Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court
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Machteld Boot

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<td>School of Human Rights Research Series</td>
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When I was studying law in Utrecht, Mischa Wladimiroff took on some students to work for him in the defense of the first person who stood trial before the International Criminal Tribunal for the Former Yugoslavia. I am very grateful to him for giving me the opportunity to participate in this unique adventure. Above all, it inspired me to start with this study.

The subject of this thesis has changed quite a bit since 1995, due to the major developments in the field of international criminal law. A few years after I started this research on the basis of a draft Statute of the International Law Commission, the Diplomatic Conference in Rome adopted the Statute for the International Criminal Court. The conclusions of this study were finalized on the day former President Slobodan Milosević was transferred to the UN Detention Unit at The Hague. On 11 September 2001, I submitted the manuscript to be sent off to the Commission for assessment.

Despite the continuing development of case law deriving from the ad hoc Tribunals and other courts, I concluded this research on 1 September 2001. Materials appearing after this date have been considered only to the extent that they shed new light on the subject of study.

These past few years have been amazing years, though not only at world level for me. I should like to mention some of the people who contributed to this study.

Willem van Genugten, Anton van Kalmthout, and Jan Sjöcrona together wrote the research proposal to which I applied at the Faculty of Law of Tilburg University in 1995. Their confidence and support have been truly encouraging. Nico Keijzer has always been there for his students too, if need be with tea. May this not be our last joint effort; I promise to be briefer next time. Having said that, I should also like to thank Irma for her care and her cookies.

I derived great inspiration for this study from Adriaan Bos, who provided me with the opportunity of an internship. In this way I was able to attend one of the Preparatory Committee sessions on the establishment of the International Criminal Court in August 1996. Being accredited as an “expert” within the Dutch delegation – thank you, Roeland Böcker – certainly opened my eyes to the way in which “international criminal law” is actually created. Ian Guest and his On The Record-advocacy project enabled me to attend the Diplomatic Conference in 1998 and made me live in a Roman convent for once in my life.

Otto Triffterer’s writings inspired me to focus on the sources of international criminal law and the *nullum crimen sine lege* principle. Likewise, my visit to the
Acknowledgments

Max-Planck-Institut für ausländisches und internationales Strafrecht in Freiburg in 1996 has been very useful: not only the time spent in library, but especially the discussions with Professor H.-H. Jescheck and, not in the least, the documents always discovered right on time and care provided by Bas van Riel.

I enjoyed the discussions with Frits Kalshoven, Guido den Dekker, Herman von Hebel, Richard van Elst, Göran Sluiter, Liesbeth Zegveld, Marten Zwanenburg and others, within the framework of the “Kalshoven International Humanitarian Law Research Group.” These sessions often strengthened my enthusiasm for my work: may they long continue to be held.

The Department of Criminal Law of Tilburg University still is a good place to be. Marian de Jong still keeps its troops together after all these years. Marion Brienen, Afshin Ellian, Elishewa van de Griend, Ernestine Hoegen, Piet-Hein van Kempen, François Kristen, Anna Meijknecht, and Elies van Sliedregt were not only colleagues, but also friends. With many other “AI0’s” working at Tilburg’s Law Faculty I plodded on and partied.

Marcel Felet and the Schoordijk Institute of Tilburg University have been instrumental in making life easier. Richard van Rijsbergen regularly saved my documents from miraculous disappearances, so did Rob Matthijssen. Marjolijn Verhoven should be thanked for her capacity to avoid bureaucratic hurdles and for her (last) cigarettes. Hildegard Penn and Ineke Sijtsma turned this text into digestible English in the shortest amount of time possible: thank you so much.

Many colleagues from the Netherlands Red Cross Society were forced to be patient during the last year of working on this study. Particularly Anne Helene Borgts, Mireille Hector, and Pita Schimmelpenninck van der Oije: for their support I owe them more than one favor. They make it fun to work as a team.

Many others made an effort to distract me from my work and to put it into perspective. With Clarisse Girot I shared a house in Tilburg, work, fun, and a few teardrops: a cross-border friendship. Madeleine van Toorenburg and Theo Ermens were always there when needed with a positive spirit and help. So was my Frysian family, especially Jan and Baukje de Vries.

