Beyond Retroactivity to Realizing Justice: A Theory on the Principle of Legality in International Criminal Law Sentencing

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ABSTRACT

Only the innocent deserve the benefits of the principle of legality. This assertion naturally offends our notions of justice. It would be unacceptable for courts of criminal justice to institutionalize such an approach. Yet, in the context of prosecuting mass atrocities, genocide, crimes against humanity, and war crimes, international criminal courts 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, that 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 they work in tandem as principles 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 long standing 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.
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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. Salamanca, International Law Commission (1954)

1. 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 courts of criminal law 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. 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 they work in tandem as principles of legality, the neglect of nulla poena is difficult to justify, although not entirely without explanation. As prominent legal scholar Jerome Hall observed, nulla poena sine lege ‘affects only proven criminals’ while nullum crimen sine lege ‘protects the mass

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of respectable citizens. 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.’ 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 sine lege* 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.

This article aims to redress this lacuna 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 liberty rights, designed merely to prevent retroactive punishment, to one that captures its role as *quality of justice* principle, aimed at realizing justice in the distribution of punishment. This understanding of the *nulla poena* is more in tune with its role in national systems.

The study’s methodology deconstructs the *nulla poena sine lege* 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 sine lege*, gained through an elucidation of its underlying legal principles, can facilitate a more penetrating analysis of its normative development in international law. Accordingly, Part Two begins with an examination of the maxim, focusing on its function and purpose in legal systems as well as drawing attention to some modern adventures of *nulla poena sine lege*. The analysis then connects underlying attributes of the maxim, formulated as legal principles, with the previously identified functions and purpose of *nulla poena*. I argue that the

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5 Robinson, supra note 2, at 398.
6 The concept of ‘negative liberty,’ in contrast to ‘positive liberty,’ was elaborated by Isaiah Berlin in his inaugural lecture delivered before the University of Oxford. See ISAIAH BERLIN, TWO CONCEPTS OF LIBERTY (Clarendon Press: Oxford 1958).
goal 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 broad and modern approach.\(^8\)

Part Three investigates sources of international law in order to determine the international standard for *nulla poena sine lege* through an integrated analysis of international and regional conventions, customary international law, general principles of law, and international judicial precedent. Drawing upon the analysis of Parts Two and Three, the article advances an international standard for *nulla poena* integrating the particularities of international law with the requirements of criminal justice.

In Part Four, 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).\(^9\) The article comments upon the treatment of *nulla poena sine lege* by the ICTY in its sentencing jurisprudence against the backdrop of the analysis developed in Parts Two and Three. Next, the article critiques the provisions of the Rome Statute of the International Criminal Court\(^10\) pertaining to *nulla poena sine lege* and sentencing. Here, the article elucidates the strengths and weaknesses of the ICC Statute in light of the international standard for *nulla poena sine lege* with careful regard for its function and purpose in 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, 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 sine lege* in advancing international law and justice.

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\(^8\) The broader approach to *nulla poena* is here also referred to as its ‘positive justice’ dimension or ‘quality of law’ function. See infra notes 15, 17 (discussing a broader approach).


2. The Nature of Nulla Poena Sine Lege

A. Values: Interests Protected and Purposes Served

Nulla poena sine lege together with its counterpart nullum crimen sine lege are collectively referred to as principles of legality. They protect one of the most treasured individual rights of all – the right to liberty. In legal positivism, their emergence is historically connected with the struggle against the dangers of unbridled and absolute power.\textsuperscript{11} They thus developed alongside other doctrines, such as trias politica, also designed to curb abuses of centralized power, although their application does not appear to be theoretically limited to a particular form of government.\textsuperscript{12} In a trias politica system, principles of legality place 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 their 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.\textsuperscript{13}

Nulla poena protects interests similar to those protected by nullum crimen.\textsuperscript{14} First, it protects an individual’s interest in being free from abuse of power leading to loss of life, liberty, or property. Because one of the severest forms of punishment is incarceration, 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 a violation of 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. Certainly, securing the first two values promotes legal certainty. On the other hand, society’s interest in legal certainty and modern justifications for respecting nulla poena\textsuperscript{2} appear to be broader than the goals of providing notice and preventing abuse of power and include, for example, the realization of the principle of equal treatment and consistency.

\textsuperscript{11} See also Hall, supra note 7, at 165-72; Mokhtar, supra note 7.
\textsuperscript{12} See also Hall, supra note 7, at 167-70; M. Cherif Bassioumi & Peter Manikas, The Law of the International Criminal Tribunal for the Former Yugoslavia 270-80 (Transnational Publishers 1996); See also Farhad Malekian, The Concept of Islamic International Criminal Law: A Comparative Study 20-22, 179-80 (Kluwer Law Intl 1994) (noting the relevance of nulla poena sine lege and nullum crimen sine lege in Islamic legal traditions).
\textsuperscript{13} 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 . . .’ See Prosecutor v. Krujelac, Case No. IT-97-25-A, Separate Opinion by Justice Schomburg, ¶ 1 (Sep. 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 ¶ 264.
\textsuperscript{14} See Rauter Case, Special Appeals Court Netherlands, ILR 542-43 (Jan. 12, 1949) (recognizing two interests protected by nulla poena: legal security and individual liberty).
in the sentencing of offenders similarly situated.15 The fact that *nulla poena sine lege* has outgrown its ‘negative’ justice dimension16 and developed a ‘positive’ justice attribute17 is evidenced by trends reforming sentencing laws in various countries since the 1970s and building momentum over the last two decades.18 Undertaken in both civil law and common law countries, these reforms in sentencing policy transcend the traditional dichotomy between adversarial and inquisitorial legal systems.19 One common element emerging from them is that, in undertaking these reforms, the concern of the policymakers does not appear to be that the state has abusively employed its power against individuals, but rather the concern has been to achieve consistency and equal treatment in sentencing to ensure equality before the law.20 This reflects a broader approach to *nulla poena sine lege*.

Accordingly, a modern approach to *nulla poena sine lege* appreciates its utility to both limit and safeguard judicial authority by preventing factors such as prejudice, political pressure, or immediate public opinion from influencing the sentence. It partly reetrains 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

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15 The common trends in reform of domestic penal policy, for example in the U.S. during the 1950s and 60s with the proclamation of the Model Penal Code and again in the late 1980s with 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 also Allen, supra note 3, at 385-412.

16 E.g., prevention of abuse of power and application of retroactive penalties.

17 E.g., equality before the law, consistency in sentencing, proportionality, and predictability. See Robinson, supra note 2, at 394 (stating ‘[w]hile 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.’).


19 The 1976 revisions of the Finnish Penal Code provide an illustrative example of such reforms in a civil law system. See Pickard, supra note 18; U.S. SENTENCING COMM’N, FEDERAL SENTENCING GUIDELINES MANUAL (1991) (containing examples of reforms in a common law system); Mears, Rehnquist slams Congress over reducing sentencing discretion, CNN WASHINGTON BUREAU (Jan. 1, 2004), available at 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 on-going 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 US Federal Sentencing Guidelines for the purpose of international sentencing.

20 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 principles of legal security, proportionality, predictability, and equal treatment. See Pickard, supra note 188. 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. See R. TAYLOR, SENTENCING GUIDELINES URGED, INSTITUTE OF WAR AND PEACE REPORTING (Mar. 8, 2004), available at http://www.iwpr.net/?p=tri&s=f&o=166179&apc_state=henitri2004.
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.

Another issue relevant to a full appreciation of nulla poena sine lege is whether it should be fundamentally regarded as an individual right or as a principle of equity. The purpose here is not to attempt an exclusive characterization, but to draw attention to the consequences. Characterization as an individual right lends strong force to its formal application. In other words, as a fundamental right of an individual, the arguments are compelling that it should be followed strictly and without exception to context or convenience. On the other hand, characterizing it as a principle of equity would permit limited departures from it in the ‘interests of justice’. In examining this issue, a distinction must be made between the approach of national legal systems and the treatment of the principle by international criminal courts – a matter that shall be pursued further in the following sections.

B. Attributes: Legal Principles Underlying Nulla Poena Sine Lege

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. 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. Continental European legal systems interpret the lex scripta principle as requiring penalties to be based upon codified laws, that is written laws.

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22 In the context of international criminal justice, one commentator concluded that nulla poena sine lege does not give rise to a right of the individual and should instead be viewed as a principle of equity. See id.
23 Hall, supra note 7, at 165 et seq.; Lamb, supra note 2, at 733-66; Roelof Haveman, Principle of Legality, in SUPERNATIONAL CRIMINAL LAW: A SYSTEM SI GENERIS 39, 40-61 (Roelof Haveman, Olga Kavran & Julian Nicholls eds., Intersentia 2003); Boot, supra note 2, at 94-102; Bassiouni, supra note 2, at 123-26. In commentaries on principles 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.
24 Haveman, supra note 23, at 40-3; see also Prosecutor v. Tadić, Case No. IT-94-1-A and IT-94-1-Abis, Judgement in Sentencing Appeals, Separate Opinion of Judge Cassese (January, 26 2000) [hereinafter Cassese Separate Opinion in Tadić Appeals Sentencing Judgment] (stating that ‘the nulla poena sine praevia lege poenali principle that 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.’).
provided by the legislature. Although common law traditions historically permitted ‘written law’ to include judge-made law, the United States, and most common law countries, follow a continental law approach to lex scripta as evidenced by their practice of relying on statutory law in the application of criminal penalties. 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. It also requires the law to differentiate between the specific maximum (i.e. severity) applicable to different crimes. 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. It prohibits the imposition of a 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 system and has been explicitly recognized in international human rights declarations and treaties. Moreover, the lex

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25 See Haveman, supra note 23 at 41.
26 Scotland is arguably a remaining exception. See id. at 41 n.6.
27 See id. at 41.
28 E.g., death, incarceration, forced labor, fines, etc.
29 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, 15 years exactly for a particular crime, no more and no less). Moreover, while the law in the first instance sets the out range of the 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.
31 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 30, at 43.
praevia attribute of nulla poena is consistently among the non-derogable provisions of these international instruments, prompting one commentator to argue that it ranks among the core human rights protections.  

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. Jurists from the common law tradition explain lex stricta, more generally, as the requirement of strict interpretation. This includes the notion that penal statutes should not be extended to the detriment of the accused. This applies to both the scope of a penal provision and the mode of interpretation by a judge. 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.

