit not explicitly criminalized, previously. Göring's lawyer also made, unsuccessfully, the lenity or *in dubio pro reo* argument that an ambiguity in the statute ought to be construed in his client's favor. See KENNETH S. GALLANT, *THE PRINCIPLE OF LEGALITY IN INTERNATIONAL AND COMPARATIVE CRIMINAL LAW* 67–68, 107–08 (2009).

<sup>5</sup> The International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") are often referred to as the "ad hoc" tribunals due to their temporary and conflict-specific nature.

<sup>6</sup> See GALLANT, *supra* note 4, at 304; see also Prosecutor v. Galic, Case No. IT-98-29-T, Judgement and Opinion, ¶ 93 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 5, 2003), (stating that the effect of *nullum crimen sine lege* is "that penal statutes must be strictly construed" and that the "paramount duty of the judicial interpreter [is] to read into the language of the legislature, honestly and faithfully, its plain and rational meaning and to promote its object" and that ambiguities that cannot be resolved with resort to canons of construction instead should be resolved in favor of the accused) (citing Prosecutor v. Delali, Case No. IT-96-21-T, Judgement, ¶¶ 408, 413 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998)).

<sup>7</sup> See, e.g., Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement, ¶¶ 500–01 (Sept. 2, 1998) (choosing the more lenient interpretation of the law by saying that genocide required *intentional* killing). This was no great loss for the prosecution,

of the *ad hoc* tribunals were conflicted on whether any rule of lenity or strict construction applied. Some judges invoked *in dubio pro reo* (doubts favor the accused) for the proposition that legal ambiguities be read in favor of the defendant.<sup>8</sup> Others, however, insisted that *in dubio pro reo* only applied to findings of fact.<sup>9</sup> Even the judges who recognized the principle of strict construction of the law generally allowed a very limited role for it. They cabined the principle by putting it last, after all other tools of interpretation had been exhausted, and by reducing it to a bare formula of foreseeability, borrowed from the European Court of Human Rights (“ECtHR”), which permitted expansive interpretation<sup>10</sup> and application of legal principles to new factual circumstances.<sup>11</sup>

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since the Rwandan genocide did not proceed through recklessness or negligence but rather through brutal, intentional killing. *See also* Prosecutor v. Blagojevic, Case No. IT-02-60-T, Judgement, ¶ 642 n.2057 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005) [hereinafter Blagojevic Trial Judgement] (noting that “[i]n accordance with the general principle of interpretation *in dubio pro reo*, the Tribunals’ case law has opted for the interpretation most favourable to the accused and found that the term ‘killings’, in the context of a genocide charge, must be interpreted as referring to the definition of murder, i.e. intentional homicide”) (citing Prosecutor v. Kayishema, Case No. ICTR-95-1-A, Appeal Judgement, ¶ 151 (June 1, 2001) (concluding that there was little difference between killing and “meurtre,” but, even if there were, it still did not help the defendant)). Likewise, in *Blagojevic*, no one contended that the 7000 men and boys killed were killed unintentionally. Blagojevic Trial Judgement, ¶ 151. *See generally* ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 50 (2d ed. 2008) (discussing the “principle of favoring the accused,” known in the United States as the lenity canon, and these two cases).

<sup>8</sup> *See supra* text accompanying notes 6–7.

<sup>9</sup> *See, e.g.*, Prosecutor v. Stakic, Case No. IT-97-24-T, Judgement, ¶ 416 (Int’l Crim. Trib. for the Former Yugoslavia July 31, 2003) (“The Trial Chamber explicitly distances itself from the Defence submission that the principle *in dubio pro reo* should apply as a principle for the interpretation of the substantive criminal law of the Statute. As this principle is applicable to findings of fact and not of law, the Trial Chamber has not taken it into account in its interpretation of the law.”). The Appeals Chamber did not adopt this narrow reading of *in dubio pro reo*. *Id.* ¶ 417.

<sup>10</sup> *See* William A. Schabas, *Interpreting the Statutes of the Ad Hoc Tribunals*, in MAN’S INHUMANITY TO MAN: ESSAYS ON INTERNATIONAL LAW IN HONOUR OF ANTONIO CASSESE 849, 877 (Lal Chand Vohrah et al. eds., 2003) (citing Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Appeals Judgement, ¶ 127 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000)) (stating that the legality 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”); Prosecutor v. Milutinovic, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanic’s Motion Challenging Jurisdiction – Joint Criminal Enterprise, ¶¶ 37, 38 (Int’l Crim. Trib. for the Former Yugoslavia May 21, 2003) (“[T]he principle *nullum crimen sine lege* is, as noted by the International Military Tribunal in Nuremberg, first and foremost, a ‘principle of justice’ . . . . This fundamental

The ICC's Rome Statute sets out the crimes over which the ICC has jurisdiction and provides definitions of widely ranging specificity for those crimes. An ICC document drafted after the Rome Statute, the Elements of Crimes, defines the crimes in yet greater detail. Still, uncertainty over the law and, specifically, definitions of crimes and forms of criminal responsibility, remains.<sup>12</sup> Many legal questions have yet to be answered by any international court. The ad hoc tribunals have answered others, but the ICC is not bound by their law.

Others have discussed the broader issue of *nullum crimen sine lege*,<sup>13</sup> but until recently, there had been scant attention to the interpretive components of the Rome Statute's legality guarantee. In the past few years, however, scholars have turned

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principle 'does not prevent a court from interpreting and clarifying the elements of a particular crime'. Nor does it preclude the progressive development of the law by the court. *But it does prevent a court from creating new law or from interpreting existing law beyond the reasonable limits of acceptable clarification.* This Tribunal must therefore be satisfied that the crime or the form of liability with which an accused is charged was sufficiently foreseeable and that the law providing for such liability must be sufficiently accessible at the relevant time, taking into account the specificity of international law when making the assessment." (emphasis added). *See also* Mohamed Shahabuddeen, *Does the Principle of Legality Stand in the Way of Progressive Development of Law?*, 2 J. INT'L CRIM. JUST. 1007 (2004).

<sup>11</sup> Prosecutor v. Hadžihasanovic, Case No. IT-01-47-AR72, Separate and Partially Dissenting Opinion of Judge Hunt Command Responsibility Appeal, ¶ 44, n.66 (Int'l Crim. Trib. for the Former Yugoslavia July 16, 2003) ("A principle so held to have been part of customary international law may . . . be applied to a new situation where that situation *reasonably* falls within the application of the principle."). Judge Hunt invoked the object and purpose of Additional Protocol I and IHL generally in favor of extending criminal responsibility for commanders for acts committed by subordinates prior to the commander's taking command. *Id.* ¶ 22.

<sup>12</sup> *See* CASSESE, *supra* note 7, at 42–43 (stating that ICL remains "decentralized" and "fragmentary," and "the possibility frequently arises of a contradictory and 'cacophonous' interpretation or application of international criminal rules"); *see also* Van Schaack, *supra* note 2, at 189 ("[T]here are 'legality deficits' within the Statute, as many crimes are vaguely or sparingly worded and key terms remain undefined, notwithstanding the Elements of Crimes").

<sup>13</sup> Both Gallant and Van Schaack also explore strict construction and lenity as part of their broader work on *nullum crimen sine lege* generally. Van Schaack, *supra* note 2, at 176, 189 (discussing strict construction as a corollary of *nullum crimen sine lege*). Gallant provides an extensive survey of domestic and international jurisdictions vis-à-vis strict construction and the prohibition on analogy, and offers observations on legality at the ICC. *See* discussion *infra* note 33. The Rome Statute in fact puts its strict construction requirement in the provision on *nullum crimen sine lege*, which makes sense. If judges construe offenses so broadly as to create new crimes, they effectively are creating new law retroactively. GALLANT, *supra* note 4, at 33.

their attention to this important issue.<sup>14</sup> This Article seeks to build on this discussion by probing more deeply into the justifications for strict construction and the other Article 22(2) guarantees and assessing the extent to which they apply at the ICC.

This Article seeks to answer a few seemingly simple questions: What are strict construction, the ban on analogy, and lenity under Article 22(2) of the Rome Statute, and what role do and should they play in interpreting or making ICL? This discussion is particularly salient in light of criticisms of international criminal courts playing fast and loose with the law in the name of “ending impunity”<sup>15</sup> and important discussions regarding the inherent tension between a liberal criminal justice system and liberal human rights enforcement.<sup>16</sup> Arguably, lenity, strict construction, and the prohibition on defining crimes by analogy are an important check against this illiberal teleological approach to criminal law. As Professor Antonio Cassese, a former President at the International Criminal

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<sup>14</sup> See generally Leila Nadya Sadat & Jarrod M. Jolly, *Seven Canons of ICC Treaty Interpretation: Making Sense of Article 25's Rorschach Blot*, 27 LEIDEN J. INT'L L. (UK) 755 (2014) (proposing canons of construction); Leena Grover, *A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court*, 21 EUR. J. INT'L L. 543, 544 (2010) [hereinafter Grover, *A Call to Arms*] (identifying “three fundamental interpretive dilemmas” in the interpretation of the Rome Statute); LEENA GROVER, INTERPRETING CRIMES IN THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (2016) [hereinafter GROVER, INTERPRETING CRIMES].

<sup>15</sup> See Göran Sluiter, *Atrocity Crimes Litigation: Some Human Rights Concerns Occasioned by Selected 2009 Case Law*, 8 NW. J. INT'L HUM. RTS. 248, 257–58 (2010) (noting the disturbing trend of using an “object and purpose” inquiry focused on ending impunity to justify broad interpretations of crimes); Darryl Robinson, *The Identity Crisis of International Criminal Law*, 21 LEIDEN J. OF INT'L L. (UK) 925, 928 (2008) [hereinafter Robinson, *Identity Crisis*] (discussing the conflict between liberalism in human rights and humanitarian law enforcement and criminal law); Benjamin Perrin, *Searching for Law While Seeking Justice: The Difficulties of Enforcing International Humanitarian Law in International Criminal Trials*, 39 OTTAWA L. REV. 367, 385 (2007–2008) (discussing the tension between the goal of maximizing humanitarian protection in armed conflict and respecting the defendant's right to a fair trial); Schabas, *supra* note 10, at 163 (noting the potential free pass for expansive judicial lawmaking that the objects and purposes gives judges); see also Alexander K.A. Greenawalt, *The Pluralism of International Criminal Law*, 86 IND. L.J. 1063, 1073 (2011) (“Gaps in the law are an endemic aspect of judicial decision making, but with ICL the gaps have at times appeared to swallow the rules.”).

<sup>16</sup> Robinson, *Identity Crisis*, *supra* note 15, at 927–32.

Tribunal for the former Yugoslavia (“ICTY”) has stated, the Rome Statute “seems to evince a certain mistrust in . . . [j]udges.”<sup>17</sup>

The traditional justifications for strict construction, imperfect even in the domestic context, are on shaky ground in the international context. Other justifications for the canon, however, including curbing arbitrary enforcement, encouraging state participation in the Rome regime, and bolstering the court’s gravity requirement, arguably support an even more robust role for strict construction. This Article also flags the oddity of using the doctrines of strict construction, lenity, and the prohibition on analogy, principles that are meant for statutory construction, in interpreting customary international law, which is notoriously amorphous and unwritten.<sup>18</sup> How exactly does one strictly construe state practice and *opinio juris*? Ultimately, this Article advocates a realistic but still robust version of the principle that gives judges room for interpretation and development of the law, yet avoids wholesale judicial crime creation. It argues that, even though lenity—construing ambiguity in favor of defendants—is unlikely to do much work at the ICC after courts consult Article 21 sources of law, there is independent meaning to the concept of strict construction.<sup>19</sup> Borrowing from the work of John Jeffries on statutory interpretation, this Article argues that a better conception of the Article 22(2) guarantee of strict construction is an admonition to judges to avoid usurping the role of the

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<sup>17</sup> David Hunt, *The International Criminal Court: High Hopes, ‘Creative Ambiguity’ and an Unfortunate Mistrust in International Judges*, 2 J. INT’L CRIM. JUST. 56, 61 (2004) (stating that this puts it mildly and that “[i]t would be more accurate to say that the Statute evinces a deep suspicion of the Court’s judges”).

<sup>18</sup> Michael Wood (Special Rapporteur), *Int’l Law Comm’n, First Report on Formation and Evidence of Customary International Law*, ¶ 21, A/CN.4/663 (May 17, 2013) [hereinafter ILC CIL 1] (noting “the inherent difficulties of the topic, primarily the very nature of customary international law as unwritten law, and the ideological and theoretical controversies that are often associated with it”); see also Dov Jacobs, *Positivism and International Criminal Law: The Principle of Legality as a Rule of Conflict of Theories*, (draft at 18), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2046311](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2046311) (noting that “[i]t is well known that difficulties arise in conceptualizing this source, due to the fact . . . of its inherent circularity, given States need to act as if it existed even before it did in order for it to exist”); Van Schaack, *supra* note 2, at 138 (arguing that “perfect positivism is impossible where customary international law (CIL)—the practice of states bolstered by a sense of legal duty—remains an integral source of ICL”).

<sup>19</sup> Although this Article discusses Article 22(2)’s bar on analogy, the primary focus is on lenity and strict construction.

drafters. In essence, judges should avoid contravening the clear intention of states parties, unduly encroaching on state sovereignty, and unfairly surprising defendants. The Article offers a framework for assessing unfair surprise. Subject to these constraints, judges should interpret the Rome Statute in a manner that enhances clarity in ICL. Finally, this Article clarifies the proper role for the Vienna Convention's "object and purpose" inquiry. Contrary to the standard meaning given to the inquiry in ICL, whereby judges justify expansive interpretation based on the object and purpose of "ending impunity," this Article contends that the proper object and purpose of the Rome Statute is to punish people found guilty of international crimes through a fair process.

The Article proceeds in four parts. Part I introduces the Rome Statute's provision on *nullum crimen sine lege*, focusing in particular on its requirements that judges strictly construe crime definitions, construe ambiguous provisions in favor of defendants, and avoid crime creation by analogy. It offers working definitions for relevant concepts and describes some of the difficulties in applying them, particularly in light of the Rome Statute's provision setting out the sources of law the court is to consider. Part II asks whether strict construction makes sense in the context of international crimes. It assesses the values that undergird the principle, most importantly, notice, separation of powers, the judiciary's role in protecting individual freedom, efficiency, and democratic accountability. It concludes that the justifications relied on in domestic jurisdictions for strict construction apply more readily in the international context than one might think, but suffer from many of the same flaws they do domestically. These flaws are often magnified at the ICC. Part II also examines justifications for strict construction that are particular to the ICC, including promoting human rights, respecting state sovereignty, encouraging participation in the ICC framework, and ensuring that the ICC focuses its limited resources on the gravest crimes. Ultimately, this Article finds merit to these arguments, but not enough to prioritize lenity over competing language in the Rome Statute itself and over other tools of interpretation. Part III assesses the potential ordering for strict construction in light of the purposes it serves. Part IV then offers a conception of strict construction that distills it to a few critical principles that better support the justifications for it

and help to square strict construction with the realities of ICL and the Rome Statute. These principles are: avoiding usurping the authority of states, avoiding unfair surprise to defendants, and seeking, where possible, to clarify ICL. This proposed conception of strict construction grapples with the inescapable fact that the great legality challenge of ICL likely is not ambiguity, but rather vagueness.<sup>20</sup>

### I. ARTICLE 22(2): STRICT CONSTRUCTION, THE BAR ON ANALOGY, AND LENITY

Although the existence of international crimes is fairly uncontroversial, “much of the modern history of ICL has been consumed by an identity crisis regarding the content and sources of these offenses.”<sup>21</sup> Determining the content of these offenses is closely tied to legality. ICL is considerably more codified and clearer now than ever before, and claims of bald after-the-fact crime creation will likely be less frequent. It seems likely that, for the ICC, most of the fighting about legality will arise in the context of strict—or broad—construction of existing crimes.<sup>22</sup> This Part introduces the ICC’s provision on strict construction and attempts to situate it within the legal framework of the ICC.

#### A. *Article 22(2)*

As part of its guarantee of legality, the Rome Statute of the International Criminal Court includes strict construction, a ban on analogy, and lenity. In addition to the language on non-retroactivity set out in Article 22(1),<sup>23</sup> Article 22(2) provides:

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<sup>20</sup> This Article uses the dictionary definition of the terms ambiguity and vagueness. See Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/ambiguous> (last visited July 22, 2017) (defining the word “ambiguous” as “capable of being understood in two or more possible senses or ways”); Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/vague> (last visited July 22, 2017) (defining the word “vague” as “not clearly expressed; stated in indefinite terms; not clearly defined, grasped, or understood; not thinking or expressing one’s thoughts clearly or precisely”).

<sup>21</sup> Greenawalt, *supra* note 15, at 1073.

<sup>22</sup> Cf. John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 195 (1985) (arguing that, due to the codification and development of American law, true judicial crime creation is a thing of the past and that the doctrines of strict construction and void for vagueness now do most of the heavy legality lifting in the United States.).

<sup>23</sup> Article 22(1) of the Rome Statute, the non-retroactivity principle, provides: “1. A person shall not be criminally responsible under this Statute unless the conduct in

The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.<sup>24</sup>

This provision contains three overlapping guarantees in an attempt to translate strict construction into a variety of legal languages. First, crime definitions shall be strictly construed. Second, crime definitions shall not be extended by analogy. Third, ambiguities shall be interpreted in favor of defendants or would-be defendants.

In the Anglo-American tradition of criminal law, strict construction is synonymous with lenity. It is the notion that any doubt in the meaning of a statutory provision should be resolved in favor of the defendant.<sup>25</sup> In French law, by contrast, strict construction boils down to teleological inquiry into the intent of the legislator and a prohibition on defining the crime by analogy.<sup>26</sup> An ICC Trial Chamber in the *Prosecutor v. Katanga*

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question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.” Rome Statute, *supra* note 1, art. 22(1). Article 22(3) provides: “This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.” *Id.* at art. 22(3).

<sup>24</sup> *Id.* at art. 22(2).

<sup>25</sup> ANDREW ASHWORTH, *PRINCIPLES OF CRIMINAL LAW* 67 (4th ed. 2003); Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 *FORDHAM L. REV.* 885 (2004) (“[T]he ‘rule of lenity’—the common law doctrine, also known as ‘strict construction,’ that directs courts to construe statutory ambiguities in favor of criminal defendants”). See generally Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 *SUP. CT. REV.* 345. In the United States, courts emphasize that lenity only applies when a provision is ambiguous, meaning susceptible to more than one interpretation, not when it is vague, meaning courts must guess as to its meaning. For vagueness, defendants must argue that the statutory provision is “void for vagueness.” This Article offers a reading of Article 22’s guarantee of strict construction that can be used to address both ambiguity and vagueness. See *infra* Part IV.

<sup>26</sup> The French Penal Code provides that penal law is to be strictly construed. CODE PÉNAL [C. PÉN] [PENAL CODE] art. 111-4 (Fr.) (“La loi pénale est d’interprétation stricte.”). The requirement entered the code in 1994 and codified a longstanding principle from French law. XAVIER PIN, *DROIT PÉNAL GÉNÉRAL* § 50 (6th ed. 2014). Strict construction, according to Xavier Pin, requires precision in definitions of crimes. The Conseil constitutionnel requires that criminal texts be sufficiently clear and precise that they preclude arbitrariness. *Id.* § 49. Christophe André has explained that strict interpretation does not mean narrow interpretation. Otherwise put, “only the law, but all of the law.” CHRISTOPHE ANDRÉ, *DROIT PÉNAL SPECIAL* § 5 (3d ed. 2015) (“[L]a loi, uniquement la loi, mais toute la loi”). Strict construction also appears to permit interpretation of more than just the statutory text. To interpret a statute courts will analyze the text but also engage in a

case likewise equated strict construction with the ban on analogy, in juxtaposition to Article 22(2)'s requirement that ambiguity be construed in favor of the defendant, which it put under the label "*in dubio pro reo*."<sup>27</sup> In France, the prohibition on analogy means that judges may not extend a crime by analogy to a situation that the legislator did not intend but could have envisioned,<sup>28</sup> while in Germany there is no guarantee of strict construction or lenity.<sup>29</sup> German law bars defining crimes by analogy, meaning crimes are "not [to be] interpreted in a sense that goes beyond their literal meaning."<sup>30</sup> Article 22(2)'s redundancies thus theoretically attempt to capture each of these notions of cabining judges' ability to create new crimes under the guise of interpretation. Subtle differences aside, the crux of the issue in all of these systems is fundamentally the same and boils down to the vexing question: What is the line between interpretation and lawmaking?

