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Shahram Dana

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CRIMINAL LAW

BEYOND RETROACTIVITY TO REALIZING JUSTICE: A THEORY ON THE PRINCIPLE OF LEGALITY IN INTERNATIONAL CRIMINAL LAW SENTENCING

SHAHRAM DANA*

If an international court were to be set up, it would be unwise to give it the very wide power to determine the penalty to be applied to each crime.

—Mr. Carlos Salamanca Figueroa, International Law Commission (1954)

Only the innocent deserve the benefits of the principle of legality. This assertion naturally offends our notions of justice. It would be unacceptable for a legal system to institutionalize such an approach. Yet, in the context of prosecuting mass atrocities, genocide, crimes against humanity, and war crimes, international criminal justice mechanisms appear to be resigned to such a principle, if not openly embracing it. Although ranking among the most fundamental principles of criminal law, nulla poena sine lege (no punishment without law) receives surprisingly little attention in international criminal justice. Indeed, it may be considered the “poor cousin” of nullum crimen sine lege (no crime without law), which has attracted far greater consideration. Whereas nullum crimen addresses the punishability of the conduct in question, nulla poena deals with the legality of the actual punishment or penalty itself. Given that both are at the core of

* Assistant Professor of Law, The John Marshall Law School. Former Associate Legal Officer at the United Nations International Criminal Tribunal for the former Yugoslavia. I am grateful to Roger Clark, Mark Drumbl, Stanley Fisher, Menno Kamminga, Andre Klip and Rod Rastan for their valuable comments on earlier drafts. Many thanks also to Cheyne Adam, Katarina Durcova, and Ali Abid for their research assistance on this piece. Most of all, I am encouraged by the loving support of my wife, Amelia. All errors are mine.

the principle of legality, the neglect of nulla poena sine lege is difficult to justify, although not without explanation. As one prominent scholar observes, nulla poena "affects only proven criminals" while nullum crimen "protects the mass of respectable citizens." While most criminal justice systems have made considerable efforts to close this gap over the years, international criminal justice has not. The potential contribution of nulla poena sine lege has been overlooked on the international level by policy makers, drafters, and judges. Likewise, there exists a lacuna in academic scholarship on this subject. Under-theorization of nulla poena in international criminal justice stalls the maturation in international law of this longstanding criminal law principle, keeps dormant its contribution to justice, and challenges the legitimacy of international punishment.

This Article aims to redress this imbalance by (1) developing the normative content of nulla poena sine lege under international law; (2) critically evaluating the statutes of international criminal courts and their sentencing jurisprudence on genocide, crimes against humanity, and war crimes; and (3) advancing a theory for understanding the role and potential contribution of nulla poena to international justice. I argue for an understanding of nulla poena that goes beyond its simple caricature as a principle of negative rights, designed merely to prevent retroactive punishment, to one that captures its full contribution to justice, including equality before the law, consistency in punishment, and legitimacy in international prosecutions. By advancing an international standard for nulla poena sine lege, I hope to lay a foundation on which international sentencing can more readily achieve the goals of the international community in prosecuting and punishing perpetrators of mass atrocities.

I. INTRODUCTION

Only the innocent deserve the benefits of the principle of legality. This statement naturally offends our notions of justice. It would be unacceptable for a legal system to institutionalize such an approach. Yet, in the context of prosecuting mass atrocities, genocide, crimes against humanity, and war crimes, international criminal law appears to be resigned to such a principle, if not openly embracing it. Although ranking among the most fundamental principles of criminal law, *nulla poena sine lege* (no punishment without law) has received surprisingly little attention in international criminal justice. So little, in fact, that it may be considered the poor cousin of *nullum crimen sine lege* (no crime without law) which has

attracted far greater consideration in scholarship and jurisprudence.¹ Whereas *nullum crimen sine lege* addresses the *punishability* of the conduct in question, *nulla poena sine lege* deals with the legality of the actual punishment or penalty itself. Given that both are at the core of the principle of legality,² the neglect of *nulla poena* is difficult to justify, although not entirely without explanation.³ As prominent legal scholar Jerome Hall observed, *nulla poena sine lege* “affects only proven criminals” while *nullum crimen sine lege* “protects the mass of respectable citizens.”⁴ Commenting on the traditional approach of strict adherence to *nullum crimen* combined with a cavalier attitude towards *nulla poena*, eminent criminal law professor Paul Robinson observed that such a practice “bestows the benefits of legality on innocent people and denies it only to the criminals.”⁵ While most national criminal justice systems have made considerable efforts over the years to close this gap, international criminal justice has not. The potential contribution of *nulla poena* has been largely overlooked on the international level by policy makers, drafters, and judges. Likewise, there exists a lacuna in academic scholarship on this subject. Under-theorization of *nulla poena* in international criminal justice stalls the maturation in international law of this long standing criminal law principle, keeps dormant its contribution to justice, and challenges the legitimacy of international prosecution and punishment.

¹ See C.R. v. United Kingdom, App. No. 20190/92, 335 Eur. Ct. H.R. (1996) at 68-69; S.W. v. United Kingdom, App. No. 20166/92, 335 Eur. Ct. H.R. (1996), at 41-42; M. CHERIF BASSIOUNI, *CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW* (1999); MACHTELD BOOT, *GENOCIDE, CRIMES AGAINST HUMANITY AND WAR CRIMES: NULLUM CRIMEN SINE LEGE AND THE SUBJECT MATTER JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT* (2002); STANISLAW POMORSKI, *AMERICAN COMMON LAW AND THE PRINCIPLE NULLUM CRIMEN SINE LEGE* (Elżbieta Chodakowska trans., 2d ed. 1975); L. C. Green, *The Maxim Nullum Crimen Sine Lege and the Eichmann Trial*, 38 BRIT. Y.B. INT’L L. 457 (1962); John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985); Jordan J. Paust, *It’s No Defense: Nullum Crimen, International Crime and the Gingerbread Man*, 60 ALB. L. REV. 657 (1997); Mohamed Shahabuddeen, *Does the Principle of Legality Stand in the Way of Progressive Development of Law?*, 2 J. INT’L CRIM. JUST. 1007 (2004); Beth Van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L. J. 119 (2008).

² Susan Lamb, *Nullum Crimen, Nulla Poena Sine Lege in International Criminal Law*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 773, 773-74, 756 (Antonio Cassese, Paola Gaeta & John R. W. D. Jones eds., 2002); Paul H. Robinson, *Legality and Discretion in the Distribution of Criminal Sanctions*, 25 HARV. J. ON LEGIS. 393, 396-97 (1988); William A. Schabas, *Nulla Poena Sine Lege*, in *COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS’ NOTES*, ARTICLE BY ARTICLE 463, 463 (Otto Triffterer ed., 1999).

³ See generally Francis A. Allen, *The Erosion of Legality in American Criminal Justice: Some Latter-Day Adventures of the Nulla Poena Principle*, 29 ARIZ. L. REV. 385 (1987).

⁴ JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 55 (2d ed. 2005).

⁵ Robinson, *supra* note 2, at 398.

This Article aims to redress this lacuna by (1) developing the normative content of *nulla poena* under international law; (2) critically evaluating the statutes of international criminal courts and their sentencing jurisprudence on genocide, crimes against humanity, and war crimes; and (3) advancing a theory for understanding the role and potential contribution of *nulla poena* to international justice. The Article argues for an understanding of *nulla poena* in international law that goes beyond its simple caricature as a principle of negative rights, designed merely to prevent retroactive punishment, to one that captures its role as a *quality of justice* principle, aimed at realizing justice in the distribution of punishment. This understanding of *nulla poena* is more in tune with its role in national systems.

The study's methodology deconstructs the *nulla poena* maxim into its underlying legal principles, examines sources of international law pertaining to each principle, and then reconstructs an international *nulla poena* maxim. The Article hypothesizes that a fuller appreciation of the function and purpose of *nulla poena*, gained through an elucidation of its underlying legal principles, can facilitate a more penetrating analysis of its normative development in international law. Accordingly, Part II examines the purpose of and interests protected by *nulla poena* and draws attention to its modern function.⁶ The analysis then connects underlying attributes of the maxim, formulated as legal principles, with its previously identified function and purpose. This Part argues that the goal of *nulla poena* is not merely to prevent retroactive punishment or abuse of power but also to realize equality before the law and consistency in sentencing. The former reflects a narrow understanding of *nulla poena* whereas the latter manifests a modern approach.⁷

Part III investigates sources of international law in order to determine the international standard for *nulla poena* through an analysis of international and regional conventions, customary international law, general principles of law, and international judicial precedent. Rather than giving a blanket treatment of *nulla poena* under international law, this Part examines sources of international law as they pertain to each underlying attribute. Drawing upon this analysis, the Article advances an international standard

⁶ As the historical development of *nulla poena sine lege* has been covered by other authors, it will not be further revisited here. See BASSIOUNI, *supra* note 1, at 127-35. See generally CARL LUDWIG VON BAR, THE HISTORY OF CONTINENTAL CRIMINAL LAW (Thomas S. Bell trans., Rothman Reprints 1968) (1916); POMORSKI, *supra* note 1; Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165 (1937); Aly Mokhtar, *Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects*, 26 STATUTE L. REV. 41 (2005).

⁷ The broader approach to *nulla poena* is here also referred to as its "positive justice" dimension or "quality of law" function. See *infra* notes 14 & 16 (discussing a broader approach).

for *nulla poena* integrating the particularities of international law with the requirements of criminal justice.

In Part IV, the Article moves its examination of *nulla poena* into the context of international criminal justice. This Part begins with a critical analysis of the statute and case law of the International Criminal Tribunal for the former Yugoslavia (ICTY).⁸ The treatment of *nulla poena* by the ICTY is examined against the backdrop of the analysis developed in Parts II and III. Next, the Article critiques the provisions of the Rome Statute of the International Criminal Court (ICC)⁹ pertaining to *nulla poena* and sentencing. Here, the Article elucidates the strengths and weaknesses of the ICC Statute in light of the international standard for *nulla poena* and its potential contribution to international criminal justice. The Article concludes that while one of the rationales underlying *nulla poena*, for example preventing retroactive punishment, may not raise serious concerns for international punishment of individuals guilty of war crimes, crimes against humanity, and genocide, this does not mean that *nulla poena* has lost relevance to international criminal justice. Other rationales underlying the maxim, in particular those connected with its positive justice function, such as equal treatment before the law, consistency in sentencing, and improving the quality of justice, continue to require a rethinking of the role of *nulla poena* in advancing international law and justice.

II. THE NATURE OF *NULLA POENA SINE LEGE*

A. VALUES: INTERESTS PROTECTED AND PURPOSES SERVED

Nulla poena sine lege and its counterpart, *nullum crimen sine lege*, serve as the bedrock of the principle of legality. They protect one of the most treasured individual rights of all—the right to liberty. In legal positivism, their emergence is connected with the struggle against the

⁸ The “International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991” was established by the U.N. Security Council, acting under Chapter VII of the Charter of the United Nations, in 1993 pursuant to Resolution 827. See Statute of the International Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute], reprinted in INTERNATIONAL CRIMINAL LAW: A COLLECTION OF INTERNATIONAL AND EUROPEAN INSTRUMENTS 53 (Christine Van den Wyngaert ed., 3d ed. 2005).

⁹ Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9 (July 1, 2002) [hereinafter ICC Statute]; United Nations: Rome Statute of the Criminal Court, 37 I.L.M. 999 (1998). The full text of the statute is also available at http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf.

dangers of unbridled and absolute power.¹⁰ They developed alongside other doctrines, such as *trias politica*, that were likewise designed to curb abuses of centralized power, although their application is not theoretically limited to that particular form of government.¹¹ In a *trias politica* system, the principle of legality places obligations and limitations on the powers of all three branches of the government. For example, they oblige the law-making body to define as precisely and clearly as possible the penalty applicable to a particular crime, including the form and severity of the punishment. They place on the judiciary the obligation to limit sanctions to those explicitly provided for by the legislature and prohibit judges from applying penalties retroactively. It may even be argued that *nulla poena* requires the judiciary to articulate reasons in support of the selected penalty.¹²

Nulla poena protects interests similar to those protected by *nullum crimen*.¹³ First, it protects an individual's interest in being free from abuse of power leading to loss of life, liberty, or property. For example, *nulla poena* protects an individual's right to liberty by requiring codified limits on the length of imprisonment. Second, it safeguards the principle of fair notice. Fairness and justice in the administration of criminal law demand that individuals know, or at least have the opportunity to know, the specific consequence for violating a particular law. *Nulla poena* serves this purpose by making the punishment for a crime foreseeable. In most national systems, this is expressed through codified penalty ranges for each crime.

Another interest protected by *nulla poena* is legal certainty. Legal certainty may be considered the sum of the first two interests. However, society's interest in legal certainty and modern justifications for respecting

¹⁰ See also Hall, *supra* note 6, at 165-72; Mokhtar, *supra* note 6.

¹¹ See M. CHERIF BASSIOUNI & PETER MANIKAS, *THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 270-80 (1996); Hall, *supra* note 6, at 167-70; see also FARHAD MALEKIAN, *THE CONCEPT OF ISLAMIC INTERNATIONAL CRIMINAL LAW: A COMPARATIVE STUDY* 20-22, 179-80 (1994) (noting the relevance of *nulla poena sine lege* and *nullum crimen sine lege* in Islamic legal traditions).

¹² At least one judge of the ICTY Appeals Chamber voiced concern in this regard, remarking that ICTY judgments "should be more elaborate on the reasons as to how a Chamber comes to the proportional sentence." Prosecutor v. Krnojelac, Case No. IT-97-25-A, Separate Opinion of Justice Schomburg, ¶ 1 (Sept. 17, 2003). Upon entering new convictions on appeal, the Appeals Chamber doubled the sentence without providing any substantive reasoning as to how it determined the new penalty. *Id.* at Judgment, ¶ 264.

¹³ See *In re Rauter*, Spec. Crim. Ct., The Hague (May 4, 1948), reprinted in H. LAUTERPACHT, *ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES* 526, 542-43 (1949) (recognizing two interests protected by *nulla poena*: legal security and individual liberty); see also, Robinson, *supra* note 2, at 396-97 ("The rationales that support precise written rules governing assignment of liability and its degree apply as well to criminal sentencing.").

nulla poena are broader than the goals of providing notice and preventing abuse of power, and include, for example, justice in the distribution of punishment and consistency in sentencing.¹⁴ The fact that *nulla poena sine lege* has outgrown its “negative” justice dimension¹⁵ and developed a “positive” justice attribute¹⁶ is evidenced by movements in various countries to reform sentencing laws, which began in the 1970s and built momentum over the last two decades.¹⁷ Undertaken in both civil law and common law countries, these reforms in sentencing policy transcend the traditional dichotomy between adversarial and inquisitorial legal systems.¹⁸ One common element emerging from the movements is that, in undertaking these reforms, the concern of policymakers is not that the state has abusively employed its power against individuals, but rather the concern has been to achieve justice and equal treatment in sentencing.¹⁹ This reflects a broader approach to *nulla poena sine lege*.

¹⁴ The common trends in reform of domestic penal policy, for example in the United States during the 1950s and 1960s with the proclamation of the Model Penal Code and again in the late 1980s with the Federal Sentencing Guidelines, in Scandinavian countries in the 1970s, and in Eastern European countries following the Cold War, all suggest constant and increasing movement towards placing greater emphasis on the values protected by the “positive” features of *nulla poena sine lege*. For further contemplation of the broader relevance and importance of *nulla poena sine lege*, see Allen, *supra* note 3, at 385-412.

¹⁵ For example, the prevention of abuse of power and application of retroactive penalties.

¹⁶ Take, for example, equality before the law, consistency in sentencing, proportionality, and predictability. See Robinson, *supra* note 2, at 394 (“While commentators do not always include it as a traditional purpose of the legality principle, another important effect is to assure some degree of uniformity among decisionmakers—both judges and juries—in imposing criminal sanctions in similar cases.”).

¹⁷ See Daniel B. Pickard, Note, *Proposed Sentencing Guidelines for the International Criminal Court*, 20 LOY. L.A. INT’L & COMP. L. REV. 123, 126 (1997).

¹⁸ The 1976 revisions of the Finnish Penal Code provide an illustrative example of such reforms in a civil law system. See U.S. SENTENCING GUIDELINES MANUAL (1991) (containing examples of reforms in a common law system); Pickard, *supra* note 17; Bill Mears, *Rehnquist Slams Congress Over Reducing Sentencing Discretion*, CNN.COM, Jan. 1, 2004, <http://www.cnn.com/2004/LAW/01/01/rehnquist.judiciary/> (reporting the reaction by the Chief Justice of the United States Supreme Court). The author acknowledges that some national systems face an ongoing debate about how much discretion to give judges. Moreover, it is not the author’s intention to advocate a blanket endorsement of the methods underlying the U.S. Federal Sentencing Guidelines for the purpose of international sentencing.

¹⁹ In recent reforms of domestic penal policy, greater emphasis has been placed on the positive values protected by *nulla poena*. For example, in the mid-1970s, Finland started reforming its criminal justice system, focusing on legal security, proportionality, predictability, and equal treatment. See Pickard, *supra* note 17. Significantly, in the context of international criminal justice, current and former judges of the ICTY have expressed concern that lack of consistency in international sentencing may undermine confidence in international prosecutions. Rachel S. Taylor, *Sentencing Guidelines Urged*, INST. WAR &

Accordingly, a modern approach to the principle of legality appreciates *nulla poena's* utility for not only limiting judicial authority, but also safeguarding it by preventing factors such as popular prejudice, political pressure, or immediate public opinion from influencing the sentence. It partly restrains these potential threats to justice in sentencing as well as the *appearance* of such an influence. Thus, in addition to safeguarding the rights of a defendant, *nulla poena* also protects the integrity of the criminal justice process. It provides a legal framework in which consistency in sentencing can be more readily achieved in practice. By creating a statutory framework for penalties, *nulla poena* actually preserves judicial independence, safeguarding judges from pressures arising from non-legal influences. In short, a broad approach to *nulla poena sine lege*, in tune with its modern development and recognizing its characteristic as a quality of justice principle, affords several interconnected benefits including advancing consistency in sentencing, safeguarding judicial authority, protecting the integrity of criminal justice, and upholding justice in the eyes of the public.

B. ATTRIBUTES: LEGAL PRINCIPLES UNDERLYING *NULLA POENA*

The extent of protection accorded to these interests depends in part upon the degree of adherence to four attributes of *nulla poena sine lege*. They consist of two threshold requirements on the quality of criminal law and two prohibitions on its application.²⁰ The threshold requirements are expressed in the legal principles of *lex scripta* (punishment must be based on written law) and *lex certa* (the form and severity of punishment must be clearly defined and distinguishable). The two prohibitions can be described as *lex praevia* (the prohibition against retroactive application) and *lex stricta* (the prohibition against applying a penalty by analogy).

As to the quality of law, *lex scripta* and *lex certa* work in tandem and are recognized requirements of *nulla poena* in most legal systems.²¹

PEACE REPORTING, Mar. 8, 2004, http://www.iwpr.net/?p=tri&s=f&o=166179&apc_state=henitri2004.

²⁰ BASSIOUNI, *supra* note 1, at 123-26; Hall, *supra* note 6, at 165; Roelof Haveman, *The Principle of Legality*, in *SUPERNATIONAL CRIMINAL LAW: A SYSTEM SUI GENERIS* 39, 40 (Roelof Haveman, Olga Kavran & Julian Nicholls eds., 2003); Lamb, *supra* note 2, at 733-66; *see also*, Boot, *supra* note 2, at 94-102. In commentaries on the principle of legality, these four attributes have been discussed as they relate to the *nullum crimen* principle. They are also useful in analyzing the substance of the *nulla poena* principle. As applied to *nullum crimen*, these attributes address the punishability of a particular conduct. Applied to *nulla poena*, they place limits and set standards for the punishment itself.

²¹ Haveman, *supra* note 20, at 40-43; *see also* Prosecutor v. Tadić, Case Nos. IT-94-1-A & IT-94-1-Abis, Judgement, Separate Opinion of Judge Cassese, ¶ 4 (Jan. 26, 2000) (“[T]he *nulla poena sine praevia lege poenali* principle . . . is generally upheld in most national legal

Continental European legal systems interpret the *lex scripta* principle as requiring penalties to be based upon codified laws (written laws provided by the legislature).²² Although common law traditions historically permitted “written law” to include judge-made law, the United States, in addition to most common law countries,²³ follows a continental law approach to *lex scripta*, as evidenced by the practice of relying on statutory law in the application of criminal penalties.²⁴ Accordingly, it may be concluded that *lex scripta* requires that the law, which is relied on by judges for their legal authority to punish the accused, be written and provided for by the legislature. Thus, *nulla poena* limits the use of custom for the determination of a sentence. Here, *nulla poena* protects against abuse of power and guards against the influence of prejudicial factors, such as transient emotional outrage or politically charged motives. *Lex certa* requires that the law authorizing the nature (form) and degree (severity) of punishment be specific, definite, and clear. This includes specifying the type of punishment that a judge is (and is not) authorized to impose on an accused.²⁵ It also requires the law to differentiate between the specific maximum (severity) applicable to different crimes.²⁶ Finally, it would mean that the law of penalties should also distinguish between different forms of participation in criminal conduct such as commission, attempt, aiding and abetting, and so on. The majority of states follow this approach in their domestic legal systems, and it typically includes the practice of articulating a specific maximum penalty for each criminal offense. By requiring definite and precise law on penalties, the *lex certa* requirement of *nulla poena sine lege* protects the individual’s interest in legal certainty.

Turning to the prohibition characterized as *lex praevia, nulla poena* requires strict adherence to the principle of non-retroactivity as to the nature and degree of the imposed punishment.²⁷ It prohibits the imposition of a

systems Under this principle, for conduct to be punishable as a criminal offence, the law must not only provide that such conduct is regarded as a criminal offence, but it must also set out the appropriate penalty”).

²² See Haveman, *supra* note 20, at 41.

²³ Scotland is arguably a remaining exception. See *id.* at 41 n.6.

²⁴ See *id.* at 41.

²⁵ For example, death, incarceration, forced labor, fines, and so on.

²⁶ Hereinafter referred to as either “precise,” “specific,” or “individualized” penalties. By use of these terms herein, I mean the practice of providing a penalty range or maximum penalty per crime. I do not argue for *exact* penalties (that is, for example, fifteen years exactly for a particular crime, no more and no less). Moreover, while the law in the first instance sets the outer limits of a penalty, the determination of the actual sentence within that range in a given case is influenced by a number of factors. However, an analysis of all sentencing factors is beyond the scope of the present contribution.