3. **Nulla Poena Sine Lege in International Law**

   **A. International Human Rights Conventions: An Incomplete Codification?**

   According to some scholars, principles of legality “have been integrated into the concept of fundamental human rights in criminal justice.” 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 international rule for principles of legality, 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.


33 See Schabas, *supra* note 2, at 522.
35 Hall, *supra* note 7, at 165.
36 Boot, *supra* note 2, at 100.
37 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 Judgement, ¶¶ 35-37 (Nov. 29, 1996) [hereinafter Erdemović Sentencing Judgment]. 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 2, at 124.
39 UDHR, *supra* note 32.
Nearly identical language is found in several international and regional human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR) (1966), the European Convention on Human Rights (ECHR) (1950), and the American Convention on Human Rights (ACHR)(1969). Several commentators consider the second sentence to represent the incorporation of *nulla poena sine lege* in international law as a fundamental human rights principle. This provision is consistently among the non-derogable provisions of these international human rights treaties. Moreover, all three conventions codify the *nulla poena* 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’. Its formulation further indicates that the international *nulla poena sine lege* prohibits both retroactive and retrospective punishment.

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 retrospective application of penalties. The European Court of Human Rights (the ‘Court’ or ‘ECrtHR’), however, held that this provision includes the 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.

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40 ICCPR, supra note 32 (nor 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 39, at 358-68 (providing a general commentary on this article).

41 ECHR, supra note 32 (nor 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 (Butterworths 1995). (providing a general commentary on this article).

42 ACHR, supra note 32, at 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., Cambridge University Press 2003).

43 Hereinafter referred to as the *nulla poena* provision.

44 See, e.g., Nowak, supra note 38, at 359.

45 See ICCPR, supra note 32; ECHR, supra note 32; ACHR, supra note 32, at art. 27(2).

46 Nowak, supra note 38, at 358.

47 See Welch v. United Kingdom, App. No. 17440/90, Judgment, 16 Eur. H.R. Rep. CD42 (1995) (Commission report); Adamson v. United Kingdom, App. No. 42293/98, Admissibility Decision, 28 Eur. H.R. Rep. CD209 (1999) (Court report). ‘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 ‘retrospecivity’ refers to an *ex post facto* change in the legal effect or consequence of a conduct that was already criminal. For further reading see Opinion of Professor C.J.R. Dugard before the Amsterdam Court of Appeal in the *Bouterse* case, ¶ 8.4.5 (July 7, 2000) (on file with the author).

Here, the Court takes a broad approach to *nulla poena*, viewing it not merely as a protectionist principle but also a quality of law principle.\(^{49}\) Although the case involved a situation in which ‘it may be difficult to frame laws with absolute precision and that a certain degree of flexibility may be called for’, the 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.\(^{50}\) 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, lex certa,* and *lex stricta* attributes of *nulla poena sine lege*, in addition to explicitly incorporating *lex praevia*.\(^{51}\)

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? The Court stated 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’.\(^{52}\) This *obiter dictum* neatly transcends the old tension between civil law and common law traditions, namely whether judge-made law suffices the principle of legality or whether written legislative law is the exclusive source.\(^{53}\) However, it does not entirely resolve the issue in the context of international law, particularly for the purposes of international prosecutions. International adjudication accepts a wider range of sources of law than the two types referred to by the Court. While the Court has given a liberal interpretation to

\(^{49}\)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 *Kokkinakis v. Greece*, App. No. 14307/88 and A260-A, 17 Eur. H.R. Rep. 397 (ser. A) ¶ 52, (1993) (Court report) (stating that 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.

\(^{50}\) *Başkaya* case, *supra* note 48, ¶¶ 39, 42. For a discussion on combining a flexible to *nullum crimen* with a strict approach to *nulla poena*, see further *Robinson, supra* note 2.

\(^{51}\) See, e.g., Nowak, *supra* note 38, at 359-60.

\(^{52}\) *Başkaya* case, *supra* note 48, ¶ 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). See *Welch*, 16 Eur. H.R. Rep. ¶¶ 26-27; *Adamson*, 28 Eur. H.R. Rep. ¶ 1. In *Welch*, the Court held that the confiscation provision of the Drug Trafficking Offenses Act 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. See *Welch*, 16 Eur. H.R. Rep. ¶¶ 33-35. In *Adamson*, however, the Court by a majority 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. See *Adamson*, 28 Eur. H.R. Rep. ¶ 1.

\(^{53}\) A few decisions address this question in interpreting the *nullum crimen* principle set forth in the first clause of Article 7(1). See *S.W. v. United Kingdom*, 21 Eur. H.R. Rep. ¶¶ 35-36; *C.R. v. United Kingdom*, 21 Eur. H.R. Rep. ¶¶ 33-34. 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.
the notion of ‘law’, state practice and opinion juris is presumably not what the Court had in mind when referring to ‘case-law’. Moreover, Court’s broad approach to the notion of ‘law’ is not unlimited. In cases dealing with the *nullum crimen* principle, the Court has applied the test of accessibility and foreseeability when determining whether the conduct in question falls within the scope of a criminal statute. Given that these cases concerned the issue of ‘punishability’ of conduct, and not the punishment itself, caution should be taken before mechanically applying the foreseeability test to penalties in international prosecutions. First, as noted above, 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 ICTY’s rulings on this point have been controversial, if not contrary to the intent of the statute’s drafters. As will be discussed in detail in Part IV, through clever stratagem, the ICTY avoids the intent of the drafters and effectively marginalizes 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. It would not be the last time that a trial chamber of the ICTY employs such tactics in a matter concerning penalties.

Apart from the *Başkaya* Case, judgments by the European Court of Human Rights interpreting *nulla poena sine lege* are scarce. The infrequency of challenges itself suggests the entrenchment of the maxim in municipal law and practice, as does the types of challenges among the few that have come before the Court. Typically, the challenged measure is found in law passed by the

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54 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.


56 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. For a thought-provoking discussion on applying flexible standards (e.g. foreseeability) to the *nullem crime* question but strict standards on *nulla poena* see Robinson, *supra* note 2.

57 See *infra* Part III.B and text accompanying notes 78-83.


59 See Harris, O’Boyle & Warbrick, *supra* note 41, at 274-75 (noting that ‘[v]ery few cases have been admitted for consideration on the merits under Article 7’).
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.

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 the ad hoc Tribunals or the 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. Therefore, a customary rule in international criminal law must satisfy the combined requirements of human rights law and general principles of criminal law. In this sense, international custom can strengthen the rule of law in international criminal justice.

Pursuant to Article 38(1)(b), ‘international custom, as evidence of a general practice accepted as law’ serves as an essential source of law for identifying international standards. ‘International custom’ may be described as a general recognition among States of a certain practice as obligatory. 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). Complete uniformity in practice among states is not required. According to international law scholars, a state’s domestic practice, as expressed in its legislation, constitutes appropriate evidence of state practice. In other words, state practice may be determined not only by

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61 This is true of the current practice of even common law traditions such as the UK and US. In both the Welch case and the Adamson admissibility decision, the challenged measure was found in a law passed by the legislature. In both cases, the State (UK) chose to approach the subject of criminal sanctions via a legislative act. In the US, almost all states have codified their penal laws and penal sanctions are specified by the legislature.
62 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 (6th ed. 1990).
64 See Statute of the International Court of Justice, 1999 I.C.J. art. 38(1)(b).
65 See IAN BROWNLEE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW, 6 (Oxford University Press, 6th ed. 2003); see also, George Norman and Joel P. Trachtman, The Customary International Law Game, 99 AM. J. INT’L L. 541 (2005) (applying the model of 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).
66 Id. at 6-12.
68 Brownlie, supra note 65, at 8.
the practice followed by states in their external relations, but also the practice followed by states internally.  

Examining criminal sanctions in national legal systems, state practice reveals substantial and widespread uniformity in the practice of articulating specific maximum penalties for each crime individually.  

As noted above, the criminal codes of most states contain specific maximums per crime or category of crimes.  

As to the applicable penalty, they make distinctions not only between types of crimes but also between completed crimes and inchoate crimes.  

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 constitutionally codify 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.  

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.  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

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70 See Cassese Separate Opinion in Tadić Appeals Sentencing Judgment, *supra* note 24 (stating that ‘the *nulla poena sine praevia lege poenali* principle that 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 2.  

71 See also Schabas, *Introduction*, at 162.  

72 See Pickard, *supra* note 18, at 141-62. Pickard provides a comparative overview of a variety of crimes, including genocide, murder, rape, torture, assault, and others, for 12 countries from diverse legal systems. The study indicates that each country makes the said distinctions. These countries include the Argentina, China, France, Nigeria, Romania, Russia, the United Kingdom, United States, India, Korea, Japan, Germany, Afghanistan and Turkey.  


precise maximum penalties within the framework of their domestic criminal codes.\textsuperscript{75} These treaties and conventions typically addressed only one aspect of substantive criminal law. They usually did 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.\textsuperscript{76} 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 \textit{nulla poena sine lege}.\textsuperscript{77} Therefore, it seems unwarranted to conclude state practice does not support the requirement for crime specific maximum penalties in accordance with \textit{nulla poena sine lege} from the mere fact that international criminal law treaties do not contain precise penalties.

As to the question of \textit{opinio juris}, many states have expressed a sense of legal obligation to act in accordance with \textit{nulla poena sine lege}. During the drafting of the ICTY statute, several states, presumably mindful of the quality of law function of \textit{nulla poena}, supported the application of national penalties and ‘norms’ which, in the case of the former Yugoslavia, excluded life imprisonment as a cruel and inhuman.\textsuperscript{78} For example, with the exception of the death penalty, Italy, Russia, and the Netherlands explicitly referred to national penalties in their proposals. 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 \textit{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.’\textsuperscript{79} The United States favored the adoption of sentencing guidelines.\textsuperscript{80} Italy, in a letter to the U.N. Secretary General, stated that "the need to respect the principle \textit{nullum crimen, nulla poena sine lege}, the basis of fundamental human rights, has induced the Italian Commission to decide in

\textsuperscript{75} Bassiouni, \textit{supra} note 2, at 125-126; Bassiouni, \textit{Law of the Tribunal}, at 689.

\textsuperscript{76} 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 maximum penalty.


\textsuperscript{78} \textit{See} Virginia Morris & Michael P. Scharf, \textit{AN INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS}, 440-43 (Virginia Morris & Michael P. Scharf eds., Transnational Publisher 1995).