Still, these Article 22(2) guarantees are not as firmly established a set of human rights principles as one might think. Many states do not recognize the principles and, even where they do, as in the United States,<sup>31</sup> adherence to the principle is patchy.<sup>32</sup> Kenneth Gallant, the author of *The Principle of*

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"teleological" inquiry into the legislature's intent, including by using legislative history. PIN, *supra*, § 50–51.

<sup>27</sup> See, e.g., Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Judgement Pursuant to Art. 74 of the Statute, ¶¶ 52–53 (Mar. 7, 2014).

<sup>28</sup> PIN, *supra* note 26, § 52 ("L'analogie qui est strictement prohibé est l'analogie juridique qui consiste à étendre une incrimination à un cas que le législateur n'a pas prévu alors qu'il aurait pu le prévoir. Le juge en effet ne doit pas aller au-delà de la volonté du législateur."). This aversion to crime creation by analogy also existed in U.S. law as part of strict construction. See, e.g., United States v. Wiltberger, 18 U.S. 76, 96 (1820) ("It would be dangerous, indeed, to carry the principle, that a case which is within the reason or mischief of a statute, is within its provisions, so far as to punish a crime not enumerated in the statute, because it is of equal atrocity, or of kindred character, with those which are enumerated.").

<sup>29</sup> MARKUS D. DUBBER & TATJANA HÖRNLE, CRIMINAL LAW: A COMPARATIVE APPROACH 100 (2014).

<sup>30</sup> THOMAS VORMBAUM, A MODERN HISTORY OF GERMAN CRIMINAL LAW 42 (Michael Bohlander eds., 2013).

<sup>31</sup> See Kahan, *supra* note 25, at 350–51; Jeffries, *supra* note 22, at 198–00.

<sup>32</sup> See Broomhall, *infra* note 83, at 960, 962 (noting that "the formulation and status of the rule [of strict construction] in common law jurisdictions is not free from uncertainty, and it has been irregularly applied," and "[l]ike the rule of strict construction in general, the rule relating to ambiguities is neither uniformly held to nor clearly defined in national systems").

*Legality in International and Comparative Criminal Law*, cautions that international human rights law does not require courts to choose the narrowest possible formulation of crimes.<sup>33</sup>

Unlike the actual definitions of the crimes in the Rome Statute, Article 22 apparently was uncontroversial.<sup>34</sup> The ultimate formulation of paragraph 2 stemmed from an American proposal that replaced a similar Japanese one.<sup>35</sup> The Rome Statute's legality provision was the product of the positive law inclinations of many states and states' desire to understand and clearly demarcate the risks to states' own government officials.<sup>36</sup> Finally, states wanted to define and understand their own obligations, since the Rome Statute demands actions from states.<sup>37</sup>

A critical ambiguity in Article 22(2) itself is whether the Article 22(2) guarantees apply only to the provisions of the Rome Statute setting out the crimes—genocide, crimes against humanity, war crimes, and aggression—or whether these guarantees apply to forms of criminal responsibility as well. This Article takes the view, shared by others,<sup>38</sup> that the forms of responsibility are part of the definition of the crime, at least for Article 22(2) purposes.

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<sup>33</sup> See also GALLANT, *supra* note 4, at 359 (“In many systems, there is no binding requirement that the absolutely narrowest definition of crimes set forth in statutes, codes, or case law be adopted. The current system of international human rights law does not require this.”).

<sup>34</sup> Per Saland, *International Criminal Law Principles*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE ISSUES, NEGOTIATIONS, AND RESULTS 189, 194–95 (Roy S. Lee ed., 1999).

<sup>35</sup> *Id.* at 195. The prior PrepComm formulations did not specifically mention strict construction or construing ambiguities in favor of defendants. They included bracketed language providing: “[2. Conduct shall not be construed as criminal and sanctions shall not be applied under this statute by a process of analogy.]” Language from PrepComm, Intro and Draft Organization of Work, THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 244 (M. Cherif Bassiouni ed., 1998) [hereinafter PrepComm].

<sup>36</sup> LEILA NADYJA SADAT, THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM 182 (2002) (“[M]any [states] were uncomfortable with a criminal court applying law that was uncodified.”).

<sup>37</sup> *Id.* at 182.

<sup>38</sup> See Sadat & Jolly, *supra* note 14, at 32–33 (proposing canons of construction for ICL and applying them to Article 25(3)'s forms of individual criminal responsibility, in particular the question whether Article 25(3) creates a hierarchy of responsibility and whether Article 25(3)(a) incorporates the “control of crime” theory of perpetration); see also Prosecutor v. Chui, Case No. ICC-01/04-02/12, Judgement

B. *The Drafting of Article 22(2)*

The drafters of the Rome Statute sought to accompany the guarantee of strict construction with a more detailed international criminal code than seen at prior international criminal tribunals. Consistent with the commitment to legality evinced in Article 22, during the negotiations of the Rome Statute, “[t]here was general agreement that the crimes within the jurisdiction of the Court should be defined with the clarity, precision and specificity required for criminal law in accordance with the principle of legality . . . .”<sup>39</sup> However, there was a debate as to just how much clarity and precision was needed, as well as whether crimes should be defined explicitly in the statute or should incorporate by reference other international conventions,<sup>40</sup> and whether crime definitions ought to be exhaustive or illustrative.<sup>41</sup> States also disagreed on whether it was necessary to elaborate on the elements of the crimes in the statute itself.<sup>42</sup>

Ultimately, the Rome Statute fleshed out the definitions of crimes more than any prior international criminal instrument.<sup>43</sup> The statute “contains not only categories of offences, but also nearly exhaustively lists more than ninety crimes, which are supplemented by the Elements of Crimes,” and it sets out detailed procedural protections and “general principles of international criminal law,” which include “basic concepts and modes of individual criminal responsibility, requisite mental

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Pursuant to Article 74 of the Statute Concurring Opinion of Judge Wyngaert, ¶ 18 n.27 (Dec. 18, 2012).

<sup>39</sup> PrepComm, *supra* note 35, at 394.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* (“Several delegations expressed a preference for an exhaustive rather than an illustrative definition of the crimes so as to ensure respect for the principle of legality,” while others advocated flexibility “to permit the continuing development of the law.”).

<sup>42</sup> *Id.* (explaining that some states felt it necessary to state the elements either “in the Statute or in an annex to provide the clarity and precision required for criminal law, to provide additional guidance to the Prosecution and the Court, to ensure respect for the rights of the accused and to avoid any political manipulation of the definitions”).

<sup>43</sup> Greenawalt, *supra* note 15, at 1074–75 (“The statutes of the ICTY and . . . [ICTR] followed the basic Nuremberg model of listing bare bones offenses, with many of the core standards of culpability and punishment left unspecified.”).

elements, grounds for excluding criminal responsibility, and mistakes of fact and law.”<sup>44</sup> It also offers a hierarchy of sources of law for judges to consult in interpreting the statute.<sup>45</sup>

These crime definitions, the result of heated, political wrangling over a relatively short period of time,<sup>46</sup> range from very specific to very vague.<sup>47</sup> For example, the Rome Statute recognizes the war crime of “[e]mploying bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions,” as well as the war crimes of “[c]ommitting outrages upon personal dignity, in particular humiliating and degrading treatment” and “cruel treatment.”<sup>48</sup> The first is quite specific. The latter two are considerably less so.<sup>49</sup> In some instances, crimes were defined more narrowly than under customary international law. Sometimes, as in the crimes of extermination and torture, this divergence lowered the requirements of customary international law.<sup>50</sup>

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<sup>44</sup> Grover, *A Call to Arms*, *supra* note 14, at 552–53. Article 9 of the Rome Statute provides that the Elements of Crimes are to “assist the Court in the interpretation and application of [the articles defining the crimes]” and shall be adopted by a two-thirds majority of members of the Assembly of States Parties. Rome Statute, *supra* note 1, art. 9.

<sup>45</sup> See Grover, *A Call to Arms*, *supra* note 14, at 553.

<sup>46</sup> SADAT, *supra* note 36, at 261; Shabtai Rosenne, *Poor Drafting and Imperfect Organization: Flaws to Overcome in the Rome Statute*, 41 VA. J. INT’L L. 164, 167 (2000).

<sup>47</sup> See William K. Lietzau, *Checks and Balances and Elements of Proof: Structural Pillars for the International Criminal Court*, 32 CORNELL INT’L L.J. 477, 483–84 (1999) (lamenting the vagueness of the Article 8’s war crime of “[w]ilfully causing great suffering, or serious injury to body or health” and contending that “[o]ther examples of ambiguously or poorly defined offenses include ‘wounding treacherously,’ ‘attacking . . . buildings which are undefended,’ and ‘persecution,’ defined as ‘intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity’” and arguing that “[t]here is a manifest need to clarify the elements of these harms”).

<sup>48</sup> Rome Statute, *supra* note 1, art. 8(b)(xix), 8(b)(xxi), 8(c)(i).

<sup>49</sup> GEORGE P. FLETCHER, *THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE, AND INTERNATIONAL* 85 (2007) (explaining that the Rome Statute “contains some provisions that would seem to run afoul of the mandate of precision in legislative definition” including the crimes against humanity of other inhumane acts and the catch-all provision for sexual violence).

<sup>50</sup> Hunt, *supra* note 17, 66–67 (calling for ICC judges “rapidly to assert their ability to cure the deficiencies of the Court’s Statute, its *Elements of Crimes* and its rules of procedure and evidence which may be impermissibly prejudicial to the human rights of the accused”).

Compromise also led to ambiguous definitions of crimes, sometimes by design.<sup>51</sup> Various commentators have referred to this phenomenon of the drafters' leaving some language intentionally ambiguous in order to appease various disagreeing factions as "constructive ambiguity."<sup>52</sup> As discussed below, the term "gender" in the Rome Statute is an example of such constructive ambiguity.<sup>53</sup>

C. *The Context of Article 22: The Rome Statute's Hierarchy of Laws*

Much as the Rome statute is far more specific in defining crimes than the statutes of the *ad hoc* tribunals,<sup>54</sup> particularly when read in conjunction with the Elements of Crimes, Article 21 suggests that the drafters understood that there were still "areas for development" through consultation of treaties, principles, and rules of international law, as well as general principles of law derived from domestic systems.<sup>55</sup> Recognizing its own incompleteness, the Rome Statute identifies and ranks sources of law. The Rome Statute's Article 21(1) states the "Court shall apply:"

- (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;
- (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
- (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those

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<sup>51</sup> *Id.* at 67 (lamenting that the need for compromise despite political disagreement led to "recourse to the extraordinary concept of 'creative ambiguity' in the Statute, so as not to have to deal with an issue upon which agreement would have proved difficult if not impossible to obtain"); see also Lietzau, *supra* note 47, at 484.

<sup>52</sup> See Hunt, *supra* note 17, at 67; see also Valerie Oosterveld, *The Definition of "Gender" in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?*, 18 HARV. HUM. RTS. J. 55, 57 (2005).

<sup>53</sup> See discussion *infra* notes 128–134.

<sup>54</sup> Grover, *A Call to Arms*, *supra* note 14, at 552–53.

<sup>55</sup> FLETCHER, *supra* note 49, at 107–08.

principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.<sup>56</sup>

Finally, Article 21(3) demands that the “application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights” and also be nondiscriminatory.<sup>57</sup>

The Rome Statute reigns supreme. The Rome Statute indicates that, should the statute and Elements of Crimes conflict in any way, the statute prevails.<sup>58</sup> Some commentators argue that the Elements of Crimes is merely persuasive and thus does not bind the court.<sup>59</sup> Likewise, the court is only to turn to international law “in the second place” and “where appropriate.” Judges are to turn to general principles of national law, only “failing that” and “as appropriate,” as in, absent an answer in the statute, the Elements of Crimes, and international law.

Judges have interpreted Article 21(2)’s inclusion of general principles of international law to include customary international law.<sup>60</sup> Article 21 does not explicitly mention customary international law, which at least one commentator reads to mean

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<sup>56</sup> Rome Statute, *supra* note 1, art. 21(1).

<sup>57</sup> *Id.* at art. 21(3). More precisely, it must “be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.” *Id.*

<sup>58</sup> Rome Statute, *supra* note 1, art. 9(3) and 51(5); *see also* Dapo Akande, *Sources of International Criminal Law*, in THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE § B, at 47 (Antonio Cassese ed., 2009) (citing Articles 9(3) and 51(5)); Margaret deGuzman, *Article 21*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 704 (Otto Triffterer ed., 2d ed. 2008) (noting that “[a]n unfortunate inconsistency exists between the language of article 21 and that of article 9 concerning the role of the Elements of Crimes. Article 21 mandates that the court ‘shall apply’ the Elements of Crimes whereas Article 9 defines the purpose of the Elements as merely to ‘assist the Court in the interpretation and application of articles 6, 7, and 8,’” and proposing to resolve the conflict “by reading the two provisions together: the Court ‘shall apply’ the Elements for the purpose of ‘assisting the Court . . . .”).

<sup>59</sup> *See* Jared Wessel, *Judicial Policy-Making at the International Criminal Court: An Institutional Guide to Analyzing International Adjudication*, 44 COLUM. J. TRANSNAT’L L. 377, 413 n.194, 414 (2006) (stating that this view is the majority one) (citing Valerie Oosterveld, *Sexual Slavery and the International Criminal Court: Advancing International Law*, 25 MICH. J. INT’L L. 605, 627 (2004)).

<sup>60</sup> *See, e.g.,* Prosecutor v. Katanga, Case No. ICC-01/04-01/07 Decision on the Confirmation of Charges, ¶¶ 508–10 (Sept. 30, 2008).

that the states parties intended to eschew such inquiry.<sup>61</sup> Most believe, however, that Article 21(1)(b)'s reference to "principles and rules of international law" and the "laws or customs of war" folds in customary international law.<sup>62</sup>

So far, judges have applied customary international law as part of international law. For example, the *Katanga* trial chamber stated:

Where the founding texts do not specifically resolve a particular issue, the Chamber must refer to treaty *or* customary humanitarian law and the general principles of law. To this end, the Chamber may, for example, be required to refer to the jurisprudence of the *ad hoc* tribunals and other courts on the matter.<sup>63</sup>

Thus, judges who confront an ambiguity in ICC law must turn to international law, including customary international law, to resolve it. This prompts many important questions: How does a judge strictly construe a body of law that is based on an assessment of state practice and *opinio juris* (a sense of obligation)?<sup>64</sup> What amounts to an ambiguity in customary international law? One nonconforming state? A majority of nonconforming states? A lack of clarity over whether conforming states are guided by *opinio juris*? Moreover, even if judges can decipher a customary international law norm, what role is the norm to play? Does it merely assist judges to interpret the words of the Rome Statute or must customary international law provide support for the criminality of the conduct?<sup>65</sup>

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<sup>61</sup> FLETCHER, *supra* note 49, at 222; *cf.* deGuzman, *supra* note 58, at 706–07 (canvassing the possible meanings of general principles of international law and noting that it is unclear whether it meant to include customary international law).

<sup>62</sup> *See, e.g.*, deGuzman, *supra* note 58, at 706–07 (concluding that the drafters intended some role for customary international law); Wessel, *supra* note 59, at 415 (arguing the Rome Statute privileges customary international law); Akande, *supra* note 58, § D, at 50 (noting that "[a]lthough [it is] listed as a source of applicable law in Art. 21(1)(b) [of the Rome Statute], custom is likely to play a less prominent role in that tribunal than in the *ad hoc* Tribunals" due to the Rome Statute and Elements of Crimes' greater specificity on the "elements of each crime, the general principles of liability, and the applicable grounds for excluding responsibility").

<sup>63</sup> *Katanga*, Case No. ICC-01/04-01/07, ¶ 47 (emphasis added).

<sup>64</sup> *See generally* ILC CIL 1, *supra* note 18, ¶ 2.

<sup>65</sup> *See* discussion *infra* Part IV.B (discussing the risk of unfair surprise to defendants resulting from potential applications of customary international law to support criminality).

Article 21's final source of law, general principles of domestic law, likewise complicates the strict construction picture. Professor Fletcher contends that Article 21(1)(c)'s invocation of "general principles of law derived from national laws of the legal systems of the world" renders interpretation of the Rome Statute a comparative law endeavor.<sup>66</sup> Here too, there is the problem of identifying an ambiguity. If ambiguity merely means inconsistent state practice, then ambiguities may be easy to come by.

In a departure from the practice at the *ad hoc* tribunals, the court's own case law is not binding on judges.<sup>67</sup> Article 21(2) provides: "The Court may apply principles and rules of law as interpreted in its previous decisions."<sup>68</sup> May, not must. In addition, the Rome Statute repeatedly flags that ICC decisions are not to be read to restrict the development of international law or ICL outside of the ICC.<sup>69</sup> However, as Dapo Akande notes, judicial decisions nevertheless "play a deceptively important role in international law and ICL."<sup>70</sup> Akande explains that:

In a system where much of the rules are unwritten, judges play the important role of determining precisely what the law is. They assess the extent to which state practice and *opinio juris* support an alleged rule of customary law. They also decide on what the general principles of law are.<sup>71</sup>

Moreover, binding or not, previous decisions give judges in future cases a default template that is likely to inform their analysis.<sup>72</sup>

Although the Rome Statute does not explicitly mention the Vienna Convention and scholars disagree on the appropriateness of relying on the Vienna Convention in interpreting the Rome

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<sup>66</sup> FLETCHER, *supra* note 49, at 222.

<sup>67</sup> This rejection of *stare decisis* is consistent, however, with the practice of the International Court of Justice ("ICJ").

<sup>68</sup> Rome Statute, *supra* note 1, art. 21(2).

<sup>69</sup> *Id.* at art. 10 ("Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute."); *id.* at art. 22(3) ("This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.").

<sup>70</sup> Akande, *supra* note 58, § F, at 53.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* ("Once those customary rules or general principles are identified through a process of judicial reasoning, they provide an 'off the shelf' assessment of the law which is often the starting point for deciding future cases. The onus is then on those who assert that the law is different to provide their own different assessment of the evidence.").

Statute,<sup>73</sup> the Vienna Convention is yet another source of guidance to which ICC judges may turn in interpreting crime definitions. ICC judges already have invoked the principles of the Vienna Convention in interpreting the Rome Statute,<sup>74</sup> in particular the basic or “general rule”<sup>75</sup> of the Vienna Convention. The general rule provides: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>76</sup> This rule is part of a framework made up of “several integrated parts that are collectively designed to determine the meaning of a treaty provision under interpretation, and it is generally recognized as reflecting customary international law.”<sup>77</sup> The Vienna Convention permits,

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<sup>73</sup> See Jacobs, *supra* note 18, at 30–31 (arguing that judges should not rely on the Vienna Convention in interpreting the quasi-statutory aspects of the Rome Statute); Grover, *A Call to Arms*, *supra* note 14, at 557 n.86; Sadat & Jolly, *supra* note 14, at 759–61 (noting that, due to the quasi-constitutional and legislative aspects of parts of the Rome Statute, “traditional interpretative methodologies (including a straightforward application of the Vienna Convention . . .) do not fit neatly with the unique characteristics of the Rome Statute”); deGuzman, *supra* note 58, at 705 (noting that the “delegates debated whether the VCLT [Vienna Convention] and the [CAT] [we]re applicable or merely relevant”).