²⁷ United Nations General Assembly, Mar.-Apr. & Aug. 1996, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, ¶ 189, U.N. Doc.

penalty heavier than the one applicable at the time the crime was committed. The principle of non-retroactivity is a fundamental feature of any criminal justice system²⁸ and has been explicitly recognized in international human rights declarations and treaties.²⁹ Moreover, the *lex praevia* attribute of *nulla poena* is consistently among the non-derogable provisions of these international instruments, prompting some commentators to argue that it ranks among the core human rights protections.³⁰ In the context of *nullum crimen sine lege*, writers from the civil law tradition described the *lex stricta* element as a prohibition on interpretation by analogy.³¹ Jurists from the common law tradition explain *lex stricta*, more generally, as the requirement of strict interpretation.³² This includes the notion that penal statutes should not be extended to the detriment of the accused. Accordingly, whereas the *lex stricta* component of *nullum crimen* prohibits expansion of criminal laws by analogy to cover conduct not within the law, the *lex stricta* attribute of *nulla poena* would prohibit substituting an alternative penalty by analogy.³³

A/51/22 (1996) [hereinafter ICC Prep. Committee's 1996 Report]; see also Schabas, *supra* note 2, at 463.

²⁸ The views expressed by states during the ICC preparatory meetings confirm this principle as a primary feature of their national legal systems. See ICC Prep. Committee's 1996 Report, *supra* note 27, ¶ 189.

²⁹ See International Covenant on Civil and Political Rights, G.A. Res. 2200A at 55, art. 15.1, U.N. GAOR, 21st Sess., 1496th plen. mtg., U.N. Doc. A/6316 (adopted and opened for signature, ratification and accession on Dec. 16, 1966) (entered into force on Mar. 23, 1976) [hereinafter ICCPR]; Universal Declaration of Human Rights, G.A. Res. 217A, at 73, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR]. For regional international treaties, see African (Banjul) Charter on Human and People's Rights art. 7(2), June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 [hereinafter African Charter]; Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter ACHR]; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 7(1), Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR].

³⁰ See Lamb, *supra* note 2, at 757.

³¹ BOOT, *supra* note 1, at 94, 100-02; Haveman, *supra* note 20, at 46-48.

³² See Hall, *supra* note 6, at 165.

³³ In the *Erdemović* case, an ICTY trial chamber succumbed to this type of interpretation when it made comparisons between genocide and crimes against humanity. Discussed in full *infra* Part IV(B). See Prosecutor v. Erdemović, Case No. IT-96-22-T, Sentencing Judgment, ¶¶ 35-40 (Nov. 29, 1996). While most national legal systems allow for some judicial discretion in the application of penalties, this discretion is strictly limited by legislative parameters. As noted by one commentator, "only a few permit resorting to analogy outside legislatively enacted penalties." See BASSIOUNI, *supra* note 1, at 124.

III. *NULLA POENA SINE LEGE* IN INTERNATIONAL LAWA. INTERNATIONAL HUMAN RIGHTS CONVENTIONS:
AN INCOMPLETE CODIFICATION?

According to some scholars, the principle of legality has been “integrated into the concept of fundamental human rights in criminal justice.”³⁴ Regarding national legal systems, this proposition seems beyond serious debate. The subject of particular interest here is the character and content of *nulla poena sine lege* in international law and, more specifically, in international criminal justice. When analyzing human rights instruments for an understanding of the principle of legality in international law, commentators typically begin with Article 11 of the Universal Declaration of Human Rights (UDHR) (1948):

No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal 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 penal offence was committed.³⁵

Nearly identical language is found in several international and regional human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR) (1966),³⁶ the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (1950),³⁷ and the American Convention on Human Rights (ACHR) (1969).³⁸ Several commentators consider the second sentence to represent the incorporation of *nulla poena sine lege* in international law as a fundamental human rights principle.³⁹ This provision is consistently among the non-derogable

³⁴ BASSIOUNI & MANIKAS, *supra* note 11, at 265; *see also* MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 358 (2d ed. 2005) (1993); Schabas, *supra* note 2, at 463.

³⁵ UDHR, *supra* note 29.

³⁶ ICCPR, *supra* note 29, art. 15(1) (“[N]or shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.”); *see* NOWAK, *supra* note 34, at 358-68 (providing a general commentary on this article).

³⁷ ECHR, *supra* note 29, art. 7(1) (“[N]or shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.”); *see* DAVID J. HARRIS, MICHAEL O’BOYLE & COLIN WARBRICK, LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 274-82 (1995) (providing a general commentary on Article 7).

³⁸ ACHR, *supra* note 29, art. 9 (stating that a heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed); *see also* JO M. PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS (Thomas Buergenthal ed., 2003).

³⁹ *See* NOWAK, *supra* note 34, at 359. *See generally* KENNETH S. GALLANT, THE PRINCIPLE OF LEGALITY IN INTERNATIONAL AND COMPARATIVE CRIMINAL LAW (2009).

provisions of these international human rights treaties.⁴⁰ Moreover, all three conventions codify the provision in an article separate from other procedural guarantees in criminal law, indicating “its special significance for criminal trials . . . as well as for legal certainty in general.”⁴¹ Its formulation further indicates that the international *nulla poena sine lege* prohibits both retroactive and retrospective punishment.⁴²

The text itself explicitly incorporates into international law one attribute of *nulla poena*, namely the *lex praevia* principle: the prohibition of *ex post facto* penal laws and retroactive application of penalties. The European Court of Human Rights (European Court), however, held that this provision includes the *lex stricta* prohibition against application of penalties by analogy, as well as the *lex certa* attribute of *nulla poena sine lege*:

Article 7 embodies, *inter alia*, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused’s detriment, for instance by analogy. From these principles it follows that an offence *and the sanctions* provided for it must be clearly defined in the law.⁴³

Here, the European Court took a broad approach to *nulla poena*, viewing it not merely as a protectionist principle but also as a quality of law principle.⁴⁴ Although the case involved a situation in which “it may be

⁴⁰ See ICCPR, *supra* note 29; ACHR, *supra* note 29, art. 27(2); ECHR, *supra* note 29. It also appears in international humanitarian law treaties. See e.g., Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 75(4)(c), Aug. 12, 1949, 1125 U.N.T.S. 3.

⁴¹ NOWAK, *supra* note 34, at 358.

⁴² See *Adamson v. United Kingdom*, App. No. 42293/98, 28 Eur. H.R. Rep. CD209 (1999); *Welch v. United Kingdom*, App. No. 17440/90, 16 Eur. H.R. Rep. CD42 (1996). “Retroactivity” generally refers to making a certain conduct, innocent at the time it was performed, criminal and punishable after the fact, in other words creating a *new crime ex post facto*; whereas “retrospectivity” refers to an *ex post facto* change in the legal effect or consequence of a conduct that was already criminal. For further reading, see *Bouterse Case*, Amsterdam Court of Appeals, Opinion of Professor C.J.R. Dugard, ¶ 8.4.5 (July 7, 2000) (on file with author).

⁴³ *Başkaya v. Turkey*, App. Nos. 23536/94 & 24408/94, 31 Eur. H.R. Rep. 10, ¶ 36 (1999) (emphasis added).

⁴⁴ This is consistent with the court’s approach to Article 7 in general. For example, in *Kokkinakis v. Greece*, the court interpreted the general scope of Article 7(1) to include the principles of *lex certa*, *lex scripta*, and *lex stricta* in a case concerning the “punishability” of the conduct. See App. No. 14307/88, 17 Eur. H.R. Rep. 397, 411 (1994) (“[Article 7(1)] also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty . . . and the principle that the criminal law must not be extensively construed to an accused’s detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law.”). However, in the context of national prosecutions, the court ruled that Article 7 was not violated where the “punishability” of the conduct was foreseeable in light of the interpretations of national courts. Problems with applying the foreseeability test in the context of international law are addressed below.

difficult to frame laws with absolute precision and [a] certain degree of flexibility may be called for," the European Court did not hesitate to apply a strict standard for *nulla poena sine lege* and rejected the use of analogy in fixing a penalty even where *nullum crimen sine lege* had been respected.⁴⁵ Likewise, leading commentators consider the *nulla poena* provision of ICCPR Article 15(1), ECHR Article 7(1), and ACHR Article 9 as also giving rise to the *lex scripta* (written law), *lex certa* (certain and predictable), and *lex stricta* (prohibition of analogy) attributes of *nulla poena sine lege*, in addition to explicitly incorporating *lex praevia* (prohibition of retroactivity).⁴⁶

The passive language of these provisions also leaves open to interpretation the notion of "law." What "law" satisfies the *lex scripta* requirement of *nulla poena sine lege* when determining the penalty "applicable" at the time of the offense?⁴⁷ The European Court stated, obiter dictum, that "[w]hen speaking of 'law' Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statutory as well as case-law."⁴⁸ In cases dealing with the *nullum crimen* principle,⁴⁹ the European Court has applied the test of accessibility and foreseeability when determining whether the

⁴⁵ *Başkaya*, 31 Eur. H.R. Rep. ¶¶ 39, 42.

⁴⁶ See, e.g., NOWAK, *supra* note 34, at 359-60.

⁴⁷ A few decisions address this question in interpreting the *nullum crimen* principle set forth in the first clause of Article 7(1). See *C.R. v. United Kingdom*, App. No. 20190/92, 335 Eur. Ct. H.R. at 68-69 (1996); *S.W. v. United Kingdom*, App. No. 20166/92, 335 Eur. Ct. H.R. at 41-42 (1996). In these cases, the European Court of Human Rights held that so long as the law is "accessible" and "foreseeable," then the *nullum crimen* principle is respected.

⁴⁸ *Başkaya*, 31 Eur. H.R. Rep. ¶ 36. Note, however, that in this case as well as in the *Welch* and *Adamson* cases, the *lex scripta* principle was not directly in issue. The issue in the latter two was not whether judge-made law could serve to satisfy the *nulla poena* principle in Article 7(1), but whether the measure constituted a "penalty" within the meaning of the Convention. The legislation in question in both cases was held to have retrospective effects and therefore, if the measure was deemed to be punitive, it would be held to violate the second clause of Article 7(1). *Adamson v. United Kingdom*, App. No. 42293/98, 28 Eur. H.R. Rep. CD209, 1 (1999); *Welch v. United Kingdom*, App. No. 17440/90, 16 Eur. H.R. Rep. CD42, ¶¶ 26-27 (1996). In *Welch*, the court held that the confiscation provision of the Drug Trafficking Offenses Act of 1986 were penalties within the meaning of Convention, and therefore its retrospective application to the defendant violated the *nulla poena sine lege* principle within Article 7. 16 Eur. H.R. Rep. ¶¶ 33-35. In *Adamson*, however, the majority court held that the application was inadmissible because the challenged measure under the Sex Offenders Act of 1997, although also resulting in retrospective consequences, did not violate Article 7(1) because the measure was not a penalty. 28 Eur. H.R. Rep. at ¶ 1.

⁴⁹ That is, whether the conduct in question is punishable in the first place, or in other words whether the conduct falls within the scope of a criminal statute.

conduct in question falls within the scope of a criminal statute.⁵⁰ However, caution should be taken before mechanically applying the foreseeability test to penalties in international prosecutions.⁵¹ First, international adjudication accepts a wider range of sources of law than the two types referred to by the European Court. In addition to treaty law, other sources of international law include international custom and general principles of law.⁵² While the court has given a liberal interpretation to the notion of “law,” state practice and *opinio juris* is presumably not what the court had in mind when referring to “case-law.” The diverse sources of international law and the complexities surrounding international law-making processes challenge a straightforward application of the accessibility and foreseeability test.

Second, the cases in which this test has been applied involved prosecutions in which the conduct in question and the law applied arose in the same forum. In international prosecutions, the applicability of this test is complicated by the fact that the penalties are rendered in a forum far remote from the *locus delicti*. If the law of the *locus delicti* prohibited the application of a particular penalty, can that penalty still be considered foreseeable? Should the “applicable penalty” be determined by the law of the *locus delicti* or the law of the *locus fori*? The rulings of the International Criminal Tribunal for the former Yugoslavia (ICTY) on this point have been controversial, if not contrary to the intent of the statute’s drafters.⁵³ As will be discussed in detail in Part IV, through clever stratagem, the ICTY avoided the intent of the drafters and effectively marginalized punitive norms of the *locus delicti*, even one of its most entrenched norms, the prohibition of life imprisonment, when laying the foundations for its sentencing practice.⁵⁴ Third, the foreseeability test arose in cases dealing with the issue of punishability of conduct, and not the

⁵⁰ C.R. v. United Kingdom, App. No. 20190/92, 335 Eur. Ct. H.R. (1996); S.W. v. United Kingdom, App. No. 20166/92, 335 Eur. Ct. H.R. (1996); Kokkinakis v. Greece, App. No. 14307/88, 17 Eur. H.R. Rep. 397, 411 (1994).

⁵¹ Some writers have no trouble relying on the *nullum crimen* cases to perfunctorily apply the foreseeability test to a *nulla poena* analysis. See, e.g., Schabas, *supra* note 2, at 463. However, the fact that such authors do not cite cases where the court itself applies the accessibility and foreseeability test to a *nulla poena* issue is revealing. The absence of cited case law applying the test to penalties is neither surprising nor without possible explanation. See *infra* text accompanying notes 55-57.

⁵² These sources of international law are discussed in detail *infra* Parts III.B (international custom) and III.C (general principles of law).

⁵³ See *infra* Part III.B and text accompanying notes 75-80.

⁵⁴ It would not be the last time that a trial chamber of the ICTY employs such tactics in a matter concerning penalties. Recently, a trial chamber of the ICTY continued this methodology in the interpretation of the principle of *lex mitior*. See Prosecutor v. Nikolić, Case No. IT-94-2-S, Sentencing Judgment (Dec. 18, 2003); *infra* Part IV.B.

punishment itself. In other words, the court was addressing *nullum crimen*, not *nulla poena*.

In fact, judgments by the European Court of Human Rights interpreting *nulla poena sine lege* are scarce.⁵⁵ The infrequency of challenges itself suggests the entrenchment of the maxim in municipal law and practice, as do the types of challenges among the few that have come before the European Court. Typically, the challenged measure is found in law passed by the legislature.⁵⁶ This is not surprising and reinforces the fact that most states address the issue of criminal sanctions exclusively through written law in the form of legislative enactment.⁵⁷

B. CUSTOMARY INTERNATIONAL LAW: A POSSIBLE SOURCE FOR STRENGTHENING *NULLA POENA SINE LEGE*?

In addition to international treaties and conventions, international custom may serve to inform the examination of *nulla poena sine lege* under international law. When enforced through *ad hoc* tribunals or the International Criminal Court (ICC), however, international criminal law differs from other branches of public international law in that international norms, standards, and rules are directly applicable to individuals. Moreover, it contains a unique sanction—incarceration of a person—not found in other areas of public international law which, unless exercised lawfully and legally, constitutes a breach of international human rights law.⁵⁸ Therefore, a customary rule in international criminal law must satisfy the combined requirements of human rights law and general

⁵⁵ See HARRIS, O'BOYLE & WARBRICK, *supra* note 37, at 274-75 ("Very few cases have been admitted for consideration on the merits under Article 7.").

⁵⁶ *E.g.*, *Adamson v. United Kingdom*, App. No. 42293/98, 28 Eur. H.R. Rep. CD209, ¶ 1 (1999); *Welch v. United Kingdom*, App. No. 17440/90, 16 Eur. H.R. Rep. CD42, ¶¶ 9, 12 (1996).

⁵⁷ This is true of the current practice of even common law traditions such as the United Kingdom and United States. In both *Welch* and *Adamson*, the challenged measure was found in a law passed by the legislature. In both cases, the State (the United Kingdom) chose to approach the subject of criminal sanctions via a legislative act. In the United States, almost all states have codified their penal laws and penal sanctions are specified by the legislature.

⁵⁸ The principal distinction between "lawful" and "legal" is that the former contemplates the substance of the law while the latter pertains to the form of law. To say that an act is "lawful" implies that it is authorized by the law, and to say that it is "legal" indicates that it is performed in accordance with the forms and usage of law. See BLACK'S LAW DICTIONARY 885, 892 (6th ed. 1990).

principles of criminal law.⁵⁹ In this sense, international custom can strengthen the rule of law in international criminal justice.

Pursuant to Article 38(1)(b) of the Statute of the International Court of Justice, “international custom, as evidence of a general practice accepted as law” serves as an essential source of law for identifying international standards.⁶⁰ “International custom” may be described as a general recognition among States of a certain practice as obligatory.⁶¹ There must exist a degree of uniformity and consistency in the practice of states (i.e., state practice) accompanied with a view that conformity with the practice at issue is obligatory (i.e., *opinio juris et necessitatis*).⁶² Complete uniformity in practice among states is not required.⁶³ According to international law scholars, a state’s domestic practice, as expressed in its legislation, constitutes appropriate evidence of state practice.⁶⁴ In other words, state practice may be determined not only by the practice followed by states in their external relations, but also the practice followed by states internally.⁶⁵

An examination of criminal sanctions in national legal systems reveals substantial and widespread uniformity in the practice of articulating specific maximum penalties for each crime individually.⁶⁶ As noted above, the criminal codes of most states contain specific maximums per crime or category of crimes.⁶⁷ As to the applicable penalty, they make distinctions not only between types of crimes but also between completed crimes and

⁵⁹ See also William A. Schabas, *Sentencing by International Criminal Tribunals: A Human Rights Approach*, 7 DUKE J. COMP. & INT’L L. 461 (1997) (arguing that sentencing in international criminal law should measure up to contemporary human rights standards).

⁶⁰ See Statute of the International Court of Justice, 1999 I.C.J. art. 38(1)(b).

⁶¹ See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 6 (6th ed., 2003); see also George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT’L L. 541 (2005) (applying the model of a multilateral prisoner’s dilemma to demonstrate, as a rebuttal of critics, that it is plausible that states would comply with customary international law under certain conditions).

⁶² BROWNLIE, *supra* note 61, at 6-12.

⁶³ See *id.* at 7; MALCOLM N. SHAW, *INTERNATIONAL LAW* 79 (5th ed., Cambridge University Press 2003) (1997).

⁶⁴ BROWNLIE, *supra* note 61, at 8.

⁶⁵ Andrea Carcano, *Sentencing and the Gravity of the Offence in International Criminal Law*, 51 INT’L & COMP. L.Q. 583, 587 (2002).

⁶⁶ See Prosecutor v. Tadić, Case Nos. IT-94-1-A & IT-94-1-Abis, Judgement, Separate Opinion of Judge Cassese, ¶ 4 (Jan. 26, 2000) (“[T]he *nulla poena sine praevia lege poenali* principle is generally upheld in most national legal systems Under this principle, for conduct to be punishable as a criminal offence, the law must not only provide that such conduct is regarded as a criminal offence, but it must also set out the appropriate penalty.”); see also *supra*, Part II.

⁶⁷ See also WILLIAM A. SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* 162 (2001).

inchoate crimes.⁶⁸ Thus, the *lex scripta* and *lex certa* attributes of *nulla poena sine lege* feature prominently in current state practice. Moreover, a consequence of a system's adherence to these two principles of *nulla poena* is that the need to resort to analogy naturally falls away. This indirect affirmation of the *lex stricta* principle has obviated the need to codify constitutionally the prohibition against punishing by analogy in many national systems. The *lex praevia* attribute of *nulla poena* likewise constitutes a fundamental principle of domestic legal systems and in many cases has been codified in national constitutions or criminal codes.⁶⁹ As stated by Theodor Meron, former President and judge of the International Criminal Tribunal for the former Yugoslavia (ICTY), the "prohibition of retroactive penal measures is a fundamental principle of criminal justice, and a customary, even peremptory, norm of international law that must be observed in all circumstances by national and international tribunals."⁷⁰ Thus, state practice indicates that *nulla poena sine lege* contains strong *lex scripta*, *lex certa*, *lex stricta* and *lex praevia* features.

On the other hand, after examining international conventions defining international crimes, one may be tempted to conclude that international practice suggests a lack of concern for adherence to *lex scripta* and *lex certa* because international criminal law treaties do not contain provisions for applicable penalties.⁷¹ Such a conclusion, however, would fail to take account of the fact that these international treaties envisioned a system of indirect enforcement whereby states would legislate precise maximum

⁶⁸ See Pickard, *supra* note 17, at 141-62. Pickard provides a comparative overview of a variety of crimes, including genocide, murder, rape, torture, assault, and others, for twelve countries from diverse legal systems. The study indicates that each country makes the said distinctions. These countries include Argentina, China, France, Nigeria, Romania, Russia, United Kingdom, United States, India, Korea, Japan, Germany, Afghanistan, and Turkey.

⁶⁹ The principle of non-retroactive application of penalties is widely adhered to in the internal practice of states, and is considered a fundamental feature of a criminal law system. See ICC Prep. Committee's 1996 Report, *supra* note 27, at 43; see also M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 290 (1993) [hereinafter Bassiouni Study].

⁷⁰ THEODOR MERON, *Ex Post Facto?*, in *WAR CRIMES LAW COMES OF AGE* 244, 244 (1998).

⁷¹ See International Convention for the Suppression of Terrorist Bombings, 1998, 37 I.L.M. 249, reprinted in *INTERNATIONAL CRIMINAL LAW: A COLLECTION OF INTERNATIONAL AND EUROPEAN INSTRUMENTS*, *supra* note 8; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, 974 U.N.T.S. 177; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 860 U.N.T.S. 105; Convention on the Prevention and Suppression of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

penalties within the framework of their domestic criminal codes.⁷² These treaties and conventions typically address only one aspect of substantive criminal law. They usually do not contain provisions on general principles of criminal law, such as principles of criminal liability, relevant defenses, or, particularly relevant for our purposes here, specific penalties. Moreover, the absence of an international forum, such as an international criminal court with powers of direct enforcement, meant that articulating precise penalties within the treaties was not a legal necessity.⁷³ Interestingly, at the preliminary stage of discussions on creating an international forum for the prosecution of international crimes, this deficiency in international criminal law conventions was noted by many states as falling short of adequate respect for *nulla poena sine lege*.⁷⁴ Therefore, it seems unwarranted to conclude that state practice does not support the requirement for crime-specific maximum penalties in accordance with *nulla poena sine lege* from the mere fact that international criminal law treaties do not contain precise penalties.

As to the question of *opinio juris*, many states have expressed a sense of legal obligation to act in accordance with *nulla poena sine lege*. During the drafting of the ICTY statute, several states, presumably mindful of the quality of law function of *nulla poena*, supported the application of national penalties and norms which, in the case of the former Yugoslavia, excluded life imprisonment as cruel and inhumane.⁷⁵ For example, with the exception of the death penalty, Italy, Russia, and the Netherlands explicitly referred to national penalties in their proposals. The Netherlands expressed the view that “[a]n appropriate sanction norm has to be created both for war crimes and for crimes against humanity to be applied by the *ad hoc* tribunal. In the opinion of the Netherlands this sanction norm should be derived from the norms which were applicable under former Yugoslav national law.”⁷⁶

⁷² BASSIOUNI, *supra* note 1, at 125-26; BASSIOUNI & MANIKAS, *supra* note 11, at 689.

⁷³ It is worth noting that within the legal framework of the European Union, supra-national legal instruments which require Member States to criminalize certain acts also set forth provisions instructing States as to the appropriate penalty. Although there is no European criminal forum for prosecution, the so-called “minimum-maximum” provisions require Member States to include in their enabling legislation a minimum and maximum penalty.

