
Perverse Effects of the Nulla Poena Principle: National Practice and the Ad Hoc Tribunals

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Abstract

The prohibition of retroactive punishments, known by the Latin expression nulla poena sine lege, is a component of the principle of legality. Out of concerns with retroactive sentencing and to enhance the fundamental rights of the accused, the statutes of the ad hoc tribunals for Rwanda and the Former Yugoslavia require judges to establish prison terms in the light of national practice in the place where the crimes took place. These provisions have proven difficult to apply. It is unclear whether reference should be made to the prison terms set out in penal statutes or to the actual practice of local courts, and at what point in time. Furthermore, because both Yugoslav and Rwandan law have provided for capital punishment, attempts to draw parallels are necessarily distorted. As a result, judges at the Yugoslav Tribunal have found the provisions to be of marginal relevance. Judges at the Rwanda Tribunal have applied the provision in support of harsh sentencing, suggesting that those convicted are being treated favourably compared with those judged by Rwandan courts, where sentencing options include the death penalty. Thus, a legal provision intended to protect the accused from abusive punishment has been twisted into an additional argument in favour of severity.

In its recent sentencing judgment in the case of *Clément Kayishema and Obed Ruzindana*, the International Criminal Tribunal for Rwanda imposed terms of life imprisonment and 25 years respectively on two *génocidaires* for their key role in atrocities in Kibuye prefecture during the events of 1994.¹ Among the factors supporting such harsh penalties, said the Tribunal, was 'the general practice regarding prison sentences in Rwanda'. The Tribunal relied on Article 23(1) of its

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¹ *Prosecutor v. Kayishema and Ruzindana* (Case No. ICTR-95-1-T), Judgment, 21 May 1999 (Sekule, Khan, Ostrovsky).

Statute² and rule 101(B)(iii)³ directing it to have recourse to the general practice regarding prison sentences in Rwanda in determining terms of detention.

The provisions of the Statute directing recourse to national sentencing practice were inspired by concerns about the principle *nulla poena sine lege*, a fundamental right of the accused. The irony, then, is that the norm is applied not to protect the accused but rather to support imposition of harsh sentences. This paper will consider the reference to national sentencing practice by the ad hoc tribunals, and the perverse result that sees it working against rather than in favour of the person convicted of serious international crimes.

1 *Nullum Crimen Sine Lege* and International Prosecution: Background to the Debate

The prohibition of retroactive penalties, known by the Latin phrase *nulla poena sine lege*, is usually approached in tandem with the prohibition of retroactive offences, *nullum crimen sine lege*. Together, the two are often described as the ‘principle of legality’. The international human rights instruments prohibit the imposition of a criminal sanction that is heavier than the one applicable at the time the offence was committed, thereby recognizing the *nulla poena* norm:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.⁴

The provision is consistently non-derogable in all of the major treaties, something that has prompted some to suggest it is part of the *noyau dur* of human rights.⁵ However, the Human Rights Committee has warned against confusing norms which are non-derogable with those that lie at the core of human rights.⁶

The accused Nazi war criminals invoked the *nullum crimen nulla poena sine lege* norm at Nuremberg, particularly with respect to charges of crimes against peace. According to the judgment of 30 September–1 October 1946:

It was urged on behalf of the defendants that a fundamental principle of all law — international and domestic — is that there can be no punishment of crime without a pre-existing law.

² ‘Statute of the International Criminal Tribunal for Rwanda’, UN Doc. S/RES/955, Annex.

³ ‘Rules of Procedure and Evidence [of the International Criminal Tribunal for Rwanda]’, UN Doc. ITR/3/Rev.1.

⁴ International Covenant on Civil and Political Rights, 999 UNTS (1976) 171, Article 15(1). Also European Convention on Human Rights, 213 UNTS (1953) 221, Article 7(1); American Convention on Human Rights, 1144 UNTS (1979) 123, Article 9; and Universal Declaration of Human Rights, GA Res. 217 A (III), UN Doc. A/810 (1948), Article 11(2).

⁵ International Covenant on Civil and Political Rights, *supra* note 4, Article 4(2). Also European Convention on Human Rights, *supra* note 4, Article 15(2); and American Convention on Human Rights, *supra* note 4, Article 27(2).

⁶ ‘General Comment No. 24 (52)’, UN Doc. CCPR/C/21/Rev.1/Add.6 (1994), § 12.

'Nullum crimen sine lege. nulla poena sine lege.' It was submitted that ex post facto punishment is abhorrent to the law of all civilized nations, that no sovereign power had made aggressive war a crime at the time the alleged criminal acts were committed, that no statute had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders.