<sup>74</sup> Prosecutor v. Katanga, Case No. ICC 01/04-01/07, Judgement Pursuant to Article 74 of the Statute, ¶ 43 (Mar. 7, 2014) (“To interpret the relevant provisions of the Statute and the Elements of Crimes, the Chamber must draw on the method of interpretation laid down in the Vienna Convention on the Law of Treaties (‘the Vienna Convention’), specifically articles 31 and 32. The chambers of the Court have unanimously and systematically based their interpretation of the Statute on the principles established by the Vienna Convention”) (citing various appeals ICC chamber and pre-trial Chamber decisions).

<sup>75</sup> *Id.* ¶ 44–45 (noting that the Vienna Convention sets forth “one general rule of interpretation (‘the General Rule’) and one alone . . . This method of interpretation prescribes that the various ingredients—the ordinary meaning, the context, and the object and purpose—be considered together in good faith.”). The General Rule, which therefore refers to a holistic approach, does not establish any hierarchical or chronological order in which those various ingredients are to be examined and then applied.

<sup>76</sup> Vienna Convention on the Law of Treaties art. 31, Jan. 27, 1980, 1155 U.N.T.S. 331.

<sup>77</sup> Anne-Marie Carstens, *Interpreting Transplanted Treaty Rules*, in INTERPRETATION IN INTERNATIONAL LAW 235 (Andrea Bianchi et al. eds. 2015) (discussing the applicability of the Vienna Convention to international legal norms transplanted from one legal regime to another). Cf. Duncan Hollis, *The Existential Function of Interpretation in International Law*, in INTERPRETATION IN INTERNATIONAL LAW 81 (Andrea Bianchi et al. eds. 2015) (commenting that “[t]he treaty’s centrality to existing interpretative inquiries has not, however, translated into certainty or consensus on treaty interpretation itself. . . . [D]ebate continues over (i) their legal status, (ii) the interpretative method(s) and techniques they

among other things, the consultation of *travaux préparatoires* (essentially, drafting history for treaties) to do away with ambiguities in a treaty.<sup>78</sup>

Perhaps the most controversial issue with international criminal judges' reliance on the Vienna Convention is the latter's mandate to consider the terms of a treaty in light of the treaty's "object and purpose."<sup>79</sup> Several commentators have noted that this teleological approach arguably conflicts with legality generally and Article 22(2)'s command of strict construction specifically.<sup>80</sup> As will be discussed below, international courts have employed the Vienna Convention's teleological inquiry to interpret international instruments other than the Rome Statute, such as international humanitarian law ("IHL") treaties, to assist them in interpreting or, sometimes, defining crimes.

What, then, is strict construction in a regime of manifold sources of law, combined with teleological interpretive techniques that push for broader interpretation? Before attempting to

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privilege, and (iii) the boundaries they set in defining what constitutes interpretation").

<sup>78</sup> Article 32, on Supplementary Means of Interpretation, provides: "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) Leaves the meaning ambiguous or obscure; or (b) Leads to a result which is manifestly absurd or unreasonable." Vienna Convention on the Law of Treaties art. 32, Jan. 27, 1980, 1155 U.N.T.S. 331; see also Julian D. Mortenson, *The Travaux of Travaux: Is the Vienna Convention Hostile to Drafting History*, 107 AM. J. INT'L L. 780, 781 (2013) (arguing that the drafters of the Vienna Convention "repeatedly reiterated that any serious effort to understand a treaty should rely on a careful and textually grounded resort to travaux, without embarrassment or apology").

<sup>79</sup> Robinson, *Identity Crisis*, *supra* note 15, at 934; Jacobs, *supra* note 18, at 33.

<sup>80</sup> See, e.g., Akande, *supra* note 58, § 3(A), at 44 (noting that the Vienna Convention's instruction to turn to the *travaux préparatoires* and object and purposes "might lead to a temptation to construe ambiguous provisions more liberally than might appear from simple textual interpretation," contrary to the *in dubio pro reo* or strict construction principle); see also Grover, *A Call to Arms*, *supra* note 14, at 557 ("If legality is recognized as the guiding principle for interpreting crimes in the Court's jurisdiction, it would require the textual approach to prevail over competing intent as well as object and purpose based approaches to applying Article 31 of the Vienna Convention. This means, quite simply, textual primacy. Considerations of context, object, and purpose as well as interpretive aids such as the Elements of Crimes and *travaux préparatoires* cannot be invoked inappropriately to broaden, modify, or override the plain meaning of these Articles. The same is true of normative arguments about the importance of protecting victims of crimes or giving effect to the Court's jurisdiction to end impunity.").

answer this question, the next Part discusses the justifications for strict construction and evaluates their applicability to the world of international criminal justice.

## II. PURPOSES OF STRICT CONSTRUCTION

This Part seeks to understand the purpose of Article 22's guarantee of strict construction.<sup>81</sup> The traditional justifications for strict construction of criminal statutes are notice and separation of powers—or legislative supremacy.<sup>82</sup> Building on these traditional grounds, commentators have justified the rule based on democratic accountability, avoiding arbitrary law enforcement, efficiency, and eliciting legislative preference. In the context of the ICC, one may add to this list the goals of promoting respect for human rights, the rule of law, and the protection of state sovereignty. This Part evaluates the strength of these justifications and also flags the drawbacks of too strict a strict construction regime.

### A. *Traditional Justifications for Strict Construction*

#### 1. Notice

One argument in support of strict construction is rooted in a concern about individual freedom and notice: “[C]itizens have a right to be warned in advance about the risk that their conduct will run afoul of the criminal law.”<sup>83</sup> As Justice Holmes stated in *McBoyle*:

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<sup>81</sup> Just like the ICC, it turns to domestic scholarship to elucidate this question. For example, the *Lubanga* trial chamber has supported inquiry into domestic legal doctrines to help guide courts to a better informed and reasoned interpretation. *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06 A 5, Judgement on the Appeal of Mr. Thomas Lubanga Dyilo Against His Conviction, ¶ 470 (Dec. 1, 2014) (“[T]he Appeals Chamber considers it appropriate to seek guidance from approaches developed in other jurisdictions in order to reach a coherent and persuasive interpretation of the Court’s legal texts. This Court is not administering justice in a vacuum, but, in applying the law, needs to be aware of and can relate to concepts and ideas found in domestic jurisdictions.”).

<sup>82</sup> FLETCHER, *supra* note 49, at 81; Price, *supra* note 25, at 907–12 (debunking notice and legislative supremacy arguments and arguing that democratic accountability is a better justification for lenity); Jeffries, *supra* note 22, at 201–12 (debunking these grounds and the argument based on the “rule of law”).

<sup>83</sup> FLETCHER, *supra* note 49, at 81; *see also* Bruce Broomhall, *Article 22: Nullum crimen sine lege*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 949, 953 (Otto Triffterer & Kai Ambos eds., 3d ed., 2016) (“As a principle of interpretation, *nullum crimen* aims to limit the power of the (unelected)

Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible, the line should be clear.<sup>84</sup>

As Professor Solan notes, “[D]ue process concerns . . . arise when a court breaks new ground by interpreting a statute or regulation broadly for the first time in the context of a prosecution.”<sup>85</sup> At least one ICC judge, Christine Van den Wyngaert, has invoked the notice and rule of law arguments in favor of strict construction.<sup>86</sup>

Many question notice as a sufficient justification for strict construction.<sup>87</sup> They acknowledge that the notice argument may make some sense for regulatory offenses, where someone could genuinely be caught off guard by a broader interpretation of a

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judiciary to interfere with liberty beyond the extent that a reasonable individual could understand from the words of the relevant prohibition. Just as legal subjects are presumed capable of knowing and have a duty to obey the law, so too is the lawmaker responsible for making the law clear and ascertainable, while the judiciary is obliged in principle to refrain from penalizing conduct not made criminal by the legislator through the wording of the law in question, and is thus confined to interpreting and applying, but not making the law.”); Price, *supra* note 25, at 907 (“The theory here is that narrow construction protects citizens from being caught off guard by broader prohibitions than they could anticipate”); GROVER, INTERPRETING CRIMES, *supra* note 14, at 137.

<sup>84</sup> Price, *supra* note 25, at 907 (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)).

<sup>85</sup> Lawrence M. Solan, *Statutory Inflation and Institutional Choice*, 44 WM. & MARY L. REV. 2209, 2263 (2003).

<sup>86</sup> Prosecutor v. Chui, Case No. ICC-01/04-02/12, Concurring Opinion of Judge Van den Wyngaert, ¶ 20 (Dec. 18, 2012) (arguing that “[i]ndividuals must have been in a position to know at the time of engaging in certain conduct that the law criminalised it” and noting that “[t]he Grand Chamber of the European Court of Human Rights has given considerable weight to the elements of ‘accessibility’ and ‘foreseeability’ in its assessment of the legality principle”); *see also* Achour v. France, 2006-IV Eur. Ct. H.R. 249, 264 (2006) (“It follows [from Article 7 of the European Convention on Human Rights] that offences and the relevant penalties must be clearly defined by law. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts’ interpretation of it, what acts and omissions will make him criminally liable”); Kononov v. Latvia, 2010-IV Eur. Ct. H.R. 35, 106–07 (2010).

<sup>87</sup> *The Supreme Court: 2007 Term Leading Cases*, 122 HARV. L. REV. 276, 481 n.65 (2008) [hereinafter *The Rule of Lenity*] (noting that “[s]ome argue that notice is largely a pretextual justification for the rule of lenity”).

criminal statute.<sup>88</sup> However, for *malum in se* (innately immoral)<sup>89</sup> offenses, this justification is weak, because it is very unlikely anyone thinks what they are doing is legal.<sup>90</sup>

The notice argument seems, at first blush, especially weak in the context of grave international crimes. After all, most international crimes are *malum in se*. As Professor Fletcher has explained: “The definitions of genocide, war crimes, and crimes against humanity appeal to shared norms of moral wrongdoing.”<sup>91</sup> Fletcher notes the *malum in se* nature of the crimes in turn affects the lack of specificity of the crimes: “The evils are so obvious that the drafters use catchall provisions that rely explicitly on moral judgment.”<sup>92</sup> Under this view of ICL, notice may not justify strict construction at the ICC.<sup>93</sup>

Perhaps the more fundamental critique of the notice justification is that it relies on the “fiction” that criminals are reading up on the law.<sup>94</sup> Even for regulatory offenses though, some commentators question the notice justification, given that the law often seems indifferent to notice, as demonstrated by the flimsy and formal conception of notice that exists.<sup>95</sup> Publication of a statute is enough. Moreover, the necessary clarity in the statute need not come from the text of the statute itself; a judicial decision interpreting it suffices.<sup>96</sup> Courts do not require that the

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<sup>88</sup> However, as Price notes, it could cut the other way, too. Price, *supra* note 25, at 908 (“Though it may be true that technical regulatory statutes are less intuitive than core offenses, they are also one type of criminal law that defendants may actually read. Certainly participants in regulated industries have only themselves to blame if they fail to seek counsel’s advice about the potential breadth of regulations.”).

<sup>89</sup> See *Malum in se*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>90</sup> Price, *supra* note 25, at 908 (“[N]otice concerns . . . [do not apply] when crimes fall deep within . . . societal prohibition”); see also FLETCHER, *supra* note 49, at 82; see also Greenawalt, *supra* note 15, at 1105 (arguing that the fair notice arguments supporting legality norms apply in less force to international prosecutions for “manifestly wrongful” conduct).

<sup>91</sup> FLETCHER, *supra* note 49, at 31.

<sup>92</sup> *Id.* (citing the example of “the crime against humanity is based on ‘rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization, or any other form of sexual violence of comparable gravity’”).

<sup>93</sup> *Id.* (“In the field of offenses *malum in se*, lawyers and judges can typically rely on their moral intuitions to decide what is lawful and what is not.”).

<sup>94</sup> Price, *supra* note 25, at 907.

<sup>95</sup> Jeffries, *supra* note 22, at 207.

<sup>96</sup> *Id.* at 207–08.

person in fact be on notice of the law, but merely require that the law exist such that, with a lawyer and some diligence, a person could have discovered the law.<sup>97</sup>

The procedures of the ICC seem to affirm this argument that notice is a low priority at the ICC. Regulation 55, a judge-made regulation, permits courts to change the legal characterization of the charges.<sup>98</sup> In *Katanga*, the judges permitted recharacterization of the charges even after the defendant had rested his case.<sup>99</sup> This civil law style regulation is premised on the notion that defendants need notice of the factual allegations against them, but not of the legal characterization of those facts.<sup>100</sup>

Still, the argument for notice as a basis for strict construction at the ICC may be stronger than it first appears. Arguably, not all crimes in the Rome Statute are *malum in se*, but rather *malum prohibitum* (wrong because it is prohibited) such as the war crime of transferring the civilian population by an occupying power<sup>101</sup> and various child soldiering offenses.<sup>102</sup> As Fletcher argues, “There may be precise rules governing the conduct of warfare, but they are not always morally obvious, and for that reason it is better to think of them as a function of legislative prohibition, or *malum prohibitum*.”<sup>103</sup> Moreover,

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<sup>97</sup> *Id.* at 208.

<sup>98</sup> See generally WAR CRIMES RESEARCH OFFICE, REGULATION 55 AND THE RIGHTS OF THE ACCUSED AT THE INTERNATIONAL CRIMINAL COURT (Am. Univ. Wash. Coll. of Law Legal Analysis and Educ. Project ed., 2013); Carsten Stahn, *Modification of the Legal Characterization of Facts in the ICC System: A Portrayal of Regulation 55*, 16 CRIM. L. F. 1 (2005); Sophie Rigney, ‘The Words Don’t Fit You’: *Recharacterisation of the Charges, Trial Fairness, and Katanga*, 15 MELB. J. INT’L L. 515 (2014).

<sup>99</sup> Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges Against the Accused Persons, ¶¶ 17–20 (Nov. 21, 2012).

<sup>100</sup> See *id.*

<sup>101</sup> FLETCHER, *supra* note 49, at 31–32; see also David Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law*, in THE PHILOSOPHY OF INTERNATIONAL LAW 569, 585 (Samantha Besson & John Tasioulas eds., 2010) (arguing that the legality principle is less important in ICL than in domestic criminal law).

<sup>102</sup> See generally MARK A. DRUMBL, REIMAGINING CHILD SOLDIERS IN INTERNATIONAL LAW AND POLICY (2014) (arguing that situation of child soldiers is more nuanced than ICL would like to portray it to be).

<sup>103</sup> FLETCHER, *supra* note 49, at 31–32; cf. Margaret M. deGuzman, *Gravity and the Legitimacy of the International Criminal Court*, 32 FORDHAM INT’L L.J. 1400, 1405 (2009) (questioning whether all international crimes are grave).

“even as to obviously immoral conduct there might be borderline cases, and ideally courts should not have the discretion to act arbitrarily in these cases.”<sup>104</sup>

Notice may be a more realistic possibility in ICL than in domestic jurisdictions. In domestic jurisdictions, most would-be criminals are unlikely to be poring over statutes and court decisions or have lawyers on retainer to do so for them; whereas, many, if not most, of the world's militaries provide training in IHL, which folds into ICL. Concededly, international criminal defendants may be civilians or combatants belonging to a rebel group that does not provide training of this sort, so this argument may not apply in equal force to all defendants.

## 2. Separation of Powers

The other traditional rationale for strict construction is separation of powers. As Justice Marshall stated in *Wiltberger*: “It is the legislature, not the Court, which is to define a crime, and ordain its punishment.”<sup>105</sup> The separation of powers argument is rooted partly in democratic notions that a legislature elected by the people should make law and partly in an assumption of legislative superiority in the area of lawmaking.<sup>106</sup>

The separation of powers argument is rather weak in the international context, because there is no international legislature at the ready to fix mistakes or patch holes in the law.<sup>107</sup> The Assembly of States Parties (“ASP”), a body with one representative from each state party, is the closest analog to a legislature the ICC has, but it meets infrequently and is not charged with legislating.<sup>108</sup>

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<sup>104</sup> FLETCHER, *supra* note 49, at 82.

<sup>105</sup> Price, *supra* note 25, at 909 (quoting *United States v. Wiltberger*, 18 U.S. 76, 95 (1820)).

<sup>106</sup> Ofer Raban, *Is Textualism Required by Constitutional Separation of Powers?*, 49 LOY. OF L.A. L. REV. (forthcoming) (manuscript at 5, 19), <http://ssrn.com/abstract=2735047>.

<sup>107</sup> Van Schaack, *supra* note 2, at 137 (“Complicating efforts to create a holistic corpus of law is the fact that the international system lacks a standing world legislature that can fill interstices and lacuna, modernize ancient prohibitions, or fix faulty formulations”); see also Darryl Robinson, *International Criminal Law as Justice*, 11 J. INT'L CRIM. JUST. 699, 706 (2013) [hereinafter Robinson, *ICL as Justice*].

<sup>108</sup> See Rome Statute, *supra* note 1, art. 122.

Also, any assumption that ASP “legislation,” even if it were to occur, is superior to judicial resolution of an issue is highly questionable. The negotiations over the definitions of the crimes in the Rome Statute were difficult and fraught with politics<sup>109</sup> and sometimes yielded “lowest common denominator” crime definitions.<sup>110</sup> There is little reason to think that future attempts at refining the definitions of crimes through agreement of states parties would be easier or better, even if the occasion presented itself.

An even bigger strike against the separation of powers argument is delegation. As one U.S. commentator has argued of the lenity canon: “[d]elegated criminal lawmaking and [strict construction] cannot peacefully coexist.”<sup>111</sup> Strict construction only protects legislative supremacy if the legislature did not intend to delegate lawmaking authority to the courts or, at least, to permit courts to fill in blanks as they appear in new and unforeseen factual circumstances.<sup>112</sup> The separation of powers argument is weak where it seems the legislature intended to delegate lawmaking authority by using broad language.<sup>113</sup>

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<sup>109</sup> SADAT, *supra* note 36, at 261 (arguing that “the codification process was fated to produce a text that represented a set of political compromises, rather than a new set of progressive norms criminalizing behavior on a broad scale”); *see id.* at 266 (“[P]rep comm struggled enormously with the task of defining crimes”) (citing Report of Ad Hoc Comm. on the Establishment of an International Criminal Court, U.N. GAOR, 50th Sess., Supp. 22, ¶ 57, U.N. Doc A/50/22 (Dec. 12, 1995)). *See generally* Cherif Bassiouni, *Negotiating the Treaty of Rome on the Establishment of an International Criminal Court*, 32 CORNELL INT’L L.J. 443, 444, n.7 (1999); Rosenne, *supra* note 46, at 167–72.

<sup>110</sup> SADAT, *supra* note 36, at 267.

<sup>111</sup> Kahan, *supra* note 25, at 347.

<sup>112</sup> Jeffries, *supra* note 22, at 204 (“[W]here the statute is ambiguous or inconsistent, separation of powers provides no sure guide. In this frame of reference, strict construction is required only if the legislature commands that approach. If, as is usual, the legislature does not speak to that question or specifies a rule of ‘fair construction,’ interstitial judicial lawmaking is at least tolerated and perhaps affirmatively authorized. More to the point, it is inevitable. Any resolution of statutory ambiguity involves judicial choice. The resulting ‘gloss’ on the legislative text is both politically legitimate and institutionally unavoidable.”); Kahan, *supra* note 25, at 347 (arguing that the underenforcement of strict construction, at least in the context of U.S. federal courts, demonstrates the delegation of criminal lawmaking power to courts).