⁷⁴ *E.g.*, *Summary Record of the 17th Meeting*, U.N. Doc. A/C.6/49/SR.17 at 2 (Nov. 17, 1994) (discussing the ILC report on an international criminal court); ICC Prep. Committee’s 1996 Report, *supra* note 27, at 63, ¶ 304.

⁷⁵ See 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS 440-43 (1995).

⁷⁶ Schabas, *supra* note 59, at 473 (citing Note Verbale from the Permanent Representative of the Netherlands, to the Secretary-General, United Nations (Apr. 30, 1993) U.N. SCOR, U.N. Doc. S/25716 at 5).

The United States favored the adoption of sentencing guidelines.⁷⁷ Italy, in a letter to the U.N. Secretary General, stated that “the *need to respect* the principle *nullum crimen, nulla poena sine lege*, the basis of fundamental human rights, *has induced* the Italian Commission to decide in favor of the penalties set forth by the criminal law of the State of the *locus commissi delicti*.”⁷⁸ In this expression of *opinio juris*, Italy decisively accepts the binding nature of *nulla poena* even in international law. In other words, in contemplating action at the international level, Italy’s position is that states are legally obligated to fully respect *nulla poena* when acting on a matter within the principle’s ambit. Thus, as to the content of the principle, Italy affirmed the *lex scripta* and *lex certa* aspects of *nulla poena sine lege* at the international level. Additionally, Italy characterized *nulla poena* as a fundamental human right. Slovenia called for even greater certainty by suggesting the inclusion of minimum as well as maximum penalties.⁷⁹ The Organization of the Islamic Conference said that “the tribunal should promulgate penalties before adjudicating cases, based on its statute and general principles of law of the world’s major legal systems.”⁸⁰ Presumably, it had in mind something more than the final version of Article 24, which merely excludes the death penalty. Thus, among the states making submissions on the issue, the overwhelming majority recognize a *nulla poena* rule that is deeper and extends beyond merely the prohibition of retroactive punishment.

Further insights on the views of states as to the appropriate quality and character of *nulla poena* in international law can be gained from opinions expressed by state delegations during preparatory meetings and negotiations on the statute of the ICC. Numerous states voiced their opinion that punishment for crimes must be in accordance with *nulla poena sine lege*.⁸¹ Indeed, there was even broad agreement on this point.⁸² It was noted that “the principle of legality (*nulla poena sine lege*) required that penalties be defined in the draft statute of the ICC *as precisely as possible*.”⁸³ Some states also suggested that the punishment applicable to each offense, as well as the enforcement of penalties, should be set forth in the ICC’s statute.⁸⁴ Moreover, states also widely expressed the view that adherence to

⁷⁷ MORRIS & SCHARF, *supra* note 75, at 442.

⁷⁸ Letter from the Permanent Representative of Italy, to the Secretary-General, United Nations, at 1, art. 7 §§ 1-2, U.N. Doc. S/25300 (Feb. 17, 1993) (emphasis added).

⁷⁹ MORRIS & SCHARF, *supra* note 75, at 443.

⁸⁰ *Id.* at 441.

⁸¹ ICC Prep. Committee’s 1996 Report, *supra* note 27, at 41.

⁸² *Id.* at 41.

⁸³ *Id.* at 63, ¶ 304.

⁸⁴ *Id.* at 41.

fundamental principles, such as *nulla poena sine lege*, was essential in order to ensure predictability or equality before the law.⁸⁵ This may be an early sign that the positive justice dimension⁸⁶ of *nulla poena sine lege*, which has already been recognized in domestic law for its valuable contribution in improving sentencing practice, is being considered in the international context. In addition, not only were there consistent expressions of *opinio juris* by the states on the importance of fundamental principles of criminal law but also, significantly, the reasons articulated for faithful adherence to them reflect those interests protected by the *lex certa*, *lex scripta*, *lex stricta* and *lex praevia* requirements⁸⁷ of *nulla poena sine lege*. Accordingly, any compromise on the quality of *nulla poena sine lege* as measured by these four requirements would directly undermine the reasons widely expressed and agreed upon by states for their opinion that punishment in international criminal law must comply with *nulla poena sine lege*.

At least one author has been puzzled over the “preoccupation” with *nulla poena*.⁸⁸ Schabas infers that the positions of states, outlined above, reflect a narrow “concern about the issue of retroactivity.”⁸⁹ He concludes that “such a concern . . . is difficult to understand given that this question was supposedly well settled at Nuremberg.”⁹⁰ His argument is quite simple: if post-World War II trials permitted the death penalty, can any defendant seriously argue that he faces a heavier penalty than the one applicable at the time the offense was committed? Indeed, if the concern is limited to the *lex praevia* attribute of *nulla poena*, then, as Schabas astutely puts it, all the fuss is “difficult to understand,” assuming, of course, that life imprisonment is not a more severe penalty than capital punishment.⁹¹ Yet, it is reasonable to infer that perhaps, in expressing their support for adhering to a national penalties regime, the states were concerned with more than simply the prohibition of retroactive penalties. States appear to have been also concerned about legal certainty (*lex certa*) and consistency in sentencing, concerns captured by a broader approach to *nulla poena sine lege* that gives due appreciation for its function as a principle of positive justice. As noted above, for example, the United States encouraged the adoption of sentencing guidelines. The very nature of such a proposal strongly indicates that the concern is not so much about abusive or retroactive

⁸⁵ *Id.*

⁸⁶ *See supra* Part II.B.

⁸⁷ *See supra* Parts II.A-B.

⁸⁸ Schabas, *supra* note 59.

⁸⁹ *Id.* at 468-69.

⁹⁰ *Id.* at 469.

⁹¹ The issue of whether life imprisonment is not a more severe penalty than capital punishment is further discussed below, *infra* text accompanying notes 176-178.

punishment, but more about the quality of justice in punishing individuals brought before the court. Likewise, one could view adherence to national penalties as a more organic means of achieving the stated goals of the ICTY as reflected in the opinion of the Netherlands which encouraged following the sentencing norms of the *locus delicti*. As Schabas acknowledges, when adopting the ICTY statute, states were aware of the complexities surrounding applicable penalties, such as the fact that Yugoslavian law limited terms of imprisonment to twenty years, had no provisions for life imprisonment or prison sentences of twenty-five, forty-five, or forty-six years,⁹² but allowed for the death penalty which would not have passed a veto of at least one member of the Security Council.⁹³ Accordingly, it may be too speculative to attribute to the states a narrow conception of *nulla poena*, limited to the *lex praevia* principle, and on that basis, proceed to diminish the relevance of *nulla poena* in international criminal justice.⁹⁴

The drafters' concerns, extending beyond the mere issue of non-retroactivity, become even plainer when the matter is considered from an alternative perspective. If one removes the national law provision, on the assumption that it is unnecessary because *lex praevia* is not in issue, we are left with a provision that provides no better guidance to judges than the penalty provision of the International Military Tribunal (IMT). Since the death penalty is already excluded by operation of the first sentence, what serious guidance can be gleaned from criteria of "gravity of the offense"⁹⁵ that cannot be read into the IMT criteria of "just punishment"? If, as Schabas points out, the Hans Corell commission⁹⁶ was ill at ease with the IMT sentencing precedent, then there is no reason to presume that it was limited to the issue of non-retroactivity.⁹⁷

⁹² Such as those, respectively, visited upon *Prosecutor v. Kordić*, Case No. IT-95-14/2-T, Judgment (Feb. 26, 2001), *aff'd*, Case No. IT-95-14/2-A, Judgment (Dec. 17, 2004), *Prosecutor v. Blaškić*, Case No. IT-95-14-T-A, Judgment (July 29, 2004) (reducing the original sentence to nine years), and *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgment (Apr. 19, 2004) (reducing Krstić's sentence to thirty-five years).

⁹³ Schabas, *supra* note 59, at 479.

⁹⁴ For a broader approach to *nulla poena*, see BASSIOUNI & MANIKAS, *supra* note 11, at 700; Allen, *supra* note 3; Robinson, *supra* note 2.

⁹⁵ Or even the criteria of "concerning the individual circumstance of the accused."

⁹⁶ In February 1993, while acting under the auspices of the Organization for Security and Cooperation in Europe, a team of experts lead by Hans Corell, along with Helmut Turk and Gro Hillestad Thune, proposed to the United Nations the formation of an international criminal tribunal to prosecute the perpetrators of the mass atrocities unfolding in Yugoslavia.

⁹⁷ Schabas, *supra* note 59, at 471. This misattribution of meaning concerning *nulla poena* in this context perhaps reflects old differences traditionally between common law and civil law lawyers. While certain common law systems, like that of the United States, now follow a practice of strict articulation of penalties per crime, generally speaking it has not been theoretically linked to *nulla poena sine lege*. Thus, the instinctive reaction to the

In sum, based on the views expressed by states above, the following observations can be made as to the quality of *nulla poena sine lege* in international law. First, almost without exception, states share the view that the principle of non-retroactivity (*lex praevia*) is a fundamental feature of any criminal justice system, including international criminal law.⁹⁸ Second, *lex scripta* and *lex certa* are likewise recognized as essential requirements of *nulla poena sine lege*.⁹⁹ It was noted that “the principle of legality (*nulla poena sine lege*) required that penalties be defined in the draft statute of the Court as precisely as possible.”¹⁰⁰ For example, some states expressed the view that more precise maximum penalties should be included as part of the definitions of specific crimes.¹⁰¹ This proposal mirrors state practice at the domestic level where national criminal legislation typically contains a specific maximum penalty following the definition of the crime. It was further expressed that not only maximum penalties, but also “minimum penalties for each crime should be carefully set out in the draft statute.”¹⁰² Suggestions were also made to include even more detailed sentencing regulations addressing, for example, “cumulative penalties for multiple crimes, an exhaustive list of aggravating circumstances and a non-exhaustive list of attenuating circumstances.”¹⁰³

Thus, state practice and *opinio juris* on *nulla poena sine lege* suggest that customary international law recognizes a *nulla poena sine lege* rule which contains a significant *lex certa*, *lex scripta*, *lex stricta* and *lex praevia* quality. Moreover, it is widely agreed that, in the context of criminal law and in the imposition of penal sanctions, the applicable penalties should be defined precisely, even if there is some disagreement in certain cases on what the maximum penalty should be. In this sense, it can be reasonably

principle of legality among common law lawyers still focuses narrowly on its prohibition of retroactive penalties. Civil law traditions, in which Mr. Corell once served as a criminal judge, take a broader approach to *nulla poena sine lege*, accounting also for its “positive justice” function and demonstrate a deeper tradition in doctrinally linking their practice to *nulla poena*. In the many excellent commentaries that Schabas has written on international sentencing, this broader conception of *nulla poena sine lege* is not contemplated. See also Schabas, *supra* note 2; William A. Schabas, *Penalties*, in THE ROME STATUTE OF THE INTERNATIONAL COURT: A COMMENTARY 1497-1534 (Antonio Cassese, Paola Gaeta & John Jones eds., 2002); William A. Schabas, *Perverse Effects of the Nulla Poena Principle: National Practice and the Ad Hoc Tribunals*, 11 EUR. J. INT’L. L. 521 (2000).

⁹⁸ See ICC Prep. Committee’s 1996 Report, *supra* note 27, at 43.

⁹⁹ *Id.* at 41-43.

¹⁰⁰ *Id.* at 63, ¶ 304.

¹⁰¹ See *id.* at 228 n.68 [hereinafter *Compilation of Proposals*]. For example, as to various violations of the laws and customs of war, some suggested distinguishing specific maximum penalties.

¹⁰² ICC Prep. Committee’s 1996 Report, *supra* note 27, at 63, ¶ 304 (emphasis added).

¹⁰³ *Id.*

concluded that customary international law on *nulla poena sine lege* contains stricter requirements regarding the application of penalties than is reflected in treaty provisions of positive international law.

C. *NULLA POENA SINE LEGE* AS A GENERAL PRINCIPLE OF LAW

A third source of international law to consider in order to distill the international standard for *nulla poena sine lege* is general principles of law.¹⁰⁴ “General principles of law” are principles guiding a legal system or overarching legal norms which find widespread acceptance in national law of states.¹⁰⁵ Lord Phillimore, a key figure in the formulation of the concept, explained that by “general principles of law” he meant “maxims of law.”¹⁰⁶ The primary function of “general principles of law” in international adjudication is “to make the law of nations a viable system for application of judicial process.”¹⁰⁷ “General principles of law” are particularly relevant when international tribunals must rule on substantive issues in matters not readily susceptible to international state practice. Emerging or rapidly growing areas of international law are prime examples, including international criminal prosecutions, which provide an adjudicatory forum for the direct application of criminal sanctions to individuals by international institutions.¹⁰⁸ Given that international justice, as a legal system, may be considered to be at a rudimentary stage,¹⁰⁹ “general principles of law” allow international tribunals to draw upon elements of better developed systems, resulting in the advancement of the international legal system.¹¹⁰ This is particularly true for international criminal justice. As both a body of law and as an adjudicatory process, international criminal law is replete with lacunae. A lacuna, however, should not be misunderstood as a normative standard.

The majority of commentators consider Article 38’s reference to “general principle of law” to include general principles of national legal

¹⁰⁴ Statute of the International Court of Justice, 1999 I.C.J. art. 38(1)(c). *See generally* BROWNIE, *supra* note 61, at 15-19; BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* (1987); SHAW, *supra* note 63, at 92-99; Michael Bogdan, *General Principles of Law and the Problem of Lacunae in the Law of Nations*, 46 *NORDIC J. INT’L L.* 37 (1977).

¹⁰⁵ BROWNIE, *supra* note 61, at 16; SHAW, *supra* note 63, at 94; Bogdan, *supra* note 104, at 42.

¹⁰⁶ CHENG, *supra* note 104, at 24.

¹⁰⁷ BROWNIE, *supra* note 61, at 16.

¹⁰⁸ ANTONIO CASSESE, *INTERNATIONAL LAW* 193 (2nd ed. 2005).

¹⁰⁹ *Id.*; SHAW, *supra* note 63, at 93.

¹¹⁰ BROWNIE, *supra* note 61, at 16.

systems.¹¹¹ This approach is also generally followed in international criminal justice and judgments of post-World War II tribunals. For example, the United States Military Tribunal at Nuremberg stated that where a principle is “accepted generally as a fundamental rule of justice by most nations in their municipal law, its declaration as a rule of International Law would seem to be fully justified.”¹¹² Modern international criminal tribunals also turn to municipal law when formulating a “general principle of law” in order to fill lacunae.¹¹³ While a principle must represent a common theme in the different legal traditions, most commentators agree that it is not necessary to demonstrate its presence in each and every country in the world.¹¹⁴ Nevertheless, the four attributes underlying the principle of legality are well represented in the world’s diverse legal systems.¹¹⁵

In a recent comprehensive survey of 192 national constitutions of member states of the United Nations, Professor Kenneth Gallant demonstrated that more than three quarters of the nations recognize *nulla poena*, especially *lex praevia*, in their constitution, including Islamic, Asian, civil law, and common law countries.¹¹⁶ Several other countries adhere to *nulla poena* pursuant to domestic statutes.¹¹⁷ A 1993 survey of 139 national constitutions by Bassiouni revealed that 96 states contain an expression of the principle of legality in their constitutions, in addition to

¹¹¹ *Id.* (citing Root, Phillimore, Guggenheim, and Oppenheim); SHAW, *supra* note 63, at 93-94 (“[B]oth municipal legal concepts and those derived from existing international practice can be defined as falling within the recognised catchment area.”); Bogdan, *supra* note 104, at 42. The ICTY also followed this approach in its first sentencing judgment. Prosecutor v. Erdemović, Case No. IT-96-22-T, Sentencing Judgment, ¶ 19 (Nov. 29, 1996). For a discussion and further references on additional conceptions of “general principles of law”, for example one which contemplates “natural law”, see CHENG, *supra* note 104, at 2-4. For the drafting history of the provision, see *id.* at 6-26.

¹¹² U.N. WAR CRIMES COMM’N, *The Hostages Trial: Trial of Wilhelm List and Others* (Case No. 47), in 8 LAW REPORTS OF TRIALS OF WAR CRIMINALS 34, 49 (1949) [hereinafter *Hostages*], available at http://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-8.pdf.

¹¹³ Erdemović, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, ¶ 57 (“[G]eneral principles of law are to be derived from existing legal systems, in particular, national systems of law.”); see also Erdemović, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Stephen, ¶¶ 25, 63, 65 (Oct. 7, 1997); Prosecutor v. Delalić, Case No. IT-96-21-T, Decision on the Motion to Allow Witnesses K, L and M to Give Their Testimony by Means of Video-Link Conference, ¶ 8 (May 28, 1997).

¹¹⁴ SHAW, *supra* note 63, at 94; Bogdan, *supra* note 104, at 46; see also Erdemović, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Stephen, ¶ 25.

¹¹⁵ Bassiouni Study, *supra* note 69, at 290; see also *supra* text accompanying notes 20-33, 69-76.

¹¹⁶ KENNETH S. GALLANT, *THE PRINCIPLE OF LEGALITY IN INTERNATIONAL AND COMPARATIVE CRIMINAL LAW* 243-46 (2009).

¹¹⁷ *Id.*

the good many others that adhere to the principle in case law or practice.¹¹⁸ Moreover, rulings of national courts indicate that the *nulla poena* norm, whether found in the constitution or in statute, is not limited to its *lex praevia* function, the prohibition of retroactive application of a heavier penalty. Challenging the presumption that only civil law countries adhere to a full *nulla poena* principle, a state court in the United States overturned a conviction for attempted murder because the offense as defined in the criminal code was not accompanied by a penalty specific to that crime.¹¹⁹ In doing so, the court upheld not only the *lex certa* principle, that the penalty must be clearly defined, of *nulla poena sine lege*, but also its *lex stricta* attribute, the prohibition against application of criminal penalties by analogy.¹²⁰ Likewise, in light of *nulla poena*'s widespread presence in national legal systems, international courts have implicitly relied on "general principles of law" in order to apply a *nulla poena* rule that extends beyond its *lex praevia* function.¹²¹ Accordingly, *nulla poena sine lege* may be considered a "general principle of law" within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice.¹²²

D. INTERNATIONAL PRECEDENT: OPINION OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

In 1935, the Permanent Court of International Justice (PCIJ) was offered the opportunity to address the principle of legality in the *Advisory Opinion on the Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*.¹²³ In August of 1935, the city of Danzig, following the example of Nazi law, amended its criminal code to permit punishment in the absence of a legal provision. The amendment decreed that an act is punishable:

¹¹⁸ Bassiouni Study, *supra* note 69, at 291.

¹¹⁹ *Cook v. Commonwealth*, 458 S.E.2d 317, 319 (Va. Ct. App. 1995) ("[A] 'crime is made up of two parts, forbidden conduct and a prescribed penalty. The former without the latter is no crime.'").

¹²⁰ *Id.* The court refused to turn to a similar crime or the method generally followed by penalties for inchoate crimes for other crimes in order to provide a penalty.

¹²¹ See, e.g., *Başkaya v. Turkey*, App. Nos. 23536/94 & 24408/94, 31 Eur. H.R. Rep. 10, ¶ 36 (1999); *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*, Advisory Opinion, 1935 P.C.I.J. (ser. A/B) No. 65 (Dec. 4) [hereinafter *Danzig Decrees*], available at http://www.worldcourts.com/pcij/eng/decisions/1935.12.04_danzig/; 1 J.H.W. VERZIJL, *THE JURISPRUDENCE OF THE WORLD COURT: A CASE BY CASE COMMENTARY* (1965).

¹²² Bassiouni Study, *supra* note 69, at 291-93.

¹²³ *Danzig Decrees*, *supra* note 121; see VERZIJL, *supra* note 121 (containing a commentary).

(1) where it is declared by law to be punishable, and

(2) where, according to the fundamental idea of a penal law and according to sound popular feeling, it deserves punishment. Where there is no particular penal law applicable to the act, it shall be punished in virtue of the law whose fundamental conception applies most nearly.¹²⁴

Another decree accorded “[w]ider latitude . . . to judges” and permitted the “[c]reation of law . . . by the application of penal analogy.”¹²⁵ The PCIJ noted that the “object of these new provisions is stated to be to enable the judge to create law to fill up gaps in the penal legislation.”¹²⁶ On the other hand, Article 2, paragraph 1, of the Penal Code in force in Danzig before the amendment provided: “An act is only punishable if the penalty applicable to it was already prescribed by a law in force before the commission of the act.”¹²⁷ The court recognized that this provision gave effect to the maxims *nullum crimen sine lege* and *nulla poena sine lege*. The consequence, according to the PCIJ, was that the “law alone determines and defines an offense” and that the “law alone decrees the penalty.” In relation to *nulla poena sine lege* in particular, the court further held that the maxim carries with it the principle that “[a] penalty cannot be inflicted in a given case if it is not decreed by the law in respect of that case” and a “penalty decreed by the law for a particular case cannot be inflicted in another case.”¹²⁸ Thus, the PCIJ opinion recognized the *lex stricta* principle, that is, the prohibition on the application of a penalty by analogy, as part and parcel of *nulla poena sine lege*. Moreover, the PCIJ also ruled that the imposition of a penalty must be in accordance with the principles of *lex scripta* and *lex certa*, although the opinion cannot be read so far as to limit satisfaction of *lex scripta* to statutory written law. The PCIJ went on to condemn the 1935 penal provision as incompatible with the principles of law in the Constitution.¹²⁹ In doing so, the PCIJ affirmed several important general principles of law and recognized an international *nulla poena sine lege* norm with strong attributes of *lex scripta*, *lex certa*, and *lex stricta*.¹³⁰

¹²⁴ See *Danzig Decrees*, *supra* note 121.

¹²⁵ *Id.* at 11.

¹²⁶ *Id.*

¹²⁷ *Id.* at 4.

¹²⁸ *Id.* at 10.

¹²⁹ *Id.*

¹³⁰ The court was mindful, nevertheless, that *nulla poena* was not the only principle relevant for consideration. It acknowledged that

[t]he problem of the repression of crime may be approached from two different standpoints, that of the individual and that of the community. From the former standpoint, the object is to protect the individual against the State: this object finds its expression in the maxim *Nulla poena sine*

Only *lex praevia* was not addressed and this appears to be because the question of retroactive application of the decree did not arise. According to the research performed thus far, the principle of *nulla poena sine lege* does not appear to have been addressed by the International Court of Justice.¹³¹

E. PRELIMINARY OBSERVATIONS ON INTERNATIONAL STANDARD FOR *NULLA POENA*

Before continuing on to the next section to examine *nulla poena sine lege* in the jurisprudence of international criminal courts and tribunals, it may be useful to provide here a brief summary of some preliminary observations arising from the analysis of this section on *nulla poena sine lege* in international law. Positive international law incorporates the *lex praevia* principle of *nulla poena* as a fundamental human right from which no derogation is permitted. In interpreting this principle under Article 7 of the ECHR, the European Court of Human Rights held that this provision also embodies the *lex stricta* principle as a fundamental attribute of *nulla poena* as an individual right. But this ruling comes as no surprise as leading commentaries on human rights conventions have long taken the view that *nulla poena* is not limited to merely prohibiting retroactivity. In fact, the status of *lex stricta* under international law was previously cemented by the PCIJ decision in the *Danzig Decrees* case, which explicitly rejected the application of penalties by analogy.¹³² Although it may be tempting to argue that a few cases are not conclusive of the issue, the absence of contentious cases addressing the *lex stricta* principle does not necessarily undermine its position in international law. It may simply be the result of restricted adherence to the principle by states in the context of their own national legal systems, where the practice of articulating specific penalties per crime obviates the need to resort to analogy in order to impose a penalty. More significantly, as we shall see later, the solidification of *lex stricta* as a principle of international law in relation to the application of penalty was achieved in the Rome Statute.