The International Military Tribunal rejected the plea because 'in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished . . . [The defendants] must have known that they were acting in defiance of all international law when in complete deliberation they carried out the designs of invasion and aggression'. It described *nullum crimen nulla poena* as a 'maxim'. Referring to the Hague Regulations,⁷ the Tribunal said that since 1907 the prohibitions in the London Charter were crimes, 'punishable as offences against the laws of war; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders'. The Tribunal noted that international agreements 'deal with general principles of law, and not with administrative matters of procedure'.⁸

There is some old precedent for the notion that international law has recognized the death penalty as a maximum sentence in the case of war crimes.⁹ Therefore, a penalty is prescribed and the *nulla poena* argument can never succeed, because any term of detention cannot be the 'heavier penalty' contemplated by Article 15(1) of the International Covenant on Civil and Political Rights. According to the Second World War authorities, '[i]nternational law lays down that a war criminal may be punished with death whatever crimes he may have committed'.¹⁰ The 1940 United States Army manual, *Rules of Land Warfare*, declared that '[a]ll war crimes are subject to the death penalty, although a lesser penalty may be imposed'.¹¹ A post-war Norwegian court answered a defendant's plea that the death penalty did not apply to the offence as charged, because the death penalty had been abolished for such a crime in domestic law, by finding that violations of the laws and customs of war had always been punished by death at international law.¹²

During early efforts by the International Law Commission and the General Assembly to draft a statute for an international criminal tribunal, it was sometimes argued that precise sentencing norms were required, similar to those often found in domestic penal codes. A 1951 proposal from the International Law Commission for the Draft Code of Offences Against the Peace and Security of Mankind that said the penalty 'shall be determined by the tribunal exercising jurisdiction over the individual

⁷ International Convention Concerning the Laws and Customs of War by Land, BTS (1907) 9.

⁸ *France et al. v. Goering et al.*, 22 IMT (1946) 203.

⁹ On sentencing for international crimes, see Schabas, 'War Crimes, Crimes Against Humanity and the Death Penalty', 60 *Albany Law Journal* (1997) 736; Schabas, 'International Sentencing: From Leipzig (1923) to Arusha (1996)', in M. Cherif Bassiouni (ed.), *International Criminal Law* (2nd rev. ed., 1999) 171–193.

¹⁰ 15 LRTWC (1949) 200.

¹¹ Field Manual 27–10, 1 October 1940, para. 357.

¹² *Public Prosecutor v. Klinge*, 13 ILR (1946) 262 (Supreme Court, Norway).

accused, taking into account the gravity of the offence'¹³ was challenged as being contrary to the *nulla poena sine lege* principle.¹⁴ The Romanian jurist Vespasian V. Pella said that the *nulla poena sine lege* principle applied to international criminal law as much as to domestic law 'par la force de l'équité et de la raison'.¹⁵ A General Assembly committee was unimpressed with the criticism, although it agreed 'that it would be desirable that the court, in exercising its power to fix penalties, should take into account the penalties provided in applicable national law to serve as some guidance for its decision'.¹⁶ More than 40 years later, the International Law Commission did not specify any precise penalties in the 1996 draft of its Code of Crimes Against the Peace and Security of Mankind, saying only that 'punishment shall be commensurate with the character and gravity of the crime'.¹⁷ The accompanying commentary explained that it was 'not necessary for an individual to know in advance the precise punishment so long as the actions constitute a crime of extreme gravity for which there will be severe punishment. This is in accord with the precedent of punishment for a crime under customary international law or general principles of law as recognized in the Nürnberg Judgment and in Article 15(2) of the International Covenant on Civil and Political Rights'.¹⁸

2 The 'National Law' Provision in the Ad Hoc Statutes

The idea that some reference to national law would enhance respect of the *nulla poena* rule was picked up by those who drafted the Statute of the International Criminal Tribunal for Yugoslavia, adopted by the Security Council in May 1993.¹⁹ Article 25 states:

Penalties

1. 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.²⁰

The Statute of the International Criminal Tribunal for Rwanda contains an

¹³ Yearbook of the International Law Commission, vol. II (1951) 134 *et seq.*, UN Doc. A/1858, § 59. Also 'Report of the Committee on International Criminal Jurisdiction', UN Doc. A/2136, §§ 110–111.

¹⁴ 'Report of the 1953 Committee on International Criminal Jurisdiction', UN Doc. A/2645, § 118.

¹⁵ Yearbook of the International Law Commission, vol. II (1950) at 314. See also Vespasian V. Pella, 'La Codification du droit pénal international', *Revue générale de droit international public* (1952) 337.

¹⁶ 'Report of the 1953 Committee on International Criminal Jurisdiction', *supra* note 14, § 118. See also 'Draft Code of Offences Against the Peace and Security of Mankind, Troisième rapport de J. Spiropoulos, rapporteur spécial', UN Doc. A/CN.4/85; UN Doc. A/CN.4/SR.268, §§ 45 and 52.

¹⁷ 'Report of the International Law Commission on the Work of its Forty-Eighth Session, 6 May–26 July 1996', UN Doc. A/51/10, 29–30.

¹⁸ *Ibid.*, at 29–30. Also 'Report of the International Law Commission on the Work of its Forty-Seventh Session', UN Doc. A/50/10, 183.