<sup>113</sup> Solan, *supra* note 85, at 2261 (arguing that dynamic statutory interpretation “does not offend . . . fair play” in criminal cases where the statute has broad language).

States delegate lawmaking power to international courts in part for efficiency reasons.<sup>114</sup> Discussing judicial lawmaking at international courts generally, Tom Ginsburg has explained: “judicial lawmaking serves an interest of the parties in reducing transaction costs of negotiating the details of a treaty.”<sup>115</sup> Often, “[w]hen states are unsure about the precise type of issue that will arise, . . . they will *implicitly* empower the tribunal to resolve disputes and clarify conventions.”<sup>116</sup> At the ICC, the negotiations were heated and difficult, not to mention, many years in the making.<sup>117</sup> Attempts to amend the statute would likely be equally so, as suggested by the challenging and ultimately still incomplete efforts at defining and explaining the court’s jurisdiction over the crime of aggression.<sup>118</sup>

States often delegate lawmaking for reasons other than efficiency. They may “believe that issues of law are best clarified in the context of actual cases.”<sup>119</sup> Indeed, judicial expansion of a criminal prohibition sometimes may be a good thing: “[I]t is one

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<sup>114</sup> American scholars have noted the relationship between lenity and efficiency. Efficiency concerns are sometimes offered as a justification for strict construction. Kahan, *supra* note 25, at 349 n.15; *see also* Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUDS. 257, 262–63 (1974) (weighing the benefits and transaction costs of up-front identification of the rule compared to an after-the-fact clarification of the rule by courts).

<sup>115</sup> Tom Ginsburg, *Bounded Discretion in International Judicial Lawmaking*, 45 VA. J. INT’L L. 631, 644 (2005).

<sup>116</sup> *Id.* (“This discussion assumes, however, that the third party acts as an effective agent of the parties and does not impose its own preferences on them. This is the familiar problem of principal and agent, and will likely affect the parties’ willingness to designate *any* third party to resolve disputes. We ought to expect states party to a treaty to designate third parties to interpret the agreement when the expected policy losses resulting from the agency problem are outweighed by the joint benefits to the parties from enhanced coordination.”); *see also* Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 VAND. L. REV. 1, 44–46 (2006) (discussing the possibility that the ICTY was a rogue agent).

<sup>117</sup> *See generally* Rosenne, *supra* note 46, at 167–72 (criticizing the process of drafting the Rome Statute and noting problems with the resulting statute).

<sup>118</sup> The Rome Statute indicated that the court would have jurisdiction over the crime of aggression, but put in a placeholder for the crime until states could define the crime and the nature of the court’s jurisdiction over it. States negotiated a definition at the Kampala conference, but some very critical questions remain to be resolved. *See generally* Beth Van Schaack, *The Aggression Amendments: Points of Consensus and Dissension*, 105 PROCEEDINGS OF THE 105TH ANN. MEETING OF THE SOC’Y INT’L L. 154 (2011).

<sup>119</sup> Ginsburg, *supra* note 115, at 644; *see also* Grover, *A Call to Arms*, *supra* note 14, at 554 (“[S]ome vagueness is inevitable to avoid ‘excessive rigidity and to keep pace with changing circumstances.’”).

means by which the legal system responds to new ways of disobeying social norms.”<sup>120</sup> States may also delegate to save face domestically: “[V]agueness may allow treaty parties to claim the text means different things to their respective domestic constituencies.”<sup>121</sup> They may also do so to hedge their bets on whether a particular interpretation favors their interests down the road.<sup>122</sup> Thus, “states will sometimes leave details vague, in which case international adjudicators become delegated lawmakers.”<sup>123</sup>

States parties to the Rome Statute clearly intended to delegate at least some lawmaking power to the court,<sup>124</sup> apparently for many of the reasons Ginsburg identifies. Many provisions are so vague that it seems obvious that the states parties intended the judges to flesh out the nuances of the rule on a case-by-case basis.<sup>125</sup> The negotiations of the Rome Statute also reveal that many states parties assumed that the courts would fill in some blanks in the law.<sup>126</sup> Others have noted the desire to allow the court to address new and varied forms of wrongdoing.<sup>127</sup>

The concept of gender in the Rome Statute is illustrative. The word “gender” appears several times throughout the Rome Statute,<sup>128</sup> including in the definition of the crimes against

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<sup>120</sup> Solan, *supra* note 85, at 2260–61 (noting federal courts’ rejection of common law crimes early in American history, but arguing that “there seem to be circumstances in which the dynamic interpretation of criminal statutes does not offend the values of legislative primacy or fair play,” most obviously, where “the legislature uses broad words in the statute”).

<sup>121</sup> Ginsburg, *supra* note 115, at 644.

<sup>122</sup> *Id.* (“Leaving treaties vague may also make sense when parties are unsure which side of a future dispute they will be on and want to reserve the right to argue for different positions of law at a later date.”).

<sup>123</sup> *Id.*

<sup>124</sup> See Danner, *supra* note 116, at 48.

<sup>125</sup> Van Schaack, *supra* note 2, at 124–25 (describing ICL’s common-law-style evolution).

<sup>126</sup> Wessel, *supra* note 59, at 386 (“[S]ome delegates to the ICC’s Preparatory Commission argued that problems arising from ambiguity in the treaty would be naturally addressed by the bench.”); see also Lietzau, *supra* note 47, at 482 (“[M]any delegations sought open-ended elements in order to expand the discretion of the Court. These states envisioned a Court that would not only adjudicate criminal cases, but also could define the law and thus foster its evolution.”).

<sup>127</sup> Grover, *A Call to Arms*, *supra* note 14, at 554.

<sup>128</sup> Oosterveld, *supra* note 52, at 57 (noting that the Rome Statute uses the word gender nine times).

humanity of persecution.<sup>129</sup> Controversially, in the Article on crimes against humanity, the term “gender” is defined. It is controversial both in that the drafters defined it, since many other terms are undefined, and for the definition that the drafters decided upon.<sup>130</sup> Article 7(3) of the Rome Statute provides:

For the purpose of this Statute, it is understood that the term ‘gender’ refers to the two sexes, male and female, within the context of society. The term ‘gender’ does not indicate any meaning different from the above.

Many have criticized the definition for failing to take into account more modern thinking on gender, captured in a number of other United Nations documents,<sup>131</sup> particularly the notion that gender is a socially constructed concept and is not synonymous with sex.<sup>132</sup>

A leading commentator on ICL and gender, Valerie Oosterveld contends that the definition of gender in the Rome Statute is an example of “constructive ambiguity.”<sup>133</sup> The drafters left it intentionally ambiguous, through the apparently competing language of “male and female” and “within the context of society,” so that an agreement on the Rome Statute could be reached between conservative states, particularly the Vatican and Islamic countries, who would not agree to the more fluid formulation of gender, and more progressive states. Each side could claim that its interpretation prevailed.<sup>134</sup>

A tweak on the separation of powers argument is the notion of lenity as a tool for eliciting legislative preference.<sup>135</sup> This theory may resonate in the domestic criminal context,

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<sup>129</sup> Rome Statute, *supra* note 1, art. 7(1)(h) (“Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.”).

<sup>130</sup> Some commentators have argued that the defining of gender indicated a desire to cabin or minimize it. Oosterveld, *supra* note 52, at 57.

<sup>131</sup> *Id.* at 67–71.

<sup>132</sup> *Id.* at 71–79.

<sup>133</sup> *Id.* at 57–58.

<sup>134</sup> See also SADAT, *supra* note 36, at 160 (noting “[t]he beauty, and the difficulty, of the compromise language employed is that while it was crafted to appease two irreconcilable points of view, both sides may assert that the definition as adopted reflects their understanding of the term”).

<sup>135</sup> See Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2196–97 (2002).

particularly in the United States. Since the crime control and law enforcement lobbies are more powerful than criminals, alleged criminals, or the criminal defense lobby, strict construction puts the onus on the side more likely to elicit a legislative response if the court gets it wrong.<sup>136</sup> Justice Scalia seemed to view strict construction in this way as well. He has explained that lenity “places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress’s stead.”<sup>137</sup>

The preference-eliciting argument, if anything, cuts against strict construction at the ICC. Any legislative response is unlikely. To amend the Rome Statute or the Elements of Crimes, a two-thirds vote of the assembly of states parties, which meets yearly unless by special arrangement, is needed.<sup>138</sup> Moreover, unlike in domestic jurisdictions, it is also not clear whether the Assembly of States Parties would be more likely to respond to unduly narrow readings of the law or unduly broad ones. States, protective of their sovereignty and their own officials, may be more likely to restrict liability where they view the courts to have gone too far than to enact more crimes to cover conduct that judges have excluded from a legal prohibition under the rule of strict construction.

### 3. Limiting Arbitrary Enforcement of Criminal Law

Limiting arbitrariness in the enforcement of the law is another oft-cited justification for strict construction.<sup>139</sup> A robust lenity doctrine reduces prosecutorial discretion and thus the possibility for arbitrary enforcement.<sup>140</sup> In domestic jurisdictions,

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<sup>136</sup> See *id.* at 2166, 2196–06 (discussing lenity as an example of his theory of preference-eliciting canons of construction).

<sup>137</sup> See *The Rule of Lenity*, *supra* note 87, at 477 (quoting *United States v. Santos*, 553 U.S. 507, 514 (2008)); see also Elhauge, *supra* note 135, at 2196.

<sup>138</sup> Article 121 on Amendments provides that the Assembly of States Parties may decide to take up a proposal for an Amendment by a majority vote and may amend the statute by a two-thirds vote; amendments apply only to states that have agreed to them. Rome Statute, *supra* note 1, art. 121(5).

<sup>139</sup> Cf. Luban, *supra* note 101, 15–16 (stating that the two main arguments for the principle of legality are notice and preventing arbitrary enforcement). In her separate opinion in *Ngudolo*, Judge Van den Wyngaert made the related argument that strict construction “is an essential safeguard to ensure both the necessary predictability and legal certainty that are essential for a system that is based on the rule of law.” *Prosecutor v. Ngudjolo*, Case No. ICC-01/04-02/12, Concurring Opinion of Judge Christine Van den Wyngaert, ¶ 19 (Dec. 18, 2012).

<sup>140</sup> Price, *supra* note 25, at 910–11.

the chief benefit may be a reduction in arbitrary or even discriminatory enforcement by police.<sup>141</sup> The ICC has no police force, so this concern about arbitrary police action is absent or at least greatly reduced.

Despite the lack of a police force, the concern over arbitrary or politically-driven prosecutions is very much present at the ICC. One of the United States' chief reservations about the ICC is the possibility for politically motivated prosecutions of American soldiers or officials.<sup>142</sup> The withdrawal of African states from the ICC based in part on the perception that the ICC prosecutor was discriminating against Africa—all of the ICC's cases are against African defendants—confirms that the worry over selective and arbitrary enforcement is alive.<sup>143</sup>

This concern about arbitrary enforcement by the ICC prosecution is overblown, at least on the basis of ambiguities and vagueness of laws. The Rome Statute, in fact, ties the hands of the ICC prosecutor far more than domestic jurisdictions do theirs. The prosecutor must get approval from the Pretrial Chamber to launch an investigation into a situation, to issue arrest warrants, and to confirm charges against defendants.<sup>144</sup> Moreover, as Luban has explained, “there is simply much less

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<sup>141</sup> In a variation of this argument, Zachary Price contends that lenity is best viewed as a means of ensuring transparency and political accountability in the expansion of criminal law. Lenity, he argues, forces legislators to be more transparent, makes for more specific and considered rules, and increases the chance of political resistance to overreaching. *Id.* at 911; see also William N. Eskridge, Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 YALE L.J. 331, 413–14 (1991) (arguing that lenity “serves the representation-reinforcing goal of protecting a relatively powerless group (people accused of committing crimes) and the normativist goal of injecting due process values of notice, fairness, and proportionality into the political process”). As discussed above, it is far from clear that ASP negotiations are more transparent than ICC decisions. Moreover, in the ICC context, unlike in domestic jurisdictions, political resistance to crime expansion is not in short supply. See discussion *supra* note 36 and accompanying text. States have a number of ways of expressing political resistance, including withdrawing from the court. See Wessel, *supra* note 59, at 382.

<sup>142</sup> John R. Bolton, *The Risks and Weaknesses of the International Criminal Court from America's Perspective*, 41 VA. J. INT'L L. 186, 189 (2000).

<sup>143</sup> See Sewell Chan & Marlise Simons, *South Africa to Withdraw from International Criminal Court*, N.Y. TIMES (Oct. 21, 2016), [https://www.nytimes.com/2016/10/22/world/africa/south-africa-international-criminal-court.html?\\_r=0](https://www.nytimes.com/2016/10/22/world/africa/south-africa-international-criminal-court.html?_r=0) (noting the argument of some African leaders that the ICC is “an instrument of modern colonialism”).

<sup>144</sup> Rome Statute, *supra* note 1, art. 15(3).

danger of government abuse in ICL then in domestic legal systems, because ICL arises from weak, decentralized institutions rather than strong, concentrated ones.”<sup>145</sup>

The risk of arbitrary enforcement by judges at the ICC is likewise low, but not nonexistent. As Jeffries has explained, with judges, “[t]he risk involved is that judicial particularization of the broad rubrics of common-law authority will be too ‘subjective,’ too closely grounded in the facts of the case at hand, insufficiently abstracted from the personal characteristics of the individual defendant.”<sup>146</sup> There is something to this concern in the international criminal context. In attempts to define international crimes, judges have sometimes blurred the line between describing the facts of the case at hand and the definition of the crime.<sup>147</sup>

Nevertheless, as Jeffries—and Herbert Packer before him—have argued, the judicial process places checks on judges that will constrain abuses, in particular “reasoned elaboration.”<sup>148</sup> Packer explained that “[t]he fact that courts operate in the open according to a system of reasoning that is subjected to the scrutiny of an interested audience, both professional and lay, militates against any but the most marginal invasions of the values represented by the principle of legality.”<sup>149</sup> This constraint is very much in operation at the ICC. Far more than domestic judges, at least at the trial level, ICC judges engage in lengthy discussion of their legal reasoning in published opinions that are available on the Internet. In ICL, it is hard to hide the ball on judicial overreaches.

Jeffries and Packer also note that the common law method of analogical reasoning, meaning “relat[ing] the particular bad thing that this man did to other bad things that have been treated as criminal in the past,” is a substantial impediment to

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<sup>145</sup> Luban, *supra* note 101, at 119.

<sup>146</sup> Jeffries, *supra* note 22, at 214.

<sup>147</sup> Caroline Davidson, *Explaining Inhumanity: The Use of Crime-Definition Experts at International Criminal Courts*, 48 VAND. J. TRANSNAT’L L. 359, 370 (2015) (discussing judges’ reliance on expert witness testimony about forced marriage and child soldiers at the Special Court for Sierra Leone and the ICC, respectively, to help define the crimes).

<sup>148</sup> Jeffries, *supra* note 22, at 214.

<sup>149</sup> *Id.* at 215 (quoting HERBERT PACKER, *THE LIMITS OF CRIMINAL SANCTION*, 88 (1968)).

arbitrary decision-making.<sup>150</sup> If it is taken literally, this argument is hard to reconcile with Article 22(2)'s bar on defining crimes by analogy. However, a weaker, and more sensible, notion of the bar on analogical reasoning—which merely prohibits judges from reading into a statute conduct that the legislature contemplated and chose not to include<sup>151</sup>—would still allow for analogical reasoning in interpretation of crimes.

*B. Potential Justifications for Strict Construction at the ICC*

As the discussion above indicates, some of the justifications for strict construction that apply in domestic jurisdictions, such as notice, and avoiding arbitrariness, apply more readily than one might think at the ICC. Others, such as separation of powers, eliciting legislative preference, and efficiency are quite weak. This Part explores additional justifications for strict construction at the ICC.

1. Promoting Human Rights, the Rule of Law, and the Perceived Legitimacy of the ICC

Arguably, the ICC's need to promote human rights through exemplary criminal trials justifies a fairly strict version of strict construction. Many have endorsed the expressive function of ICL.<sup>152</sup> Strict construction is arguably an important piece of this expressive function—to show the world that even with the worst of crimes, there must be strict adherence to legality principle. Larry May, for example, has argued that:

[o]ne of the most important limitations is that we respect the international rule of law and not merely prosecute on the basis of our heartfelt moral outrage in the face of mass atrocities . . . . If we limit our scope, we will have a better chance of defending international trials for the most egregious of human rights abuses.<sup>153</sup>

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<sup>150</sup> *Id.* at 214–15 (quoting HERBERT PACKER, *THE LIMITS OF CRIMINAL SANCTION*, 88 (1968)); see also Cass R. Sunstein, *On Analogical Reasoning*, 106 *HARV. L. REV.* 741 (1993) (defending analogical reasoning).

<sup>151</sup> See discussion *supra* note 28.

<sup>152</sup> MARK DRUMBL, *ATROCITY, PUNISHMENT AND INTERNATIONAL LAW* (2007).

<sup>153</sup> LARRY MAY, *AGGRESSION AND CRIMES AGAINST THE PEACE* 341 (2008) (advocating a “limited scope for international trials”).

If judges adhere strictly to the definitions set out in the Rome Statute and thus do not legislate from the bench, it may also help to legitimize the court and the court's decisions in the eyes of states.<sup>154</sup> The ICC, while on firmer footing than it was fifteen years ago, is not immune to attacks on its legitimacy.<sup>155</sup>

However, the expressive argument may cancel itself out. An extremely strict regime of strict construction, whereby little or no leeway is given to courts for interpretation or application of the law to new facts, may indeed be the most rigorous version of the legality principle in the realm of interpretation, but the expressive costs on other fronts may be quite high. Courts may be unduly limited in their abilities to express other human rights values—such as the condemnation of gross human rights or IHL violations—due to rigid interpretation. As former ICTY Judge Hunt stated in condemning the positivist trend of the Rome Statute: “[i]f it is to fulfill its goals efficiently, international criminal law must be given space to grow, rather than kept in a straightjacket imposed by a rigid code.”<sup>156</sup> This argument is strengthened by the uncertain status of the Article 22(2) interpretive rules in international human rights law and inconsistent state practice.<sup>157</sup>

Further, if judges are too strict on lenity—the requirement that ambiguity in crime definitions be construed in the defendant's favor—there is a risk of making matters worse from a legality and transparency perspective. Prosecutors will avoid arguably ambiguous provisions, which would be interpreted in the narrowest light possible, in favor of vague ones, rather than giving the court the opportunity to clarify the more specific but

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<sup>154</sup> See Robert Cryer, *The Ad Hoc Tribunals and the Law of Command Responsibility*, in *JUDICIAL CREATIVITY AT THE INTERNATIONAL CRIMINAL TRIBUNALS* 163 (Shane Darcy & Joseph Powderly eds., 2010) (“[T]he judges of the ICTY know very well that their ability to affect the law is related to the extent to which they can convince states that their interpretation of the law is acceptable.”). Lietzau, *supra* note 47, at 482 (decrying the preference of “many delegations [to the negotiations of the Rome Statute]” for “open-ended elements in order to expand the discretion of the Court” to “define the law and thus foster its evolution,” and arguing that “judicial activism of this nature conflicts with the most fundamental principles of criminal law”).

<sup>155</sup> MAY, *supra* note 153, at 335 (“In my view, the International Criminal Court needs to gain widespread acceptance, especially in non-Western countries, to best thwart the specter of political leaders in the dock continuously indicting the ICC itself instead of being forced to respond to the evidence of their putative misdeeds.”).