In connection with *lex scripta* and *lex certa*, customary international law can contribute to a fuller appreciation of the international character of *nulla poena sine lege*. State practice, as evidenced in the national

lege. From the second standpoint, the object is to protect the community against the criminal, the basic principle being the notion *Nullum crimen sine poena*.

Id. at 16.

The PCIJ observed, however, that the decrees were based on the second principle where as the Constitution took the former principles as the starting point. *See id.* at 16.

¹³¹ This is a tentative result for which the research is ongoing. To date, no ICJ cases have been found addressing this issue.

¹³² *See supra* Part III.C.

legislation of an overwhelming majority of states, coupled with state expressions of *opinio juris*, strongly indicate that the legal principles of *lex scripta* and *lex certa* may be considered as part of an international *nulla poena sine lege* norm.¹³³ Additionally, as discussed above, these four underlying principles of *nulla poena sine lege* may be considered as “general principles of law.” Accordingly, the four legal principles underlying *nulla poena sine lege* may be considered as part of its international character.

IV. NULLA POENA IN THE JURISPRUDENCE OF INTERNATIONAL CRIMINAL COURTS & TRIBUNALS

A. POST-WORLD WAR II PERIOD: PRAGMATICS OVER PRINCIPLES

The question of legality was ardently contested in the proceedings before the International Military Tribunal (IMT) in Nuremberg. The debate focused primarily on the question of “punishability” of the conduct. Nazi defendants before the IMT argued that the charges against them for crimes against the peace and crimes against humanity violated *nullum crimen sine lege*. The IMT rejected this argument. It reasoned that the crimes under its jurisdiction had been prohibited under international law since the Hague Regulations of 1907 and The General Treaty for the Renunciation of War of 1928 (Kellogg-Briand Pact).¹³⁴ The Hague Regulations and the Kellogg-Briand Pact themselves, however, do not characterize their breach as criminal, nor call for individual criminal responsibility, nor prescribe a penalty. Nevertheless, these notable absentees did not appear to trouble the IMT which observed that these international agreements “deal with general principles of law, and not with administrative matters of procedure.”¹³⁵ The judgment discusses at length the *nullum crimen* question, but offers little or no analysis of *nulla poena*.

Accordingly, while the Nuremberg precedent serves as an illustration of treatment of the principle of legality by an international court, its utility as an international source of law arising from a “judicial decision”¹³⁶ may be considered to be limited to the *nullum crimen sine lege* maxim.

¹³³ This analysis also applies to *lex praevia*, because it is likewise a fundamental feature in most domestic legal systems. Unlike the other three principles, it has, as noted above, been codified into positive international law.

¹³⁴ The General Treaty for the Renunciation of War is more generally known as the Pact of Paris or the Kellogg-Briand Pact. At the outbreak of World War II, it was binding on sixty-three nations.

¹³⁵ *Judgment, in 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL* 171, 221 (1947).

¹³⁶ Statute of the International Court of Justice, 1999 I.C.J. art. 38(1)(d).

Therefore, caution must be exercised in drawing broad inferences from the IMT judgment regarding the nature of the principle of legality generally because the *nulla poena* debate is not well represented. Although some references to *nulla poena* are made, it seems that for the large part this maxim was overlooked by all parties involved.¹³⁷ The oversight seems to flow from collapsing two separate issues into one inquiry. Rather than dealing with *nullum crimen sine lege* and *nulla poena sine lege* individually, the inquiry focused on whether the conduct proscribed in the Charter of the International Military Tribunal was reflected in general prohibitions found in international treaties. From the Nuremberg records and commentaries, it appears that it was widely presumed that if the punishability of the conduct was determined to satisfy the principle of legality then the penalties prescribed by the Charter were appropriate. The Charter permitted the imposition of the death penalty.¹³⁸ There likewise appears to be little consideration given to the fact that, even prior to World War II, some European countries had already moved away from the notion that the death penalty is an appropriate form of punishment.¹³⁹

¹³⁷ Schabas, *Penalties*, *supra* note 97, at 1498.

¹³⁸ Article 27 of the Charter authorized IMT to impose “death or such other punishment as shall be determined by it to be just” upon a convicted war criminal. See Charter of the International Military Tribunal (Nuremberg Charter), Aug. 8, 1945, 82 U.N.T.S. 279, art. 27, reprinted in INTERNATIONAL CRIMINAL LAW: A COLLECTION OF INTERNATIONAL AND EUROPEAN INSTRUMENTS 55 (Christine Van den Wyngaert ed., 2d ed. 2000). This vague and general clause was the Nuremberg Charter’s only provision addressing the subject of penalties. Article 27 was reproduced in Article 16 of the Tokyo Charter, Charter of the International Military Tribunal for the Far East (Tokyo Charter), Jan. 19, 1946, T.I.A.S. No. 1589, and Control Council Law No. 10, *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, Nuremberg Trials Final Report app. D, art. II(3) (Dec. 20, 1945), available at <http://avalon.law.yale.edu/imt/imt10.asp>.

¹³⁹ Prior to the war years, a number of European countries had already abolished the death penalty. For example, in the Netherlands, the last recorded execution occurred in 1860, and by 1870, the Netherlands abolished the death penalty for all crimes except military offenses and war crimes. Likewise, Belgium, with one exception in 1918, had not executed the death penalty since 1863. Thus, by the time of World War II, there existed over half a century of abolitionist practice, vis-à-vis the execution of the death penalty, among these countries of the future Benelux region, which had fallen victim to Nazi aggression. Of course, the fact that war crimes had been exempted from these early abolitions of capital punishment bodes in favor of the IMT’s resort to it. Moreover, immediately following the defeat of Nazi Germany, the Netherlands, Belgium, France, and a host of other European countries responded with a wave of executions and enforcement of death penalties against various members of the Nazi party who had surrendered or were captured in various localities that had been under occupation. This rapid and widespread use of the death penalty among European countries victimized by Nazi aggression, genocide, and war crimes raises legitimate skepticism of France’s uncompromising refusal of the Rwandan government’s proposal that the ICTR be empowered to have the option of imposing the death penalty for those senior political and military figures who masterminded the 1994

In the post-war period, the International Law Commission (ILC) also briefly reflected on the issue of penalties by its consideration of the Draft Code of Offenses Against the Peace and Security of Mankind. The 1951 proposal contained a terse article on penalties: "The penalty for any offence defined in this Code shall be determined by the tribunals exercising jurisdiction over the individual accused, taking into account the gravity of the offence."¹⁴⁰ Although the subsequent revised 1954 proposal removed this article, the ILC's discussion of the issue suggests that this decision does not signal a defeat of the *nulla poena* norm in international law.¹⁴¹ In fact, several members supported a penalty provision more precise than the above article.¹⁴² Several states also favored this approach as reflected in their comments on the proposed text.¹⁴³ In the end, the ILC shied away from including a more specific penalty provision for a variety of reasons. For example, there were concerns that the task of the Commission here was limited to defining the crimes, and not to dictating the type of penalties.¹⁴⁴ Several members expressly stated that penalties were not included because it is left to the states to specify the penalty according to their domestic laws, as protected by Article 2(7) of the Charter of the United Nations. However, there was a strong consensus that states themselves were obliged to provide the necessary penalties and the final report included a comment to that effect.¹⁴⁵ Thus, it is clear that the absence of a penalty provision was not a reflection on the applicability of *nulla poena sine lege* to the punishment of international crimes. It certainly was not intended to suggest that international criminal justice enjoys *carte blanche* when it came to penalties, as best captured by the comments of one expert, Mr. Carlos Salamanca Figueroa, who at the time was a member of the International Law Commission:

genocide in Rwanda. See Capital Punishment Worldwide Pages, <http://www.geocities.com/richard.clark32@btinternet.com/europe.html> (last visited Mar. 4, 2009).

¹⁴⁰ *Summary Records of the Third Session*, [1951] 1 Y.B. Int'l L. Comm'n 81, U.N. Doc. A/CN.4/44.

¹⁴¹ *Summary Records of the Sixth Session*, [1954] 1 Y.B. Int'l L. Comm'n 139, U.N. Doc. A/CN.4/85/1954 [hereinafter ILC Records].

¹⁴² *Id.* The strongest view along these lines was expressed by Mr. G. Scelle who considered the absence of a penalty provision as "tantamount to saying that the offences in question would go unpunished." *Id.* This reflects the view of some leading authorities on substantive criminal law. *E.g.*, 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *SUBSTANTIVE CRIMINAL LAW* § 1.2(d) (1st ed. 1986) ("A crime is made up of two parts, forbidden conduct and a prescribed penalty. The former without the latter is no crime.").

¹⁴³ For example, Belgium proposed that a scale of penalties be laid down. See ILC Records, *supra* note 141, at 139.

¹⁴⁴ *Id.* at 124, 139.

¹⁴⁵ *Id.* at 139.

If the offenses in question were to be tried by a national court, that court would necessarily have to apply penalties laid down in the particular State's criminal law. If an international court were to be set up, it would be unwise to give it the very wide power to determine the penalty to be applied to each crime. No doubt that problem would be dealt with when such a court came to be set up.¹⁴⁶

B. *NULLA POENA SINE LEGE* IN THE AD HOC TRIBUNALS: THE PHANTOM MAXIM

When the ad hoc international criminal tribunals for Rwanda and Yugoslavia were called upon to interpret and apply their sentencing provisions, the IMT judgments and norms arising from other sources of international law¹⁴⁷ presented divergent approaches to the task of sentencing in accordance with *nulla poena sine lege*. The tribunals were technically not bound by either and yet each could be argued in support of a particular approach. In light of the comments of the United Nations Secretary-General and the representatives of other countries,¹⁴⁸ a firm approach to *nulla poena sine lege* would have probably raised little objection. Regarding the determination of a penalty, the statutes of the ad hoc tribunals contained a reference back to national practice. Article 24 of the International Criminal Tribunal for the former Yugoslavia (ICTY) statute and Article 23 of the International Criminal Tribunal for Rwanda (ICTR) statute provides: "The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of [the former Yugoslavia or Rwanda]."¹⁴⁹

Although several commentators observed that the national law provision was included out of concern for respecting *nulla poena sine lege*,¹⁵⁰ two characteristics of the construction of this article open a window to debate the binding force of the national law provision on the discretion of judges when determining a sentence. The first provision of this article provides a clear limitation on the authority of judges regarding the form of punishment that may be imposed. Penalties "shall be limited" to

¹⁴⁶ *Id.*

¹⁴⁷ See discussion *supra* Parts III.A-D.

¹⁴⁸ See Letter from the Permanent Representative of Italy, *supra* note 78; see also *Summary Records of the 17th Meeting*, *supra* note 74.

¹⁴⁹ ICTY Statute, *supra* note 8, art. 24(1); Statute of the International Tribunal for Rwanda, S.C. Res. 955, art. 23(1), U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute]. The second sentence of this paragraph will hereinafter be referred to as the "national law provision."

¹⁵⁰ See, e.g., BASSIOUNI & MANIKAS, *supra* note 11, at 692, 700; MORRIS & SCHARF, *supra* note 75, at 94; Schabas, *Perverse Effects*, *supra* note 97, at 524-28.

imprisonment.¹⁵¹ Thus, by implication, the ICTY and ICTR are not authorized to impose the death penalty. In contrast, the second provision is drafted rather awkwardly. Like the first provision, it employs the directive “shall,” instead of “may,” suggesting that the judges do not have discretion to ignore the directive contained within this provision. Unfortunately, it follows this imperative (“shall”) with a less than forceful instruction (“have recourse to”). The force of the national law provision as a binding instruction on the judges is further compromised by the fact that it follows a provision that unambiguously sets a clear limit. The inevitable comparison between the two provisions (“shall be limited to” versus “shall have recourse to”) further opens the window to argue that it is not a binding limitation on the sentencing discretion of judges.

The ICTY’s first opportunity to interpret the national law provision of Article 24 came unexpectedly when it was suddenly plunged into sentencing considerations as a result of Dražen Erdemović’s decision to plead guilty.¹⁵² Given that sentencing matters arise, if at all, at the end stages of the criminal justice process, it was unforeseen that one of the ICTY’s earliest decisions would call upon the judges to interpret its sentencing provisions. Academics, legal officers, and judicial law clerks had been focusing on questions of jurisdiction, applicability of treaties regulating international armed conflicts, and substantive elements of crimes. Little analysis had been done on the articles of the ICTY statute and rules of procedure and evidence pertaining to sentencing.¹⁵³

While the *Erdemović* case provided the ICTY with its first opportunity to render an interpretation of Article 24 in a sentencing judgment, it seems that the question of the applicability of the national law provision as a limitation on its sentencing authority had already been predetermined by the judges.¹⁵⁴ The Rules of Procedure and Evidence (RPE), promulgated and adopted by the judges themselves prior to the *Erdemović* sentencing judgment, seem to have already determined the issue. Rule 101 of the RPE, as initially adopted on February 11, 1994, provides that “[a] convicted person may be sentenced to imprisonment for a term up to and including the

¹⁵¹ ICTY Statute, *supra* note 8, art. 24(1).

¹⁵² *Croat Pleads Guilty to War Crimes in Bosnia*, CNN.COM, May 31, 1996, available at <http://www.cnn.com/WORLD/Bosnia/updates/9605/index.html> (last visited Oct. 12, 2009); see also *Prosecutor v. Erdemović*, Case No. IT-96-22-T, Sentencing Judgment (Nov. 29, 1996).

¹⁵³ See Virginia Morris & Michael P. Scharf, *An Insider’s Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis* (1995) (providing an early commentary on the Statute of the ICTY).

¹⁵⁴ Schabas, *supra* note 59, at 480.

remainder of his life.”¹⁵⁵ As the penal code of the Socialist Federal Republic of Yugoslavia (the former Yugoslavia) in force at the time of the commission of the offences did not permit the imposition of a life sentence, Rule 101 foreshadowed the attitude of the judges towards the national law provision.

The *Erdemović* case involved a low level soldier in the Bosnian Serb Army who participated in the killing of groups of Muslim civilians, namely men between the ages of seventeen and sixty from Srebrenica, collected at a farm site near Pilica, northwest of Zvornik.¹⁵⁶ By his own admissions, Erdemović murdered approximately seventy individuals.¹⁵⁷ He admitted his involvement in these crimes, but insisted that he was forced to do so under threat of death to himself and his family.¹⁵⁸ Thus, before the Trial Chamber could proceed to a determination of the sentence, it had to deal with a more fundamental issue—the validity of his guilty plea.¹⁵⁹ Having satisfied itself that the plea was valid,¹⁶⁰ notwithstanding Erdemović’s claim that he acted under duress, the Trial Chamber proceeded to analyze the applicable law and principles under the ICTY Statute which are relevant to the determination of a sentence.

Regarding national laws and sentencing practice, Articles 141 to 156 of Chapter XVI of the criminal code of the Socialist Federal Republic of Yugoslavia dealt with, *inter alia*, genocide and war crimes committed against the civilian population. The penalty provided under Yugoslav law was a minimum of five years and a maximum of fifteen years or a death sentence.¹⁶¹ Pursuant to these same provisions, a twenty-year prison term could be imposed instead of the death penalty. The Trial Chamber reasoned that full consideration of the national law provision in the ICTY Statute also requires taking into account the case law of the courts of the former

¹⁵⁵ Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia, R. 101(A), U.N. Doc. IT/32/Rev.32 (Feb. 11, 1994) [hereinafter ICTY RPE], reprinted in *INTERNATIONAL CRIMINAL LAW: A COLLECTION OF INTERNATIONAL AND EUROPEAN INSTRUMENTS* *supra* note 8, at 63, 68.

¹⁵⁶ See *Prosecutor v. Erdemović*, Case No. IT-96-22-T, Sentencing Judgment, ¶ 2 (Nov. 29, 1996).

¹⁵⁷ *Prosecutor v. Erdemović*, Case No. IT-96-22-Tbis, Sentencing Judgment, ¶ 15 (Mar. 5, 1998). The Prosecution placed the number closer to one hundred individuals.

¹⁵⁸ Erdemović had a wife and an infant child. *Id.* ¶ 14.

¹⁵⁹ *Erdemović*, Case No. IT-96-22-T, ¶¶ 10-21.

¹⁶⁰ This ruling was overruled by the Appeals Chamber. See *Prosecutor v. Erdemović*, Case No. IT-96-22-A, Judgment (Oct. 7, 1997) (holding that, in order to be valid, a plea of guilty must be voluntary, informed, and unequivocal).

¹⁶¹ CRIM. CODE SOCIALIST FED. REP. YUGOSLAVIA, ch. 16, arts. 141-156 (1976) [hereinafter *FORMER YUGOSLAVIA CRIM. CODE*], available at http://www.eulex-kosovo.eu/training/justice/docs/Criminal_Code_of_SFRY_1976.pdf.

Yugoslavia. In this regard, there have been two significant trials for genocide in Yugoslavia. The first took place in 1946 following World War II against Mikhailovic and others.¹⁶² The majority of defendants were sentenced to death and executed.¹⁶³ The second trial took place forty years later in which Artuković was also sentenced to death, but died in prison of natural causes.¹⁶⁴ Thus, the practice of the courts of the former Yugoslavia on these “analogous” crimes was limited and the Trial Chamber concluded that it “cannot draw significant conclusions as to the sentencing practices for crimes against humanity in the former Yugoslavia.”¹⁶⁵ However, recognizing a principle of statutory interpretation, the Trial Chamber acknowledged that it must interpret the national law provision in a manner that gives it practical and logical effect.¹⁶⁶ Beginning with what appears to be an implicit acknowledgement of the view of commentators, the Trial Chamber reasoned:

It might be argued that the reference to the general practice regarding prison sentences is required by the principle *nullum crimen nulla poena sine lege*. Justifying the reference to this practice by that principle, however, would mean not recognising the criminal nature universally attached to crimes against humanity or, at best, would render such a reference superfluous. The Trial Chamber has, in fact, demonstrated that crimes against humanity are a well established part of the international legal order and have incurred the severest penalties. It would therefore be a mistake to interpret this reference by the principle of legality codified *inter alia* in paragraph 1 of Article 15 of the International Covenant on Civil and Political Rights, according to which “no one shall be held guilty of any criminal offence on account of any act or omissions which did not constitute a criminal offence, under national or international law, at the time when it was committed (. . .).” Moreover, paragraph 2 of that same article states that “nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by the community of nations.”¹⁶⁷

The Trial Chamber’s analysis here appears to be misplaced. It improperly framed the issue as an inquiry into the “punishability” of the conduct rather than the determination of the penalty itself. The error in reasoning stems from its argument that interpreting and applying the national law provision in light of the *nulla poena* principle would result in “not recognizing the criminal nature” of the crimes committed by the

¹⁶² See Dylan Cors & Siobhán K. Fisher, *National Law in International Criminal Punishment: Yugoslavia’s Maximum Prison Sentences and the United Nations War Crimes Tribunal*, 3 PARKER SCH. J.E. EUR. L. 637 (1996).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Prosecutor v. Erdemović, Case No. IT-96-22-T, Sentencing Judgment, ¶ 37 (Nov. 29, 1996).

¹⁶⁶ *Id.* ¶ 38.

¹⁶⁷ *Id.*

accused. This is simply incorrect. Applying the national law provision in accordance with *nulla poena sine lege* does not mean, as the Trial Chamber suggested, that the defendant goes unpunished. It simply means that the sentence would have to be in accordance with Yugoslavia's penalty provisions. The Trial Chamber's misframing of the issue is further demonstrated by its discussion of the principle of legality under Article 15 of the ICCPR. Although it is dealing with the question of applicable penalties under Article 24 of its Statute and Yugoslavia's laws and sentencing practice, the Trial Chamber turns to an analysis of the *nullum crimen sine lege* provision in Article 15 of the ICCPR. The illogical effect is that the Trial Chamber seems to attempt to reject a *nulla poena* argument on the grounds that *nullum crimen* has been satisfied.

Whether by stratagem or unwittingly, the Trial Chamber collapsed the analysis of the two principles *nulla poena sine lege* and *nullum crimen sine lege*. It conflated the two maxims and referred to the "requirements" of "*nullum crimen nulla poena sine lege*," and then concluded that adherence to this conflated principle would prevent recognition of the accused's acts as criminal. Moreover, its preoccupation with Erdemović's acts going unpunished as the consequence of the *nullum crimen* principle, which is essentially a *punishability* issue, was extraneous to its inquiry on the appropriate sentence since, by this stage in the proceedings, the guilt of the accused, and thus the legality of punishing the act, had already been determined. Indeed, it appears that the accused did not even raise the *nullum crimen* question, rendering the Trial Chamber's focus on it even more out of place.¹⁶⁸ Furthermore, at his initial appearance before the Trial Chamber, Erdemović pled guilty to crimes against humanity as charged in count one of the indictment.¹⁶⁹ The Trial Chamber noted that crimes against humanity, as defined in Article 5, are not "strictly speaking" provided for in the criminal code of the former Yugoslavia.¹⁷⁰ The Code did however cover genocide and war crimes against civilians.¹⁷¹ Analogizing that the former Code penalized crimes "which are of a similar nature to crimes against humanity,"¹⁷² the Erdemović Trial Chamber satisfied itself with regards to *nullum crimen sine lege*. This further

¹⁶⁸ That is not to say that the *nullum crimen* question is entirely irrelevant to the matter before the Chamber.

¹⁶⁹ See Prosecutor v. Erdemović, Case No. IT-96-22, Indictment (May 22, 1996); Erdemović, Case No. IT-96-22-T, Sentencing Judgment, ¶ 3. The plea was subsequently changed to a guilty plea to count 2 of Indictment for violations of the laws or customs of war.

¹⁷⁰ Erdemović, Case No. IT-96-22-T, Sentencing Judgment, ¶ 35.

¹⁷¹ FORMER YUGOSLAVIA CRIM. CODE, *supra* note 161.

¹⁷² Erdemović, Case No. IT-96-22-T, Sentencing Judgment, ¶ 35.

highlights the oddity of the Trial Chamber's return to the *nullum crimen* principle when interpreting the national law provision of Article 24.