\textsuperscript{80} Morris & Scharf, \textit{supra} note 78, at 442.
favor of the penalties set forth by the criminal law of the State of the *locus commissi delicti*.” In this expression of *opinio juris*, Italy strongly indicates the binding nature of *nulla poena* even in international law. In other words, in contemplating action at the international level, Italy states that it (and presumably all states in its view) is legally obligated to fully respect *nulla poena* when acting on a matter within the principle’s ambient. Thus, as to the content of the principle, Italy affirms, the *lex scripta* and *lex certa* aspects of *nulla poena sine lege* at the international level. Additionally, Italy characterizes *nulla poena* as a fundamental human right. Slovenia called for even greater certainty by suggesting the inclusion of minimum as well as maximum penalties. 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.’ 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*. Indeed, there was even broad agreement on this point. 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.’ Some states also suggested that the punishment applicable to each offense, as well as the enforcement of penalties, should be set forth in the Court’s statute. Moreover, states also widely expressed the view that adherence to fundamental principles, such as *nulla poena sine lege*, was essential in order to ensure predictability or equality before the law. This may be an early sign that the ‘positive justice’ dimension 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*

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81 Letter from the Permanent Representative of Italy, to Secretary-General, United Nations, UN Doc. S/25300, l, art. 7 §§ 1-2 (emphasis added).
82 Morris & Scharf, *supra* note 78, at 443.
83 Morris & Scharf, *supra* note 78, at 441.
89 See, *supra* section 2B.
and lex praevia requirements\(^90\) 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.\(^91\) Schabas infers that the positions of states, outlined above, reflect a narrow ‘concern about the issue of retroactivity’.\(^92\) He reflects that ‘such a concern … is difficult to understand given that this question was supposedly well settled at Nuremberg’.\(^93\) His argument is quite simple: if post-World War II trial 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.\(^94\) Yet, it is reasonable to infer that perhaps, in expressing their support for adhering to 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 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 Tribunal as reflected in the opinion of the Netherlands which encouraged following 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 Yugoslavia law limited terms of imprisonment to 20 years, had no provisions for life imprisonment or prison sentences of 25, 45, or 46 years,\(^95\) but allowed for the death penalty which would not have passed a veto of at least one member of the Security Council.\(^96\) Accordingly, it may be too speculative to attribute to the states a narrow conception of nulla poena, limited to the lex praevia principle, and subsequently, on that basis, diminish the relevance of nulla poena in international criminal justice.\(^97\)

\(^{90}\) See, supra section 2A and 2B.
\(^{91}\) Schabas, supra note 63.
\(^{92}\) Id. at 468-69.
\(^{93}\) Id. at 469.
\(^{94}\) The issue of whether life imprisonment is not a more severe penalty than capital punishment is discussed further below.
\(^{95}\) Such as those, respectively, visited upon Prosecutor v. Kordić, Prosecutor v. Blaškić (reduced to 9 years on appeal), Prosecutor v. Krstić (reduced to 35 years on appeal). See infra notes 242-245.
\(^{96}\) Schabas, supra note 63, at 479.
\(^{97}\) Cf. For a broader approach to nulla poena see Bassiouni & Manikas, supra note 12, at 700; Robinson, supra note 2; Allen, supra note 3.
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 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’ that cannot be read into the IMT criteria of ‘just punishment’? If, as Schabas points out, the Hans Corell team 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.

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. Second, the *lex scripta* and *lex certa* are likewise recognized as essential requirements of *nulla poena sine lege*. 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." For example, some states expressed the view that more precise maximum penalties should be included as part of the definitions of specific crimes. 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.’ 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.’

Thus, state practice and opinio juris on *nulla poena sine lege* suggests that customary international law recognizes a *nulla poena sine lege* rule which contains a significant *lex certa, lex praevia*.

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98 Or even the criteria of ‘concerning the individual circumstance of the accused’.
99 Schabas, *supra* note 63, 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 the US, 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 principles 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 3; Schabas, *infra* note 144; Schabas, *infra* note 131.

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 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 this exercise of distilling the international standard for nulla poena sine lege is general principles of law.106 ‘General principles of law’ are principles guiding a legal system or overarching legal norms which find widespread acceptance in national law of states.107 Lord Phillimore, a key figure in the formulation of the concept, explained that by ‘general principles of law’ he meant ‘maxims of law.’108 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.109 ‘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.110 Given that international justice, as a legal system, may be considered to be at a rudimentary stage,111 ‘general principles of law’ allow international tribunals to draw up elements of better developed systems, resulting in the advancement of the international legal system.112 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.

107 Brownlie, supra note 65, at 16 (also citing Root, Phillimore, Guggenheim, and Oppenheim); Shaw, supra note 67, at 93-94 (‘both municipal legal concepts and those derived from existing international practice can be defined as falling within the recognized catchment area.’); Bogdan, supra note 106, at 42. The ICTY also followed this approach in its first sentencing judgment. Erdemović, Sentencing Judgement, Case No. IT-96-22-T, ¶19.
109 Brownlie, supra note 65, at 16.
110 ANTONIO CASSESE, INTERNATIONAL LAW 193 (Oxford University Press 2nd ed. 2005).
111 Shaw, supra note 67, at 93; Cassese, supra note 110.
112 Brownlie, supra note 65, at 16.
The majority of commentators consider Article 38’s reference to ‘general principle of law’ to include general principles of national legal systems. This approach is also generally followed in international criminal justice and judgments of post-World War II tribunals. For example, the Hostages case 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.’

Modern international criminal tribunals also turn to municipal law when formulating a ‘general principle of law’ in order to fill a lacuna. 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 one of world’s 190 or so states. Nevertheless, the four attributes underlying principles of legality are well represented in the world’s diverse legal systems, including common law traditions. For example, a state court in the US overturned a conviction because the offense as defined in the criminal code was not accompanied by a penalty specific to that crime. In doing so, the court upheld not only the lex certa principle of nulla poena sine lege but also its prohibition against application of criminal penalties by analogy.

According to Bassiouni, an examination of 139 national constitutions demonstrates that at least 96 states contain an expression of principles of legality in their constitutions, in addition to the good many others that adhere to the principle in case-law or practice. In this sense, nulla poena sine lege may be considered a ‘general principle of law’ within the meaning of Article 38(1)(d) of the ICJ Statute. Indeed, in light of its widespread presence in national legal systems, international

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113 Brownlie, supra note 65, at 16 (also citing Root, Phillimore, Guggenheim, and Oppenheim); Shaw, supra note 67, at 93-94 (‘both municipal legal concepts and those derived from existing international practice can be defined as falling within the recognized catchment area.’); Bogdan, supra note 106, at 42. The ICTY also followed this approach in its first sentencing judgment. Erdemović, Sentencing Judgement, Case No. IT-96-22-T, ¶19. For a discussion and further references on additional conceptions of ‘general principles of law’, for example one which contemplate ‘natural law’ see Cheng, supra note 106, at 2-4. For the drafting history of the provision see id. at 6-26.


115 Erdemović, Sentencing Judgement, Joint Separate Opinion of Judge McDonald and Judge Vohrah, Case No. IT-96-22-A, ¶57 (‘general principles of law are to be derived from existing legal systems, in particular, national systems of law’) (as corrected by the Corrigendum to Joint Separate Opinion of Judge McDonald and Judge Vohrah, Nov. 19, 1997); See also Erdemović, Judgement, Separate and Dissenting Opinion of Judge Stephen, Case No. IT-96-22-A, ¶¶25, 63, 65; Prosecutor v. Delalić et al., 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).

116 Bogdan, supra note 106, at 46; Shaw, supra note 67, at 94; See also Erdemović, Judgement, Separate and Dissenting Opinion of Judge Stephen, Case No. IT-96-22-A, ¶25.

117 Bassiouni Study, supra note 73 at 290; see also supra text accompanying notes 23-37 and 73-76.

118 Cook v. Commonwealth of Virginia, 458 S.E. 2d 317 (Va. Ct. App. 1995) (holding that a ‘crime is made up of two parts, forbidden conduct and a prescribed penalty. The former without the latter is no crime.’).

119 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.

120 Bassiouni Study, supra note 73, at 291.

121 Bassiouni Study, supra note 73, at 291-93.
courts have implicitly relied on ‘general principles of law’ in order to apply a *nulla poena sine lege* rule that extends beyond its *lex praevia* function, i.e. the prohibition of retroactive application of a heavier penalty.\(^{122}\)

**D. International Precedent: Opinion of the Permanent Court of International Justice**

In 1935, the Permanent Court of International Justice (PCIJ or ‘the Court’) was offered the opportunity to address principles 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:

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.’ 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.’ 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.’ 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.’

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

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\(^{123}\) Danzig Decrees Case, *supra* note 122; see Verzijl, *supra* note 122 (containing a commentary).

\(^{124}\) See *Danzig Decrees Case, supra* note 122.
law. The Court went on to condemn the 1935 penal provision as incompatible with the principles of law down in Constitution. In doing so, the Court 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*. 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 (ICJ).

**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* legal principle of *nulla poena sine lege* as a fundamental human right from which no derogation is permitted. The European Court of Human Rights held that its *nulla poena sine lege* provision in Article 7 also embodies the *lex stricta* principle. Its status under international law is first bolstered by the PCIJ decision in *Danzig Decrees* case, which explicitly rejects the application of penalties by analogy. 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 to fix a penalty as well as the necessity to explicate a prohibition against it. More significantly, as we shall see later, the solidification of the *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 legislation of an overwhelming majority of states, coupled with state expressions of *opinion juris*, strongly indicates that the legal principles of *lex scripta* and *lex certa* may be

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125 The Court was mindful, nevertheless, that *nulla poena* was not the only principle relevant for consideration. It acknowledged that ‘[t]he problem of 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 expression in the maxim *Nulla poena sine 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*.’ 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 *Danzig Decrees Case*, supra note 122, at 529-30

126 Tentative result; research is on-going. To date, no ICJ cases have been found addressing this issue.

127 See supra section 3C.
considered as part of an international *nulla poena sine lege* norm. 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.

4. **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. The Tribunal reasoned that, since the Hague Regulations of 1907, the prohibitions in the Charter were punishable as crimes. The Hague Regulations 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." 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 principles of legality by an international court, its utility as an international source of law arising from a ‘judicial decision’ may be considered to be limited to the *nullum crimen sine lege* maxim. Therefore, caution must be exercised in drawing broad inferences from the IMT judgment regarding the nature of principles 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. 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 prosecuting the crimes listed in the Charter generally satisfied principles of legality. From the Nuremberg records and commentaries, it appears that it was widely presumed that if the punishability of the conduct was determined to satisfy principles of legality then the penalties prescribed by the Charter were appropriate. The Charter permitted the

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128 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.


imposition of the death penalty. 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.

