

***NULLUM CRIMEN SINE LEGE* IN INTERNATIONAL CRIMINAL TRIBUNAL JURISPRUDENCE:**

THE PROBLEM OF THE RESIDUAL CATEGORY OF CRIME

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This paper discusses the significance of nullum crimen sine lege, the principle of nonretroactivity in prosecution, to international law and the role that international criminal tribunals play in upholding this principle. It primarily focuses on the dangers posed by the residual category of crimes present in international criminal tribunals in that these categories allow judiciaries to convict defendants for crimes that are not listed in the tribunal statutes. This practice violates the principle of nullum crimen sine lege and threatens to undermine international confidence in, and the legacy of, the world's foremost criminal courts.

I. *NULLUM CRIMEN SINE LEGE* AS AN UNLAWFUL INTERNATIONAL PRACTICE

A. General Acceptance

Nullum crimen sine lege (no crime without law) is one of the most fundamental and internationally recognized principles in criminal prosecution.¹ Modern nations do not tolerate their judiciaries convicting citizens for what has not been already codified or otherwise recognized as a crime, valuing the protection of the populace against the whim of the judiciary over potential dangers of freed wrongdoers. If there is no defined crime, then one cannot rightfully be convicted for such an offense.

Adherence to this principle is not new. *Nullum crimen sine lege* was recognized in ancient Roman times and has been affirmed at various times throughout history in the legal systems of renowned societies. Jeremy Bentham described the significance of *nullum crimen sine lege* by ensuring that if one prosecutes a person for a crime not specifically codified in a jurisdiction, this violates the liberty guaranteed by the social contract and safeguarded by penal law.² The early United States Supreme Court case *Calder v. Bull* identified any law that criminalizes an act after the fact as unlawful practice in the national legal system.³ Having found its way into some to the world's most influential legal systems, *nullum crimen sine lege* has long governed and shaped criminal prosecutorial norms.

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¹ Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L.J. 119, 122–23 (2008).

² See Machteld Boot, GENOCIDE, CRIMES AGAINST HUMANITY, WAR CRIMES: NULLUM CRIMEN SINE LEGE AND THE SUBJECT MATTER JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT (2002), 85.

³ *Calder v. Bull*, 3 U.S. 386, 390 (1798).