The legal stratagem used by the *Erdemović* Trial Chamber to free itself from any potential limitation arising from Article 24(1) is not immediately apparent. As noted above, the use of analogy in application of penalties is not unprecedented.¹⁷³ However, the use of analogy generally follows the approach of analogizing between similar crimes in order to identify an appropriate penalty. But the *Erdemović* Trial Chamber went beyond analogizing between similar crimes to analogizing between different legal systems. It employed analogy at two levels. First, it drew an analogy between genocide and war crimes committed against civilian populations under the former Yugoslavia's criminal code on the one hand, and offenses under Article 5 (crimes against humanity) of its Statute, on the other hand. Having identified the "analogous" crimes, however, the Trial Chamber did not content itself with the penalties provided by law establishing the relevant "analogous" crimes. Instead, it continued with a second level of comparison between the penalty attached to the identified "analogous" crimes under the laws of the legal system of the *locus delicti* to the penalty attached under a different legal system, that of the *locus fori*. This method of expansive interpretation is beyond the permissible scope even in countries that allow resort to analogy in determining penalties.¹⁷⁴ The Trial Chamber justified this methodology by relying on a principle it identified: that the Criminal Code of the former Yugoslavia "reserves its most severe penalties for crimes, including genocide, which are of a similar nature to crimes against humanity."¹⁷⁵ The observation is correct, but it does not explain why the Trial Chamber did not limit itself to the penalties provided by the Code. Rather than selecting a severe *Yugoslav* penalty, which marks the logical conclusion of its reasoning, the Trial Chamber chose to select the most severe *international law* penalty. This latter step is not covered by its justification. It would be a different matter if the ICTY Statute authorized such a maneuver—that is, substituting international law's most severe penalty in place of Yugoslavia's. But it does not, and in fact the Statute does just the opposite: it instructs trial chambers to turn to Yugoslavia's sentencing laws and practice.

Furthermore, the Trial Chamber's analysis assumes in the first place that it is correct on a fundamentally important assumption, namely that life imprisonment is not a more severe penalty than capital punishment. The assumption here cannot be said to have gained sufficient universal

¹⁷³ See also BASSIOUNI, *supra* note 1, at 124.

¹⁷⁴ *Id.*

¹⁷⁵ *Erdemović*, Case No. IT-96-22-T, Sentencing Judgment, ¶ 35 (emphasis added).

acceptance so as to justify its blanket endorsement by an international institution. Many states, Yugoslavia included, hold the view that life imprisonment is crueler and more severe than capital punishment.¹⁷⁶ The former Yugoslavia, while permitting capital punishment, had abolished the penalty of life imprisonment.¹⁷⁷ It is entirely reasonable, depending on a society's presumptions about the metaphysical and the purpose of incarceration, to permit capital punishment but abolish life imprisonment. The error in reasoning and methodology here stems from the Trial Chamber's reliance on a subjective assessment as to what constitutes a "heavier penalty." So long as the comparison is between penalties of the same type, the determination of whether the imposed penalty is heavier than the one applicable at the time the offense occurred is straight-forward and objective.¹⁷⁸ However, where the comparison is between different types of penalties, the assessment becomes more subjective and less objective. Consequently, it is more difficult to objectively conclude that the prohibition against the imposition of a "heavier penalty" has not been breached.

As noted above, a latent tension exists between the IMT legacy and the principles arising from human rights treaties when it comes to sentencing in accordance with *nulla poena sine lege*. In this regard, the *Erdemović* Trial Chamber's reliance on the treatment of *nulla poena* by IMT and other judgments in the immediate wake of World War II¹⁷⁹ can be criticized for failing to take sufficient account of the development of international human rights law on this point since World War II.¹⁸⁰ Since then, as illustrated above, major international human rights treaties, widely supported by states, have recognized the principle of *nulla poena sine lege* as a norm of international law and a fundamental right of an accused.¹⁸¹ There has also been a corresponding development of criminal law principles in domestic law systems.¹⁸²

¹⁷⁶ See Stuart Beresford, *Unshackling the Paper Tiger—The Sentencing Practice of the Ad Hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 1 INT'L CRIM. L. REV. 33, 48 (2001); Schabas, *supra* note 59, at 479-80.

¹⁷⁷ See Sanja Kutnjak Ivković, *Justice by the International Criminal Tribunal for the Former Yugoslavia*, 37 STAN. J. INT'L L. 255 (2001).

¹⁷⁸ NOWAK, *supra* note 34, at 364.

¹⁷⁹ *Erdemović*, Case No. IT-96-22-T, Sentencing Judgment, ¶¶ 29, 38.

¹⁸⁰ See Mary Margaret Penrose, Comment, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L L. REV. 321, 372 (2000).

¹⁸¹ See also Schabas, *supra* note 59, at 464.

¹⁸² For example, as noted above, the movement towards codification of criminal law in the 1950s in the United States that led to the drafting of the Model Penal Code. Today, all states of the union have codes setting forth both the definitions of the crimes and the applicable penalties. See *supra* Part III.B and accompanying text.

Yet, the *Erdemović* Trial Chamber overlooks these developments and turns instead to a single decision from 1949 of a Netherlands special court for guidance on what *nulla poena* requires fifty years later.¹⁸³ In addition to failing to appreciate the normative development of *nulla poena* over the past five decades, the *Erdemović* Trial Chamber's reliance on the Dutch case is misplaced for yet another reason. The argument of the accused before the Dutch special court was that he *could not* be punished *at all* because of a *lack* of legal sanctions previously prescribed by law.¹⁸⁴ The laws of the former Yugoslavia, however, did provide for legal sanctions previously prescribed;¹⁸⁵ thus, the ICTY in *Erdemović* was facing a different issue than the Dutch court. The issue before the ICTY was not that Erdemović could not be punished, but rather *what* that punishment should be, and more generally how should the ICTY go about determining the period of incarceration and the relevance of national sentencing laws.

Again, we see that the error stems from the Trial Chamber's failure to distinguish between *nullum crimen* and *nulla poena*.¹⁸⁶ It is puzzling (even disingenuous to the cynical eye) that the Trial Chamber chose to collapse its own analysis on this issue into an inquiry about *nullum crimen nulla poena sine lege* especially given that it observed that the Dutch special court was addressing *nulla poena*.¹⁸⁷

Taking the position that the national law provision in its statute was not binding upon the ICTY, the Trial Chamber attempted to bolster its view by emphasizing a single isolated comment contained in a UN report attached to a proposed draft of the ICTY statute.¹⁸⁸ The Trial Chamber drew specific attention to the permissive tone of the Secretary-General's comments: "[I]n determining the term of imprisonment, the Trial Chambers *should have recourse* to the general practice of prison sentences applicable

¹⁸³ *In re Rauter*, Spec. Crim. Ct., The Hague (May 4, 1948), reprinted in H. LAUTERPACHT, *supra* note 13, at 526, 542-43 (1949).

¹⁸⁴ *Id.*

¹⁸⁵ Erdemović ultimately ended up pleading guilty to war crimes. Prosecutor v. Erdemović, Case No. IT-96-22-T, Sentencing Judgment, ¶ 8 (Nov. 29, 1996).

¹⁸⁶ See *supra* text accompanying notes 165-167.

¹⁸⁷ *Erdemović*, Case No. IT-96-22-T, Sentencing Judgment, ¶ 38 (observing that the Dutch Special Court was "seized of a line of defence based on the principle *nulla poena sine lege*").

¹⁸⁸ Pursuant to the request of the Security Council, the Secretary-General of the United Nations prepared a background report that accompanied the proposed draft statute of the ICTY. See The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), U.N. Doc. S/25704 (May 3, 1993) [hereinafter Secretary-General's Report].

in the courts of the former Yugoslavia.”¹⁸⁹ It then isolated this phrase and relied on it to achieve the not-so-subtle ends sought, namely freeing the Tribunal of any limitation on sentencing arising from the general practice of the former Yugoslavia.

There are at least two problems with the Trial Chamber’s reasoning and methodology here. First, the Trial Chamber fails to appreciate the context of the Secretary-General’s report and the relationship between the Secretary-General and the Security Council. The Trial Chamber characterizes the Secretary-General’s comment as an “interpretation” of the Statute. The comment, however, is not intended as an “interpretation” of the Statute, but rather as a rationalization for the inclusion or exclusion of matters from the scope of the Statute.¹⁹⁰ These comments are made as an introduction to the proposed text of the Statute that follows them. The permissive tone is intended to defer to the authority of the Security Council to ultimately decide upon the final text of the Statute. It recognizes that the decision of whether to use “shall” or “should” is a policy choice to be made by the Security Council in its role as the legislative body of the ICTY Statute. In the end, the Security Council chose “shall.” For the judges to go back and engage in a debate on whether the national law provision is binding or permissive is to go beyond their function and legislate from the bench, effectively redrafting their own statute.

It is submitted that this is the proper contextual understanding of the permissive tone of the Secretary-General’s comment, and not what the Trial Chamber suggested, namely the modification of the actual text of the Statute from “shall have” to “should have.” Moreover, if the Secretary-General in fact intended “should have,” as the Trial Chamber suggested, then he presumably would have maintained that language in the actual text of the Statute that he proposes immediately following these comments. Surely, if the Secretary-General intended “should,” and not “shall,” then his proposed text would not have stated “shall.”

The erroneous reasoning of the Trial Chamber is accentuated if we attempt to apply its methodology and reasoning to the very next comment that appears in the report of the Secretary-General: “The International Tribunal should not be empowered to impose the death penalty.”¹⁹¹ The proposed text of the Statute corresponding to this comment reads: “The

¹⁸⁹ *Erdemović*, Case No. IT-96-22-T, Sentencing Judgment, ¶ 39 (quoting the Secretary-General’s Report, *supra* note 188, ¶ 111).

¹⁹⁰ Much the same way that acts of national legislative bodies, which pass new laws, may include rationalization for the new legislation. In this sense, they may form part of the legislative history of the Statute.

¹⁹¹ Secretary-General’s Report, *supra* note 188, ¶ 112.

penalty imposed by the Trial Chamber shall be limited to imprisonment.”¹⁹² Applying the Trial Chamber’s interpretative methodology would lead to the conclusion that this provision is likewise not binding on trial chambers, and consequently the ICTY could also apply the death penalty. Clearly, this is not intended by the Secretary-General’s use of the permissive language (“should”) in his report, and the Trial Chamber may be criticized for applying it in such a manner.

Second, the Trial Chamber may be reasonably criticized for not taking full account of statements by Italy, Russia, the Netherlands, and other states on this issue.¹⁹³ Given that the Security Council approved the report of the Secretary-General in Resolution 827 establishing the ICTY, the contents of the report may be considered as part of the “legislative history” of the ICTY Statute. However, it is only one among several possible sources that may be considered as part of the “legislative history” of the Statute, including comments from members of the Security Council at that time. The Trial Chamber’s presumption of exclusivity, or at the very least of priority, towards the comments of the Secretary-General is questionable in this regard. Moreover, even if the statements of the Secretary-General are to be given greater weight than the views of a state, the use of legislative history in the interpretation of a statute has limitations, and cannot have the effect of contravening the plain and ordinary meaning of the text.

In the end, the *Erdemović* Trial Chamber concluded that the laws and practice of the courts of the former Yugoslavia can be turned to for guidance, but they are not binding on the trial chambers:

Whenever possible, the International Tribunal will review the relevant legal practices of the former Yugoslavia but will not be bound in any way by those practices in the penalties it establishes and the sentences it imposes for the crimes falling within its jurisdiction.¹⁹⁴

¹⁹² *Id.* ¶ 115.

¹⁹³ *See supra* Part III.B.

¹⁹⁴ *See Erdemović*, Case No. IT-96-22-T, Sentencing Judgment, ¶ 40. This position, taken from the outset in the ICTY’s seminal sentencing judgment, has been confirmed and followed without deviation, entrenching it deep in the Tribunal’s jurisprudence. *See, e.g.*, *Prosecutor v. Kunarac*, Case Nos. IT-96-23 & IT-96-23/1-A, Judgment, ¶ 349 (June 12, 2002); *Prosecutor v. Kupreškić*, Case No. IT-95-16-A, Appeal Judgment, ¶ 418 (Oct. 23, 2001); *Prosecutor v. Tadić*, Case Nos. IT-94-1-A & IT-94-1-*Abis*, Judgment in Sentencing Appeals, ¶ 21 (Jan. 26, 2000). This seminal sentencing judgment at the rebirth of international criminal law also set the tone for other international tribunals, such as the ICTR and East Timor Special Panels for Serious Crimes, which followed the ICTY position. *See, e.g.*, *Prosecutor v. Nahimana*, Case No. ICTR-99-52-A, Judgment, ¶ 1038 (Nov. 28, 2007); *Prosecutor v. Leite*, Case No. 04b/2001, Judgment, ¶ 68 (Dec. 7, 2002); *Prosecutor v. Kayishema & Ruzindana*, Case No. ICTR-95-1-T, Judgment, Sentencing Order, ¶ 3 (May 21, 1999).

Despite the *Erdemović* Trial Chamber's declaration that it would not be bound by Yugoslavia's sentencing practice, the penalty it imposed on Erdemović was in fact within the penalties provided for under Yugoslavia's law. The *Erdemović* holding, that the national law provision in Article 24(1) is not binding on the ICTY, has been reiterated by other trial chambers¹⁹⁵ and consistently affirmed by the Appeals Chamber.¹⁹⁶ The holding is now a well-established principle in the sentencing jurisprudence of the ICTY, the ICTR, and other international criminal tribunals.¹⁹⁷ This "guidance but not binding" approach has proved illusory and, in practice, has amounted to little more than a perfunctory reference to Yugoslavia's sentencing laws.¹⁹⁸ While earlier commentators on the ICTY Statute conceded that the ambiguous language of the provision permitted such an interpretation, they seemed ill at ease with the ICTY exercising unlimited discretion in sentencing. Bassiouni, for example, argued that "the Tribunal should follow the law of the former Yugoslavia" when determining penalties.¹⁹⁹ And while Morris and Scharf take the position that the ICTY is not bound by the sentencing practice of the former Yugoslavia, they seem to do so with the assumption that the ICTY will "establish its own uniform sentencing guidelines."²⁰⁰ Moreover, in hindsight, it was perhaps naive to believe, as some scholars suggested, that a flexible "directive but not binding" approach would help "to achieve consistency in sentencing."²⁰¹

The *Erdemović* judgment does not provide much analysis of the *nulla poena* maxim itself. Thus, it provides little guidance on the content and character of the norm in international criminal proceedings. Efforts to address the relevance of *nulla poena sine lege* in international criminal justice came later in the *Tadić* case,²⁰² and then only briefly in the separate

¹⁹⁵ E.g., *Tadić*, Case Nos. IT-94-1-A & IT-94-1-Abis, Judgment in Sentencing Appeals, ¶ 21.

¹⁹⁶ Prosecutor v. Krajišnik, Case No. IT-00-39-A, Judgment, ¶¶ 749-50 (Mar. 17, 2009); Prosecutor v. Hadžihasanović & Kubura, Case No. IT-01-47-A, Judgment, ¶ 335 (Apr. 22, 2008); *Kunarac*, Case Nos. IT-96-23 & IT-96-23/1-A, Judgment, ¶ 349; *Kupreškić*, Case No. IT-95-16-A, Judgment, ¶ 418.

¹⁹⁷ See *supra* note 194.

¹⁹⁸ *Hadžihasanović & Kubura*, Case No. IT-01-47-A, Judgment, ¶ 335; Schabas, *supra* note 59.

¹⁹⁹ BASSIOUNI & MANIKAS, *supra* note 11, at 700.

²⁰⁰ MORRIS & SCHARF, *supra* note 75, at 276.

²⁰¹ Schabas, *supra* note 59, at 481. Consistency in international sentencing remains elusive whether concerned from a perspective internally to each Tribunal or externally comparing the two ad hoc Tribunals.

²⁰² Prosecutor v. *Tadić*, Case Nos. IT-94-1-A & IT-94-1-Abis, Judgment in Sentencing Appeals (Jan. 26, 2000).

opinion of Judge Antonio Cassese.²⁰³ Still, to date, no judgment or decision of the ICTY has elucidated the international standard for *nulla poena sine lege*. According to Judge Cassese,

This principle is clearly intended to achieve three main objectives:

(i) to spell out the varying degree of disapproval or condemnation of certain instances of misbehaviour by the social order. Clearly, the more reprehensible a course of conduct is considered, the heavier the penalty imposed on persons engaging in that conduct. Thus, if a national legal system provides for a penalty of 25 years' imprisonment for murder whereas it envisages 10 years for theft, this signifies that this legal system attaches greater importance to human life than to private property.

(ii) to ensure legal certainty by reducing the discretionary power of courts (*arbitrium iudicis*).

(iii) to bring about some relative uniformity and harmonisation in the application of penalties.²⁰⁴

It is worth noting that the main objectives of *nulla poena sine lege*, as identified by Judge Cassese, relate to the positive justice function of *nulla poena sine lege*.²⁰⁵ Here, Cassese reinforces the observation made earlier that *nulla poena sine lege* is considered more than just a negative rights principle. While acknowledging that *nulla poena sine praevia lege poenali* is upheld in most national legal systems, Cassese inexplicably concluded that it "is still inapplicable in international criminal law."²⁰⁶ Although he elaborated earlier on the objectives of *nulla poena*, this latter conclusion is not as well developed. The objectives he identified, a teleological understanding, as well as *nulla poena's* acknowledged adherence in national practice strongly suggest an alternative conclusion. Accordingly, his opinion would have benefited from further reasoning. In the absence of such argumentation,²⁰⁷ it may be assumed that this conclusion was drawn from the fact that international conventions on criminal matters do not contain specific penalties.²⁰⁸ However, as already noted, this cannot be read to mean that *nulla poena* is inapplicable to international criminal justice.²⁰⁹

²⁰³ *Tadić*, Case Nos. IT-94-1-A & IT-94-1-Abis, Judgment in Sentencing Appeals, Separate Opinion of Judge Cassese.

²⁰⁴ *Id.* ¶ 4.

²⁰⁵ *Supra* Part II.A.

²⁰⁶ *Tadić*, Case Nos. IT-94-1-A & IT-94-1-Abis, Appeals Sentencing Judgment, Separate Opinion of Judge Cassese, ¶ 4.

²⁰⁷ Note that this conclusion appears in a separate opinion and thus does not represent the views of the court.

²⁰⁸ *See supra* note 73. The same can be generally said about the statutes of international criminal courts, which contain only broad guidelines on penalties.

²⁰⁹ *See supra* text accompanying notes 71-74.

As Bassiouni argues, the absence of penalties provisions in these conventions should be understood in light of the fact that international criminal law regimes were generally indirect enforcement systems, requiring states to prosecute the relevant crime domestically, and if need be, enact appropriate legislation which provided the applicable penalty.²¹⁰ Since the international community did not directly enforce the crimes within these treaties, there was no need to lay out specific penalties in the international instrument. Thus, Cassese correctly observes the absence of specific penalty provisions in treaties that rely on indirect enforcement through national law, but this does not per se nullify the force of *nulla poena sine lege* in cases of direct enforcement by the international community, a distinction made clear by the International Law Commission.²¹¹ A lacuna does not establish an alternative international standard for *nulla poena*, nor make the principle inapplicable to international prosecutions. As Cassese's own treatise on international law states, the very function of "general principles of law" as derived from municipal systems is to fill such a lacuna.²¹² In addition, it should also be noted that Cassese's views on *nulla poena* appear in a separate opinion which disagrees with the majority's ruling that there is no hierarchy between war crimes and crimes against humanity. His sweeping conclusions about the applicability of *nulla poena* are not central to his main argument and are provided only as "preliminary considerations."

In the early practice of the ICTY, it could be argued that despite their strong rhetoric that they were not bound by the penalty scheme of the former Yugoslavia, trial chambers, with a few exceptions, generally sentenced within the range of penalties acceptable under Yugoslavia law.²¹³ The exceptions were limited to cases of notoriously sadistic perpetrators,²¹⁴ high-ranking officers,²¹⁵ and persons convicted of genocide.²¹⁶ Indeed, in order to persuade the Appeals Chamber to reduce his sentence, at least one accused, while acknowledging that the ICTY jurisprudence holds that it is

²¹⁰ BASSIOUNI, *supra* note 1, at 125-26; BASSIOUNI & MANIKAS, *supra* note 11, at 689.

²¹¹ See *supra* text accompanying notes 140-146.

²¹² CASSESE, *supra* note 108, at 193.

²¹³ Beresford, *supra* note 176.

²¹⁴ E.g., Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment (Dec. 14, 1999) (sentencing Jelisić to forty years imprisonment), *aff'd*, Prosecutor v. Jelisić, Case No. IT-95-10-A, Judgment (July 5, 2001).

²¹⁵ For example, the Trial Chamber sentenced General Blaškić to forty-five years imprisonment, which was reduced to nine years on appeal. See Prosecutor v. Blaškić, Case No. IT-95-14-T-A, Judgment (July 29, 2004).

²¹⁶ E.g., Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment (Aug. 2, 2001) (sentencing Krstić to forty-six years of imprisonment), *modified*, Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment (Apr. 19, 2004) (reducing Krstić's sentence to thirty-five years on appeal).

not bound by the sentencing practices of the former Yugoslavia, argued that the practice of the ICTY up to that point had been to stay within the sentencing range provided by Article 38 of the former Yugoslavia's criminal code.²¹⁷ In that case, the Trial Chamber predictably rejected the defendant's argument that imposing a term of imprisonment of more than fifteen years would violate the principle of legality.²¹⁸ As a matter of practice before the ICTY, defense counsel would profit from noting that the Appeals Chamber's ostensible position is that comparing one accused to another for the purposes of determining a penalty "is often of limited assistance" and that "often the differences are more significant than the similarities."²¹⁹

In the past few years, the number of accused sentenced to more than twenty years in prison has increased. However, an interesting development took place in the *Kunarac* case.²²⁰ The Appeals Chamber ruled that family circumstances constitute a mitigating factor and held that the *Kunarac* Trial Chamber should have considered evidence of such circumstances as a mitigating factor.²²¹ It is worth taking note that the Appeals Chamber made this ruling relying on the "existing case-law of the Tribunal" and by "having recourse to the practice of the courts of the former Yugoslavia."²²² The Appeals Chamber further noted that:

Family concerns should in principle be a mitigating factor. Article 41(1) of the 1977 Penal Code required the courts of the former Yugoslavia to consider circumstances including the "personal situation" of the convicted person. The Appeals Chamber holds that this should have been considered as a mitigating factor.²²³

Perhaps the Appeals Chamber's specific reference to and reliance on the practice of the courts of the former Yugoslavia should serve as a signal to

²¹⁷ *Prosecutor v. Delalić ("Čelebići Case")*, Case No. IT-96-21-A, Judgment, ¶ 811 (Feb. 20, 2001). The defendant urged the Trial Chamber to reduce his sentence on the grounds that Trial Chambers had "scrupulously avoided assessing penalties greater than that imposed under SFRY law." This ground of appeal predictably failed not only because of the standing jurisprudence that ICTY is not bound by national sentencing practice but also because his sentence of twenty years was within the sentencing range for serious crimes under Yugoslav law. Although the general range for sentences of imprisonment was between five and fifteen years, Yugoslav law allowed an increase to twenty years for "criminal acts . . . which were perpetrated under particularly aggravating circumstances or caused especially grave consequences." *Id.*

²¹⁸ *Id.* ¶ 814. For the relevant passage of the trial judgment, see *Prosecutor v. Delalić*, Case No. IT-96-21-T, Judgment, ¶ 402 (Nov. 16, 1998).