<sup>156</sup> Hunt, *supra* note 17, at 59.

<sup>157</sup> See discussion *supra* notes 32 and 33.

ambiguous law. This shift in charging practice may stymie the development of ICL and lead to retrograde definitions of crimes on issues where attitudes are shifting or have shifted since the drafting of the Rome Statute.

## 2. Protecting State Sovereignty

At the ICC, strict construction may be better understood as a doctrine that protects state sovereignty than as a human rights principle that protects individual defendants. Bill Schabas has argued that “[t]he drafters at Rome will justify the provision by invoking the *nullum crimen* rule and human rights norms, but the underlying reason may be far less noble, a technique to stymie dynamism in the future Court.”<sup>158</sup> The Rome Statute’s crime definitions demarcate where states were willing to give up sovereignty, at least if they fail to investigate and prosecute offenses, and where they were not.<sup>159</sup>

Although less noble than justifying strict construction based on human rights principles, the sovereignty justification for strict construction warrants attention for instrumental reasons. The ICC may gain legitimacy in the eyes of states by respecting the bounds of state consent.<sup>160</sup> This restraint may encourage participation of states, like the United States, concerned about their citizens appearing before the court for ever more broadly-defined crimes.<sup>161</sup> It also may keep the court from losing the support or even membership of countries that signed on initially,

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<sup>158</sup> Schabas, *supra* note 10, at 886–87 (“Indeed, we may well ask if the elaborate subject-matter jurisdiction provisions in the Rome Statute, not to mention that obsessive exercise in legal positivism known as the Elements of Crimes, as well as the entrenchment of the ‘strict construction’ principle in article 22(1) [sic], were reactions to the innovations of Judge Cassese and his colleagues in the interpretation of the ad hoc Tribunals Statutes.”).

<sup>159</sup> SADAT, *supra* note 36, at 182 (noting that in negotiations of the Rome Statute, the specter of cases against states’ own government officials loomed large, so states had an incentive to define crimes clearly so that states could understand the extent of the court’s jurisdiction); *see also* Broomhall, *supra* note 83, at 951; Schabas, *supra* note 10, at 886.

<sup>160</sup> Wessel, *supra* note 59, at 401.

<sup>161</sup> Ambiguity is one of the reasons the United States opposes the court. *Id.* at 400 (citing President William J. Clinton, Statement on Signature of the International Criminal Court Treaty (Dec. 31, 2000), <https://www.gpo.gov/fdsys/pkg/WCPD-2001-01-08/pdf/WCPD-2001-01-08-Pg4.pdf>) (noting that “U.S. civilian and military negotiators helped to ensure greater precision in the definitions of crimes”); *see also* Van Schaack, *supra* note 2, at 189, n.378 (noting that the vagueness of definitions one of U.S.’s chief concerns in not signing the Rome Statute).

but disagree with expansive interpretations of crimes. As Wessel has noted of international courts generally, there is a “strategic interplay created by the tension between the legitimacy international courts gain from deferring to state consent and the ‘normative bias favoring international completeness, predictability, coherence, and dynamism.’”<sup>162</sup>

Even where states may not have intended to give up sovereignty, ICL is premised on the notion that some crimes are grave enough to warrant bending traditional notions of sovereignty.<sup>163</sup> Even though the ICC’s jurisdiction is not based on universal jurisdiction, unless the case comes to the court through a Security Council referral, it still exclusively, or almost exclusively,<sup>164</sup> adjudicates universal jurisdiction crimes. Thus, too high a prioritization of sovereignty may be misplaced.

### 3. Bolstering the Gravity Requirement

Arguably, lenity and strict construction can be justified as supporting the ICC’s gravity requirement. As a matter of prosecutorial discretion and jurisdiction, the Rome Statute requires that the crimes before the court be of sufficient gravity.<sup>165</sup> Many crimes also contain independent gravity requirements.<sup>166</sup> For example, the war crimes provision encompasses only “grave” breaches of the Geneva Conventions or other “serious violations of the laws [of war.]”<sup>167</sup>

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<sup>162</sup> Wessel, *supra* note 59, at 382 (quoting Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT’L L. 247, 258 (2004)).

<sup>163</sup> The topic of sovereignty and international law is the subject of a great deal of international law and international relations scholarship. This Article does not attempt to canvass this vast literature, but merely seeks to flag the relationship between concerns about sovereignty and strict construction.

<sup>164</sup> Genocide, crimes against humanity, and war crimes are typically considered universal jurisdiction crimes. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 404 (1987); see also Michael P. Scharf, *Universal Jurisdiction and the Crime of Aggression*, 53 HARV. INT’L L.J. 357, 381, 389 (2012) (evaluating whether aggression is also a crime of universal jurisdiction and concluding that it arguably is, though domestic prosecutions for aggression may be problematic).

<sup>165</sup> See deGuzman, *supra* note 103, at 1405 (“[T]he concept of gravity provides a legal and normative basis for the Court’s jurisdiction as well as the exercise of that jurisdiction; and second, consideration of *relative* gravity is an important factor in the Prosecutor’s discretionary selection of situations and cases to pursue”).

<sup>166</sup> See, e.g., Rome Statute, *supra* note 1, arts. 6–8.

<sup>167</sup> Rome Statute, *supra* note 1, arts. 8(2)(a), 8(2)(c), 8(2)(e).

Strict construction may support the gravity requirement by way of statutory interpretation. In many instances, the broad interpretation of a provision is also the extension of a crime definition to a slightly less grave context. For example, in *Lubanga* the parties fought over whether the crime of “using” children “to participate actively in hostilities” included children in support roles, such as porters and lookouts. Using children in support roles, though harmful and reprehensible, arguably is not as bad as using them directly as fighters.<sup>168</sup> To the extent that it is equally bad, due to rampant sexual abuse of the children, for example, it arguably constitutes any number of other international crimes.<sup>169</sup> Strict construction would encourage the prosecution to select the more appropriate and, arguably, graver charges up front. Charging the defendant with the optimal charge may not always be easy given the difficulties prosecutors face collecting evidence in hostile areas and even zones of ongoing conflict, but it should be encouraged.

This gravity-enforcing notion of strict construction may put ICL on more solid footing from a philosophical perspective. The graver the crimes, the more justified the encroachment on state sovereignty.<sup>170</sup> The chief problem with this notion of strict construction as a means of bolstering the Rome Statute’s requirement is that it is an imperfect tool for guaranteeing gravity. For one, the prosecution may avoid the command of construing ambiguous crime definitions in favor of the defendant by picking a vague one instead. Moreover, it may not always be the case that the broad interpretation of a crime extends its reach to less grave conduct. To use again the *Lubanga* “use” of child soldiers example, arguably, a better understanding of children in armed conflict leads to the conclusion that front line

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<sup>168</sup> *But see* Prosecutor v. Lubanga, Case No. ICC-01/04-01/06-1229-AnxA, Decision on the Confirmation of Charges, Annex A: Written Submissions of the United Nations Special Representative of the Secretary-General on Children and Armed Conflict Submitted in Application of Rule 103 of the Rules of Procedure and Evidence (Jan. 29, 2007) (explaining that, when one better understands the realities on the ground, it becomes clear that using children in support roles is just as grave and should be punished as harshly as using children as fighters).

<sup>169</sup> One problem in *Lubanga* was that the prosecutor did not charge sexual violence crimes in the first place. *See* Susanna Greijer, *Thematic Prosecutions of Crimes Against Children*, in THEMATIC PROSECUTIONS OF INTERNATIONAL SEX CRIMES 137, 151 (Morten Bergsmo ed., 2012).

<sup>170</sup> *See generally* MAY, *supra* note 153, at 338 (arguing for “moral minimalism” in ICL).

and support roles are equally harmful, and liberal interpretation of the crime merely includes equally grave conduct within the reach of the criminal sanction.<sup>171</sup>

### III. TIMING IS EVERYTHING—OR IS IT?

If Article 22(2) is read in a way that reduces it to the guarantee that ambiguity in crime definitions be construed in favor of the defendant, which is the common law lenity canon, then timing is everything. Does it come into play as soon as judges find an ambiguity in the text of the Rome Statute, or only after they consult other sources of law or exhaust other tools of interpretation before finding an ambiguity?<sup>172</sup> As American scholars Price and Kahan have noted, “if lenity invariably comes in ‘last,’ it should essentially come in never.”<sup>173</sup> Commentators have noted the same dynamic in ICL: “[a]pplying, at a prior stage, a teleological approach that maximizes victim protection means that there is never an ambiguity left for strict construction to resolve, because all ambiguities have already been resolved *against* the accused.”<sup>174</sup>

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<sup>171</sup> The expert on child soldiers and ultimately the court in *Lubanga* emphasized that the use of child soldiers in support roles was as grave as their use in combat. See Davidson, *supra* note 147, at 398–00.

<sup>172</sup> Cf. Price, *supra* note 25, at 890 (“The key question in applying lenity, therefore, is what rank the rule holds relative to other interpretive conventions. If multiple interpretive resources—say, plain text and legislative history—were given equal rank to each other and to lenity, then the rule of lenity would have significant implications. In that case, if the text supported a broad view and the legislative history a narrower one, lenity would compel adoption of the latter. On the other hand, if other conventions came before lenity, they would often resolve ambiguities before lenity took effect.”); Kahan, *supra* note 25, at 384–85 (“The ‘meaning’ of a statute is a function not just of the signification of words to English-speaking people generally but of the interpretive conventions shared by members of the legal culture in particular. Statutory language is ‘ambiguous’ when these conventions conflict or point in different directions. Ambiguity is either avoided or resolved by giving certain of these conventions priority over others.”).

<sup>173</sup> Price, *supra* note 25, at 890 (quoting Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 384–85).

<sup>174</sup> See Robinson, *Identity Crisis*, *supra* note 15, at 934; Perrin, *supra* note 15, at 377 (“Due to the relative exhaustiveness of international interpretive doctrines, the maxim [*in dubio pro reo*] which is a fundamental interpretive principle in many national systems was essentially eviscerated, demonstrating the repercussions of relying on public international law interpretive canons to resolve international criminal law issues.”).

If, however, the guarantee of strict construction and the ban on analogy have meaning independent of lenity, timing may be less critical. Even where lenity is effectively read out of the statute through interpretive techniques, the guarantee of strict construction and the ban on analogy may help to cabin judicial overreaching.

Commentators on strict construction in ICL have largely fallen into one of two camps. One camp puts lenity last and endorses the framework set out by the European Court of Human Rights ("ECtHR"). This ECtHR framework views strict construction as a rather flexible notion that boils down to whether the broad interpretation or judicial "adaptation" of a crime was foreseeable and consistent with the essence of the offense.<sup>175</sup> The other camp embraces a positive law approach to ICL interpretation and advocates a more robust version of strict construction wherein ambiguity is recognized sooner, without resort to nebulous principles of international and domestic criminal law or the tools of interpretation of the Vienna Convention, and is resolved in favor of the accused.<sup>176</sup> This Part critiques the arguments of both camps and offers a more nuanced look at the potential ordering and meanings of lenity.

This Part concludes that a natural and logical reading of Article 21 indeed puts the Article 22(2) guarantee of lenity last, which means that it is unlikely to play much of a role in interpreting the Rome Statute. Part IV explains why putting

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<sup>175</sup> Shahabuddeen, *supra* note 10; CASSESE, *supra* note 7; Sadat, *supra* note 14, at 763; Van Schaack, *supra* note 2. Although Leena Grover also set out this argument in her article on interpreting the Rome Statute, it was unclear whether she endorsed it. Grover, *A Call to Arms*, *supra* note 14, at 554. Her book on the Rome Statute makes clear that she believes the ECtHR formula's notion that "the 'essence' of the offence . . . is perhaps too malleable for criminal law and therefore at risk of being abused," and potentially conflicts with the ban on extending crimes by analogy. GROVER, INTERPRETING CRIMES, *supra* note 14, at 173-74.

<sup>176</sup> See Jacobs, *supra* note 18, at 23. Jacobs argues for the most rigorous positive law regime, but others are sympathetic to the problem of broad construction of ICL in the name of the object and purpose of fighting impunity; see also Sluiter, *supra* note 15, at 257 (decrying tribunal's tendency to invoke "fighting impunity" as something like a canon of statutory construction to the detriment of the rule of lenity). Robinson started the conversation by noting the illiberal tendencies of ICL to construe crimes expansively, at the expense of the legality principle, in order to fight impunity, but in more recent scholarship seems not to embrace a strict version of lenity. Compare Robinson, *Identity Crisis*, *supra* note 15, with Robinson, *ICL as Justice*, *supra* note 107, at 700-01 (arguing that the most lenient interpretation of the law is not necessarily the best and noting the concern that the ICC become an "expensive acquittal machine").

lenity last does not render Article 22(2) meaningless. Giving independent meaning to strict construction and the bar on analogy may help to curtail overly aggressive judicial extensions of the law not only where the law is ambiguous, as in, having more than one meaning but also, importantly, where it is vague, as in, leaving one to guess at its meaning.<sup>177</sup>

A. *Lenity First: Textual Ambiguity in Rome Statute—or Rome Documents—Alone then Lenity?*

If legality were prioritized above all else, Article 22(2) arguably would demand that any ambiguity on the face of the Rome Statute, or less restrictively, on the face of the Rome Statute and other ICC documents, such as the Elements of Crimes, should be resolved in favor of the defendant.<sup>178</sup> This approach seems to ensure strict fidelity to the legality principle, since it excludes judicial recourse to uncodified principles of international law and general principles of domestic law to eliminate ambiguities. Reliance on these sources, which are at best not codified by the ICC, and at worst not codified anywhere, seems to be the most problematic aspect of Article 21 from a legality perspective. However, these legality gains come at too high a cost.

Professor Dov Jacobs supports a positivist conception of ICL and a stricter adherence to the legality principle in interpreting the crimes of the Rome Statute that would support this ordering of lenity—or perhaps the next one, which also permits consultation of the Elements of Crimes and Rules of Procedure and Evidence (“RPE”).<sup>179</sup> Using what he calls a “functional approach”—under the “quantum theory of positivism”—to interpret the Rome Statute, he advocates interpreting the Rome Statute differently depending on the institutional context in which a provision is used<sup>180</sup>:

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<sup>177</sup> See *supra* note 20.

<sup>178</sup> Grover likewise seems to suggest that if the court adheres strictly to the principle of legality, this is what strict construction means. Grover, *A Call to Arms*, *supra* note 14, at 557 (“If legality is recognized as the guiding principle for interpreting crimes in the Court’s jurisdiction, it would require the textual approach to prevail over competing intent as well as object and purpose based approaches to applying Article 31 of the Vienna Convention.”).

<sup>179</sup> Jacobs, *supra* note 18, at 2.

<sup>180</sup> *Id.* at 3–4. Professor Sadat appears to agree with reading the Rome Statute differently depending on the subject matter of the particular provision. Leila Nadya

[W]hen a Judge applies the ICC Statute in criminal proceedings, for example, he is applying it *qua* treaty, but applying it as the internal instrument for the functioning of the Court, which therefore does not automatically warrant, as usually claimed, the reference to the Vienna Convention as providing the rules of interpretation.<sup>181</sup>

In sum, this means keeping Vienna out of Rome, at least when interpreting the ICC's provisions dealing with crimes, and giving strict construction some teeth.<sup>182</sup>

Given that the Rome Statute includes significant detail on many crimes and a section on general principles and defenses, this approach is more possible at the ICC than it would have been at previous international tribunals.<sup>183</sup> It also squares with the plain text of Article 22(2), as well as the states parties' apparent desire to avoid the freewheeling judicial lawmaking of the *ad hoc* tribunals and the Rome Statute's purported commitment to making the ICC a model human rights institution.

However, this approach to reading the Rome Statute is hard to reconcile with textualism, which, after all, looks at the text of a statute in the context of other provisions of the statute, since it would make other provisions of the Rome Statute nonsensical. Why enumerate sources of law in Article 21 if judges are only permitted to base their interpretation of the statute on the statute itself? It likewise appears to contravene Article 9, which provides that the "[e]lements of Crimes shall assist the Court in the interpretation *and application* of articles 6 [genocide], 7 [crimes against humanity] and 8 [war crimes]."<sup>184</sup> Finally, some of the crime definitions in fact incorporate by reference other

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Sadat, *Legacy of the ICTY: The International Criminal Court*, 37 NEW ENG. L. REV. 1073, 1078 (2003) ("[T]eleological methods should be applied to constitutive aspects and provisions representing foundational principles of the Rome Statute, while canons of strict construction are the appropriate guide to interpreting the 'legislation within the Statute,'—that is, the definitions of crimes, which should be narrowly interpreted in accordance with the legality principle and article 22(2)'s command that definitions of crimes shall be strictly construed and not extended by analogy.").

<sup>181</sup> Jacobs, *supra* note 18, at 38 (arguing that the institutional context in which the document will be applied is more important than the manner in which it was created).

<sup>182</sup> Like Judge Van den Wyngaert, he appears to believe that strict construction applies not only to the articles defining the substantive crimes, but also to the provisions dealing with forms of liability. Jacobs, *supra* note 18, at 15–16.

<sup>183</sup> See discussion *infra* note 43.

<sup>184</sup> Rome Statute, *supra* note 1, art. 9.

fields of international law, so, at least for those provisions, a strict “Rome Statute only” approach to lenity contravenes the intent of states parties.<sup>185</sup>

Further, the costs of this strict version of strict construction may simply be too high in relation to the relatively modest benefits. Although the ICC should be a model human rights-respecting criminal institution, it is not clear that it needs to be the world’s leader on lenity, which, after all, appears not to rise to the level of a human right recognized by customary international law.<sup>186</sup> Where lenity exists chiefly to protect state sovereignty, not defendants’ rights, we may not wish to prioritize it so starkly over other legitimate goals, including human rights enforcement.<sup>187</sup>

This very strict version of lenity seems a prime example of the “danger [of courts] over-correct[ing]” in response to the liberal critique of ICL.<sup>188</sup> As Professor Darryl Robinson has noted, whereas the *ad hoc* tribunals were accused of being “conviction machines,” the ICC “is much more likely to be accused of being a very expensive ‘acquittal machine.’”<sup>189</sup>

This lenity-first approach also may prove unworkable despite the relatively detailed definitions set out in the Rome Statute. As Jolly and Sadat have noted, strict textualism is harder in ICL than in domestic jurisdictions. The textualist penchant for pulling out the dictionary gets rather difficult with a treaty with official translations in six different languages.<sup>190</sup> A resort to plain language is likely to lead to a great deal of ambiguity, and a

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<sup>185</sup> See, e.g., *id.* at art. 8(2) (“For the purpose of this Statute, war crimes means: (a) *Grave breaches of the Geneva Conventions* of 12 August 1949, namely, any of the following acts against persons or property protected *under the provisions of the relevant Geneva Convention*: . . . (b) Other serious violations of the laws and customs applicable in international armed conflict, *within the established framework of international law* . . .”) (emphasis added).

<sup>186</sup> *Id.* at art. 8(2)(a).

<sup>187</sup> GALLANT, *supra* note 4, at 359.

<sup>188</sup> See Robinson, *ICL as Justice*, *supra* note 107, at 700.

<sup>189</sup> See *id.*

<sup>190</sup> Sadat, *supra* note 14, at 765 (“While resort to the dictionary is sometimes useful, and was a technique employed by the judges in *Lubanga* regarding the meaning of ‘enlistment’ and ‘conscriptio[n]’, this is a methodology to be sparingly employed given that a text like the Rome Statute is ‘authentic’ or official in six languages and is a highly complex instrument with ancillary texts like the Rules of Procedure and Evidence and Elements of Crimes that complete its meaning.”).

bloated role for the lenity canon, particularly when compared to domestic jurisdictions, which, if they recognize it at all, invoke it inconsistently.<sup>191</sup>

Importantly, this lenity-first approach to Article 22(2) may make for unnecessary divergences between ICL and IHL, and to the detriment of both bodies of law. The Rome Statute would be interpreted in a vacuum with no regard to IHL, international law generally, or general principles of criminal law other than those explicitly provided for in the statute. This may make for a rather ill-informed ICL, which is unfair to defendants, particularly military commanders who are likely to rely on military training in IHL.