Ron and Tini Boot, my parents, of whom I am proud. My father’s inquisitiveness and my mother’s enthusiasm, and the perseverance and love of both have been both necessary and inspiring.

But life is really boring when Luuk is not around.

Leiden, 15 November 2001
ABBREVIATIONS

AA  
Ars Aequi  
AI  
Amnesty International  
Alberta L. Rev.  
Alberta Law Review  
Am. J. Int’l L.  
American Journal of International Law  
ALC  
Annotated Leading Cases  
Am. Ct. H. R.  
American Court of Human Rights  
Am. U. J. Int’l L. & Pol’y  
The American University Journal of International Law and Policy  
Ann. Digest  
Annual Digest and Reports of Public International Law Cases  
Appl.  
Application  
Ariz. L. Rev.  
Arizona Law Review  
ASIL  
American Society of International Law  
Austrian Journal of Public International Law  
BBS  
Besluit Buitengewoon Strafrecht (Extraordinary Penal Law Decree)  
Brit. Y.B. Int’l L.  
British Yearbook of International Law  
B.U. Int’l L.J.  
Boston University International Law Journal  
BGHSt  
Entscheidungen des Bundesgerichtshofes in Strafsachen (Judgments of the German Supreme Court)  
BVerfGE  
Entscheidungen des Bundesverfassungsgerichts (Judgments of the German Federal Constitutional Court)  
Cal. W. Int’l J.J.  
California Western International Law Journal  
CCPR  
International Covenant on Civil and Political Rights  
CERD  
Committee on the Elimination of Racial Discrimination  
Colum. J. Transnat’l L.  
Columbia Journal of Transnational Law  
Colum. L. Rev.  
Columbia Law Review  
Comm.  
Communication  
Crim. L.F.  
Criminal Law Forum  
Denv. J. Int’l L. & Pol’y  
Denver Journal of International Law and Policy  
DePaul L. Rev.  
DePaul Law Review  
Doc.  
Document  
Duke J. of Comp. & Int’l L.  
Duke Journal of Comparative & International Law
Abbreviations

DR
Decisions and Reports of the European Commission of Human Rights

ECHR
European Convention on Fundamental Rights and Fundamental Freedoms

ECtHR
European Court of Human Rights

ELSA
European Law Students’ Association

EPIL
Encyclopedia of Public International Law

ETS
European Treaty Series

EuGRZ
Europäische Grundrechte-Zeitschrift

Eur. J. Crime Cr.L. Cr.J
European Journal of Crime, Criminal Law and Criminal Justice

Eur. J. Int’l L.
European Journal of International Law

Fordham Int’l L.J.
Fordham International Law Journal

FS
Festschrift

Ga. J. Int’l. & Comp. L.
Georgia Journal of International and Comparative Law

GG
Grundgesetz (German Basic Law)

GYIL
German Yearbook of International Law

Harv. Hum. Rts. J.
Harvard Human Rights Journal

HR
Hoge Raad (Netherlands Supreme Court)

HRLJ
Human Rights Law Journal

Hum. Rts. Q.
Human Rights Quarterly

HuV-I
Humanitäres Völkerrecht-Informationsschriften

HRW
Human Rights Watch

ICC
International Criminal Court

ICJ
International Court of Justice

ICJ Rep.
International Court of Justice, Reports of Judgments, Advisory Opinions and Orders