²¹⁹ *Čelebići Case*, Case No. IT-96-21-A, Judgment, at ¶ 719.

²²⁰ *Prosecutor v. Kunarac*, Case Nos. IT-96-23 & IT-96-23/1-A, Judgment (June 12, 2002).

²²¹ *Id.* ¶ 362.

²²² *Id.*

²²³ *Id.*

the trial chambers to give greater weight and consideration to the provisions of national law and the practice of the courts of the former Yugoslavia when it comes to mitigating factors. Given the established principle in the jurisprudence of the ICTY that national practice is not binding, this is the most the Appeals Chamber could do to strengthen the role of sentencing provisions in laws of Yugoslavia in the determination of a sentence by ICTY trial chambers without overruling a well-entrenched principle and throwing the integrity of its past sentences into jeopardy.

In the *Čelebići* trial judgment, the legality of the penalty was aberrantly analyzed under the *nullum crimen sine lege* principle rather than *nulla poena sine lege*.²²⁴ It is unclear whether this mishap spawned from the defendant's brief and was simply responded to in like by the Trial Chamber²²⁵ (in which case it would have been preferable for the Trial Chamber to make note of the error) or whether the *Čelebići* Trial Chamber, like the *Erdemović* Trial Chamber, is itself the cause of the failure to adequately distinguish between the two maxims.²²⁶

The *Čelebići* Trial Chamber acknowledged the existence of some "controversy" regarding its sentencing policy of substituting the Yugoslavia maximum penalty (capital punishment) with the ICTY's maximum of life imprisonment, in light of the fact that the former Yugoslavia had abolished the latter sanction, which it viewed as cruel and inhuman.²²⁷ It defended this policy by summarily concluding that it is "consistent with the practice of States which have abolished the death penalty"²²⁸ and by reference to the views of one member of the Security Council.²²⁹ Even if it is acceptable that life imprisonment is a suitable substitute for the death penalty, a proposition which has not gone unchallenged,²³⁰ the Trial Chamber's analysis is incomplete in another important aspect. Under Yugoslav law, an accused could be sentenced to a term of imprisonment of up to fifteen years or sentenced to capital punishment, which could be mitigated to a sentence of twenty years. However, a term of imprisonment beyond twenty years

²²⁴ Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment, ¶¶ 1209-12 (Nov. 16, 1998).

²²⁵ *Id.* ¶ 1197. However, on appeal the Appeals Chamber referred to the defendant's submissions as challenging the sentence on the grounds that "the Trial Chamber erred in violating the principle of *nulla poena sine lege*." *Čelebići Case*, Case No. IT-96-23-A, Judgment, ¶ 809.

²²⁶ *Delalić*, Case No. IT-96-21-T, Judgment, ¶ 1210.

²²⁷ *Id.* ¶ 1208.

²²⁸ *Id.* Although this is an assumption that is commonly repeated, it is unfortunate that the Trial Chamber does not provide a single example, much less illustrate a "consistent" practice, to bolster its reasoning.

²²⁹ *Id.*

²³⁰ Objections arise from both a legal and normative perspective. See, e.g., BASSIOUNI & MANIKAS, *supra* note 11, at 702.

was not permissible. It was either twenty years or the death penalty. Thus, even if the ICTY policy of substituting the death penalty with life imprisonment is correct, this does not automatically justify terms of imprisonment that exceed twenty years. A sentencing policy that would be faithful to the Statute's directive of having "recourse to the sentencing practice of the former Yugoslavia" would be one that set a maximum term of imprisonment at twenty years while permitting life imprisonment.²³¹

By explicit reference, however, the Trial Chamber rejected the position of Professor M. Cherif Bassiouni who concluded that imprisonment in excess of twenty years allowed under "the applicable national codes" would violate the principle of legality,²³² characterizing his opinion as "an erroneous and overly restrictive view of the concept."²³³ The *Čelebići* Trial Chamber held that "the governing consideration for the operation of the *nullum crimen sine lege* principle is the existence of a punishment with respect to the offence. . . . The fact that the new punishment of the offence is greater than the former punishment does not offend the principle."²³⁴ In other words, according to the Trial Chamber, once a penalty—any penalty—is provided for, then the accused are put on notice generally that their conduct can subject them to criminal jurisdiction, and thus the principle of legality is not violated, even if the court now substitutes its own higher penalty for the original penalty.²³⁵ Once again, international judges misconstrue the principle of legality as encompassing only the *nullum crimen* principle, and fail to consider *nulla poena* separately. While the existence of a law making certain conduct a punishable offense satisfies *nullum crimen*, the substitution and enforcement of a higher penalty after the commission of the conduct violates *nulla poena*. The *Čelebići* Trial Chamber's application of the principle of legality here grants the benefits of legality on the innocent but withholds it from the guilty.

²³¹ Similar in structure to the sentencing provisions that were finally adopted in ICC Statute, *supra* note 9.

²³² BASSIOUNI & MANIKAS, *supra* note 11, at 702.

²³³ *Delalić*, Case No. IT-96-21-T, Judgment, ¶¶ 1209-10.

²³⁴ *Id.* ¶ 1212. In another passage, the Trial Chamber also held that "[*nullum crimen sine lege*] is founded on the existence of an applicable law. The fact that the new maximum punishment exceeds the erstwhile maximum does not bring the new law within the principle." *Id.* ¶ 1210.

²³⁵ *Id.* ¶ 1212 (quoting *Prosecutor v. Tadić*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995) ("Nationals of the former Yugoslavia . . . were therefore aware, or should have been aware, that they were amendable to the jurisdiction of national criminal courts . . .")); *see also id.* ¶ 1210 (holding that "[t]his concept is founded on the existence of an applicable law. The fact that the new maximum punishment exceeds the erstwhile maximum does not bring the new law within the principle.").

The Trial Chamber's analysis leads to two serious implications: the first is a rejection of the prohibition against the use of analogy on the discretion of international criminal adjudicators, and the second is an explicit renunciation of the prohibition against imposing a greater penalty than the one applicable at the time the crime was committed.²³⁶ While it may be argued, in turn, that this weakens the *lex stricta* and *lex praevia* attributes of *nulla poena sine lege* under international law, the better inference to be drawn is that the Trial Chamber's analysis of the principle should not be given serious weight as international precedent for determining the international standard for *nulla poena sine lege*. First, although it is addressing the question of penalties, the Trial Chamber's discussion is in terms of *nullum crimen sine lege*. The Trial Chamber's failure to adequately distinguish between the two maxims weakens its authority as precedent on the *nulla poena sine lege* inquiry. Second, the Trial Chamber's dismissal of the *lex stricta* principle can be criticized for failing to consider, even nominally, the international precedent arising from the *Advisory Opinion on the Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*.²³⁷ It may be said that to some extent this criticism can be deflected by the fact that traditionally resorting to analogy was permitted on a limited basis, but this counter-argument has less force in light of modern practice of criminal law. With the exception of one or two isolated states, national criminal justice systems prohibit the expansion of criminal sanctions by analogy. Yet, even if breach of the *lex scripta* principle was to be deemed acceptable in international criminal justice, the Trial Chamber's analysis is liable to an even more serious criticism. Contrary to the well-established principle of *lex praevia* in international and national law, the Trial Chamber concluded that a "new punishment" which is "greater than the former punishment does not offend" the principle of legality.²³⁸

In light of the sentences imposed, it seems quite unnecessary for the Trial Chamber to reach such controversial conclusions. In this case, the Trial Chamber acquitted one defendant on all charges, and imposed imprisonment sentences of seven, fifteen, and twenty years on the other three. Hazim Delic, who received the harshest penalty of twenty years imprisonment, argued that, based on the principle of legality, the Trial Chamber could not impose a sentence greater than fifteen years.²³⁹ Indeed,

²³⁶ It may be countered that these proffered implications constitute a "worse case" critique of the Trial Chamber's analysis; nevertheless, it is the logical conclusion of the Trial Chamber's holdings.

²³⁷ *Danzig Decrees*, *supra* note 121.

²³⁸ *Delalić*, Case No. IT-96-21-T, Judgment, ¶ 1212 (emphasis added).

²³⁹ *Id.* ¶ 1211.

the standard maximum under the former Yugoslavia's penal code was fifteen years.²⁴⁰ However, as already mentioned, under certain circumstances national courts could increase the penalty to twenty years. These include cases where the death penalty was applicable but for some reason, such as mitigating circumstances, the court chose to not impose it and cases where "criminal acts . . . were perpetrated under particularly aggravating circumstances or caused especially grave consequences."²⁴¹ Accordingly, the Trial Chamber did not need to go so far as to engage in a controversial analysis which could call into question its judgment or damage the credibility of international judges, or even cast a shadow on the endeavor to fight impunity through international criminal justice. It could simply have reasoned that Delic's crimes were of such gravity as to fall within the provisions of the former Yugoslavia's penal code, which permitted an increase in penalty from fifteen years to twenty years.

The *Čelebići* Appeals Chamber appropriately reframed the analysis in terms of *nulla poena sine lege*.²⁴² More significantly, it also focused the issue towards whether *nulla poena sine lege* required an international criminal tribunal to be bound by the penalties available under national law.²⁴³ The Appeals Chamber steered clear of any overreaching declarations such as those made by the Trial Chamber that "[t]he fact that the new punishment of the offence is greater than the former punishment does not offend the principle."²⁴⁴ This could arguably be considered as an implicit disavowal of the Trial Chamber's ruling on this point. After limiting the inquiry to whether *nulla poena sine lege* required strict adherence to national law, the Appeals Chamber concluded that the penalty of life imprisonment authorized by the ICTY Statute and RPE did not violate the *nulla poena* principle because it reasoned that "the accused must have been aware" that their crimes were "punishable by the most severe penalties."²⁴⁵ Thus, the Appeals Chamber limited its holding, and consequently the rulings of the Trial Chamber, by the principle of foreseeability. Citing decisions of the European Court of Human Rights, the Appeals Chamber reasoned that so "long as the punishment is accessible and foreseeable, then the principle cannot be breached."²⁴⁶

²⁴⁰ See *supra* note 161.

²⁴¹ *Čelebići Case*, Case No. IT-96-21-A, Judgment, ¶ 810 n.1383 (Feb. 20, 2001) (referring to Article 38 of the SFRY Penal Code).

²⁴² *Id.* ¶ 814.

²⁴³ *Id.*

²⁴⁴ *Delalić*, Case No. IT-96-21-T, Judgment, ¶ 1212.

²⁴⁵ *Čelebići Case*, Case No. IT-96-21-A, Judgment, ¶ 817.

²⁴⁶ *Id.* ¶ 817 n.1400 (citation omitted). The Appeals Chamber here relied on two cases from the European Court of Human Rights: *C.R. v. United Kingdom*, App. No. 20190/92,

The difficulties in applying the foreseeability test in this context have been addressed above already.²⁴⁷ It is fair to say that it was foreseeable that serious violations of international humanitarian law would be subject to the “most severe penalties,” as the Appeals Chamber pointed out.²⁴⁸ However, in a country that had abolished life imprisonment as a cruel form of punishment, can it fairly be said that such a sanction was foreseeable? In a country that did not permit terms of imprisonment beyond twenty years on the fundamental belief that such imprisonment was cruel and inhumane, it would be fair to argue that sentences of twenty years,²⁴⁹ forty years,²⁵⁰ forty-five years,²⁵¹ or forty-six years²⁵² were not foreseeable.

C. NULLA POENA SINE LEGE IN THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT

1. ICC Statute Framework for the Legality of Sanctions

Under Part III of the ICC Statute on General Principles of Criminal Law lies Article 23, the keystone to understanding the legality of the ICC’s power to impose a particular punishment.²⁵³ Entitled “*Nulla poena sine lege*,” Article 23 states: “A person convicted by the Court may be punished only in accordance with this Statute.”²⁵⁴ Although at first glance this single succinct sentence seems rather stingy for content, underlying its brevity are

335 Eur. Ct. H.R. at 68-69 (1996), and *S.W. v. United Kingdom*, App. No. 20166/92, 335 Eur. Ct. H.R. at 41-42 (1996). However, in both of these cases, the central issue was the “punishability” of the conduct, not the determination of the appropriate penalty. In other words, the threshold question before the ECHR in both cases was the application and interpretation of *nullum crimen sine lege*, not *nulla poena sine lege*. The foreseeability test was applied to determine whether *nullum crimen sine lege* had been breached.

²⁴⁷ See *supra* text accompanying notes 47-53.

²⁴⁸ *Čelebići Case*, Case No. IT-96-21-A, Judgment, ¶ 817.

²⁴⁹ See, e.g., *Prosecutor v. Kordić*, Case No. IT-95-14/2-T, Judgment (Feb. 26, 2001), *aff’d*, Case No. IT-95-14/2-A, Judgment (Dec. 17, 2004).

²⁵⁰ *Prosecutor v. Jelisić*, Case No. IT-95-10-T, Judgment (Dec. 14, 1999).

²⁵¹ *Prosecutor v. Blaškić*, Case No. IT-95-14-T, Judgment (Mar. 3, 2000). For a critique of methodology and reasoning of the *Blaškić* sentence in light of the general sentencing jurisprudence of the ICTY, see Shahram Dana, *Revisiting the Blaškić Sentence: Some Reflections on the Sentencing Jurisprudence of the ICTY*, 4 INT’L CRIM. L.R. 321 (2004). General *Blaškić*’s sentence was reduced to nine years on appeal. See *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Judgment (July 29, 2004).

²⁵² See *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment (Aug. 2, 2001). *Krstić*’s sentence was reduced to thirty-five years on appeal. *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgment (Apr. 19, 2004).

²⁵³ For a general commentary on this Article, see Lamb, *supra* note 2, at 762-65; Schabas, *supra* note 2, at 463-66.

²⁵⁴ ICC Statute, *supra* note 9, art. 23.

important requirements for the legality of any selected sanction within the ICC framework. First, the list of sanctions provided by the Statute is exhaustive. If a particular punishment is not provided for by the Statute, then the ICC has no power to impose it. Second, the language “only in accordance with this Statute” obliges the ICC to comply with any conditions, qualifications, or other requirements attached to any sanction, whether in regard to its determination, imposition, or enforcement. From this perspective, it may be said that the Statute reaffirms the *lex scripta* principle underlying *nulla poena sine lege*.

While the inclusion of *nulla poena sine lege* via an individualized article within the ICC Statute may be considered a positive contribution to the development of the norm under international law, it must be admitted that Article 23 contains a peculiar expression of its namesake.²⁵⁵ The principle is made dependent on the quality of provisions found in other articles of the Statute, and in some cases even dependent on the ICC Rules of Procedure and Evidence (ICC RPE). This reverse dependency is an awkward and unfamiliar position for a fundamental principle of criminal law, which is normally independent of subsequent rules. Put differently, fundamental principles of the system, such as *nulla poena sine lege*, contain norms and values that subsequent rules within the system must satisfy. The dependency of the ICC’s *nulla poena sine lege* provision on other articles of the Statute may limit its effectiveness in achieving the goals associated with the maxim, particularly those that pertain to its “positive justice” function.

While Article 23 limits the form and severity of the punishment to those penalties enumerated in the Statute, it cannot be said that it likewise limits the factors, especially aggravating circumstances, that judges may rely on to increase the severity of a sentence. Its effectiveness to limit judicial discretion to the factors enumerated in the Rome Statute or the ICC RPE is weakened by open-ended language in other articles and rules. For example, Article 78 instructs judges to “take into account *such factors as* the gravity of the crime and the individual circumstances of the convicted person.”²⁵⁶ The language suggests that the enumeration of factors here is not exhaustive. Article 78 further states that the determination of the sentence should also be in accordance with the ICC RPE. Rule 145,

²⁵⁵ At least one international judge has made a similar observation. See Prosecutor v. Tadić, Case Nos. IT-94-1-A & IT-94-1-Abis, Judgment, Separate Opinion of Judge Cassese, ¶ 5 (Jan. 26, 2000) (observing that “Article 23 lays down the *nulla poena* principle, but only in a particular form”).

²⁵⁶ ICC Statute, *supra* note 9, art. 78(1) (emphasis added).

however, contains a non-exhaustive list of aggravating factors.²⁵⁷ Thus, in determining a sentence, judges may take into account “other circumstances” not found in the Statute or ICC RPE.²⁵⁸ This opening in the Statute has been criticized as being contrary to *nulla poena*.²⁵⁹

Prior to the adoption of Rule 145, the potential scope of Article 23 was a matter of interpretation for the judges. The threshold issue would have been whether the language “in accordance with this Statute” requires that the factors impacting the sentence be enumerated in the Statute or the RPE, or whether it is permissible for the Statute or ICC RPE to allow consideration of factors not enumerated. Rule 145 seems to lay this issue to bed. However, can it be argued that the court has the authority, or even the obligation, to ensure that rules adopted by the Assembly of State Parties, as part of the ICC RPE, do not conflict with the fundamental principles laid down in the Statute? In other words, does the ICC have the power of judicial review over provisions adopted in the ICC RPE? This matter cannot be addressed within the scope of this article, but perhaps there is room to argue that this particular provision of Rule 145 is contrary to the requirements of the Statute pursuant to Article 23.

Another factor contributing to the peculiar nature of the formulation of *nulla poena sine lege* in Article 23 is the absence of language expressly incorporating the *lex praevia* principle, which is codified in numerous international and regional human rights instruments. From the perspective of normative development of *nulla poena sine lege* in international law, it would have been preferable to explicitly incorporate the *lex praevia* principle in the ICC’s *nulla poena* article, especially in light of some potentially adverse statements from the jurisprudence of the ICTY.²⁶⁰ However, from a practical standpoint, its absence in Article 23 is not fatal to the operation of the *lex praevia* principle within the general framework of the Statute, provided that the Statute is interpreted consistent with Article 15(1) of the ICCPR. Moreover, it may be argued that the drafters of the Statute did not consider this to be a serious omission given that the Statute

²⁵⁷ International Criminal Court Rules of Procedure and Evidence, ICC-ASP/1/3, Rule 145(2)(b)(vi).

²⁵⁸ *Id.* (granting that these “other circumstances” must “by virtue of their nature be similar” to the enumerated aggravating factors).

²⁵⁹ SALVATORE ZAPPALÁ, HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS 201 (2003). For similar criticism of the ICTY Statute, see BASSIOUNI & MANIKAS, *supra* note 11, at 702.

²⁶⁰ *E.g.*, Prosecutor v. Delalić, Case No. IT-96-21-T, Judgement, ¶ 1210 (Nov. 16, 1998) (“The fact that the new maximum punishment exceeds the erstwhile maximum does not bring the new law within the principle.”); *id.* ¶ 1212 (“The fact that the new punishment of the offence is greater than the former punishment does not offend the principle.”); see *supra* Part IV.B.

contains a clear provision on the non-retroactive application of the Statute to conduct occurring prior to its entry into force.²⁶¹

Given that the ICC's *nulla poena sine lege* article does not explicitly contain the *lex praevia* principle, namely that a heavier penalty shall not be imposed than the one that was applicable at the time the offense was committed,²⁶² the court may have to turn outside its own statute for authority to incorporate this principle.²⁶³ There are a number of sources that the court can rely upon to incorporate the *lex praevia* principle into its legal framework, including "applicable treaties"²⁶⁴ and "general principles of law" derived from national laws of legal systems of the world.²⁶⁵ Although it is hard to imagine that ICC judges would not incorporate *lex praevia* into the *nulla poena* provision of the Statute, it would nevertheless have been preferable to have included an explicit provision to that effect.

An earlier proposal, which was not included in the final text of Article 23, offered the following language: "No penalty shall be imposed on a person convicted of a crime within the jurisdiction of the Court, unless such penalty is expressly provided for in the Statute and is applicable to the crime in question."²⁶⁶ However, without explicit reference to determining the penalty in accordance with the law applicable "at the time the conduct was committed," the proposal does not address the *lex praevia* principle, although it does provide for a stronger *lex certa* character which could have possibly required that penalties be specified per crime. It is not clear why the Working Group on Penalties reformulated the proposal into the present language.²⁶⁷ Perhaps it was because the Working Group did not have sufficient time to achieve a more precise sentencing framework. Whether this decision will weaken the *nulla poena* norm within the ICC framework remains uncertain.

To strengthen the *lex praevia* character of *nulla poena* within the ICC framework, one could argue that the principle of non-retroactive application

²⁶¹ ICC Statute, *supra* note 9, art. 24(1). The ICC Statute entered into force on July 1, 2002. *Id.* art. 126.

²⁶² See *supra* Parts II.B & III.A. See generally UDHR, *supra* note 29, art. 11, ¶ 2; ICCPR, *supra* note 29, art. 15(1); ECHR, *supra* note 29, art. 7(1); ACHR, *supra* note 29, art. 9.

²⁶³ See ICC Statute, *supra* note 9, art. 21.

²⁶⁴ See *id.* art. 21(1)(b). These may include for example international human rights treaties as well as international humanitarian law conventions. With regard to the latter, Article 75(4)(c) of Additional Protocol I to the Geneva Conventions of August 12, 1949 provides that "nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed."

²⁶⁵ See ICC Statute, *supra* note 9, art. 21(1)(c).

²⁶⁶ See Schabas, *supra* note 2, at 465. This proposal was offered by Mexico.

²⁶⁷ *Id.*

of a heavier penalty appears in all major human rights treaties.²⁶⁸ This argument, however, is only successful to the extent it is accepted that the court is bound by these treaties. Another approach would be to turn to general principles of law or customary international law, as the majority of nations prohibit *ex post facto* application of criminal law.²⁶⁹ A third approach could be to rely on related articles of the Statute such as Article 22 and Article 24, although such reliance will also depend upon the interpretation of these provisions in accordance with international human rights standards.²⁷⁰ Article 22 *Nullum crimen sine lege* makes clear that the applicable law is that which was in place at the time the conduct occurred.²⁷¹ Given the nexus between *nullum crimen sine lege* and *nulla poena sine lege*,²⁷² the ICC may reasonably rely on Article 22 to incorporate the *lex praevia* principle into Article 23. Article 24 also has potential to strengthen *lex praevia* within the Statute, depending on the interpretation given to the phrase “the law applicable.” Article 24 provides that “[i]n the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.”²⁷³ Strictly speaking, this provision incorporates the *lex mitior* principle, but it can be interpreted so as to include the *lex praevia* principle of *nulla poena sine lege*. The threshold question to be resolved is what is meant by “the law applicable to a given case.” While at first glance this may seem obvious to some, the Statute itself does not make explicit if “applicable law” refers to the law in force at the time the conduct was committed or the law in force at the time the ICC seized jurisdiction of the case. The *Čelebići* Appeals Chamber stated that “any sentence imposed must always be . . . ‘founded on the existence of applicable law.’”²⁷⁴ However, the Appeals Chamber did not further elaborate on how the “applicable law” should be identified and determined.