Putting lenity first also may undermine enforcement of IHL.<sup>192</sup> The outcry over the ICTY trial chamber's decision on targeting in the *Gotovina* decision seems to be an apt example of problematic ICL interpretation with insufficient regard to established principles of IHL.<sup>193</sup> In *Gotovina*, "the Trial Chamber found that all impact sites located more than 200 metres from a target it deemed legitimate served as evidence of an unlawful artillery attack."<sup>194</sup> Commentators complained that the trial chamber's overly strict test had no basis in IHL and would lead

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<sup>191</sup> See *supra* note 180 and accompanying text.

<sup>192</sup> The International Committee of the Red Cross, for example, has supported criminal sanctions for violations of IHL in order to increase deterrence. It believes that, due to the criminalization of IHL norms, "states will make a greater effort to teach and integrate the law effectively within state institutions and civil society, and will prosecute and punish the perpetrators of any IHL violations." Patrick Zahnd, *How the International Criminal Court Should Help Implement International Humanitarian Law*, in INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT 43 (Dinah Shelton ed., 2000) (noting that the threat of the ICC stepping in if a state fails to investigate or punish is additional motivation).

<sup>193</sup> See, e.g., Laurie R. Blank, *Operational Law Experts Roundtable on the Gotovina Judgment: Military Operations, Battlefield Reality and the Judgment's Impact on Effective Implementation and Enforcement of International Humanitarian Law*, in EMORY PUB. L. & LEG. THEORY RES. PAPER SERIES, No. 12-186, 2 (Jan. 28, 2012), <https://ssrn.com/abstract=1994414>; see also Gary Solis, *The Gotovina Acquittal: A Sound Appellate Course Correction*, 215 MIL. L. REV. 78, 82 (2013) ("The Gotovina-Markac trial judgment rested heavily on a flawed standard of artillery accuracy, which the AC [Appeals Chamber] unanimously found to have no support in either the record of trial or the real world of armed conflict.").

<sup>194</sup> Prosecutor v. Gotovina, Case No. IT-06-90-A, Judgment, 25–67 (Nov. 16, 2012) (discussing and rejecting the Trial Chamber's 200 meter standard).

military commanders to disregard the teachings of ICL or find ways around the test that would wind up incurring more civilian casualties.<sup>195</sup>

Interpreted in the strictest, Rome Statute only sense, the lenity-first version of Article 22(2) likewise upends a great deal of work, including in the elaboration of the Elements of Crimes. As Leena Grover has noted, the Elements of Crimes document is a helpful interpretive tool that serves as a “‘decoder’ of archaic language in the Rome Statute,” and also fills in details where the provisions of the Rome Statute are vague or ambiguous.<sup>196</sup> The legality gain of permitting judges to analyze the text of only the Rome Statute, rather than the Rome Statute and the Elements of Crimes, before turning to lenity, seems minimal. Although the Elements of Crimes was negotiated after the Rome Statute, the states parties agreed to its creation in the Rome Statute, it was the product of negotiations among states parties, and it too only applies to defendants prosecuted after its creation.<sup>197</sup>

*B. Ambiguity After All of Article 21 Sources then Lenity?*

An alternative Article 21 focused ordering would permit judges to interpret the Rome Statute using all of the sources set out in Article 21 to guide them before turning to the lenity canon. Judges therefore could draw on the Elements of Crimes and, if relevant, RPE, as well as general principles of international law or those derived from national systems, to help them resolve ambiguities in ICC law. This version of lenity represents a less rigorous legality regime. It deemphasizes the lenity canon because judges have more tools of interpretation at their disposal before finding an ambiguity. However, this ordering is a more sensible reading of Article 22 in light of Article 21 than the others above. Why permit the judges to consult those other sources of law, if not to help them to interpret and produce more refined definitions of the crimes?

One difficulty with this approach is identifying just what strict construction, analogizing, or ambiguity means in a world of many possibly contradictory and unwritten sources of law.

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<sup>195</sup> Blank, *supra* note 193, at 3–7.

<sup>196</sup> Grover, *A Call to Arms*, *supra* note 14, at 576.

<sup>197</sup> The Elements of Crimes was completed on June 30, 2000. See Philippe Kirsch & Valerie Oosterveld, *The Preparatory Commission for the International Criminal Court*, 25 *FORDHAM INT'L L.J.* 563, 564 (2001).

Judges have shown themselves to be rather keen to declare that customary international law has an answer to questions based on dubious evidence to avoid a finding of an ambiguity.<sup>198</sup> The same difficulty presents itself with putting lenity “dead last.”<sup>199</sup>

C. *Dead Last—All of Article 21 Plus Canons of Construction, Including the Vienna Convention then Lenity?*

The approach described above gives a greater role to lenity than the dead last approach, which puts the lenity canon after all of the Article 21 sources and canons of interpretation, including the tools of the Vienna Convention. This dead last approach prevailed at the ICTY<sup>200</sup> and appears to be the dominant approach at the ICC.<sup>201</sup>

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<sup>198</sup> See generally Joseph Powderly, *Distinguishing Creativity from Activism: International Criminal Law and the ‘Legitimacy’ of Judicial Development of the Law*, in ASHGATE RESEARCH COMPANION TO INTERNATIONAL CRIMINAL LAW (2013).

<sup>199</sup> Cf. Price, *supra* note 25, at 891 (2004) (using the term “dead last” to describe invocation of the lenity canon only after exhausting all other tools of statutory interpretation).

<sup>200</sup> This dead last vision of strict construction was the prevailing one at the ICTY. See *Prosecutor v. Hadžihasanovic*, Case No. IT-01-47-AR72, Separate and Partially Dissenting Opinion of Judge Hunt: Command Responsibility Appeal, (Int'l Crim. Trib. for the Former Yugoslavia July 16, 2003); see also *Prosecutor v. Delalic*, Case No. IT-96-21-T, Judgement, ¶ 413 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998) (stating that “[t]he effect of strict construction of the provisions of a criminal statute is that where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning *which the canons of construction fail to solve*, the benefit of the doubt should be given to the subject and against the legislature which has failed to explain itself” but nevertheless choosing the broad construction) (emphasis added); *Prosecutor v. Milutinovic*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction—Joint Criminal Enterprise, ¶ 27 (Int'l Crim. Trib. for the Former Yugoslavia May 21, 2003) (noting the defendant's argument that “in case of doubt as to the content or meaning of a rule, the interpretation most favourable to the accused should be adopted” but finding no ambiguity in the statute after consulting the language of the ICTY Statute, Nuremberg and ICTY caselaw, the objects and purposes of the statute, and legislative history); *Prosecutor v. Hadžihasanovic*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ¶ 12 (Int'l Crim. Trib. for the Former Yugoslavia July 16, 2003) (July 16, 2003) (stating, in response to the defendant's argument that “[u]ncertainty in the law must be interpreted in favour of the accused,” that, “As I understand the injunctions of the maxim *in dubio pro reo* and of the associated principle of strict construction in criminal proceedings, those injunctions operate on the result produced by a particular method of interpretation but do not necessarily control the selection of the method”).

<sup>201</sup> See discussion *infra* note 205. Some commentators take it as a given that strict construction comes last. See, e.g., Broomhall, *supra* note 83, at 961 (“[L]ike the

In *Katanga*, the court made it clear that, in its view, strict construction was the absolute last resort.<sup>202</sup> It acknowledged that under Article 22, the court may not define new crimes by analogy or extend the crimes to situations the drafters of the Rome Statute did not intend.<sup>203</sup> Espousing a positivist, *jura novit curia*-style vision of the law, it noted: “The primary task of the bench in criminal cases is the application and interpretation of the law but, under no circumstances, creation of the law, since the sole purpose of the bench’s interpretative activity is to impart meaning to *existing* law.”<sup>204</sup> This seems like a reasonably strict version of strict construction. However, the court immediately cabined this language, stating that Article 22(2)’s guarantee of strict construction, or as it called it:

*in dubio pro reo* . . . is applicable only ‘in case of ambiguity’ and clearly should be relied on only after an unsuccessful attempt at interpretation effected in good faith and in accordance with the General Rule of the Vienna Convention or in accordance with article 32 of the Convention.<sup>205</sup>

The most problematic aspect of relying on the Vienna Convention is its acceptance of teleological interpretation, or at least the version of it many judges have deployed to justify expansive readings of crimes. As noted above, international judges’ reliance on the object and purpose analysis to justify expansive interpretation is controversial. Part IV.A.2 proposes a way to cabin the dangers of teleological interpretation.

*D. Backstop Rule of Foreseeability and Consistency with the “Essence” of the Offense*

Many ICL commentators argue that strict legality is neither feasible nor desirable for ICL, which in turn permits a less strict notion of strict construction.<sup>206</sup> According to this view, what is

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rule of strict construction, analogy is an interpretative technique used as the last in a series of steps.”)

<sup>202</sup> Prosecutor v. *Katanga*, Case No. ICC-01/04-01/07, Judgement Pursuant to Article 74 of the Statute, ¶ 50–57 (Mar. 7, 2014).

<sup>203</sup> *Id.* ¶ 52.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* ¶ 53.

<sup>206</sup> Sadat, *supra* note 14, at 763 (“[I]t is not possible (or appropriate) to ‘elevate strict construction over every other goal of the ICC Statute, including substantive justice’ ”); see also Van Schaack, *supra* note 2, at 178–80; Luban, *supra* note 101, at 581.

required by the principle of legality is that a judicial interpretation is “reasonably foreseeable” and consistent with the “essence” of an offence.<sup>207</sup> This formulation seems to depend less on the ordering of the lenity canon for its weakness, since it appears to presume that lenity—construing ambiguities in favor of defendants—rarely comes into play due to the many interpretive techniques at a judge’s disposal. This Part assesses this formula and concludes that, though it is commendable for trying to strike a balance between reality and theory, it ultimately requires refinement.

Two particular cases in which the European Court of Human Rights heard claims relating to the United Kingdom’s elimination of its marital defense to rape figure prominently in this notion of strict construction.<sup>208</sup> In these cases, the ECtHR held that the UK’s judicial elimination of the marriage defense to rape did not violate *nullum crimen sine lege*.<sup>209</sup> The court explained that *nullum crimen sine lege* “cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is *consistent with the essence of the offence* and could reasonably be *foreseen*.”<sup>210</sup> So, the

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<sup>207</sup> Sadat, *supra* note 14, at 763 (quoting *SW v. United Kingdom*, 21 Eur. Ct. H.R. (ser. A) 363, ¶ 36, 49 (1995)); *see also* Mohamed Shahabuddeen, *Policy-Oriented Law in the International Criminal Tribunal for the Former Yugoslavia*, in *MAN’S INHUMANITY TO MAN: ESSAYS IN INTERNATIONAL LAW IN HONOUR OF ANTONIO CASSESE* 889 (2003) (defending a policy-oriented approach and advocating the same formula).

<sup>208</sup> *SW v. United Kingdom*, 21 Eur. Ct. H.R. 363, (ser. A) ¶ 36, 49 (1995); *C.R. v. the United Kingdom*, 1995 Eur. Ct. H.R. 51, ¶ 42 (1995).

<sup>209</sup> Van Schaack also embraces the ECtHR foreseeability formula in her discussion of the broader concept of *nullum crimen sine lege*. She explains that although international courts from Nuremberg to The Hague have engaged in common law-style law making, they nevertheless adhered to the crux of the legality principle—foreseeability. Van Schaack, *supra* note 2, at 178–180. Still, she contends ICL has reached a more mature stage and thus should begin to respect a more robust conception of legality. *Id.* at 192. Gallant also endorses this foreseeability test. He states, of the ICC, “[p]roblems of legality in crime definition should arise only if crimes are not sufficiently clearly defined (do not meet *lex certa*) or if the court interprets them in a broad and unforeseeable manner, in violation of its statute.” *See* GALLANT, *supra* note 4, at 336, 362–66.

<sup>210</sup> *C.R. v. United Kingdom*, 335-C Eur. Ct. H.R. ¶ 34 (1995); *see also* Shahabuddeen, *supra* note 10, at 1012, 1017 (emphasis added) (“[A]s was indicated by the European Court of Human Rights in *C.R. v the United Kingdom*, the principle of *nullum crimen sine lege* does not bar development of the law through clarification or interpretation ‘provided that the resultant development is consistent with the

argument goes, ambiguities in the law can be resolved through interpretation, rather than automatically choosing the interpretation that favors the accused.

Although “[t]he Rome Statute does not expressly admit the qualification of foreseeability,”<sup>211</sup> it is possible that the court will read strict construction this way. Judges of the ICTY and the Special Court of Sierra Leone (“SCSL”) embraced a similar foreseeability formula for *nullum crimen sine lege* and strict construction.<sup>212</sup>

This foreseeability and consistency rule has its allure. For one, it has the imprimatur of the ECtHR, which would allow the ICC to claim adherence to international human rights principles in construing the reach of Article 22(2). Second, it seems to recognize that there is something to strict construction beyond lenity, such that even if the ICC used the sources of law and techniques of interpretation that its statute and this Article suggest it ought to, there would remain some constraint on judicial overreaching.

It bears noting though that the ECtHR formula derives from a very different institutional context. The ECtHR hears claims from individuals who argue that a state has violated their rights under the European Convention of Human Rights (“European Convention”). Much like a U.S. federal court examining a state court’s interpretation of state law, the ECtHR is very deferential to national courts’ interpretations of their own laws.<sup>213</sup>

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essence of the offence and could reasonably be foreseen.’ So, it is the essence of the offence—or its ‘very essence’—that governs.”); CASSESE, *supra* note 7, at 150.

<sup>211</sup> Grover, *A Call to Arms*, *supra* note 14, at 555.

<sup>212</sup> See *supra* notes 10 and 11 (discussing ICTY judges’ embracing of this foreseeability formula); Prosecutor v. Norman, Case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), ¶ 25 (Spec. Ct. for Sierra Leone May 31, 2004) (“‘In interpreting the principle *nullum crimen sine lege*, it is critical to determine whether the underlying conduct at the time of its commission was punishable. The emphasis on conduct, rather than on the specific description of the offence in substantive criminal law, is of primary relevance.’ In other words it must be ‘foreseeable and accessible to a possible perpetrator that his concrete conduct was punishable.’”) (citing Prosecutor v. Hadžihasanović, Case No. IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, ¶ 62 (Nov. 12, 2002)).

<sup>213</sup> C.R. v. United Kingdom, 335-C Eur. Ct. H.R. ¶ 34 (1995). See also Theodor Meron, Editorial Comment, *Revival of Customary International Law*, 99 AM. J. INT’L L. 817, 826 (2005).

The European Convention, which the ECtHR is charged with interpreting, and the Rome Statute articulate radically different positions on the role of legality in the context of grave international crimes. The European Convention has an explicit carve-out for crimes based on the general principles of civilized nations that was designed to dispense with *nullum crimen sine lege* arguments in the context of serious international crimes.<sup>214</sup> The Rome Statute, which deals only with serious international crimes,<sup>215</sup> has departed from this compromised view of legality in the context of international crimes through Article 22's guarantee of *nullum crimen sine lege* and strict construction.<sup>216</sup>

Reflecting this institutional context, the ECtHR's test is insufficiently rigorous. At first blush, foreseeability seems reasonably clear: Was it foreseeable that the court read the Rome Statute so as to include the defendant's conduct? However, it raises the question, foreseeable to whom? To the defendant? To a defendant with a good international criminal defense lawyer on retainer? To states? Moreover, commentators have questioned, particularly in light of international judges' track record of expansive interpretation, whether the foreseeability test really "exclude[s] anything."<sup>217</sup>

The second part of the test, which asks whether the interpretation is consistent with the "essence of the offense,"<sup>218</sup> is even more problematic. International crimes are hard to reduce to their essence, at least without reducing them all to the same crime—as crimes that offend all humanity or crimes that offend the international community. If one tries to distill each of the

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<sup>214</sup> See GALLANT, *supra* note 4, at 203. FLETCHER, *supra* note 49, at 164. Article 7 of the European Convention provides: "No punishment without law 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. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. 2. 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." European Convention on Human Rights, art. 7 Nov. 4, 1950, 213 U.N.T.S. 221 (emphasis added).

<sup>215</sup> *But see* deGuzman, *supra* note 103, at 1408 (questioning whether all international crimes are grave).

<sup>216</sup> See *supra* Part I.A.

<sup>217</sup> Darryl Robinson, *Legality and Our Contradictory Commitments: Some Thoughts About How We Think*, 103 AM. SOC. INT'L L. 104, 104 (2009) (quoted in GROVER, INTERPRETING CRIMES, *supra* note 14, at 171).

<sup>218</sup> See discussion *supra* note 210.

categories of crimes to its essence, problems persist. For example, scholars and courts have thus far been unable to come up with a satisfying core conception or unifying theory of crimes against humanity.<sup>219</sup> Perhaps genocide is some serious, harmful act done with the intent to destroy in whole or in part an enumerated group, but this “essence” leaves open critical questions about the boundaries of the harmful acts, and *mens rea* requirements across groups of perpetrators who play varying roles. Perhaps war crimes could be reduced to serious violations of the laws of war? Again, this approach seems to eviscerate the advancements in ICL of the last twenty-five years. If this reductive, essentialist approach is all that strict construction demands, it seems a significant step backwards in the development of ICL. Like foreseeability, the “essence” test seems to permit just about anything.

For these reasons, this Article proposes another formula for strict construction or, viewed differently, an alternative to strict construction when the lenity canon is inevitably read out of the statute through interpretation.

#### IV. A BETTER CONSTRUCTION OF STRICT CONSTRUCTION

This Part offers a reading of Article 22(2) that is both meaningful and realistic in the context of ICL. In broad terms, it agrees with other commentators that Article 22(2) is an admonition to judges to exercise restraint in interpreting crimes and making law<sup>220</sup> which, like it or not, they will inevitably do.

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<sup>219</sup> See Margaret M. deGuzman, *The Elusive Essence of Crimes Against Humanity*, in FOR THE SAKE OF PRESENT AND FUTURE GENERATIONS: ESSAYS ON INTERNATIONAL LAW, CRIME AND JUSTICE IN HONOUR OF ROGER S. CLARK 1, 12 (Suzannah Linton et al. eds., Brill/Nijhoff, 2015) (noting a tension in any attempt to define crimes against humanity between the goal of distinguishing crimes against humanity from domestic crimes and the goal of capturing all conduct “shock[ing] to humanity’s conscience”). See also Leila Nadya Sadat, *Crimes Against Humanity in the Modern Age*, 107 AM. J. INT’L L. 334, 334 (2013) (noting the “absence of a consistent definition and uniform interpretation of crimes against humanity has made it difficult to establish the theory underlying such crimes and to prosecute them in particular cases,” and noting that Pretrial Chambers of the ICC have reached varying conclusions on the state or organizational policy requirement).