ICJ Brief
International Commission of Jurists Brief

Int’l & Comp. L.Q.
The International & Comparative Law Quarterly

ICRC
International Committee of the Red Cross

ICTR
International Criminal Tribunal for Rwanda

ICTY
International Criminal Tribunal for the former Yugoslavia

ILC
International Law Commission

ILM
International Legal Materials

ILR
International Law Reports

IMT
International Military Tribunal

Inter-Am. Ct. H.R.
Inter-American Court of Human Rights

Int’l Conciliation
International Conciliation

IRRC
International Review of the Red Cross

Israel L. Rev.
Israel Law Review

Israel Y.B. on Hum. Rts.
Israel Yearbook on Human Rights
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<td>IZ</td>
<td>Juristenzeitung</td>
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<tr>
<td>Law &amp; Cont. Problems</td>
<td>Law and Contemporary Problems</td>
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<td>LNTS</td>
<td>League of Nations Treaty Series</td>
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<td>L.R.T.W.C.</td>
<td>Law Reports of Trials of War Criminals</td>
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<td>LJIL</td>
<td>Leiden Journal of International Law</td>
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<td>Mil. L. Rev.</td>
<td>Military Law Review</td>
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<td>MPC</td>
<td>Model Penal Code</td>
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<td>MRT</td>
<td>Militair-rechtelijk Tijdschrift</td>
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<td>NATO</td>
<td>North Atlantic Treaty Organization</td>
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<td>NEP</td>
<td>Nouvelles Études Pénales</td>
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<td>NILR</td>
<td>Netherlands International Law Review</td>
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<td>NJB</td>
<td>Nederlands Juristenblad</td>
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<td>NWJ</td>
<td>Neue Juristische Wochenschrift</td>
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<td>NQHR</td>
<td>Netherlands Quarterly of Human Rights</td>
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<td>NYIL</td>
<td>Netherlands Yearbook of International Law</td>
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<tr>
<td>OAS</td>
<td>Organisation of American States</td>
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<td>OAU</td>
<td>Organisation of African Unity</td>
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<td>OJ</td>
<td>Official Journal of the European Communities</td>
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<td>para.</td>
<td>paragraph</td>
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<td>PCIJ</td>
<td>Permanent Court of International Justice</td>
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<td>pr.</td>
<td>preamble</td>
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<td>PrepCom</td>
<td>Preparatory Committee</td>
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<td>RBDI</td>
<td>Revue belge de droit international</td>
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<tr>
<td>Rec. des Cours</td>
<td>Recueil des Cours de l’Académie de droit international</td>
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<td>Res.</td>
<td>Resolution</td>
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<td>Rev. Belge Dr. Intern.</td>
<td>Revue Belge de Droit International</td>
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<tr>
<td>Rev. Intern. Dr. Intern.</td>
<td>Revue internationale de droit pénal</td>
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<td>Rev. sc. crim.</td>
<td>Revue de science criminelle et de droit pénal comparé</td>
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<td>RPE</td>
<td>Rules of Procedure and Evidence</td>
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<td>Rutgers L. J.</td>
<td>Rutgers Law Journal</td>
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<td>SC</td>
<td>Security Council</td>
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<tr>
<td>StGB</td>
<td>Strafgesetzbuch (German Criminal Code)</td>
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<tr>
<td>Sr</td>
<td>Wetboek van Strafrecht (Dutch Criminal Code)</td>
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<td>Tex. L. Rev.</td>
<td>Texas Law Review</td>
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<tr>
<td>TIAS</td>
<td>Treaties and Other International Acts Series</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UN Doc.</td>
<td>United Nations Document</td>
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<tr>
<td>UN GAOR</td>
<td>United Nations General Assembly Official Record</td>
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<tr>
<td>U.N.S.W. L.J.</td>
<td>University of New South Wales Law Journal</td>
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<td>UNTS</td>
<td>United Nations Treaty Series</td>
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<td>UNWCC</td>
<td>United Nations War Crimes Commission</td>
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<td>US</td>
<td>United States</td>
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<td>v.</td>
<td>versus</td>
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<td>Vand. L. Rev.</td>
<td>Vanderbilt Law Review</td>
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<td>vol.</td>
<td>volume</td>
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<td>Yale Int’l L.J.</td>
<td>The Yale Journal of International Law</td>
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<tr>
<td>Yale L. J.</td>
<td>The Yale Law Journal</td>
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<tr>
<td>YB ECHR</td>
<td>Yearbook of the European Convention of Human Rights</td>
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<tr>
<td>YB ILC</td>
<td>Yearbook of the International Law Commission</td>
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<tr>
<td>YB IHL</td>
<td>Yearbook of International Humanitarian Law</td>
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<td>Wm. &amp; Mary L. Rev.</td>
<td>William and Mary Law Review</td>
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<td>ZãöRV</td>
<td>Zeitschrift für ausländisches öffentliches Recht und Völkerrecht</td>
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<td>ZStW</td>
<td>Zeitschrift für die gesamte Strafrechtswissenschaft</td>
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