In the post war period, International Law Commission 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.’ 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. In fact, several members supported a penalty provision more precise than the above article. Several states also favored this approach as reflected in their comments on the proposed text. 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. 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

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132 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 Article 27, Charter of the International Military Tribunal, 18 U.N.T.S. 279 (1945), reprinted in C. Van den Wyngaert, INTERNATIONAL CRIMINAL LAW: A COLLECTION OF INTERNATIONAL AND EUROPEAN INSTRUMENTS 55 (C. Van den Wyngaert ed., 2d ed. 2000) [hereinafter Nuremberg Charter]. This vague and general clause was the Charter’s only provision addressing the subject of penalties. Article 27 was reproduced in Article 16 of the Tokyo Charter and Article II (3) of Control Council Law No. 10.

133 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 by law 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 mastered the 1994 genocide in Rwanda. See Capital Punishment Worldwide Pages, http://www.geocities.com/richard.clark32@btinternet.com/europe.html (last visited Mar. 4, 2009).


135 Y.B. INT’L L. COMM’N 139 (1954) [hereinafter ILC Records].

136 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 offense in question would go unpunished.’ This reflects the view of some leading authorities on substantive criminal law. E.g., W.R. Lafave & A.W. Scott Jr., 1 Substantive Criminal Law § 1.2 (1986) (‘A crime is made up of two parts, forbidden conduct and a prescribed penalty. The former without the latter is no crime.’).

137 For example, Belgium proposed that a scale of penalties be laid down. See ILC Records, supra note 135, at 139.

138 Id. at 124, 139.
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.\textsuperscript{139} Thus, it is clear that the absence of a penalty provision was due to other factors and not a reflection on the applicability of \textit{nulla poena sine lege} to the punishment of international crimes. It certainly was not intended to suggest that international criminal justice enjoys \textit{carte blanche} when it came to penalties, as best captured by the comments of Mr. C. Salamanca: ‘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.’\textsuperscript{140}

\textbf{B. Nulla poena sine lege in the Ad Hoc Tribunals: The Phantom Maxim}

When the \textit{ad hoc} international criminal tribunals for Rwanda and Yugoslavia were called upon to interpret and apply their sentencing provisions, the precedent arising from the IMT judgments and norms arising from other sources of international law\textsuperscript{141} presented divergent approaches to the task of sentencing in accordance with \textit{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,\textsuperscript{142} a firm approach to \textit{nulla poena sine lege} would have probably raised little objection. Regarding the determination of a penalty, the statutes of the \textit{ad hoc} Tribunals contained a reference back to national practice. Article 24 of the ICTY statute and Article 23 of the ICTY statute provided:

\begin{quote}
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][Rwanda].\textsuperscript{143}
\end{quote}

The weight of this provision as a binding measure was not entirely clear from the text of the statutes themselves, notwithstanding the fact that various commentators have argued that it was included out of concern for respecting \textit{nulla poena sine lege}.\textsuperscript{144} 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

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\textsuperscript{139} ILC Records, \textit{supra} note 135, at 139.
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\textsuperscript{140} Id.
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\textsuperscript{141} As elaborate above in sections 3A-3D.
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\textsuperscript{142} See Letter from the Permanent Representative of Italy to the U.N, \textit{supra} note 81; see also Statement of Representative of Brazil, \textit{supra} note 77.
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\textsuperscript{143} Article 24(1), ICTY Statute; Article 23(1) ICTR Statute. The second sentence of this paragraph will hereafter be referred to as the ‘national law provision’.
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limitation on the authority of judges regarding the form of punishment that may be imposed. Penalties ‘shall be limited’ to imprisonment.\textsuperscript{145} 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 then 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’ v. ‘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 the Tribunal was suddenly plunged into sentencing considerations as a result of Dražen Erdemović decision to plead guilty.\textsuperscript{146} 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 Statute and rules of procedure and evidence pertaining to sentencing.\textsuperscript{147}

While the Erdemović case provided the ICTY with its first opportunity to render an interpretation on Article 24 in a sentencing judgment, it seems that the question of the applicability of the national law provision as a limitation on the Tribunal’s sentencing authority had already been predetermined by the judges.\textsuperscript{148} 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 ICTY RPE, as initially adopted on 11 February 1994, provides that: ‘A convicted person may be sentenced to imprisonment for a term up to and including the remainder of his life.’\textsuperscript{149} As the penal code of the Socialist Federal Republic of Yugoslavia (hereafter ‘SFRY’ or ‘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.

\textsuperscript{145} ICTY Statute, Article 24(1).
\textsuperscript{148} Schabas, supra note 63, at 480.
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 17 and 60 from Srebrenica, collected at a farm site near Plići, north-west of Zvornik. By his own admissions, Erdemović murdered approximately 70 individuals. 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. 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. Having satisfied itself that the plea was valid, 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 former 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 15 years or a death sentence. Pursuant to these same provisions, a 20 year prison term could be imposed instead of the death penalty. The Trial Chamber correctly reasoned that full consideration of the national law provision in its Statute also requires taking into account the case-law of the courts of the former 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. The majority of defendants were sentenced to death and executed. The second was that of Artuković in 1986 who was also sentenced to death, but died in prison of natural causes. 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 conclusion as to the sentencing practices for crimes against humanity in the former Yugoslavia.’ 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. Beginning with what appears to be an implicit acknowledgement of the view of commentators, the Trial Chamber reasoned:

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150 See Erdemović Sentencing Judgment, supra note 37, ¶2.
152 Erdemović had a wife and an infant child.
153 Erdemović Sentencing Judgment, supra note 37, ¶¶10-21.
154 This ruling was overruled by the Appeals Chamber. See Prosecutor v. Erdemović, Case No. IT-96-22-A, Judgement (Oct. 7, 1997) (holding that, in order to be valid, a plea of guilty must be voluntary, informed, and unequivocal).
155 Chapter XVI of the former Code, Articles 141 - 156.
157 Id.
158 Id.
159 Erdemovic Sentencing Judgment, supra note 37, ¶37.
160 Erdemovic Sentencing Judgment, supra note 37, ¶38.
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.”

The Trial Chamber’s analysis here appears to be misplaced. It improperly frames 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 accused. This is simply incorrect. Applying the national law provision in accordance with *nulla poena sine lege* does not mean, as the Trial Chamber suggests, 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 principles 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, it turns to an analysis of the *nullum crimen sine lege* provision in Article 15 of the ICCPR. The illogical effect is that the Trial Chambers 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 collapses the analysis of the two principles *nulla poena sine lege* and *nullum crimen sine lege*. It conflates the issue as the ‘requirements’ of *nullum crimen nulla poena sine lege* and then concludes that adherence to this conflated principle would prevent recognition of the accused’s acts as criminal. Moreover, its pre-occupation with Erdemović’s acts going unpunished as the consequence of the *nullum crimen* principle, which is essentially a *punishability* issue, is 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, has already been determined. Indeed, the accused does not even appear to raise the *nullum crimen* question, making the Trial Chamber’s focus on it even more out of place. Furthermore, at his initial appearance before the Trial Chamber, Erdemović pled guilty to crimes

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161 *Erdemovic Sentencing Judgment*, *supra* note 37, ¶38.

162 That is not to say that the *nullum crimen* question is entirely irrelevant to the matter before the Chamber.
against humanity as charged in count one of the indictment. 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. The code did however cover genocide and war crimes against civilians. Analogizing that the former code penalized crimes ‘which are of a similar nature to crimes against humanity,’ the Erdemović Trial Chamber satisfied itself with regards to nullum crimen sine lege. This further 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. 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 goes beyond analogizing between similar crimes to analogizing between different legal systems. It employs analogy at two levels. First, it draws an analogy between offenses under Article 5 of its Statute, crimes against humanity, and genocide and war crimes committed against civilian populations under the SRFY’s criminal code. Having identified the ‘analogous’ crimes, however, the Trial Chamber does not content itself with the penalties provided by law establishing the relevant ‘analogous’ crimes. Instead, it continues 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. 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’. 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.

163 See Prosecutor v. Erdemović, Indictment (May 22, 1996); Erdemović Sentencing Judgment, supra note 37, ¶3. The plea was subsequently changed to a guilty plea to count 2 of Indictment for violations of the laws or customs of war.
164 Erdemović Sentencing Judgment, supra note 37, ¶35.
165 Chapter XVI of Criminal Code for the former Yugoslavia, Articles 141 – 156.
166 Erdemovic Sentencing Judgment, supra note 37, ¶35.
167 See also Bassiouni, supra note 2, at 124.
168 See generally Bassiouni, supra note 2, at 124.
169 Erdemovic Sentencing Judgment, supra note 37, ¶35 (emphasis added).
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 acceptance so as to justify its blanket endorsement by an international institution. Many states, Yugoslavia included, hold the view that life imprisonment is more cruel and more severe than capital punishment. The former Yugoslavia, while permitting capital punishment, had abolished the penalty of life imprisonment. 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 offence occurred is straightforward and objective. 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 existed 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 Nuremberg cases and a Dutch case of 1949 as an appropriate precedent can be criticized for failing to take sufficient account of the development of international human rights law on this point since World War II. 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. There has also been a corresponding development of criminal law principles in domestic law systems.

The Erdemović Trial Chamber’s reliance on the Dutch Rauter case is misplaced. Although the Rauter case dealt with the nulla poena principle, the issue manifested itself somewhat differently than in Erdemović. The accused's argument before the Netherlands Special Court of Appeals was that

172 Nowak, supra note 38, at 364.
174 *Rauter*, Special Court of Appeals, Netherlands, I.L.R. 542 (Jan. 12, 1949) [hereinafter *Rauter* case].
175 *Erdemovic Sentencing Judgment*, supra note 37, ¶38.
177 See also Schabas, supra note 63, at 464.
178 For example, as noted above, the movement towards codification of criminal law in the 1950s in the United States which lead to the drafting of the Model Penal Code. Today, all states of the US have codes setting forth both the definitions of the crimes and the applicable penalty. See generally *supra* section 3B.
he could not be punished at all because of a lack of legal sanctions previously outlined and prescribed.\textsuperscript{179} The laws of SFRY, however, did provide for legal sanctions previously prescribed;\textsuperscript{180} thus the ICTY in Erdemović was facing a different issue than the Dutch court. The issue here 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. In fact, the Erdemović Trial Chamber recognized that the Dutch Special Appeals Court was addressing \textit{nulla poena sine lege}.\textsuperscript{181} So why it chose to collapse its own analysis on this issue into an inquiry about \textit{"nullum crimen nulla poena sine lege"} is somewhat puzzling.