<sup>220</sup> See GROVER, INTERPRETING CRIMES, *supra* note 14, at 202 (arguing that “the rule of strict construction should require judges of the Court to ‘interpret crimes in the Statute in a moderate manner’, meaning that they are interpreting and applying existing definitions of crimes rather than crafting new ones and favouring the suspect or accused when the intent of the provision as it relates to the interpretive issue before the Court is ‘left in doubt’”); Shahabuddeen, *supra* note 10, at 1017

This Article refines this prescription to tailor it to the legitimate aims of strict construction. Borrowing from Professor John Jeffries's work on lenity and vagueness in statutory construction, it argues that judges must: avoid unfair surprise to defendants; avoid extending crimes to conduct that states parties anticipated and intended not to cover; make—or interpret—law in a way that leads to greater clarity in the law; and, finally, avoid case-specific lawmaking.<sup>221</sup>

This Part then examines the application of these guidelines in the context of the Rome Statute's idiosyncratic blend of statutory text that is sometimes specific and sometimes vague and contains references to loose sources of law such as international law and general principles derived from national systems. It also addresses statutory interpretation in the face of "constructive ambiguity," language that was left ambiguous by design due to an inability of drafters to reach an agreement on any one meaning.<sup>222</sup>

In *Legality, Vagueness, and the Construction of Penal Statutes*, Professor John Jeffries rejects lenity and strict construction because he finds the underlying justification of notice and separation of powers unconvincing in the domestic context. He argues that when judges face ambiguity, rather than picking the most lenient interpretation, for which he sees no justification in domestic criminal law, judges should pick the best interpretation.<sup>223</sup> This Article does not go so far as to reject

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("Licence is not appropriate; a useful brake is supplied by the important principle of *nullum crimen sine lege* and associated doctrines. It is difficult to exaggerate the importance of that principle. But perhaps it should not be exaggerated."); Joseph Powderly, *The Rome Statute and the Attempted Corseting of the Interpretive Judicial Function: Reflections on Sources of Law and Interpretive Techniques*, in *THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT* 444, 498 (2015) (arguing that the drafters of the Rome Statute intended Article 22 to constrain judges, but that it should not preclude reasonable interpretation and development of the law).

<sup>221</sup> Jeffries's recommendations are offered as constraints on judges that remain even without lenity. Jeffries, *supra* note 22, at 195.

<sup>222</sup> See discussion *supra* notes 52, 130.

<sup>223</sup> Jeffries, *supra* note 22, at 221 ("Sometimes statutory ambiguity presents an essentially binary choice. The law is either A or B; whichever is chosen, future coverage is fairly clear. In such a case, strict construction would dictate exculpation, and this would be true even though the actor's conduct was both dangerous and reprehensible, even though there was no prospect of unfair surprise, and even though the result left an irrational gap in the law. In my view, this approach does not make sense. Faced with this kind of binary choice—where neither outcome is precluded by express or implied legislative decision, where there is no threat of

lenity. It merely acknowledges, as did Judge Shahabuddeen, that few ambiguities are likely to remain after judges employ the various interpretive devices at their disposal. ICC judges are unlikely to be faced with a clear “binary choice” between two interpretations of a crime standing in equipoise<sup>224</sup> or, perhaps, judges will seldom recognize equipoise. Given this reality, these interpretive guidelines may offer a better way of reading strict construction than the reductionist ECtHR formula discussed above.

In lieu of picking the most lenient interpretation of a statute, Jeffries advocates interpreting criminal statutes by considering the merits of the particular *issue*, not the particular *case*, at hand,<sup>225</sup> subject to “three generalized constraints”: courts “should avoid usurpation of legislative authority,” courts “should avoid interpretations that threaten unfair surprise,” and, finally, judges “confronting ambiguity in a penal statute might usefully ask whether a proposed resolution makes the law more or less certain.”<sup>226</sup>

This Part advocates a variation of this interpretive mandate tailored to the justifications for strict construction at the ICC. Judges should choose the best interpretation of the statute in light of the issue at hand, subject to the certain constraints designed to address the valid objectives of strict construction in the ICC context. First, judges should avoid usurpations of state authority. This inquiry looks to whether states have delegated lawmaking authority and reconceives the objects and purposes inquiry. Second, judges should avoid unfair surprise to defendants. This constraint looks at the strength of the support for a particular interpretation. Where the statute is ambiguous or vague, the absence of a preexisting international norm criminalizing the conduct creates a rebuttable presumption of unfair surprise. Finally, judges should attempt to clarify ICL and international law generally. In most instances, this will

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[unfair] surprise, and where neither construction embraces an open-ended commitment to ad hoc criminalization—a judge should do whatever seems right.”).

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* (“[I]n the criminal law, this urge toward particularity should be avoided. In this context, judicial lawmaking is best where it is not fact-specific. The trouble with fact-specific innovation is that it invites further innovation on other facts; it implies an open-ended, flexible, progressive character inimical to the appropriate rule-of-law constraints on the use of penal sanctions.”).

<sup>226</sup> *Id.* at 220–21.

mean reading ICL consistently with IHL and international human rights. However, there will be instances where a narrower reading of ICL is warranted, such as where states intended to exclude the conduct from the crime or where there is a risk of unfair surprise. In these instances, ICC judges may clarify the law through transparent reasoning on how they reached a particular definition of the crime and why it diverged from IHL or human rights norms. These guidelines better address the concerns that undergird Article 22's guarantee of strict construction than any of the orderings or approaches described in Part III above.

A. *Avoiding Usurpations of State Authority*

Avoiding usurpation of legislative authority can be translated in the ICC context to a command to interpret the Rome Statute consistently with state intent, where it is possible to ascertain, and to avoid including within a crime definition something that states parties clearly meant to exclude. To borrow the words of an ICTY trial chamber, to respect the intent of the legislature means simply "not to fill omissions in legislation when this can be said to have been deliberate."<sup>227</sup> Thus, some gap filling and interpreting is permitted: "[if] the omission was accidental, it is usual to supply the missing words to give the legislation the meaning intended."<sup>228</sup> This prohibition on filling *intentional* blanks in statutory coverage is in essence the French notion of strict construction.<sup>229</sup>

This prescription addresses concerns about respecting state intent and encouraging state participation in the Rome regime. It also adequately addresses any concerns about separation of powers, which, as discussed above, at any rate are weak at the

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<sup>227</sup> Prosecutor v. Delalic, Case No. IT-96-21-T, Judgement, ¶ 412 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998). Schabas, *supra* note 10, at 854. Jeffries contends that separation of powers does not explain much, but in the context of statutory interpretation it demands merely "that judicial lawmaking not be inconsistent with legislative choice." Jeffries, *supra* note 22, at 204–5 ("This means chiefly that courts should not place on a statute a meaning that its text will not bear, or that is plainly contradicted by legislative history, or that does unnecessary violence to the policy expressed in some other enactment.").

<sup>228</sup> Prosecutor v. Delalic, Case No. IT-96-21-T, Judgement, ¶ 412 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998); Schabas, *supra* note 10, at 854; Jeffries, *supra* note 22, at 204–5.

<sup>229</sup> See discussion *supra* note 28.

ICC. As discussed below, there is no usurpation where states have delegated lawmaking authority through vague language or constructive ambiguity. By contrast, circular teleological analysis invoking the need to “end impunity” to justify crime expansion runs afoul of this constraint.

### 1. Vagueness and Constructive Ambiguity as Delegation

It is important to be clear on what qualifies as usurpation. Where language in the Rome Statute is specific and clear, there is a strong argument that states were not delegating lawmaking authority and, therefore, judicial lawmaking would amount to usurpation. By contrast, vague provisions or provisions that incorporate by reference other fields of law, such as IHL, suggest that states were delegating lawmaking power.<sup>230</sup> Interpretation and application of the law is therefore necessary and consistent with the intent of states parties.<sup>231</sup> Still, judges must exercise care to interpret broad provisions in a way that does not offend the next principle of unfair surprise to defendants.<sup>232</sup>

Constructive ambiguity, like vagueness, also constitutes a delegation. Where states agreed to a compromise definition in the Rome Statute that was intentionally ambiguous, as in the case of gender,<sup>233</sup> they were on notice that the court might land on an interpretation that differed from their own by consulting other sources of law and using standard tools of interpretation,

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<sup>230</sup> Danner, *supra* note 116, at 44–49 (discussing the possibility that the Security Council delegated lawmaking authority to the ICTY and that the ICTY was acting as a faithful agent in lawmaking); Ginsburg, *supra* note 115, at 641–47; GROVER, INTERPRETING CRIMES, *supra* note 14, at 401 (arguing that “the strict construction imperative is rebutted where States choose to insert in the Rome Statute open-textured language, thereby signalling the delegation of a greater than normal degree of law-making power to judges”).

<sup>231</sup> See discussion *supra* notes 112–113 (discussing separation of powers and delegation).

<sup>232</sup> International judges seem to be aware of the need for care in interpreting broad provisions so as not to unfairly surprise defendants. See Van Schaack, *supra* note 2, at 138–140 (discussing the ICTY’s caselaw on the legality of the crimes against humanity of “other inhumane acts”); see also Prosecutor v. Blagojevic, Case No. IT-02-60-T, Judgement, ¶ 625 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005) (noting that “the principle of legality requires that a trier of fact exercise great caution in finding that an alleged act, not regulated elsewhere in Article 5 of the Statute, forms part of this crime [of “other inhumane acts”]: norms of criminal law must always provide individuals with sufficient notice of what is criminal behaviour and what is not”) (quoted in Van Schaack, *supra* note 2, at n.79).

<sup>233</sup> See discussion *supra* note 128–133.

such as those set out in the Vienna Convention. Ascertaining the intentionality of the ambiguity will, of course, require recourse to *travaux préparatoires* of the Rome Statute. The task for judges is to determine whether the ambiguity was intentional or merely a drafting error. For intentionally ambiguous provisions, like vague ones, judges must ascertain whether, in light of applicable international law and general principles derived from national judicial systems and relevant tools of interpretation of international law, extending the criminal prohibition of the Rome Statute to the conduct in question makes sense.<sup>234</sup>

By contrast, where there is strong evidence that States Party meant for certain conduct to be excluded from the coverage of a crime, reading conduct into an existing crime under the Rome Statute would amount to a usurpation of state intent. The Rome Statute's treatment of chemical weapons arguably is an example of such an intentional exclusion.<sup>235</sup> The Rome Statute's war crimes provisions relating to "employing poison or poisoned weapons" and "asphyxiating, poisonous or other gases, and all analogous liquid, materials or devices" are ambiguous.<sup>236</sup> Plausible arguments can be made on the face of the provision that the language includes or excludes biological and chemical weapons.<sup>237</sup> If states intended to exclude chemical weapons from

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<sup>234</sup> See discussion *supra* note 128–133.

<sup>235</sup> See Beth Van Schaack, *Chemical Weapons Use Returns to Syria*, JUST SECURITY (Aug. 8, 2016, 11:09 AM), <https://www.justsecurity.org/32309/chemical-weapons-returns-syria/> ("Coming cold to the text of the ICC Statute, one would assume the genus crimes of 'employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices' would encompass the use of chemical (and maybe some biological) weapons. Knowing the treaty's drafting history, however, reveals that a provision specifically penalizing the use of 'chemical weapons' was deliberately rejected by delegates as part of a compromise around the inclusion of nuclear weapons.").

<sup>236</sup> See Alex Whiting, *The International Criminal Court, the Islamic State, and Chemical Weapons*, JUST SECURITY (Nov. 4, 2015, 10:36 AM), <https://www.justsecurity.org/27359/icc-islamic-state-chemical-weapons/>.

<sup>237</sup> Whether or not the Rome Statute prohibits the use of chemical weapons has been the subject of recent academic debate relating to the use of chemical weapons in Syria and Iraq. See, e.g., Dapo Akande, *Can the ICC Prosecute for Use of Chemical Weapons in Syria?*, EJIL: TALK! (Aug. 23, 2013), <http://www.ejiltalk.org/can-the-icc-prosecute-for-use-of-chemical-weapons-in-syria/>; Kevin Jon Heller, *The Rome Statute Does Not Criminalise Chemical and Biological Weapons*, OPINIO JURIS (Nov. 5, 2015), <http://opiniojuris.org/2015/11/05/why-the-rome-statute-does-not-criminalise-chemical-and-biological-weapons/>; Ralf Trapp, *The Investigation Into the Islamic State and Chemical Weapons*, JUST SECURITY (Oct. 27, 2015, 9:40 AM), <https://www.justsecurity.org/27116/investigation-islamic-state-chemical-weapons/>.

the ambit of the provision, then judges should not read the crime into the statute on the back end. Such a result may feel deeply dissatisfying in the face of horrific acts deserving of condemnation, but is nevertheless superior from a legality perspective and from the perspective of maintaining continued participation of states in the ICC regime.

When ICC judges do then engage in judicial lawmaking, as they should with cases of constructive ambiguity, the process is more democratic than it may seem. Because ascertaining general principles of international law and general principles derived from national judicial systems forces judges to look at international conventions and state practice, it is inherently an inquiry into the level of consensus on a given issue.<sup>238</sup> Thus, in essence, Article 21 directs judges to ascertain whether there is a consensus that particular conduct falls within the ambit of a particular crime of the Rome Statute, not as a legislative matter, but through interpretation. Since an estimation of consensus is part of the inquiry, judges are less likely to enact controversial expansions of the law.<sup>239</sup> In essence, judges must wait for a norm to develop.

This recognition of a delegation and, in turn, refusal to recognize a usurpation, is consistent with Article 22's command that ambiguities in crime definitions be construed in favor of the defendant. As explained above, the most sensible reading of the Rome Statute makes clear that an ambiguity, for the purposes of Article 22(2)'s command of lenity, is not an ambiguity on the face of the Rome Statute, but rather an ambiguity remaining after all sources of law in Article 21 and standard tools of interpretation are exhausted.<sup>240</sup>

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<sup>238</sup> Cf. Jacobs, *supra* note 18, at 19 (noting that “when asking judges to identify and apply customary law, we are necessarily asking them, maybe not to act as legislators, but at least to think as ones. In this sense, the reference to political or moral considerations by judges is in fact legitimate when it comes to this source of law” but arguing against the ICC’s use of CIL in interpreting crimes). It bears noting that critics of traditional CIL have argued that it is undemocratic. ILC CIL 1, *supra* note 18, ¶ 98 n.235.

<sup>239</sup> Jeffries, *supra* note 22, at 205 (arguing that separation of powers “also means . . . that in confronting statutory ambiguity, courts should ordinarily avoid large-scale innovation. In other words, courts should avoid, where possible, interpretations that embrace controversial perceptions of public policy”).

<sup>240</sup> See *supra* Part III.

## 2. Object and Purpose, Defined Properly

This notion of avoiding usurpations of state authority and respecting state intent includes a teleological inquiry into “object and purpose,” but it differs from the one courts and commentators currently employ. The invocation of the object and purpose of “ending impunity” to justify a number of fairly big leaps has been rightly criticized.<sup>241</sup> Under a correct view of the object and purpose of the Rome Statute, the best interpretation is not necessarily the broadest, because the object and purpose of the Rome Statute is not simply to “end impunity.”<sup>242</sup> Rather, it is to condemn and punish people who have been found guilty of committing gross violations of ICL through fair trials conducted in accordance with international human rights and the rule of law.

Certainly, the preamble of the Rome Statute announces the goal of “ending impunity,” but the object and purpose of the Rome Statute is far bigger than this rather lofty, but ultimately circular, aim. In a human rights-enforcing criminal institution like the ICC, it seems fair to assume that the framers sought to end impunity for—or start punishing—people who in fact have committed international crimes. One need not even assume this, however, since the Rome Statute itself says so. The language on ending impunity is more nuanced than is typically admitted. The Rome Statute affirms that: “[T]he most serious *crimes* of concern to the international community as a whole must not go unpunished and that their *effective prosecution* must be ensured by taking measures at the national level and by enhancing international cooperation.”<sup>243</sup> Thus, the Rome Statute announces the rather obvious goal of seeking to punish people who have committed “the most serious crimes of concern to the

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<sup>241</sup> See *supra* note 15.

<sup>242</sup> Leena Grover has another way of cabining object and purpose analysis. She argues that judges, to the extent they engage in an inquiry into objects and purposes, “should, to the greatest extent possible, be limited to commenting about the mischief that the relevant criminal prohibition—as opposed to the Rome regime as a whole—is intended to address.” GROVER, INTERPRETING CRIMES, *supra* note 14, at 217. This solution is an improvement in that it ends resort to the empty “ending impunity” mantra of crime expansion, but it also risks expansion through a conflation of the object and purpose of a Rome Statute prohibition with the object and purpose of the underlying IHR or IHL norm. For that reason, this Article suggests that inquiry into the objects and purposes of the Rome Statute requires recognition of the ICC as a human rights-respecting criminal justice system.

<sup>243</sup> Rome Statute, *supra* note 1, pmb. (emphasis added).

international community” through “effective prosecution,” not the goal of punishing people for all serious conduct that the court may later declare to be crimes.

Other aspects of the Rome Statute lend support to ending the use of object and purpose analysis as a free pass to crime expansion. The Preamble also states that the states parties are “[r]esolved to guarantee *lasting respect* for and the enforcement of international *justice*.”<sup>244</sup> Guaranteeing lasting respect for international justice arguably counsels against aggressive judicial crime creation. Recalling Justice Jackson’s admonition at the International Military Tribunal at Nuremberg—“we must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow”—overly expansive interpretations of crimes to fit the facts, it would seem, ultimately undermine respect for international justice.<sup>245</sup> As for the guarantee to enforce international justice, this guarantee, like the notion of ending impunity for crimes, is question begging—enforcement of just what criminal prohibition? The use of the term “justice” seems to require fidelity to law; not just punishment. Finally, the Rome Statute’s many fair trial-related provisions, including the explicit requirement that trials comply with international human rights<sup>246</sup> and the Article 22 provisions on legality, are evidence that the ICC is not to seek convictions at all cost.

It bears emphasis that this teleological inquiry into the Rome Statute should not be conflated with a teleological inquiry into an underlying IHL convention upon which the ICC was founded.<sup>247</sup> The object and purpose of the underlying convention is likely to be to expand international humanitarian protection, as it should be.<sup>248</sup> However, as noted, that is not the primary

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<sup>244</sup> *Id.* (emphasis added).

<sup>245</sup> ROBERT H. JACKSON, OPENING STATEMENT NUREMBERG TRIALS (1945), [http://www.pbs.org/wnet/supremecourt/personality/sources\\_document12.html](http://www.pbs.org/wnet/supremecourt/personality/sources_document12.html).

<sup>246</sup> *Id.* at art. 21(3) (“The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights . . .”).

<sup>247</sup> See generally Carstens, *supra* note 77 (describing difficulties in interpreting transplanted treaty rules).

<sup>248</sup> See, e.g., Prosecutor v. Hadžihasanovic, Case No. IT-01-47-AR72, Separate and Partially Dissenting Opinion of Judge Hunt Command Responsibility Appeal, ¶ 22 (July 16, 2003) (arguing in support of extending liability based on command responsibility for acts committed prior to a commander’s taking charge and citing as support the object and purpose of IHL: “The object and purpose of Additional Protocol I is, according to its Preamble, to ‘reaffirm and develop the provisions

object and purpose of the Rome Statute. The object and purpose of the Rome Statute is to punish people found guilty, through a fair process, of international crimes. Thus, contrary to the typical analysis in international courts, the teleological inquiry into underlying IHL conventions offers a strong argument in favor of reading the Rome Statute more narrowly than the underlying IHL convention.

This interpretation of the Vienna Convention's teleological inquiry may lead to greater "fragmentation" in international law,<sup>249</sup> but perhaps not as much as it may seem. Pursuant to Article 21 of the Rome Statute and the "general rule" of the Vienna Convention, judges still may consider the underlying IHL or international human rights "source" norm to assist in finding the "ordinary meaning" of a term in one of the Rome Statute's crime definitions.<sup>250</sup> It merely may not shroud expansions in the law in the justification of achieving the Rome Statute's purported "object and purpose" of "ending impunity."