²⁶⁸ E.g., ICCPR, *supra* note 29, art. 15(1) (“Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.”); see *supra* Part III.A; see also ECHR, *supra* note 29, art. 7(1); ACHR, *supra* note 29, art. 9; UDHR, *supra* note 29, art. 11, ¶ 2.

²⁶⁹ See BASSIOUNI, *supra* note 1, at 123.

²⁷⁰ Article 22 deals with *nullum crimen sine lege* and therefore speaks to *punishability* of an act and not the punishment itself. Article 24(1) prohibits imposition of “criminal responsibility” in relation to the temporal jurisdiction of the court.

²⁷¹ ICC Statute, *supra* note 9, art. 22(1) (“A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.”).

²⁷² See Robinson, *supra* note 2, at 396-97 (“The rationales that support precise written rules governing assignment of liability and its degree apply as well to criminal sentencing.”).

²⁷³ ICC Statute, *supra* note 9, art. 24(2).

²⁷⁴ *Čelebići Case*, Case No. IT-96-21-A, Judgment, ¶ 817 (Feb. 20, 2001).

Moreover, it made no negative judgment against the Trial Chamber's approach which seemed to suggest that when the determination of "applicable law," for the purposes of determining a penalty, is framed in terms of a jurisdictional question, it is permissible to exceed the penalty applicable at the time the crime was committed. In certain instances, this could result in an *ex post facto* increase of the penalty. On the other hand, an alternative reading of the combined rulings of the Trial Chamber and the Appeals Chamber in *Čelebići* would be that the ICTY has not endorsed *ex post facto* increase of a penalty as such, but rather is saying that *nulla poena sine lege* does not require an international criminal tribunal to be bound by the penalty provisions arising from national law so long as the international tribunal is acting in accordance with its own statutory provisions, even if those provisions result in an increase in the penalty that otherwise would have been applicable were the individual to be tried in the forum of the *locus delicti*.²⁷⁵ It is one thing to say that *nulla poena sine lege* does not require an international criminal court to be strictly limited to penalties arising from national penal codes; it is an entirely different matter to suggest that *nulla poena sine lege* under international law does not encompass the *lex praevia* principle prohibiting retroactive application of penalties. Put simply, regardless of what interpretation the ICTY chooses to give to its national law provision, it cannot result in a sweeping ruling that *nulla poena sine lege* in international law does not include the principle of non-retroactivity. Such a holding would be manifestly against international human rights treaties.

Accordingly, to the extent that the *Čelebići* Trial Chamber's ruling suggested this latter consequence, it should be rejected as incompatible with international human rights standards and fundamental principles of criminal law. On the other hand, the former proposition arising from the combined rulings of the Appeals Chamber and Trial Chamber in *Čelebići* has significance for future cases before the ICC, and maybe also for the interpretation of its *nulla poena sine lege* article. The upshot of the *Čelebići* case on the *nulla poena sine lege* question is to preempt any success that the defendant may have in arguing that, where the penalty provisions of the ICC are greater than the penalties allowed under national law, the imposition of the former would violate the principle of legality. The ICC can bolster its rejection of such an argument by, in addition to references to the relevant articles of its own Statute, recalling this analysis of the *Čelebići* case.²⁷⁶

²⁷⁵ This would be subject to the limitation that the penalties in the forum of adjudication were foreseeable. *Id.* at 293 n.1400.

²⁷⁶ The ICC Statute does not contain a national law provision like the one found in the statutes of the ad hoc Tribunals. This makes sense in light of the differences in their

A third peculiar aspect of the drafting of Article 23 pertains to its legal construction which places “may” and “only” in close proximity: “may be punished only in accordance with this Statute.” It may seem too obvious to argue that the textual and teleological interpretation of this language would be that the court may, but is not obligated to (as opposed to “shall”), punish a convicted person; however, if it chooses to punish, it can only do so in accordance with the Statute. However as pointed out above, we have witnessed the ICTY reject what leading scholars considered to be the appropriate textual and teleological interpretation of its Article 24.²⁷⁷ Moreover, like the national law provisions of the ad hoc tribunals,²⁷⁸ which followed on the heels of a more strongly worded provision regarding applicable penalties,²⁷⁹ Article 23 of the ICC Statute also follows the more strongly worded Article 22, which states, *inter alia*: “A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.”²⁸⁰ The “shall not . . . unless” formulation is a stronger legal construction than the language of Article 23. Additionally, as noted

geographic reach. Because the ICTR and ICTY’s jurisdiction is limited to crimes occurring on the territory of a single (former) state, reference to national laws is defensible. In the context of a permanent international criminal court, with the potential for global territorial reach, a national law provision would result in a fragmentation of international sentence. Some have expressed optimism that this will “build on the principle of equality of justice through uniform penalties regime for all persons convicted by the Court.” See Rolf Einar Fife, *Applicable Penalties*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVER’S NOTES, ARTICLE BY ARTICLE 985, 986 (Otto Triffterer ed., 1999).

²⁷⁷ Compare Prosecutor v. Kunarac, Case Nos. IT-96-23 & IT-96-23/1-A, Judgment, ¶ 349 (June 12, 2002); Prosecutor v. Kupreškić, Case No. IT-95-16-A, Judgment, ¶ 418 (Oct. 23, 2001); Prosecutor v. Tadić, Case Nos. IT-94-1-A & IT-94-1-Abis, Judgment, ¶ 21 (Jan. 26, 2000); with BASSIOUNI & MANIKAS, *supra* note 11, at 692, 700; Schabas, *Perverse Effects*, *supra* note 97, at 524-28.

²⁷⁸ A comparison between ICC Statute, *supra* note 9, art. 23, and the second sentence of ICTY Statute, *supra* note 8, art. 24(1) (and ICTR Statute, *supra* note 149, art. 23(1)) seems appropriate as it has been argued that the latter was included out of concern for respecting *nulla poena sine lege*. See BASSIOUNI AND MANIKAS, *supra* note 11, at 692, 700; Schabas, *Perverse Effects*, *supra* note 97, at 524-28. Except for the reference to the applicable state, the provisions of ICTY Statute, *supra* note 8, art. 24(1) and ICTR Statute, *supra* note 149, art. 23(1) are identical: “The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of [the former Yugoslavia or Rwanda].”

²⁷⁹ Compare the first sentence and the second sentence of ICTY Statute, *supra* note 8, art. 24(1) (“shall be limited to” versus “shall have recourse to”).

²⁸⁰ ICC Statute *supra* note 9, art. 22(1). For a general commentary on this article, see Bruce Broomhall, *Nullum Crimen Sine Lege*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 276, at 447, 452-53.

already, Article 22 also explicitly includes the *lex praevia* principle. It is worth recalling that the national law provision of the ICTY statute also contained unorthodox drafting.²⁸¹ ICTY Article 24 uses “shall” alongside “have recourse to,” creating ambiguity as to its character as a strict legal limitation on judicial discretion or as a lesser guiding, but not binding, provision.²⁸² ICTY judges concluded that the sentencing laws and practice of the former Yugoslavia are not binding on them.²⁸³ Although it has been argued that this provision was included out of concern for respecting the *nulla poena sine lege*,²⁸⁴ the interpretations of the judges have effectively read out this limitation on their discretion.²⁸⁵

In sum, some improvement has been made in comparison to the statutes of the ad hoc tribunals. Although sparse and not providing satisfactory elucidation of the *nulla poena* principle, Article 23 infuses the ICC sentencing regime with a significant *lex scripta* quality, which may have in turn inspired the state representatives at the drafting table to produce what has been characterized as the most progressive international sentencing code. Moreover, the fact that *nulla poena sine lege* is recognized in its own right under Article 23, separate and independent of *nullum crimen sine lege* (Article 22), should serve to give the norm additional weight and embed its position in international criminal law.²⁸⁶

2. Analysis of Imprisonment Sanctions

The penalty provision proposed by the International Law Commission in its draft statute for an international criminal court was nearly identical to the penalty provisions of the ad hoc tribunals (ICTY Article 24 and ICTR Article 23), and relied upon the same general criteria as found in the sentencing provisions of the ICC Statute.²⁸⁷ In the view of many delegations, this ILC draft provision

²⁸¹ See *supra* Part IV.B.

²⁸² See also BASSIOUNI & MANIKAS, *supra* note 11, at 700.

²⁸³ This position was taken from the outset in the ICTY’s first sentencing judgment. See *Prosecutor v. Erdemović*, Case No. IT-96-22-T, Judgement, ¶ 39 (Nov. 29, 1996). It has been confirmed and followed without deviation, entrenching it deep in the Tribunal’s jurisprudence. See, e.g., *Prosecutor v. Kunarac*, Case Nos. IT-96-23 & IT-96-23/1-A, Judgment, ¶ 349 (June 12, 2002); *Prosecutor v. Kupreškić*, Case No. IT-95-16-A, Judgment, ¶ 418 (Oct. 23, 2001); *Prosecutor v. Tadić*, Case Nos. IT-94-1-A & IT-94-1-Abis, Judgment, ¶ 21 (Jan. 26, 2000).

²⁸⁴ See BASSIOUNI & MANIKAS, *supra* note 11, at 702; Schabas, *Perverse Effects*, *supra* note 97, at 525; Schabas, *supra* note 2, at 464.

²⁸⁵ See *supra* note 194.

²⁸⁶ And, hopefully, encourage more scholarship on this subject.

²⁸⁷ See *Report of the International Law Commission to the General Assembly on the Work of Its Forty-Sixth Session*, U.N. GAOR Supp. (No. 10) at 60, U.N. Doc. A/49/10

gave rise to a serious problem with regard to its conformity with the principle *nulla poena sine lege*. It was generally held that there was a need for maximum penalties applicable to various types of crimes to be spelled out. The view was also expressed that minimum penalties should also be made explicit in view of the seriousness of the crimes.²⁸⁸

With regard to imprisonment sanctions, Articles 23 and 77 work in tandem. Article 77 sets out the ICC's powers regarding the sanction of imprisonment. It gives the court two alternatives: judges must make a choice between imprisonment of not more than thirty years²⁸⁹ or life imprisonment. This structure resulted from the insistence of states for clarity as to the maximum sentence,²⁹⁰ a recognition of the *lex scripta* and *lex certa* attributes of *nulla poena*.²⁹¹ The idea to include a maximum term for a sentence of determinate years originated with France and other civil law countries in order to, in the view of one participant,²⁹² "increase legal certainty with regard to the range of imprisonment."²⁹³ Consequently, a degree of specificity was introduced into international criminal justice that did not exist in the statutes of previous international criminal tribunals.²⁹⁴ Under the statutes of the IMT, IMTFE, ICTR and ICTY, a person could be sentenced to forty years or fifty years or any other period of time.²⁹⁵ The

(1994), reprinted in [1994] 2 Y.B. Int'l L. Comm'n 287, U.N. Doc. A/CN.4/SER.A/1994/Add.1 (providing that "[i]n imposing sentence, the Trial Chamber should take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.").

²⁸⁸ Report of the Ad Hoc Committee to the General Assembly on the Establishment of an International Criminal Court, 50 U.N. GAOR Supp. (No. 22) at 36, ¶ 187, U.N. Doc. A/50/22 (1995) [hereinafter 1995 Ad Hoc Committee Report].

²⁸⁹ Proposals on the maximum years for a specific term of imprisonment ranged from twenty to forty. See Fife, *supra* note 276, at 990 n.24.

²⁹⁰ *Id.* at 1424; see also Rolf Einar Fife, *Penalties, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, AND RESULTS* 319, 319 (Roy S. Lee ed., 1999)

²⁹¹ Further indicia of this recognition can be found in the support of some countries for the inclusion of minimums as well as maximums. See ICC Prep. Committee's 1996 Report, *supra* note 27, at 63; see also Compilation of Proposals, *supra* note 101, at 227-34; Preparatory Committee on the Establishment of an International Criminal Court, *Decisions Taken by the Preparatory Committee at its Session Held from 1 to 12 December 1997*, U.N. Doc. A/AC.249/1997/L.9/Rev.1 (1997); United Nations Diplomatic Conference on the Plenipotentiaries on the Establishment of an International Criminal Court, June 15-17, 1998, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, arts. 75-79, U.N. Doc. A/CONF.183/2/Add.1 (April 14, 1998).

²⁹² Rolf Einar Fife (Norway), Chairman of the Working Group on Penalties.

²⁹³ Fife, *supra* note 276, at 990.

²⁹⁴ Compare ICC Statute, *supra* note 9, art. 77, with ICTY Statute, *supra* note 8, art. 24, and ICTR Statute, *supra* note 149, art. 23.

²⁹⁵ E.g., General Radislav Krstić was sentenced to forty-six years of imprisonment. See *Prosecutor v. Krstić*, Case No. IT-98-33-T, Trial Judgment, ¶ 726 (Aug. 2, 2001). On

ICC Statute, however, does not provide precise penalties for specific crimes, despite the wide range of offenses and modes of participation that the court is called upon to judge. Thus, the sentencing scheme in Article 77 applies to all crimes within the ICC jurisdiction.

When determining a sentence within this structure, judges must take into account two factors: “gravity of the crime” and “the individual circumstances of the convicted person.”²⁹⁶ In the practice of the ICTY, the “gravity of the crime” emerged as the key factor in sentencing,²⁹⁷ and the ICC’s reliance on it to produce a just sentencing practice should not be underestimated. “Gravity of the crime” appears as the key criterion in two places in the Statute. Under Article 77(1)(b), “gravity of the crime” is relied on to determine the appropriateness of life imprisonment. At minimum, the “gravity of the crime” must be “extreme” in order to justify life imprisonment. It appears again in Article 78(1) as a general factor in determining the appropriate length of any sentence.

3. Life Imprisonment

Article 77(1)(b) provides two general qualifications intended to limit the application of life imprisonment. Life imprisonment should only be imposed “when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.” Both criteria must be met before an individual can be sentenced to life imprisonment. There are no crimes for which the Statute categorically excludes the applicability of a life sentence. Consequently, even with the intended limitation in Article 77(1)(b), life imprisonment is theoretically applicable to all the crimes within the Statute.

A life imprisonment sentence is, to state the obvious, a severe sanction.²⁹⁸ The drafting and negotiation process revealed a notable divide between some states on its propriety. Several European and Latin American countries opposed, in principle, the inclusion of life imprisonment within the ICC’s statute, and at minimum, its imposition without the possibility of parole.²⁹⁹ Some states viewed life imprisonment

appeal, his sentence was reduced to thirty-five years. *See* Prosecutor v. Krstić, Case No. IT-98-33-A, Appeal Judgment, 87 (Apr. 19, 2004).

²⁹⁶ ICC Statute, *supra* note 9, art. 78(1).

²⁹⁷ *See, e.g.*, Prosecutor v. Delalić, Case No. IT-96-21-A, Appeal Judgment, ¶731 (Feb. 20, 2001); Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Appeal Judgment, ¶182 (Mar. 24, 2000).

²⁹⁸ For further reading on life imprisonment, see DIRK VAN ZYL SMIT, *TAKING LIFE IMPRISONMENT SERIOUSLY IN NATIONAL AND INTERNATIONAL LAW* (2002).

²⁹⁹ *See* SCHABAS, *supra* note 67, at 141; Fife, *supra* note 276, at 990.

as cruel, inhuman, and degrading punishment.³⁰⁰ As such, in their view, it violated provisions of international human rights treaties.³⁰¹ Other states disagreed, stressing the importance of including severe penalties within the ICC's power because the penalties under consideration were to be applied to the most serious crimes of international concern.³⁰² Accordingly, they supported the inclusion of life imprisonment and, in the case of some states, the death penalty, "as a prerequisite for the credibility of the International Court and its deterrent functions."³⁰³ Thus, on the question of which penalties should be placed under the ICC's authority, the views among the states ranged from those who supported the inclusion of death penalty to those who argued against life imprisonment.

Given this diversity in views, it is perhaps surprising that further efforts were not made in the Working Group on Penalties to make appropriate distinctions among the range of crimes within the ICC's jurisdiction as to the applicable penalty for each, or at the very least, to identify those crimes for which a life sentence would be excluded. Instead, a compromise was made excluding the death penalty, but allowing for the sanction of life imprisonment which would be generally applicable to all crimes and levels of culpability, albeit with the qualification found in Article 77(1)(b). While this clause arguably places a formal limitation on the imposition of life imprisonment, its undefined quality has the potential to betray the aim of consistent application.

4. Statutory Provisions Advancing the Nulla Poena Norm

The Statute contains several articles which serve to strengthen its compliance with *nulla poena sine lege*. As illustrations, three of them will be discussed here. The first is a mandatory review procedure; the second pertains to specific rules regarding sentencing in the case of multiple convictions; and finally, the third covers sanctions for offenses against the administration of justice.

i. Mandatory Review of Sentences

The inclusion of a mandatory review mechanism was inspired by concerns regarding the ICC's authority to impose the sanction of life

³⁰⁰ SCHABAS, *supra* note 67, at 141.

³⁰¹ The view that life imprisonment is unacceptable from a human rights perspective remains contentious. The majority of states allow for it. For further reading, see Schabas, *supra* note 59, at 461.

³⁰² Fife, *supra* note 276, at 986-87.

³⁰³ *Id.*

imprisonment without the possibility of parole.³⁰⁴ In the final text of the ICC Statute, however, it was made widely applicable to all imprisonment sentences. The procedure is laid out in Article 110, which places upon the court a legal obligation to review the sentence after a specified period of time.³⁰⁵ It provides the convicted person with legal certainty that his or her sentence will be reviewed for possible reduction. Thus, the Statute gives rise to a right of the accused to a review of his sentence during the execution phase. Significantly, these provisions represent an effort to improve the *lex scripta* and *lex certa* qualities of international sentencing by extending legal certainty into the enforcement stage. Thus, the ICC Statute extends the reach of the *nulla poena sine lege* maxim to execution of penalties. In the context of the ICTY, early commentators on the statute concluded that *nulla poena sine lege* applies to the execution of sentences, although they did not elaborate on how they reached this conclusion.³⁰⁶ Indeed, a modern approach to *nulla poena sine lege*, which appreciates that it functions more than simply as a principle prohibiting the imposition of a penalty heavier than the one applicable at the time the offense was committed, supports the position of these authors. In its first sentencing judgment, the ICTY held that “[t]he principle of *nulla poena sine lege* must permit every accused to be cognisant not only of the possible consequences of conviction for an international crime and the penalty but also the conditions under which the penalty is to be executed.”³⁰⁷ Interestingly, the Trial Chamber’s rationale for its holding appears to not be premised so much on *nulla poena*’s protectionist function but rather its “quality of justice” function: “[T]he Trial Chamber is concerned about reducing the disparities which may result from the execution of sentences.”³⁰⁸ On the other hand, where the analysis of *nulla poena* is limited to its *lex praevia* principle, some commentators have argued that it “applies only to the ‘penalty’ imposed, not to the manner of its enforcement. Hence, it does not prevent any retroactive alteration in the law or practice concerning the parole or conditional release of a prisoner.”³⁰⁹ In light of such varying opinions among human rights scholars, it is regrettable that the formulation

³⁰⁴ *Id.* at 988.

³⁰⁵ For a general commentary on this article, see Gerhard A.M. Strijards, *Review by the Court Concerning Reduction of Sentence*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 276, at 1197, 1197.

³⁰⁶ *E.g.*, BASSIOUNI & MANIKAS, *supra* note 11, at 692.

³⁰⁷ Prosecutor v. Erdemović, Case No. IT-96-22-T, Sentencing Judgment, ¶ 70 (Nov. 29, 1996).

³⁰⁸ *Id.*

³⁰⁹ *E.g.*, D.J. HARRIS, M. O’BOYLE & C. WARBRICK, LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 281 (1995); *cf.* Erdemović, Case No. IT-96-22-T, Sentencing Judgment, ¶ 70.

of *nulla poena sine lege* within the ICC framework did not explicitly codify *lex praevia* into Article 23.³¹⁰

While the genesis of Article 110 lies in making available the possibility of parole, the language of the final draft of the article also creates a minimum penalty on a case by case basis. Although the sentencing regime of the ICC does not have explicit minimum sentences, neither generally nor per crime, Article 110(3) prevents the court from reviewing a sentence for possible reduction prior to the execution of two-thirds of the sentence or twenty-five years in the case of life imprisonment.

ii. Specific Rules for Multiple Convictions

Particular rules regarding sentencing in cases of multiple convictions are provided for in Article 78(3),³¹¹ thereby strengthening the *lex certa* characteristic of the Statute's sentencing provisions. It contains two mandatory features that are important to compliance with *nulla poena*. The first pertains to the obligations of the ICC when imposing a sentence for multiple convictions. "When a person has been convicted of more than one crime," Article 78(3) requires the court to first "pronounce a sentence for each crime" individually. The court "shall" then also pronounce a joint sentence "specifying the total period of imprisonment." This requirement marks an improvement on a fainéant practice that had developed in some trial chambers of the ICTY and ICTR to simply provide only a single overall sentence without enumerating specific sentences for each conviction. It has been widely assumed that the RPE of the ad hoc tribunals authorized the practice of rendering a single sentence³¹² at the time it was introduced in the *Blaškić* case.³¹³ Although General *Blaškić* was convicted of multiple crimes, the Trial Chamber did not render multiple sentences, opting instead for the less distinctive approach of rendering a single sentence for all crimes.³¹⁴ To justify its departure from the then existing practice of other ICTY trial chambers, the *Blaškić* Trial Chamber curiously turned to Rule 101 and observed that it "does not preclude it from passing a

³¹⁰ See *supra* Part IV.C(1).

³¹¹ See Mark Jennings, *Determination of the Sentence*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 276, at 999, 999-1004.

³¹² This is sometimes referred to as a "global" sentence.

³¹³ Prosecutor v. *Blaškić*, Case No. IT-95-14-T, Judgment, ¶¶ 805-07 (Mar. 3, 2000) (noting that "until now the ICTY Trial Chambers have rendered Judgements imposing multiple sentences"). For a commentary on the sentencing analysis of the *Blaškić* Trial Chamber, see Dana, *supra* note 251. See United Nations, www.un.org/icty (last visited Mar. 3, 2008) (containing a full text of all ICTY judgments cited herein); 4 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS 477-667 (André Klip & Göran Sluiter eds., 2002) (containing a full text of the *Blaškić* judgment, along with notes and commentary).

³¹⁴ *Blaškić*, Case No. IT-95-14-T, Judgment, ¶ 807.

single sentence for several crimes.”³¹⁵ At the time, however, Rule 87(C) *did* preclude the Trial Chamber from passing a single sentence for multiple crimes and it is quite egregious that the Trial Chamber did not even mention this Rule.³¹⁶ Rule 87(C) required the Trial Chamber to impose a sentence with respect to *each* finding of guilt: “If the Trial Chamber finds the accused guilty on one or more of the charges contained in the indictment, it shall at the same time determine the penalty to be imposed in respect of each finding of guilt.”³¹⁷ Thus, when the *Blaškić* Trial Chamber introduced the practice of single sentencing, it did so in contravention of the ICTY RPE.³¹⁸ Subsequently, following two revisions of the ICTY RPE, the Rules caught up to reflect the practice of single sentencing, and Rule 87(C) was amended to allow the imposition of single sentences for multiple crimes.³¹⁹

The lack of transparency resulting from a single sentence approach undermines the criminal justice process in several ways. For example, it leaves the Appeals Chamber without any indication of how each conviction influenced the overall sentence in the event that one conviction is overturned. Likewise, both the accused and the prosecution are placed at a disadvantage when seeking to challenge a sentence on appeal. This is particularly concerning for the accused, whose right to an effective appeal is thereby undermined. Accordingly, this first feature of Article 78(3), obliging the court to render a sentence for each crime in addition to an overall sentence reflecting the total period of imprisonment, strengthens the *lex certa* principle of *nulla poena* in connection with sentencing before the ICC.