The Trial Chamber’s isolated emphasis on a single comment of the Secretary-General of the United Nations is also open to criticism. Its discussion of the Secretary-General’s Report\textsuperscript{182} is somewhat misleading. The Trial Chamber characterizes the comments contained in the Report as an ‘interpretation’ of the Statute. These comments, however, are not intended as ‘interpretations’ of the Statute, but rather as rationalizations for inclusion and exclusion of matters from the scope of the Statute.\textsuperscript{183} The Trial Chamber draws specific attention to the permissive tone of the Secretary-General’s comments: ‘in determining the term of imprisonment, the Trial Chambers should have recourse to the general practice of prison sentences applicable in the courts of the former Yugoslavia.’\textsuperscript{184} It then isolates this phrase and relies 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.

\textsuperscript{179} \textit{Rauter Case, supra} note 174.
\textsuperscript{180} Erdemovic ultimately ended up pleading guilty to war crimes.
\textsuperscript{181} \textit{See Erdemovic Sentencing Judgment, supra} note 37, ¶38. Prior to quoting the passage that it relies on from the \textit{Rauter Case}, the \textit{Erdemovic} Trial Chamber states that ‘the 1949 Netherlands Special Appeals court, seized of a line of defence based on the principle \textit{nulla poena sine lege} in a case relating to a crime against humanity, expressed itself as follows: In so far as the appellant considers punishment unlawful because his acts, although illegal and criminal, lacked a legal sanction precisely outlined and previously prescribed, this objection also fails. The principle that no act is punishable in virtue of a legal penal provision which had preceded it, aims at creating a guarantee of legal security and individual liberty. Such legal interests would be endangered if acts as to which doubts could exist with regard to their deserving punishment, were to be considered punishable after the event. However, there is nothing absolute in that principle. Its operation may be affected by other principles whose recognition concerns equally important interests of justice. These latter interests do not permit that extremely serious violations of generally accepted principles of international law (the criminal character of which was already established beyond doubt at the time they were committed), should not be considered punishable solely on the ground that a previous threat of punishment was absent.” (emphasis added).
\textsuperscript{182} \textit{Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808} (1993), S/25704, (May 3, 2003) [hereinafter Report of the UN Secretary-General on the establishment of the ICTY or the Report].
\textsuperscript{183} 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.
\textsuperscript{184} \textit{Erdemovic Sentencing Judgment, supra} note 37, ¶39 (emphasis added by the Trial Chamber) \textit{quoting} \textit{Report of the UN Secretary-General on the establishment of the ICTY, supra} note 182, ¶111.
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. These comments are made as an introduction to the (proposed) text of the Statute that follows them. The permissive tone recognizes the ultimate authority of the Security Council to decide upon the final text of the Statute, and in any case the Council approved ‘shall’ in the end. It is submitted that this is the proper contextual understanding of the permissive tone (‘should have recourse’) of the comments of the Secretary-General, and not what the Trial Chamber suggests, 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 suggests, then it presumably would have maintained that language in the actual text of the Statute that it proposes immediately following these comments. Surely, if the Secretary-General intended ‘should’, and not ‘shall’, then its proposed text would not have stated ‘shall’.

The erroneous reasoning of the Trial Chamber becomes accentuated if we attempt to apply its methodology and reasoning in similar fashion to the very next comment of the Secretary-General: ‘The International Tribunal should not be empowered to impose the death penalty.’\(^{185}\) The proposed text of Statute corresponding to this comment reads: ‘The penalty imposed by the Trial Chamber shall be limited to imprisonment.’\(^{186}\) 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 International Tribunal could also apply the death penalty. Clearly, this is not intended by the Secretary-General’s use of the permissive language (‘should’) in its 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.\(^{187}\) 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.

\(^{185}\) Report of the UN Secretary-General on the establishment of the ICTY, supra note 182, ¶112.  
\(^{186}\) Report of the UN Secretary-General on the establishment of the ICTY, supra note 182, ¶115.  
\(^{187}\) See supra section 3B.
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.\(^{188}\)

Despite the Erdemović Trial Chamber’s declaration that it will 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 Tribunal has been reiterated by other trial chambers\(^{189}\) and consistently affirmed by the Appeals Chamber.\(^{190}\) The holding is now a well-established principle in the sentencing jurisprudence of the ICTY. This ‘directive but not binding’ approach has proved illusory and in practice has amounted to little more than a perfunctory reference to Yugoslavia’s sentencing laws.\(^{191}\) While earlier commentators on the ICTY Statute conceded that the ambiguous language of the provision permitted such an interpretation, they seem ill at ease with the Tribunal exercising unlimited discretion in sentencing. Bassiouni, for example, argued that ‘the Tribunal should follow the law of the former Yugoslavia’ when determining penalties.\(^{192}\) And while Morris and Scharf take the position that the Tribunal 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.’\(^{193}\) 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.’\(^{194}\)

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\(^{195}\) and then only briefly in the separate opinion of Judge Antonio

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\(^{188}\) See Erdemovic Sentence Judgment, ¶¶39, 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. Tadić, Case No. IT-94-1-A and IT-94-1-Abis, Judgement in Sentencing Appeals, ¶21 (Jan. 26, 2000) [hereinafter Tadić Appeals Sentencing Judgment]; Prosecutor v. Kupreškić, Case No. IT-95-16-A, Judgement, ¶418 (Oct. 23, 2001); and Prosecutor v. Kunarac, Case No. IT-96-23 & IT-96-23/1-A, Judgment, ¶349 (June 12, 2002).

\(^{189}\) E.g., Tadić Appeals Sentencing Judgment, supra note 188, ¶21.

\(^{189}\) Kupreškin, Case No. IT-95-16-A, ¶ 418; and Kunarac, Case No. IT-96-23 & IT-96-23/1-A, ¶349.

\(^{190}\) Schabas, supra note 63.

\(^{191}\) Bassiouni & Manikas, supra note 12, at 700.

\(^{192}\) Morris & Scharf, supra note 78, at 276.

\(^{193}\) Schabas, supra note 63, at 481. Consistency in international sentencing remains illusive whether concerned from a perspective internally to each Tribunal or externally comparing the two ad hoc Tribunals.

\(^{194}\) Tadić Appeals Sentencing Judgment, supra note 188.
Still, to date, no judgment or decision of the Tribunal 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 judicis).
(iii) to bring about some relative uniformity and harmonisation in the application of penalties.

It is worth noting that the main objectives of *nulla poena sine lege*, as identified by Judge Cassese, relate to the ‘positive justice’ characteristic of *nulla poena sine lege*. Here, Cassese reinforces the observation made earlier that *nulla poena sine lege* is considered more than just a ‘protectionist’ principle. While acknowledging that *nulla poena sine praevia lege poenali* is upheld in most national legal systems, Cassese’s separate opinion concluded that it ‘is still inapplicable in international criminal law.’ Although he elaborates on the objectives of *nulla poena*, this latter conclusion is not as well developed. The objectives he identifies (*i.e.* a teleological understanding) as well as its 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, it may be assumed that this conclusion was drawn from the fact that international conventions on criminal matters do not contain specific penalties. However, as already noted, this cannot be inferred to mean that *nulla poena* is inapplicable to international criminal justice. As Bassiouni argues, the absence of penalties provisions in these conventions should be understood in light of the fact that international criminal law regime was generally an indirect enforcement system, requiring states to prosecute the relevant crime domestically, and if need be, enact appropriate legislation which provided the applicable penalty. 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 is correct to point out this lacunae in international criminal law treaties, but

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198 *Supra* sect. 2A.
200 Note that this conclusion appears in a separate opinion and thus does not represent the views of the court.
201 *See supra* note 74. The same can be generally said about the statutes of international criminal courts which contain only broad guidelines on penalties.
202 *See supra* text accompanying notes 74-77.
it does not **per se** nullify the force of *nulla poena sine lege* in cases of direct enforcement by the international community, a distinction clearly understood by the ILC.\(^{204}\) A lacunae 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 lacunae.\(^{205}\) 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 with the range of penalties acceptable under Yugoslavia law.\(^{206}\) Those exceptions were limited to cases of notoriously sadistic perpetrators,\(^{207}\) high-ranking officers,\(^{208}\) and/or persons convicted of genocide.\(^{209}\) 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 not bound by the sentencing practice of the former Yugoslavia, argued that the practice of the Tribunal up to that point had been to stay within the sentencing range provided by Article 38 of the SFRY Penal Code.\(^{210}\) In that case, the Trial Chamber predictably rejected the defendant’s argument that imposing a term of imprisonment of more than 15 years would violate the principle of legality.\(^{211}\) 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

\(^{204}\) See supra text accompanying notes 134-140
\(^{205}\) Cassese, supra note 110, at 193.
\(^{207}\) E.g., Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgement, (Dec. 14, 1999) [hereinafter Jelisić Trial Judgment] (sentenced to 40 years imprisonment); see Prosecutor v. Jelisić, Case No. IT-95-10-A, Judgement (July 5, 2001) (confirmed on appeal) [hereinafter Jelisić Appeals Judgment].
\(^{208}\) E.g., Prosecutor v. Blaškić, Judgement, Case No. IT-95-14-T (Mar. 3, 2000) [hereinafter Blaškić Trial Judgment]. The Trial Chamber sentenced General Blaškić to 45 years imprisonment which was reduced to 9 years on appeal. See Prosecutor v. Blaškić, Judgement, Case No. IT-95-14-T-A (July 29, 2004) [hereinafter Blaškić Appeals Judgment].
\(^{209}\) E.g., Prosecutor v. Krstić, Judgement, Case No. IT-98-33-T (Aug. 2, 2001) (sentenced to 46 years of imprisonment by the Trial Chamber); see Prosecutor v. Krstić, Judgement, Case No. IT-98-33-A (Apr. 19, 2004) (reduced to 35 years on appeal).
\(^{210}\) Prosecutor v. Delalić, Case No. IT-96-21-A, Judgement ¶811 (Feb. 20, 2001) [hereinafter Čelebići Appeals Judgment]. 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 not bound by national sentencing practice but also because his sentence of 20 years was within the sentencing range for serious crimes under Yugoslav law. Although the general range for sentences of imprisonment was between 5 and 15, Yugoslav law allowed an increase to 20 years for ‘criminal acts . . . which were perpetrated under particularly aggravating circumstances or caused especially grave consequences.’
\(^{211}\) Čelebići Appeals Judgment, supra note 210, ¶814. For the relevant passage of the trial judgment see Prosecutor v. Delalić, Case No. IT-96-21-T, Judgement ¶402 (Nov. 16, 1998) [hereinafter Čelebići Trial Judgment].
determining a penalty ‘is often of limited assistance’ and that ‘often the differences are more significant than the similarities.’