The object and purpose of the Rome Statute, properly understood, includes an element of gravity. As noted above, and exemplified by the "*most serious crimes of concern to the international community*" language in the Preamble, the Rome Statute gravity requirements are sprinkled throughout the

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protecting the victims of armed conflicts and to supplement measures intended to reinforce their application', which accords neatly with the object and purpose of international humanitarian law generally: 'The aim of international humanitarian law is to protect the human being and to safeguard the dignity of man in the extreme situation of war. The provisions of international humanitarian law have always been tailored to fit human requirements. They are bound to an ideal: the protection of man from the consequences of brute force'"); *see also supra* notes 10, 11, and 15.

<sup>249</sup> *See generally* Int'l Law Comm'n, Rep. on the Work of Its Sixty-First Session, ¶ 251(1), UN Doc A/61/10 (2006), [hereinafter ILC Report on Fragmentation]. *See also* Michael Waibel, *Interpretive Communities in International Law*, in INTERPRETATION IN INTERNATIONAL LAW 164 (Andrea Bianchi et al. eds., 2015) (discussing the fragmentation of interpretive communities and noting that "[t]he extensive discourse on fragmentation in international law oscillates between the two extreme poles: the view that fragmentation poses a mortal threat to the international legal order, or that it is a natural outgrowth of international law's advanced state of development, mirroring earlier developments in national law").

<sup>250</sup> *See* Carstens, *supra* note 77, at 236 (noting that "a transplanted treaty rule might become so ubiquitous within a particular series of treaties that an 'ordinary meaning' can be ascribed to the common terms within it by reference to the wider body of earlier treaties" but noting that "the [other] primary elements" including object and purpose of the general rule are less applicable than "ordinary meaning").

definitions of crimes.<sup>251</sup> The Rome Statute also requires consideration of gravity as a jurisdictional matter and as a matter of prosecutorial discretion in deciding whether to bring charges.<sup>252</sup>

At least one ICC judge appears to endorse an understanding of Article 22(2) that recognizes a role for the Vienna Convention and yet keeps teleological analysis from swallowing strict construction. In *Ngudjolo*, Judge Van den Wyngaert wrote a concurring opinion to express her views on the proper interpretation of the Rome Statute's provision on forms of criminal responsibility.<sup>253</sup> She noted that "the Court must first apply the applicable rules of interpretation, as provided for by the Statute and the Vienna Convention on the Law of Treaties," including the *travaux préparatoires*.<sup>254</sup> However, emphasizing the importance of the strict construction or, as she called it, the *in dubio pro reo* command of Article 22(2),<sup>255</sup> she rejected the Vienna Convention's teleological inquiry into the "objects and purposes" of a treaty.<sup>256</sup>

### B. Avoiding Unfair Surprise

This discussion on the Rome Statute's "object and purpose" relates to the next proposed guideline for strict construction—avoiding unfair surprise. This prescription is akin to the ECtHR notion of foreseeability,<sup>257</sup> but makes clear that foreseeability is judged from the perspective of the defendant. In reading the statute, supplemented by consultation of international law and general principles where needed, judges must consider whether a defendant could reasonably have understood his conduct to be criminal. This focus speaks to the underlying human rights concern about notice to defendants. Where the court is treading new ground, it must consider whether the defendant could have reasonably anticipated the criminality of his conduct.

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<sup>251</sup> See *supra* Part III.B.3.

<sup>252</sup> See deGuzman, *supra* note 103, at 1405.

<sup>253</sup> Prosecutor v. Ngudjolo, Case No. ICC-01/04-02/12, Concurring Opinion of Judge Christine Van den Wyngaert, ¶ 10 (Dec. 18, 2012).

<sup>254</sup> *Id.* ¶¶ 10–13.

<sup>255</sup> *Id.* ¶ 19 (stating "I believe that the express inclusion of the *in dubio pro reo* standard in Article 22(2) of the Statute is a highly significant characteristic of the Statute.").

<sup>256</sup> *Id.* ¶ 18.

<sup>257</sup> See *supra* Part III.D.

This prescription has more bite to it than it may seem. At the *ad hoc* tribunals and the SCSL, jurisdiction over defendants whose crimes often predated the courts' statutes was contingent on the existence at the time of the defendant's acts of an applicable crime in international law,<sup>258</sup> either through a treaty or customary international law. By contrast, at the ICC, the judges arguably need not find evidence that conduct is *criminal* under customary international law. Rather, judges may consult customary international law and general principles to help them interpret the language of Rome Statute.<sup>259</sup> If these sources support a particular reading of a term or of a general prohibition, then the judges may use this reading as support for the proposition that the conduct is included in the Rome Statute's crime.

Although the Rome Statute does not purport to codify customary international law, a preexisting international criminal norm strongly suggests that the risk of unfair surprise is low. Where language in a crime definition is ambiguous, and there is weak evidence that particular conduct is criminal according to the general principles of international law, including customary international law, the risk of unfair surprise is high. In essence, the absence of a customary international law norm criminalizing particular conduct amounts to a presumption of unfair surprise. This presumption can be overcome through consultation of general principles derived from national judicial systems or perhaps from evidence that customary international law and

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<sup>258</sup> See, e.g., Prosecutor v. Tadic, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); Prosecutor v. Vasiljevic, Case No. IT-98-32-T, Trial Judgement, ¶¶ 198–203 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 29, 2002) (finding that the court lacked jurisdiction over the defendant for the crime of "violence to life and person" since it was unconvinced that "violence to life and person" amounted to a crime under customary international law).

<sup>259</sup> For example, in the ICC's first case, *Lubanga*, the Trial Chamber consulted IHL treaties and customary IHL to understand the meaning of the Rome Statute's war crime based on "use of children to participate [] in hostilities." In reaching a broad definition of "use to participate in the hostilities" the Trial Chamber relied on customary international law evidence that use of children in support roles was prohibited, not that IHL showed that it was a crime. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgement Pursuant to Article 74 of the Statute, ¶¶ 619–628 (Mar. 14, 2012) [hereinafter "*Lubanga Judgment*"]; cf. Marko Milanovic, *Is the Rome Statute Binding on Individuals? (And Why We Should Care)*, 9 J. INT'L CRIM. JUST. 25, 27 (2011) (asking whether the Rome Statute is jurisdictional or substantive).

treaty law understands a particular term in a particular way, even if it does not recognize that it is a crime, but the evidence must be very strong.

Thus, strict construction can be read as a command to engage in more rigorous customary international law analysis than international courts have sometimes employed.<sup>260</sup> As Joseph Powderly has noted of the customary international law analysis of the *ad hoc* tribunals,

There is . . . a legitimate concern that recourse to ‘new’ norms of customary international law, identified on the basis of questionable evidence of state practice and *opinio juris*, may be used as a means of concealing the arbitrary development of the law and its fraught relationship with the principle of legality.<sup>261</sup>

The flexibility of customary international law analysis inherently lends itself to the risk that the existence and content of the norm depend on the eye of the beholder, and courts must be careful in basing expansive interpretations of crimes in arguments based on customary international law.

This guideline that courts avoid unfair surprise is not, however, a requirement that any particular defendant have actual notice that his conduct was illegal.<sup>262</sup> The question is whether a reasonable person in the defendant’s position would have been on notice that her conduct was criminal. There is no unfair surprise where there is sufficiently clear support for an interpretation in some source of law recognized whether or not

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<sup>260</sup> Judge Robertson’s dissent from an SCSL’s trial chamber’s finding of jurisdiction for the crime of recruiting children into armed forces accuses the majority of suspect customary international law analysis and defends a more rigorous inquiry into customary international law. *Prosecutor v. Norman*, Case No. SCSL-2004-14-AR72(E), Dissenting Opinion of Justice Robertson, ¶ 22 (Spec. Ct. for Sierra Leone May 31, 2004).

<sup>261</sup> Powderly, *supra* note 198, at 237; *see also id.* at 236 (“There is a definite danger then that the convenient selectiveness of established and newly identified customary rules is being used as a fail-safe mechanism when compliance with the principle of legality is brought into question as a consequence. Some critical scholars might even go as far as to say that, before the international criminal tribunals, customary international law is to be considered inherently malleable and capable of saying whatever you want it to say. This is perhaps excessively cynical and certainly only attaches to a minority of cases; however, the critique is not without some merit.”).

<sup>262</sup> The defendant in the ICC’s first case made a notice or ignorance of the law argument, which the Pretrial Chamber rejected on the basis that the Rome Statute itself had made enlistment of child soldiers a crime prior to Lubanga’s conduct. *See Milanovic*, *supra* note 259, at 34.

the defendant knew about it.<sup>263</sup> The further from ICL and IHL the norm is, arguably, the less reasonable it would be to impute knowledge of the norm to the defendant. It puts the onus on military and civilian leaders in conflict situations to know the legal landscape in which they are operating. This landscape includes not only IHL, but also international human rights law and ICL, both customary and treaty-based. It may include notice stemming from general principles derived from national systems, but these domestic legal principles are an area to be treated with extreme care since the risk of unfair surprise is high. While there may be unfair surprise concerns with attributing knowledge of international law to international defendants, these concerns are far greater still when the court begins to assume a mastery of comparative criminal law unless there is near uniformity on a rule.

Thus, if judges are inquiring into the possibility of unfair surprise due to a new application or interpretation of an ambiguous or vague provision of the Rome Statute, and are looking to customary international law for guidance, as this Article suggests they should, judges should look for strong evidence of both state practice and *opinio juris* in support of a crime under customary international law or, at a minimum, of a clear international norm supporting a particular reading of a Rome Statute crime. This traditional approach to identifying customary international law may not be optimal from a “utopian,” ending-impunity vantage point,<sup>264</sup> but it is more defensible from the vantage point of legality and strict construction.

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<sup>263</sup> Here, the author agrees with Gallant, who adopts Jerome Hall's argument that “[i]f an act can reasonably be construed as within the ambit of definition of the crime existing at the time of the act (whether statutory, common law, or international law), the actor is sufficiently warned so that a conviction will not violate the customary international law version of *nullum crimen sine lege*.” GALLANT, *supra* note 4, at 360 (quoting Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165 (1937)).

<sup>264</sup> ILC CIL 1, *supra* note 18, ¶ 98 (describing modern arguments that customary international law norms could be found on either state practice or *opinio juris* alone).

### C. *Maximizing Clarity*

Finally, judges should aim to make—or interpret—law in a way that leads to greater clarity in the law.<sup>265</sup> Jeffries proposes that judges ask the following questions:

Would this interpretation, taken as precedent, constrain future applications? Or would it merely multiply the possibilities? Would the decision resolve the ambiguity in the law, or merely exploit it? Of course, not every rule is a good rule, but the lack of any rule is usually a bad idea. To be avoided, therefore, is an interpretation that creates or perpetuates openendedness in the criminal law.<sup>266</sup>

ICL could benefit from clarification. Despite the codification of ICL in the Rome Statute and the Elements of Crimes, ICL is still a relatively nascent field and many critical questions on the nature and elements of criminal responsibility remain to be answered.<sup>267</sup>

Clarifying the norms often will mean interpreting them consistently with underlying international human rights and IHL norms. Interpreting the Rome Statute consistently with international human rights norms and IHL will often make sense, particularly since the Rome Statute often explicitly directs judges to interpret the crimes consistently with those bodies of law. As the International Law Commission (“ILC”) has noted in its findings on the “fragmentation” of international law:

International law as a legal system. International law is a legal system. Its rules and principles (i.e. its norms) act in relation to and should be interpreted against the background of other rules and principles. As a legal system, international law is not a random collection of such norms. There are meaningful relationships between them.<sup>268</sup>

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<sup>265</sup> Sadat and Jolly likewise list clarifying the law as one of their proposed principles of interpretation. See Sadat & Jolly, *supra* note 14, at 764.

<sup>266</sup> Jeffries, *supra* note 22, at 220–221 (“Such an interpretation should be avoided not because it would be unfair or unwise in the instant case (that might or might not be true), but because it would invite abuse in the future.”).

<sup>267</sup> See, e.g., Valerie Oosterveld, *Sexual Slavery and the International Criminal Court: Advancing International Law*, 25 MICH. J. INT’L L. 605, 608–09, 622–23 (2004) (discussing the lack of clarity on the elements of and relationship between sexual slavery and enslavement). See deGuzman, *supra* note 219, at 1 (noting that the meaning of the state policy requirement for crimes against humanity in the Rome Statute is unclear).

<sup>268</sup> See ILC Report on Fragmentation, *supra* note 249, ¶ 251(1) (“Norms may thus exist at higher and lower hierarchical levels, their formulation may involve

Moreover, the ILC has recommended harmonization: "It is a generally accepted principle that when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations."<sup>269</sup>

This goal of increasing clarity in—and harmonization of—the law is in tension with this Article's argument that the objects and purposes of underlying IHL and human rights treaties not be confused with the object and purpose of the Rome Statute.<sup>270</sup> Indeed, this Article's object and purpose thesis permits at least some divergence between IHL and ICL. As the negative reaction in the military community to the ICTY's *Gotovina* decision on targeting illustrates, clarity, at least in international law as a whole, often is not enhanced by a different norm in ICL and IHL.<sup>271</sup> Likewise, had the ICC, in its judgments in the *Lubanga* case, decided, international human rights and IHL principles notwithstanding, that only use of children in fighting and not in support roles sufficed for the crime of enlistment and recruitment of child soldiers, there is some risk that the narrow ICL norm announced would have muddied the waters for the human rights and IHL norms. Indeed, the United Nations Special Representative of the Secretary General on Children and Armed Conflict, who testified as an expert in the case, seemed very concerned that ICL, international human rights law and IHL be striking the same note.<sup>272</sup> To be sure, there is a cost in recognizing a narrower ICL rule.

Nevertheless, despite the overlap in the fields of ICL, IHL, and international human rights and the benefits of harmonization, there is a strong argument that ICL is what the ILC would call a "[s]pecial (self-contained) regime" distinct from IHL or international human rights law due to the distinctive requirements of criminal law, including legality and strict construction.<sup>273</sup> Thus, it is appropriate that the Rome Statute's crimes sometimes will cover a narrower swath of conduct than IHL or international human rights norms.

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greater or lesser generality and specificity and their validity may date back to earlier or later moments in time.").

<sup>269</sup> ILC Report on Fragmentation, *supra* note 249, ¶ 251(4).

<sup>270</sup> *See supra* Part IV.A.2.

<sup>271</sup> *See discussion supra* note 193.

<sup>272</sup> Davidson, *supra* note 147, at 395–400.

<sup>273</sup> ILC Report on Fragmentation, *supra* note 249, ¶ 251(11)–(12).

ICC judges can help to clarify the contours of the ICC crime and the relationship between these fields of international law through careful and clear decisions articulating where and why the Rome Statute's interpretation of ICL differs from the underlying international human rights and IHL norms in certain contexts. The ICC is uniquely positioned to play this role of clarifying the law and, where appropriate, identifying developments in ICL. In domestic jurisdictions, due to a lack of familiarity with international law, the strange footing of international law in the country's law, or a state's aversion to a particular norm, judges are "likely to (and perhaps should) adopt a cautious approach to developing the law."<sup>274</sup> By contrast, ICL, IHL, and international human rights law, are the bread and butter of all cases before the ICC, and ICC judges typically have extensive backgrounds in at least one of these fields, and often more than one.<sup>275</sup> Thus, the ICC is likely to be in a better position, from a resource, knowledge, and, in some circumstances, political perspective, to identify the emergence of new customary international law norms than most. A key component in achieving this aim is transparent reasoning and explicit customary international law and comparative criminal law analysis in judgments.

#### D. *Avoiding Case-Specific Crime Creation*

Jeffries's final caveat—that judges should avoid case-specific lawmaking—bears particular consideration in the ICC context. One of the justifications offered for judicial lawmaking in the international criminal context—and the international context generally—is the desire to give judges the flexibility to adapt to changing circumstance and new and varied forms of harm.<sup>276</sup> This interest stands in tension with this guideline of avoiding *ad hoc* lawmaking in order to fit the law to the facts of a particular case before the court.<sup>277</sup> Judges must be mindful to take into

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<sup>274</sup> ILC CIL 1, *supra* note 18, at 37.

<sup>275</sup> See generally *Who's Who*, INT'L CRIM. CT., <https://www.icc-cpi.int/about/judicial-divisions/biographies/Pages/default.aspx> (last visited July 28, 2017).

<sup>276</sup> See discussion *supra* note 13.

<sup>277</sup> As Fletcher notes, "[t]he critical feature of these legislative warnings is that they are systematic, abstracted from particular controversies, and well defined," which is why the "leading legal systems of the world converge in favoring legislation as the primary source of criminal law." FLETCHER, *supra* note 49, at 80–81.

account changing circumstances in the world and warfare generally, rather than the facts of a given conflict or defendant. The international and hybrid tribunals have had a mixed record on this score.<sup>278</sup>

In other words, judges should be thoughtful about how their interpretations of crimes will apply beyond the case at hand. This insight seems rather obvious and yet, it may be easier than one thinks for judges to lose sight of this goal in the face of atrocities, albeit ones that may not tidily fit into a particular definition of the Rome Statute, and in the name of “closing the impunity gap.” Again, this Article offers an alternative interpretation of the object and purpose of the Rome Statute—as a tribunal that is charged with punishing those responsible for grave international crimes in a manner consistent with the defendant’s right to a fair trial.

This Article offers these guidelines as an alternative to overly strict and unrealistic notions of lenity that require ignoring sources of law in a manner inconsistent with Article 21 and to the prevailing reductionist and permissive vision of strict construction of the ECtHR. The hope is that these guidelines are clearer and better comport with the justifications for strict construction in the ICC context, the strongest of which are notice, respecting state intent—whether as an end in itself or for the instrumental goal of encouraging state participation in the ICC framework—promoting respect for human rights and the rule of law, and helping to ensure that the court focus its limited resources on grave crimes. Finally, it explicitly and transparently recognizes that the primary job of ICC judges is to reach the best, rather than the narrowest, interpretation of the Rome Statute, a document that is going to need some interpreting.

The institutional design of the ICC helps to ensure that it will not be overly aggressive in interpreting its crimes. At least one commentator has argued that the ICC is a bad place for lawmaking, because, unlike the *ad hoc* tribunals, it has jurisdiction over the world’s future conflicts, rather than a defined, largely past, regional conflict that involved crimes that the international community has already recognized to be sufficiently grave through the very creation of an *ad hoc*

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<sup>278</sup> See Davidson, *supra* note 147, at 413.

tribunal.<sup>279</sup> On the contrary, the ICC's jurisdiction over future crimes committed by a national of any state party or on the territory of a state party, or by anyone, anywhere, should the Security Council refer the matter to the court, makes it unlikely the court will be too bold. Judges are well aware of the context in which they operate. States parties have various tools, including refusing to cooperate with the court, voicing their disagreement, or, if they disagree strongly enough with an interpretation of a crime, exiting from the Rome Statute treaty regime.<sup>280</sup> This institutional context, in conjunction with the statute's gravity requirements and the court's resource constraints, is likely to put powerful pressure on judges not to use expansive readings of the law to take on marginal cases.

#### CONCLUSION

In sum, lenity comes last at the ICC, but strict construction remains. Though not all of the justifications for strict construction apply as readily at the ICC as in domestic jurisdictions, strict construction still implicates legitimate concerns in the ICC context. To address these concerns, judges should interpret the crimes in the Rome Statute in a manner that avoids usurping the authority of states and unfairly surprising defendants and that enhances the clarity of ICL. The proposed conceptions of the "object and purpose" of the Rome Statute and the role of customary international law and general principles derived from national laws set out above can help judges to navigate these guidelines and, ultimately, to make good law.

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<sup>279</sup> Lietzau, *supra* note 47, at 482.

<sup>280</sup> See generally Wessel, *supra* note 59.