The second feature places mandatory limitations on the outer ranges of the imprisonment period. Article 78(3) mandates that the total period of imprisonment “shall not exceed 30 years,” or, alternatively, life imprisonment, provided that the requirements of Article 77(1)(b) are

³¹⁵ *Id.* at ¶ 805.

³¹⁶ *See* ICTY RPE, *supra* note 155, R. 87(C).

³¹⁷ *Id.*

³¹⁸ Not only has the *Blaškić* Trial Chamber relied on the wrong rule, it has also relied on case law that is not on point. After acknowledging that the practice of ICTY trial chambers has been to render multiple sentences, it relied on two ICTR cases to justify its decision to violate the ICTY Rules of Procedure and Evidence and deviate from ICTY practice. The two ICTR cases relied on were not even factually or procedurally similar to qualify them as relevant authority since both resulted from guilty pleas by the defendant, which may provide more justification for a single sentence. In any event, a factually and procedurally irrelevant case from another tribunal can hardly serve as sufficient grounds for the *Blaškić* Trial Chamber to ignore its own rules of procedure as well as depart from existing practice at the ICTY.

³¹⁹ *See* Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia, R. 87(C), U.N. Doc. IT/32/Rev.19 (Dec. 13, 2000).

satisfied. At the other end of the spectrum, the total period cannot be less than the highest individual sentence imposed.³²⁰

Thus, Article 78(3) strengthens the Statute's compliance with the *nulla poena sine lege* principle in at least two ways. First, by providing a sentencing provision dealing directly with multiple convictions, state parties to the Rome Treaty have signaled recognition in principle that such matters should be addressed in the constitutional framework of an international penal court as required by *lex scripta*, the codification requirement of *nulla poena*. By incorporating this rule within the Statute itself, the drafters have further protected the value of legal certainty by preventing a trial chamber from departing from the rules that an accused can reasonably expect to rely on, and subsequently burying its breach under layers of revisions to the rules of procedure and evidence. Here, a clear improvement is evidenced in the ICC Statute over the statutes of its predecessor tribunals, which were silent on the issue. Next, it sets statutorily codified limits on the terms of imprisonment in the event of multiple convictions, thereby moving towards better fulfillment of *lex certa*. To the degree possible given Article 77's own shortcomings on *lex certa*, Article 78 provides a measure of clarity and predictability in sentencing situations involving multiple convictions.

iii. Legal Authority for Sanctions Relating to Contempt of Court

The sanctions set forth in Article 77 are applicable only to a "person convicted of a crime referred to in article 5 of this Statute."³²¹ Therefore, it does not empower the court to impose sanctions for contempt of court, misconduct, or offenses against the administration of justice, which must likewise satisfy *nulla poena sine lege* pursuant to Article 23. The ICC's authority and the limitations regarding these sanctions are provided for in Articles 70 and 71. Article 70 sets out a range of offenses relating to the obstruction of justice³²² and provides a specific penalty provision authorizing the ICC to impose a maximum of five years imprisonment.³²³

Interestingly, the ICC's authority to impose sanctions for what can be generally considered contempt of court could have easily been left to the judges to develop under the doctrine of inherent judicial powers.³²⁴ The

³²⁰ ICC Statute, *supra* note 9, art. 78(3).

³²¹ *Id.* art. 77(1).

³²² *Id.* art. 70(1)(a)-(f).

³²³ *Id.* art. 70(3) (providing that the court may also impose a fine).

³²⁴ The ICTY and ICTR statutes did not contain provisions dealing directly with contempt of court and its corresponding sanctions. For a commentary on select decisions of the ad hoc Tribunals on contempt of court, see Shahram Dana, *The Law of Contempt Before the UN ICTR*, in 10 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS

inclusion of these specific provisions indicates a strict approach, by the drafters of the Statute, to *nulla poena sine lege* in the Article 23. The judges ought to rely on this teleological perspective when determining the general nature of the *nulla poena* norm while developing the ICC sentencing practice.

5. Shortcomings on Compliance with Nulla Poena Sine Lege

There can be little doubt that the ICC Statute represents a marked improvement over the statutes of its predecessor courts when it comes to provisions on sentencing. A certain degree of respect for the principle of legality, *nulla poena sine lege*, must be acknowledged within the ICC structure. But does it go far enough? If criticism were to be entertained, or put differently, if areas for improvement through possible future amendments are to be considered, the Statute's primary weakness lies in its satisfaction of the *lex certa* requirement of *nulla poena*, namely that penalties should be specific and precise, thereby providing a sufficient degree of legal certainty. This shortcoming is typified in two compromising characteristics of the Statute's sentencing provisions—generality and ambiguity: “generality” because it lacks sufficient distinctions between penalties for the variety of crimes within its jurisdiction, and “ambiguity” because it relies on vague sentencing criteria.

i. The Problem of Generality: All for One and One for All

The problem of generality appears at two levels. At the level of application, the “gravity of the crime” serves as a determinative criterion both in the specific application of life imprisonment³²⁵ and also in the general determination of any term of imprisonment.³²⁶ At the framework level, the ICC Statute contains a single sentencing scheme, with alternative maximums, applicable to any and all offenses under its jurisdiction. In other words, either maximum can be applied to all crimes, including inchoate crimes, and all modes of participation. The ICTY and ICTR statutes, which likewise did not provide specific penalties for particular crimes or categories of crimes, were criticized for not satisfying *nulla poena sine lege*. The ICC Statute is likewise open to the same criticism.³²⁷ This framework departs from the example of most national criminal codes, which establish a precise penalty range for individual offenses. Thus,

278 (André Klip & Göran Sluiter eds., 2006); Taru Spronken, *Commentary, in 7 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS*, *supra*, at 225, 225.

³²⁵ ICC Statute, *supra* note 9, art. 77(1)(b).

³²⁶ *Id.* art. 78(1).

³²⁷ See BASSIOUNI & MANIKAS, *supra* note 11, at 689.

measured against the practice of states, the ICC sentencing provisions lack sufficient precision and specificity.

This is particularly disconcerting in relation to life imprisonment. The general applicability of the most severe sanction to all crimes within the ICC's jurisdiction compromises the *lex certa* requirement and ultimately, it must be admitted, encroaches on the accused's right to legal certainty.³²⁸ It is tempting to justify this failure on the grounds that further agreement among states on specific penalties could not be reached. While it is true that states are sharply divided on issues surrounding the death penalty, and even to some extent, the propriety of life imprisonment, this explanation is not entirely satisfying.

First, given the range of crimes within the ICC's jurisdiction and forms of individual participation,³²⁹ some degree of separation can be made as to the severity of the sanction applicable. At a most basic level, for example, offenses against property and offenses against life can be distinguished. There is a hierarchy of interests protected by international crimes including the interest of the international community in the existence of groups of people, the interest in freedom from terror and persecutory acts, the interest in individual life, the interest in bodily integrity, the interest in cultural property, and so on.³³⁰ The interests protected are distinguishable, as is the mode of participation, the criminal intent, and the harm committed. Therefore, appropriate distinctions must likewise be made in applicable penalties. Second, the difference between states on specific philosophical concerns, such as the propriety of the death penalty, has been unnaturally stretched into a perceived general disagreement on theoretical methodologies useful for distinguishing penalties. All states make general distinctions between offenses against property and offenses against a

³²⁸ For example, in the event that an accused pleads guilty to a crime, he has no certainty about the upper limits of penalty he will face, and his lawyer cannot provide sufficient legal advice on the matter.

³²⁹ For the purposes of *punishability* of conduct, the Statute recognizes both completed crimes and inchoate crimes. It further recognizes that individual participation in crimes can take on different forms. See ICC Statute, *supra* note 9, arts. 25, 28.

³³⁰ The scope of this comment does not permit further elaboration on the question of hierarchy of crimes in international law. Various proposals have been made based on different methodologies for creating a hierarchy. For further reading, see Pickard, *supra* note 17 (advancing a comparative analysis of the same or comparable crime in the domestic law of twelve states); Andrea Carcano, *Sentencing and the Gravity of the Offense in International Criminal Law*, 51 INT'L & COMP. L.Q. 583 (2002) (proposing a ranking scheme based on combining both gravity *in abstracto* and gravity *in concreto*); Allison Marston Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, 87 VA. L. REV. 415 (2001) (proposing a hierarchy of crimes based on an abstract assessment of harm combining the substantive elements of the crime with its jurisdictional elements in the *chapeau*).

person, between commission and attempt, and between different mental states. Third, reports from the preparatory meetings reveal a lot of political jockeying, which was the root of much disagreement.³³¹ Many delegates took the position that they could not discuss other sentencing matters until the issues surrounding the death penalty were resolved. This tactic was motivated by concerns pertaining to national interests and a firm intent to protect a state's sovereignty in applying particular penalties domestically without prejudice arising from the provisions of the ICC. It had marginal relevance to reaching agreement on distinguishing between various offenses in terms of severity and, unfortunately consumed precious time in which issues such as hierarchy of crimes, criminal intent, mode of participation, and resulting harm could have been discussed in relation to applicable penalties. In addition to these hindrances, there appears to be some cavalier, if not misplaced, confidence that, since we are dealing with the most horrible crimes, the most severe penalties will be applied. The reasoning is attractive; yet, the actual practice betrays that presumption. The practice of the ICTY in particular is littered with instances of lenient penalties.³³² Thus, the implicit presumption (that we give the harshest penalties anyway) behind the indifference towards the need for an advanced sentencing regime is simply unsustainable and can no longer be accepted as a tacit reason for not advancing international sentencing law.

ii. The Problem of Ambiguous Criteria: Between the Most Serious Crimes and Extremely Grave Crimes

The ICC Statute contains two dangerously ambiguous criteria for determining a sentence: "gravity of the crime" and "extreme." They strongly resemble the language of general guidelines or "benchmarks" in standard setting international treaties; yet they are not functionally intended as such. They carry a much weightier role within the ICC sentencing framework. The Statute has elevated these benchmark provisos to the level of legal criteria. The question thus arises whether "gravity of the crime"

³³¹ Schabas, *Penalties*, *supra* note 97, at 1533.

³³² *E.g.*, Prosecutor v. Plavsic, Case No. IT-00-39 & 40/1-S, Sentencing Judgment, ¶ 134 (Feb. 27, 2003) (imposing only eleven years imprisonment on a high-ranking leader indicted for genocide and convicted of crimes against humanity). For a critical analysis of undue leniency in sentencing by the ICTY, see Shahram Dana, *A Turning Point in International Criminal Justice*, in 11 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS 962, 962 (André Klip & Göran Sluiter eds., 2007); *see also* Milanka Saponja-Hadzic, *Hague Deals Reduce Impact*, INST. FOR WAR & PEACE REPORTING, July 24, 2003, http://www.iwpr.net/?p=tri&s=f&o=164725&apc_state=henitri2003 (noting the local reactions).

and “extreme” qualify as legal criteria and whether they can adequately satisfy *nulla poena sine lege*.³³³

Reliance on the phrase “gravity of the crime” to generate a fair and consistent sentencing practice is beset with many difficulties. First, the Statute does not rank the gravity of crimes within its jurisdiction. Second, the phrase is not defined anywhere in the Statute. Third, the phrase is open to varying interpretations, each being legally tenable but leading to different outcomes, and thus resulting in inconsistent sentences. The ICC forum is particularly vulnerable to this danger because its judges are drawn from diverse legal, political, philosophical, and cultural backgrounds. From case to case, accused to accused, the composition of judges will change dramatically and randomly. Fourth, despite one author’s hopes to the contrary,³³⁴ the sentencing jurisprudence of the ICTY and ICTR is not sufficiently developed or coherent to provide meaningful, consistent guidance on interpretation and application of this concept. A major culprit here is the “single” or “global sentencing” practice of the ad hoc tribunals in case of multiple convictions which has inhibited the maturation of sentencing norms in international criminal justice.³³⁵

The problem of ambiguity also arises in the method of distinguishing between the application of life imprisonment sentences and sentences for a

³³³ Curiously, these criteria were challenged as being contrary to *nulla poena sine lege* more than fifty years ago, when a 1951 proposal of the International Law Commission for the Draft Code of Offenses against the Peace and Security of Mankind employed a similar criteria (“gravity of the offense”) for the determination of penalties. See Schabas, *Perverse Effects*, *supra* note 97, at 523-24.

³³⁴ See Jennings, *supra* note 311, at 1436 (asserting that “[t]he sentencing jurisprudence of the ICTY and the ICTR will provide the Court with useful guidance on the comparative gravity of the crimes” (emphasis added)). Regrettably, his reliance on a brief quote from one ICTR case (*Kambanda*) is insufficient for such a grand assertion. In broad strokes, the *Kambanda* merely states that crimes listed under the category of war crimes are not as serious as those under the heading of genocide and crimes against humanity. Even judges at the ICTR consider this inadequate to provide meaningful guidance. See *Prosecutor v. Ntagerura*, Case No. ICTR-99-46-T, Judgment & Sentence, ¶ 812 (Feb. 25, 2004) (expressing concern “that the practice of awarding a single sentence for the totality of an accused’s conduct makes it difficult to determine the range of sentences for each specific crime”). Moreover, his analysis does not draw upon any case law from the ICTY to support for his assertion. In fact, the jurisprudence of the ICTY rejects hierarchy set out in *Kambanda*, and thus, far from providing any such “useful guidance,” there exists some inconsistency between the ICTY and ICTR rulings. Other commentators on this issue have strong reservations as to whether the case law of the ad hoc tribunals will provide any substantial utility on sentencing matters for the ICC. See Danner, *supra* note 330, at 501; Pickard, *supra* note 17, at 137; see, e.g., Dirk van Zyl Smit, *International Imprisonment*, 54 INT’L & COMP. L.Q. 357, 367 (2005).

³³⁵ *Ntagerura*, Case No. ICTR-99-46-T, Judgment & Sentence, ¶ 812 (expressing concern “that the practice of awarding a single sentence for the totality of an accused’s conduct makes it difficult to determine the range of sentences for each specific crime”).

fixed period of time not to exceed thirty years. The inclusion of this separation may be viewed as an improvement upon the statutes of the ad hoc tribunals which contained no limitation on sentences for a term of years. However, what was gained in terms of legal certainty by the inclusion of a maximum for non-life sentences was largely taken away by the statutory criteria for making the distinction. The Statute informs us that the difference between life imprisonment and thirty years lies somewhere between “extreme gravity of the crime” and “gravity of the crime.” The notion of “extreme” is an insufficient criterion; it is vague and general at best, and superfluous at worst, given that the ICC is intended to deal with the “most serious” crimes in the first place.³³⁶ Paradoxically, with its optional approach to maximum penalties combined with ambiguous criteria for selection, the ICC sentencing structure arguably results in less legal certainty. Furthermore, an accused, who is contemplating pleading guilty to a charge, has no legal certainty as to which of the alternative maximum penalties will be applied. Additionally, the challenge of applying these criteria to make necessary distinctions at sentencing is further aggravated by the constant rhetoric that the ICC was created to deal with only the most serious and gravest of crimes. This over-inflation comes at the cost of meaningful analysis. While the ICC is intended to deal with only serious crimes committed in grave contexts, all crimes within its jurisdiction are not of equal gravity.

V. CONCLUSION

One of the most fundamental rights of an individual is the right to liberty. Therefore, any institution vested with power to deprive persons of their liberty must exercise that power in accordance with basic human rights and fundamental principles of criminal law. *Nulla poena sine lege* is among the chief guardians of this right. Examining *nulla poena sine lege* through its underlying legal principles aids our understanding of its role and potential contribution to international justice. The general picture that emerges after examining treaties, custom, and general principles of law is that *lex scripta*, *lex certa*, *lex stricta*, and *lex praevia* are part of the international standard for *nulla poena sine lege*. The latter legal principle has been explicitly codified in numerous international and regional human rights treaties. International courts have held that these provisions represent a *nulla poena sine lege* standard that embodies more than a prohibition of retroactive application of a heavier penalty, but also includes the prohibition

³³⁶ See ICC Statute, *supra* note 9, pmb1. At least one commentator points out that “[t]he curious reference to ‘extreme gravity of the crime’ may seem out of place, since the Court is designed to try nothing but crimes of extreme gravity.” SCHABAS, *supra* note 67, at 141.

of analogy in selecting a penalty, the requirements of legal certainty, and the obligation to clearly define penalties.³³⁷ Furthermore, all four legal principles underlying *nulla poena sine lege* constitute general principles of law recognized in the majority of world's legal traditions.³³⁸ State practice, in the context of their domestic legal systems, evidences strong adherence to these principles. Moreover, the views expressed by states in international forums indicate that these principles also apply to international criminal justice.

The time is ripe for international justice to grow out of its adolescence and develop into a mature legal system.³³⁹ There are positive signs of movement in this direction. For example, the ICC Statute requires the court to first pronounce a sentence for each crime individually before rendering an overall sentence in the case of multiple conventions. This hopefully puts a stop to the practice of single sentencing which has greatly inhibited the maturation of international sentencing norms. Likewise, despite the fact that the ICTY freely employed the use of analogy in its sentencing analysis, *lex stricta* still received positive recognition in international law through the Rome Treaty of the ICC. These developments further bolster the view that the ICTY's approach on these matters was not in keeping with the international standard for *nulla poena sine lege*.

There are general signs of increasing appreciation that *nulla poena sine lege* is not only a principle associated with negative rights but can also contribute greatly to positive justice in international criminal law. Adherence to *nulla poena sine lege* can serve to achieve the aim of consistency in sentencing. It can also remove, or significantly limit, the influence of arbitrary factors in the determination of a penalty. While the administration of criminal justice has made great advances over the past half century, the problem of emotive influences on punishment remains even today, both domestically and internationally.³⁴⁰

³³⁷ See *supra* Parts III.A and III.C-D; see also *Danzig Decrees*, *supra* note 121; Başkaya v. Turkey, App. Nos. 23536/94 & 24408/94, Judgment, 31 Eur. H.R. Rep. 10, ¶ 36 (1999).

³³⁸ GALLANT, *supra* note 39, at 243-46; Bassiouni Study, *supra* note 69.

³³⁹ To achieve this would naturally require progress on other fronts besides international sentencing, for example, on matters pertaining to enforcement and police powers. In the context of international prosecutions, it would mean loosening its dependence on state authorities for the execution of basic police powers such as investigations, arrests of suspects, and seizure of evidence and assets.

³⁴⁰ The abusive practices that appear to be on the rise in the name of "fighting against terrorism" remind us of the dangers of unchecked powers. In the context of international criminal prosecutions, emotive influences may be suspected in the sentencing of Duško Tadić. See *Prosecutor v. Tadić*, Case No. IT-94-1-T, Sentencing Judgment (July 14, 1997). Although a relatively minor figure according to the Trial Chamber's own assessment, Tadić had the misfortune of being the first defendant to arrive at the ICTY. While not suggesting that his twenty year sentence was unjust per se, it was harsher treatment than that imposed

The penalty provisions of the IMT, IMTFE, ICTY, and ICTR attracted criticism in legal commentaries for not meeting the requirements of *nulla poena sine lege*.³⁴¹ While the sentencing practice of international tribunals can hardly be characterized as an “abuse of power,” the absence of a more complete approach to *nulla poena*, by both judges and drafters of statutes, has harmed the quality of justice rendered by the ICTY and ICTR.³⁴² The sentencing practice gives the appearance of an inconsistent body of law, or at least a jurisprudence that provides little guidance to the ICC. Too often, sentences imposed from case to case appear irreconcilable, especially where low level perpetrators are punished more severely than their superiors.

Although the ICC sentencing provisions mark an improvement over their counterparts in the statutes of the ad hoc tribunals to the extent that the ICC Statute contains a clear ceiling on sentences for a term of years, the ICC provisions nevertheless continue to carry the fundamental weaknesses of the earlier statutes—generality and ambiguity—into the most recent code for international criminal justice. They do not provide specific maximums for particular crimes or categories of crimes and they rely on ambiguous criteria. Sentencing frameworks that rely almost entirely on general notions like “gravity of the offense” without providing further guidelines must be seen as relics of a nascent period in international war crimes prosecutions. In the ICC sentencing provisions, particular concern surrounds the consistent application of life imprisonment. The qualification of “extreme gravity of the crime” is too elastic to satisfy the *lex certa* requirement of *nulla poena*, especially given the severity of the sanction.

The execution of penalties has been touched upon in this Article but has not been discussed in detail due to space limitations. Given that the ICC and other international criminal tribunals lack their own permanent penitentiary systems, an issue worthy of further exploration is the role and relevance of *nulla poena sine lege* to the execution of penalties issued by international criminal courts. Here again, the nature of the discussion will differ depending on whether the analysis is focused only on the negative

on others with similar criminal culpability who came later and perhaps even more severe than the sentences imposed on other war criminals with more blood on their hands.

³⁴¹ See BASSIOUNI & MANIKAS, *supra* note 11, at 689 (exploring that the imprecision of the penalty provisions of the statutes of the ad hoc tribunals violates *nulla poena sine lege*); Fife, *supra* note 276, at 987-88; *cf.* Schabas, *supra* note 59, at 469.

³⁴² Mark B. Harmon & Fergal Gaynor, *Ordinary Sentences for Extraordinary Crimes*, 5 J. INT’L CRIM. JUST. 683 (2007) (expressing concern regarding low sentences by the ICTY and the systematic inconsistency and discrepancy when compared to the length of sentences at the ICTR).

rights dimension of *nulla poena sine lege* or whether its positive justice role is also considered.³⁴³

It is in light of its positive justice role that *nulla poena sine lege* has much to contribute to legitimacy and justice in international sentencing. What little consideration commentators have given to the *nulla poena* principle has focused on its traditional role, namely its negative rights dimension, and in particular on the issue of retroactivity. If the discussion is to continue to be limited to this perspective, then indeed all the fuss over *nulla poena* is “difficult to understand.”³⁴⁴ On the other hand, if we broaden our discourse on *nulla poena* to embrace its positive justice function, such as ensuring equality before the law, consistency in sentencing, and justice in the distribution of punishment for mass atrocities, then we might realize it still has much to offer to international criminal justice.

³⁴³ For ICC provisions governing enforcement of sentences, see ICC Statute, *supra* note 9, arts. 103-10. In light of the fact that diverse states will carry out the execution of the sentences and that the conditions of imprisonment shall be governed by the law of the enforcing state, the ICC and the judges will need to exercise oversight to ensure equal treatment of convicted persons when it comes to conditions of detention, parole, or pardon.

³⁴⁴ See Schabas, *supra* note 59.