In the past few years, the number of accused sentenced to more than 20 years has increased. However, an interesting development took place recently in the Kunarac case. The Appeals Chamber ruled that family circumstances constituted a mitigating factor and held that the Kunarac Trial Chamber should have considered this as a mitigating factor. 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.’ 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.

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 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 is aberrantly analyzed under the *nullum crimen sine lege* principle rather than *nulla poena sine lege*. It is unclear whether this mishap in terminology spawned from the defendant’s brief and was simply responded to in like by the Trial Chamber (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.

The Čelebići Trial Chamber acknowledges the existence of some ‘controversy’ regarding its sentencing policy of substituting the Yugoslavia maximum penalty (capital punishment) with the

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212 Čelebići Appeals Judgment, supra note 210, ¶719.
213 Prosecutor v. Kunarac, Case No. IT-96-23 & IT-96-23/1-A, Judgment (June 12, 2002) [hereinafter Kunarac Appeals Judgment].
214 Kunarac Appeals Judgment, ¶362.
215 Id.
216 Id.
217 Čelebići Trial Judgment, supra note 211, ¶1209-1212.
218 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.*’ See Appeals Chamber judgment ¶809.
219 Id. ¶1210.
Tribunal’s maximum of life imprisonment, in light of the fact that the SFRY had abolished the latter sanction which it viewed as cruel and inhuman. It defended this policy by summarily concluding that it is ‘consistent with the practice of States which have abolished the death penalty’ and by reference to the views of one member of the Security Council. Even if it is acceptable that life imprisonment is a suitable substitute for the death penalty, a proposition which has not gone unchallenged, 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 15 years or sentenced to capital punishment, which could be mitigated to a sentence of 20 years. However, a term of imprisonment beyond 20 years was not permissible. It was either 20 years or the death penalty. Thus, even if the ICTY policy of substituting the death penalty for life imprisonment is correct, this does not automatically justify terms of imprisonment that exceed 20 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 20 years while permitting life imprisonment.

By explicit reference, the Trial Chamber however rejected the position of Professor M. Cheriff Bassiouni who concluded that imprisonment in excess of 20 years allowed under ‘the applicable national codes’ would violate principles of legality, characterizing it as ‘an erroneous and overly restrictive view of the concept of *nullum crimen sine lege*.’ 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.’ In other words, so long as a penalty is provided for, then the principle of legality has been satisfied with the implicit consequence that the court may now substitute its own penalty, and apparently even one that is greater. The Trial Chamber went on to hold that ‘[t]he fact that the new punishment of the offence is greater than the former punishment does not offend 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 a explicit renunciation of the prohibition against

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220 *Id.* ¶1208.
221 *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.
222 *Id.*
224 Similar in structure to the sentencing provisions that were finally adopted in the Rome Statute of the International Criminal Court, UN. Doc. A/CONF.183/9 (1998) [hereinafter ICC Statute].
225 Bassiouni, *supra* note 223, at 702.
227 *Id.* ¶1212.
228 *Id.* ¶1212. In another passage, the Trial Chamber also held that ‘[t]his concept [*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.”
imposing a greater penalty than the one applicable at the time the crime was committed. 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. It may be said that to some extent this criticism can be deflected by the fact that traditionally resort 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.

In light of the sentences imposed, it seems quite unnecessary for the Trial Chamber to reach such controversial conclusions. Of the four defendants, the Trial Chamber acquitted one on all charges, and imposed imprisonment sentences of seven, fifteen, and twenty years on the other three. Hazim Delić, who received the harshest penalty, argued that, based on the principle of legality, the Trial Chamber could not impose a sentence greater than 15 years. Indeed, the standard maximum under SFRY Penal Code was 15 years. However, as already mentioned, under certain circumstances national courts could increase the penalty to 20 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.’ 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 creditability of international judges, or even cast a shadow on the endeavor to fight impunity through international criminal justice. It could simply have reasoned that Delić’s crimes

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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.

See Danzig Legislative Decrees Case, supra note 123.

See supra note 155.

Čelebići Appeals Judgment, supra note 210, n. 1383 referring to Article 38 of the SFRY Penal Code.

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230 See Danzig Legislative Decrees Case, supra note 123.

231 Čelebići Trial Judgment, supra note 2111, ¶1212 (emphasis added).

232 Id. ¶1211

233 Čelebići Appeals Judgment, supra note 210, n. 1383 referring to Article 38 of the SFRY Penal Code.
were of such gravity as to fall within the provisions of SFRY Penal Code which permitted an increase in penalty from 15 years to 20 years.

The Čelebići Appeals Chamber appropriately reframed the analysis in terms of *nulla poena sine lege.* 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. The Appeals Chamber steered clear of any overreaching declarations such as those made by the Trial Chamber stating that ‘[t]he fact that the new punishment of the offence is greater than the former punishment does not offend the principle.’ 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.’ Thus, the Appeals Chamber limits 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 reasons that so ‘long as the punishment is accessible and foreseeable, then the principle cannot be breached.’

The difficulties in applying the foreseeability test in this context have been addressed above already. 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 points out. 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 20 years on the fundamental belief that such imprisonment was cruel and inhumane, it would be fair to argue that sentences of 25 years, 40 years, 45 years, or 46 years were not foreseeable.

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235 Čelebići Appeals Judgment, supra note 2100, ¶814.
236 Id. ¶814.
237 Čelebići Trial Judgement, supra note 2111, ¶1212.
238 Čelebići Appeals Judgment, supra note 2100, ¶817.
239 Id. ¶817, n. 1400. The Appeals Chamber here relied on two cases from the ECHR: SW v. The United Kingdom and CR. v. The United Kingdom, Judgement of 22 November 1995, Series A, Vol.33-B. 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.
240 See supra text accompanying notes 53-57.
241 Čelebići Appeals Judgment, supra note 2100, ¶817.
C. Nulla Poena Sine Lege in the Statute of the International Criminal Court

1. ICC Statute Framework for the Legality of Sanctions

Under Part 3 of the ICC Statute on General Principles of Criminal Law lies Article 23, the keystone to understanding the legality of the Court’s power to impose a particular punishment.\textsuperscript{246} Entitled ‘Nulla poena sine lege’, Article 23 states: ‘A person convicted by the Court may be punished only in accordance with this Statute.’\textsuperscript{247} Although at first glance this single succinct sentence seems rather stingy for content, underlying its brevity are 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 Court has no power to impose it. Second, the language ‘only in accordance with this Statute’ obliges the Court 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 \textit{lex scripta} principle underlying \textit{nulla poena sine lege}.

While the inclusion of \textit{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.\textsuperscript{248} 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 \textit{nulla poena sine lege}, contain norms and values that subsequent rules within the system must satisfy. The dependency of the ICC’s \textit{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

\textsuperscript{246} For a general commentary on this article \textit{see} Schabas, \textit{supra} note 2, at 463-66; Lamb, \textit{supra} note 2, at 762-65.
\textsuperscript{247} ICC Statute, \textit{supra} note 224, art. 23.
\textsuperscript{248} At least one international judge has made a similar observation. \textit{See} Cassese Separate Opinion in Tadić Appeals Sentencing Judgment, \textit{supra} note 24, ¶5 (observing that ‘Article 23 lays down the \textit{nulla poena} principle, but only in a particular form.’).
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.’ 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, however, contains a non-exhaustive list of aggravating factors. Thus, in determining a sentence, judges may take into account ‘other circumstances’ not found in the Statute or RPE. This opening in the Statute has been criticized as being contrary to nulla poena. It may even be argued that this particular provision of Rule 145 is contrary to the requirements of the Statute pursuant to Article 23.

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 and/or the RPE, or whether it is permissible for the Statute and/or RPE to allow consideration of factor 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 Court 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. 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

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249 ICC Statute, supra note 224, art. 78(1) (emphasis added).
250 ICC RPE, Rule 145(2)(b)(vi).
251 Id. (even granted that these ‘other circumstances’ must ‘by virtue of their nature be similar’ to the enumerated aggravating factors).
252 Zappalà, at 201 (2003). For similar criticism of the ICTY statute see Bassiouni and Manikas, supra note 12, at 702.
253 See supra section 4B. E.g., Čelebići Trial Judgment, supra note 2111, ¶1210 (‘The fact that the new maximum punishment exceeds the erstwhile maximum does not bring the new law within the principle.’) and ¶1212 (‘The fact that the new punishment of the offence is greater than the former punishment does not offend the principle.’).
consider this to be a serious omission given that the Statute contains a clear provision on the non-retroactive application of the Statute to conduct occurring prior to its entry into force.\textsuperscript{254}

Given that the ICC’s \textit{nulla poena sine lege} article does not explicitly contain the \textit{lex praevia} principle, namely that a heavier penalty shall not be imposed than the one that was applicable at the time the offence was committed,\textsuperscript{255} the Court may have to turn outside its own statute for authority to incorporate this principle.\textsuperscript{256} There are a number of sources that the Court can rely upon to incorporate the \textit{lex praevia} principle into its legal framework, including ‘applicable treaties’\textsuperscript{257} and ‘general principles of law’ derived from national laws of legal systems of the world.\textsuperscript{258} Although it is hard to imagine that ICC judges would not incorporate \textit{lex praevia} into the \textit{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.’\textsuperscript{259} 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 \textit{lex praevia} principle, although it does provide for a stronger \textit{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.\textsuperscript{260} 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 \textit{nulla poena} norm within the ICC framework remains uncertain.

To strengthen the \textit{lex praevia} character of \textit{nulla poena} within the ICC framework, one could argue that the principle of non-retroactive application of a heavier penalty appears in all major human rights treaties.\textsuperscript{261} 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 \textit{ex post facto} application of criminal

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\item\textsuperscript{254} ICC Statute, \textit{supra} note 224, art. 24(1). The ICC Statute entered into force on 1 July 2002. \textit{See} ICC Statute, \textit{supra} note 225, art. 126.
\item\textsuperscript{255} \textit{See supra} section 2B and 3A. \textit{See generally} UDHR art. 11, ¶2; ICCPR art. 15(1); ECHR art. 7(1); and ACHR art. 9.
\item\textsuperscript{256} \textit{See ICC Statute, supra} note 224, art. 21.
\item\textsuperscript{257} \textit{See ICC Statute, supra} note 224, 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(3)(c) of Additional Protocol I to the Geneva Conventions of 12 August 1949 provides that ‘nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed’.
\item\textsuperscript{258} \textit{See ICC Statute, supra} note 224, art. 21(1)(c).
\item\textsuperscript{259} \textit{See Schabas, supra} note 2, at 465. This proposal was offered by Mexico.
\item\textsuperscript{260} \textit{Id}.
\item\textsuperscript{261} \textit{See supra} section 3A, for example, Article 15(1) ICCPR: ‘Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed.’ \textit{See also}, ECHR Article 7(1); ACHR Article 9; and UDHR Article 11, ¶2.
\end{enumerate}
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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. Article 22 *Nullum crimen sine lege* makes clear that the applicable law is that which was in place at the time the conduct occurred. Given the nexus between *nullum crimen sine lege* and *nulla poena sine lege*, the Court may reasonable 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.’ 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.”’ However, the Appeals Chamber did not further elaborate on how the ‘applicable law’ should be identified and determined. 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 the Čelebići case would be that the Tribunal 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 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

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262 See Bassiouni, *supra* note 2, at 123.
263 Article 22 deals with *nullum crimen sine lege* and therefore speaks to *punishability* of a act and not the punishment itself. Article 24(1) prohibits imposition of ‘criminal responsibility’ in relation to the temporal jurisdiction of the Court.
264 ICC Statute, *supra* note 224, art. 22(1) provides: ‘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.’
265 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 sanctions.’).
266 ICC Statute, *supra* note 224, art. 24(2).
individual to be tried in the forum of the *locus delicti*. 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 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 suggests 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 on 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 principles 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.

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. Moreover, like the national law provisions of the ad hoc tribunals which followed on the heels of a more strongly worded provision regarding

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268 This would be subject to the limitation that the penalties in the forum of adjudication were foreseeable. *Id.* ¶817, n. 1400.

269 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 geographic reach. Because the ICTR and ICTY’s jurisdiction was limited to crimes occurring on the territory of a single (former) state, reference to national laws is defendable. 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 person convicted by the Court.’ See Rolf Einar Fife, *Penalties, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 986 (Otto Triffterer ed., 1999).

270 Compare the judgments of the ICTY in Tadić, Kupreškić, and Kunarac cases, *supra* note 1888, with the positions of the following authors: Schabas, *supra* note 145, at 524-28; Bassiouni & Manikas, *supra* note 12, at 692, 700.

271 A comparison between ICC Article 23 and the second sentence of ICTY Article 24(1) (and ICTR Article 23(1)) seems appropriate as it has been argued that the latter was included out of concern for respecting *nulla poena sine lege*. See Schabas, *supra* note 144, at 524-28; Bassiouni and Manikas, *supra* note 12, at 692, 700.
applicable penalties. 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.’ The ‘shall not . . . unless’ formulation is a stronger legal construction than the language of Article 23. Additionally, as noted 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. ICTY Article 24 used ‘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. ICTY judges concluded that the sentencing laws and practice of the former Yugoslavia are not binding on them. Although it has been argued that this provision was included out of concern for respecting the *nulla poena sine lege*, the interpretations of the judges have effectively read out this limitation on their discretion.

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.

2. Analysis of Imprisonment Sanctions

The penalty provision proposed by the International Law Commission in its draft statute for the international criminal court was nearly identical to the penalty provisions (ICTY Article 24 and

Except for the reference to the applicable state, the provisions of ICTY Article 24(1) and ICTR Article 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].’ Compare, the first sentence and the second sentence of Article 24(1) of the ICTY Statute (‘shall be limited to’ verses ‘shall have recourse to’).

ICC Statute supra note 224, art. 22(1). For a general commentary on this article see Bruce Broomhall, Article 22 *Nullum crimen sine lege*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 447, 452–53 (Otto Triffterer ed., 1999).

See supra section 4B.

See also Bassiouni and Manikas, supra note 12, at 700.

This position was taken from the outset in the ICTY’s first sentencing judgment. See Erdemović *Sentencing Judgment*, ¶39. It has been confirmed and followed without deviation, entrenching it deep in the Tribunal’s jurisprudence. See, e.g., Prosecutor v. Tadić, Case No. IT-94-1-A and IT-94-1-Abis, Judgment in Sentencing Appeals ¶21 (Jan. 26, 2000); Prosecutor v. Kupreškić, Case No. IT-95-16-A, Judgment ¶418 (Oct. 23, 2001); and Prosecutor v. Kunarac, Case No. IT-96-23 & IT-96-23/1-A, Judgment ¶349 (June 12, 2002).

See Schabas, supra note 144, at 525; Bassiouni and Manikas, supra note 12, at 702; Schabas, supra note 2, at 464.

See supra note 1888.

And, hopefully, encourage more scholarship on this subject.
ICTR Article 23) of the ad hoc tribunals, and relied upon the same general criteria as found in the sentencing provisions of the ICC Statute. In the view of many delegations, this ILC draft provision ‘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.

With regards to imprisonment sanctions, Articles 23 and 77 work in tandem. Article 77 sets out the Court’s powers regarding the sanction of imprisonment. It gives the Court two alternatives: judges must make a choice between imprisonment of not more than 30 years or life imprisonment. This structure resulted from the insistence of states for clarity as to the maximum sentence, a recognition of the lex scripta and lex certa attributes of nulla poena. 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, ‘increase legal certainty with regard to the range of imprisonment.’ Consequently, a degree of specificity was introduced into international criminal justice that did not exist in the statutes of previous international criminal tribunals. Under the statutes of the IMT, IMTFE, ICTR and ICTY, a person could be sentenced to 40 years or 50 years or any other period of time. The 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 Court’s jurisdiction.

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280 See Report of the International Law Commission on the work of its forty-sixth session, 2 May to 22 July 1994, G.A.O.R. 49th Session, Supplement No. 10, A/49/10, p.123. Article 47 (titled ‘Applicable Penalties) of the draft statute prepared by the ILC provided: ‘In 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.’


283 Id. p. 990; see also Fife 1999, in LEE 319 (1999).

284 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 300, at 63; see also Compilation of Proposals, supra note 1033, at 227-34; Decisions Taken by the Preparatory Committee at its Session Held from 1 to 12 December, U.N. Doc. A/AC.249/1997/L.9/Rev.1 at 81-90 (1997); The Final Reports of Preparatory Committee on the Establishment of the International Criminal Court (Draft Statute and Final Act), U.N. Doc. A/CONF.183/2/Add.1, at 119-124 (1998).

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

286 Fife, supra note 282, at 990.

287 Compare, ICC art. 77 with ICTY art. 24 and ICTR art. 23.

288 E.g., General Radislav Krstić was sentenced to 46 years of imprisonment. See Prosecutor v. Krstić, Judgement, Case No. IT-98-33-T ¶726 (Aug. 2, 2001). On appeal, his sentence was reduced to 35 years. See Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment, 87 (Apr. 19, 2004).
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.’ In the practice of the ICTY, the ‘gravity of the crime’ emerged as the key factor in sentencing, and the ICC’s reliance on it to produce a just sentencing practice should not be under-estimated. ‘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 life imprisonment can be legally sentenced upon a convicted person. 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. 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 Court’s statute, and at minimum, its imposition without the possibility of parole. Some states viewed life imprisonment as cruel, inhuman, and degrading punishment. As such, in their view, it violated provisions of international human rights treaties. Other states disagreed, stressing the importance of including severe penalties within the Court’s power because the penalties under consideration were to be applied to the most serious crimes of international concern. 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 Court and its deterrent functions.’ Thus, on the question of

289 ICC Statute supra note 224, art. 78(1).
291 For further reading on life imprisonment see D. VAN ZYL SMIT, TAKING LIFE IMPRISONMENT SERIOUSLY IN NATIONAL AND INTERNATIONAL LAW, (Kluwer Law International 2002).
292 See Fife, supra note 282, at 990; W.A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 166 (Cambridge University Press 2004).
293 Schabas, supra note 292, at 166.
294 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 United Nations Office at Vienna-Crime Prevention and Criminal Justice Branch, Life Imprisonment (1994); Schabas, supra note 63, at 461.
295 Fife, supra note 282, at 986.
296 Id. at 986-87.
which penalties should be placed under the Court’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 Court’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.

(a) Mandatory Review of Sentences

The inclusion of a mandatory review mechanism was inspired by concerns regarding the Court’s authority to impose the sanction of life imprisonment without the possibility of parole. 297 In the final text of the 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. 298 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. 299 Indeed, a modern approach to nulla poena sine lege, which appreciates that it functions more than simply 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

297 Id. at 988.
298 For a general commentary on this article see G.A.M. Strijards, Article 110 Review by the Court Concerning Reduction of Sentence, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 1197 (Otto Triffterer ed., 1999).
299 E.g., Bassiouni and Manikas, supra note 12, at 692.
possible consequences of conviction for an international crime and the penalty but also the conditions under which the penalty is to be executed. 300 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. 301 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.’ 302 In light of such varying opinions among human rights scholars, it is regrettable that the formulation of nulla poena sine lege within the ICC framework did not explicitly codify lex praevia into Article 23. 303

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 sentence 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 25 years in the case of life imprisonment.

(b) Specific Rules for Multiple Convictions

Particular rules regarding sentencing in cases of multiple convictions are provided for in Article 78(3), 304 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 Court 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 as 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 development in some trial chambers of the ICTY 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 sentence 305 at the time it was introduced in the Blaškić case. 306 Although General Blaškić was

300 Erdemović Sentencing Judgment, ¶70.
301 Erdemović Sentencing Judgment, ¶70.
302 E.g., D.J. HARRIS, M. O’BOYLE, AND C. WARBRICK, LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 281 (Butterworths, 1995); Cf. Erdemović Sentencing Judgment, ¶70.
303 See supra section 4C(1).
305 Sometimes referred to as a ‘global’ sentence.
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. To justify its departure
from the then existing practice of other ICTY trial chambers, the Blaškić Trial Chamber curiously
turns to Rule 101 and observes that it ‘does not preclude it from passing a single sentence for several
crimes’. 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 does not even mention
this Rule. 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.’ Thus, when the Blaškić Trial Chamber introduced the practice of single sentencing, it did so
in contravention of the ICTY RPE. 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.

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 satisfied. At

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(containing a full text of the Blaškić Judgment, along with notes and commentary).**

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**Blaškić Trial Judgment, supra note 2444, ¶807.**

**Id. ¶805.**

**See Rules of Procedure and Evidence, IT/32/REV.17, R. 87(C) (Nov. 17, 1999) [hereinafter ICTY RPE
revision 17].**

**ICTY RPE revision 17, R. 87(C).**

**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
relies 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.**

**See Rules of Procedure and Evidence, IT/32/REV.19, R. 87(C) (Dec. 13, 2000).**
the other end of the spectrum, the total period cannot be less than the highest individual sentence imposed.\(^{313}\)

Thus, Article 78(3) strengthens the Statute’s compliance with the *nulla poena sine lege* principle in at least two ways. First, providing a sentencing provision dealing directly with multiple convictions signals 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 reasonable 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.

(c) 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’.\(^{314}\) 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 Court’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 justice\(^{315}\) and provides a specific penalty provision authorizing the Court to impose a maximum of 5 years imprisonment.\(^{316}\)

Interestingly, the Court’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.\(^{317}\) The inclusion of these specific provisions indicates a strict approach, by the drafters of the Statue, to *nulla poena sine lege* in the Article 23. The judges ought to rely on this teleological perceptive when determining the general nature of the *nulla poena* norm while developing the ICC sentencing practice.

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313 ICC Statute *supra* note 224, art. 78(3).
314 ICC Statute *supra* note 224, art. 77(1).
315 ICC Statute *supra* note 224, art. 70(1)(a)-(f).
316 ICC Statute *supra* note 224, art. 70(3) (the Court may also impose a fine).
317 Cf. The ICTY & 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, *Commentary on the Law of Contempt before the UN ICTR*, in *ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS*, VOL. X 478 (A. Klip & G. Sluiter eds., 2006); Taru Spronken, *Commentary*, in *ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS*, VOL. II 225 (A. Klip & G. Sluiter eds., 2006).
4. 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 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.

(a) 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 imprisonment and also in the general determination of any term of imprisonment. 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. This framework departs from the example of most national criminal codes, which establish a precise penalty range for individual offenses. Thus, 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 Court's jurisdiction compromises the *lex certa* requirement and ultimately, it must be admitted, encroaches on the accused’s right to legal certainty. 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 on the propriety of life imprisonment, this explanation is not entirely satisfying.

318 ICC Statute *supra* note 224, art. 77(1)(b).
319 ICC Statute *supra* note 224, art. 78(1).
320 See Bassiouni and Manikas, *supra* note 12, at 689.
321 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.
First, given the range of crimes within the courts jurisdiction and forms of individual participation, 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, for example, the interest of the international community in 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. The interests protected are distinguishable, as is the mode of participation, the criminal intent, and harm committed. Therefore, appropriate distinction 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 versus offenses against a 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. 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. Thus, the implicit presumption (that we give the harshest penalties anyway) behind the

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322 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 224, art. 25, 28.

323 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 188, at 123 et seq. (based on 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 concerto); Allison M. Danner, Constructing a Hierarchy of Crimes in International Criminal Law Sentencing, 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).

324 Schabas, supra note 131, at 1533.

325 E.g., Prosecutor v. Plavšić, IT-00-39&40/1-S, 27, Sentencing Judgment (Feb. 2003) (The ICTY imposed only 11 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 Prosecutions, in ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL
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.

(b) 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’ and ‘extreme’ qualify as legal criteria and whether they can adequately satisfy nulla poena sine lege.326

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,327 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.

326 Curiously, these criteria were challenged as being contrary to nulla poena sine lege more than 50 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, supra note 144, at 524.
327 See Jennings, supra note 304, at 1002. Jennings asserts ‘[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. While the Kambanda case sets forth a hierarchy between war crimes on the one hand, and genocide and crimes against humanity on the other; his analysis does not draw upon any case law from the ICTY to support for his assertion. In fact, far from providing any such ‘useful guidance,’ the jurisprudence of the ICTY rejects any strict distinction in hierarchy. 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, e.g., D. Van Zyl Smit, International Imprisonment, 54 INT’L & COMP. L. Q. 357, 367 (2005); See Pickard, supra note 188, at 137; Danner, supra note 323, at 501.
The problem of ambiguity also arises in the method of distinguishing between the application of life imprisonment sentences and sentences for a fixed period of time not to exceed 30 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 maxim 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 30 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.\textsuperscript{328} 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 Court is intended to deal with only serious crimes committed in grave contexts, all crimes within its jurisdiction are not of equal gravity.

5. 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 of analogy in selecting a penalty, the requirements of legal certainty, and the obligation to clearly define penalties.\textsuperscript{329} Furthermore, all four legal principles underlying nulla poena

\textsuperscript{328} See ICC Statute, supra note 224, Preamble. At least one commentator points out the ‘curious reference to “extreme gravity of the crime”’ which ‘may seem out of place, since the Court is designed to try the nothing but crimes of extreme gravity.’ Schabas, supra note 292, at 166.

\textsuperscript{329} See supra Part III-A, C and D; see also Danzig Legislative Decrees Case, supra note 1233; Baškaya case, supra note 488.
sine lege constitute general principles of law recognized in the majority of world’s legal traditions.\textsuperscript{330} 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 the international justice to grow out of its adolescence and develop into a mature legal system.\textsuperscript{331} 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, \textit{lex stricta} still received positive recognition in international law through the Rome Statute 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 \textit{nulla poena sine lege}.

There are general signs of increasing appreciation that \textit{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 \textit{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.\textsuperscript{332}

The penalty provisions of the IMT, IMTFE, ICTY and ICTR attracted criticism in legal theory for not meeting the requirements of \textit{nulla poena sine lege}.\textsuperscript{333} While the sentencing practice of international tribunals can hardly be characterized as an ‘abuse of power,’ the absence of a more complete approach to \textit{nulla poena}, by both judges and drafters of statutes, has harmed the quality of justice rendered by the ICTY and ICTR. The sentencing practice gives the appearance of an inconsistent body of law, or at least a jurisprudence that provides little guidance to the ICC.

\begin{footnotesize}

\textsuperscript{330} Bassiouni Study, \textit{supra} note 73.

\textsuperscript{331} To achieve this would naturally require progress on other fronts beside 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, seizure of evidence and assets, arrests of suspects.

\textsuperscript{332} 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. \textit{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 20 year sentence was unjust \textit{per se}, it was harsher treatment than that imposed on others with similar criminal culpability who came later, and perhaps even more severe than the sentences imposed on other war crimes with more blood on their hands.

\textsuperscript{333} \textit{See} Fife, \textit{supra} note 282, at 987-88; Bassiouni & Manikas, \textit{supra} note 12, at 689 (imprecision of penalty provisions of the statutes of the \textit{ad hoc} tribunals violates \textit{nulla poena sine lege}); \textit{Cf.} Schabas, at 469.

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Although the ICC sentencing provisions mark an improvement over their counter-parts 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 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 rights’ dimension of *nulla poena sine lege* or whether its ‘positive justice’ role is also considered.  

It is in light of this latter role that *nulla poena sine lege* has much to contribute to justice in international sentencing. What little consideration commentators have given to the *nulla poena* 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. On the other hand, if further research on *nulla poena* focuses on its modern day adventure as a principle of justice, ensuring equality before the law and consistency in sentencing, then we might realize it still has much to offer to international criminal justice. Furthermore, a strict approach to *nulla poena* combined with a flexible approach to *nullum crimen* may be well suited to international criminal prosecutions, even if at first glance, such an approach seems counter-intuitive. International crimes, such as those which the ICC is called upon to prosecute, occur in a context that defies the law’s ability to capture all forms of deviant conduct.

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334 For ICC provisions governing enforcement of sentences see Part 10 of the Statute, Articles 103-110. 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 (ICC Statute, *supra* note 224, art. 106(2)), 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.  
335 *See supra* note 93.  
336 For similar arguments in the domestic context see Robinson, *supra* note 2.  
337 *See, e.g.*, Prosecutor v. Furundzija Trial Judgment, ¶¶182-84 (Dec. 10, 1998)
The ICC statute implicitly recognizes this through certain ‘catch-all’ criminal offenses. ICC judges will continue to flexibly interpret these provisions to ensure that perpetrators do not go unpunished. Thus, a more robust application of the norms underlying *nulla poena sine lege* combined with a flexible approach to *nullum crimen* may help focus the advantages of judicial discretion where it is needed most while at the same time respecting principles of legality. Although not formulated in such terms, this approach is implicit in the comments and representations made by some states during the drafting the ICTY Statute.

Under such an approach, principles of legality truly work in tandem to serve the needs of international prosecutions better than the current myopic fixation with *nullum crimen* and aloofness towards *nulla poena*. Accordingly, appropriate judicial discretion would capture the criminal behavior within a penalty framework that ensures consistency and predictability in punishment. Approaching *nulla poena sine lege* in this manner, as an equal to *nullum crimen*, reflects a modern approach to the maxim that recognizes both its traditional role as an individual right and its modern relevance as a principle for ensuring consistency in sentencing. International criminal justice needs to have greater regard for a broader concept of *nulla poena sine lege*.

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338 E.g., art. 7(1)(g) (‘. . . any other form of sexual violence of comparable gravity.’); art. 7(1)(k) (‘Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.’); see also art. 21.

339 For example, the Netherlands stated that it ‘favors a system whereby the *ad hoc* Tribunals would prosecute suspects on the basis of violations of substantive norms under international law but would, as far as the available sanctions are concerned, refer to the national law . . . it is being understood that in principle the court would not be allowed to impose sanctions of greater severity than those provided for under national law for similar offenses. Only if this system is adopted will optimal effect be given to the principle *nullum crimen, nulla poena sine lege*.’ Although specific reference is made to national law, the Netherlands’ position here in essence supports a flexible approach to *nullum crimen* and a strict approach to *nulla poena*. Moreover, the Netherlands considers this ‘system’ to be the optimal way to give effect the values underlying principles of legality. *See* Note Verbale, dated Apr. 12, 1993 from the Permanent Representative of the Netherlands to the United Nations Address to the Secretary-General, at 3, UN Doc. No. S/25716 (1993) *cited in* Bassiouni, *Law of the Tribunal*, at 700.