¹⁹ Generally on the sentencing provisions in the statutes, see Schabas, 'Sentencing and the International Tribunals: For a Human Rights Approach', 7 *Duke Journal of International and Comparative Law* (1997) 461.

²⁰ UN Doc. S/RES/827, Annex.

essentially identical provision, except that the word 'Rwanda' replaces 'former Yugoslavia' at the end of paragraph 1.²¹

Rule 101(B)(iii) of the Rules of Procedure and Evidence of both ad hoc tribunals repeats the norm found in the statutes:

(B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 23(2) of the Statute, as well as such factors as: . . . (iii) the general practice regarding prison sentences in the courts of [Yugoslavia] [Rwanda] . . .²²

That Article 25(1) was inspired by the *nulla poena* principle can be seen clearly in the *travaux préparatoires* of the Statute. An early draft statute for the Yugoslav tribunal was prepared by the Conference on Security and Cooperation in Europe (now the Organization on Security and Cooperation in Europe) acting under the Moscow Human Dimension Mechanism in February 1993. The three CSCE rapporteurs, Hans Corell, Helmut Türk and Gro Hillestad Thune, were manifestly ill at ease with the Nuremberg precedent on retroactive offences and punishments. Their report drew particular attention to the absence of sentencing provisions in international humanitarian and human rights treaties such as the Convention for the Prevention and Punishment of the Crime of Genocide.²³ They observed that it would be difficult to establish any concordance between sentences in effect in Yugoslavia at the time of outbreak of the conflict and the provision of the statute because, in the former, the death penalty availed whereas, in the latter, it did not.²⁴ Significantly, although Yugoslavia still allowed for the death penalty, it considered life imprisonment to be cruel, inhuman and degrading treatment or punishment, and thus limited its maximum custodial sentence to 15 or 20 years. The CSCE draft provision went well beyond a perfunctory nod of respect for national sentencing practices, and said plainly that the tribunal would only be empowered 'to impose the penalties provided for in the Penal Code of the former Yugoslavia'.²⁵

A subsequent Italian proposal manifested the same concern with retroactivity of sanctions.²⁶ The Italian jurists declared:

All war crimes and those against humanity provided for under Article 4 are considered international crimes as set forth by international law or far-ranging conventions. However,

²¹ *Supra* note 2, Article 24.

²² 'Rules of Procedure and Evidence [of the International Criminal Tribunal for the Former Yugoslavia]', UN Doc. IT/32; 'Rules of Procedure and Evidence [of the International Criminal Tribunal for Rwanda]', *supra* note 3. On the Rules, see Nsereko, 'Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia', 5 *Criminal Law Forum* (1994) 507; Schabas, 'Le Règlement de preuve et de procédure du Tribunal international chargé de poursuivre les personnes présumées responsables de violations graves du droit international humanitaire commises sur le territoire de l'ex-Yougoslavie depuis 1991', 10 *Revue québécoise de droit international* (1994) 112; Hervé Ascensio, 'The Rules of Procedure and Evidence of the International Criminal Tribunal for Yugoslavia', 9 *Leiden Journal of International Law* (1996) 467.

²³ Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS (1951) 277.

²⁴ Hans Corell, Helmut Türk and Gro Hillestad Thune, *Proposal for an International War Crimes Tribunal for the Former Yugoslavia* (1993) 49–53.

²⁵ *Ibid.*, at 111–112.

²⁶ 'Letter from the Permanent Representative of Italy to the United Nations Addressed to the Secretary-General', UN Doc. S/25300, Article 7, §§ 1–2.

these international law sources do not envisage any penalties for such crime; the need to respect the principle '*nullum crimen, nulla poena sine lege*', the basis of fundamental human rights, has induced the Italian Commission to decide in favour of the penalties set forth by the criminal law of the State of the *locus commissi delicti* (according to paragraph 1 of Article 1, reference is inevitably to one of the States resulting from the dissolution of the former Yugoslavia). If the principle is inapplicable (because the crime has been committed in a place which is not subject to the sovereignty of any State), recourse shall be made to the principle of active or passive personality in order to determine the law to be enforced.

The Russian Federation's proposal, quite similar to that of Italy, reflected similar concerns:

Article 22. Penalties

1. Subject to the provisions of paragraph 3, for the crimes in Article 12 of this Statute, the Court shall designate the penalties established under the legislation of the State in which the crime was committed which was in force at the time the crime was committed.

2. If a crime has been committed in a place which is not under the sovereignty of any State, the Court shall designate a penalty provided for under the legislation of the State of which the perpetrator is a national or the State of which the victim is a national, which was in force at the time the crime was committed.²⁷

It soon became clear that the reference to national sentencing practice in the Statute was somewhat of a conundrum. Neither the Statute nor the Rules of Procedure and Evidence suggested a timeframe for the appreciation of 'general practice'. Was the reference to the law at the time of the crime, or the law at the time of the trial? Nor was it evident whether the Statutes contemplated the actual practice of the courts in sentencing offenders, or simply the legislation in force. If it was the former, which seemed the favoured interpretation on a literal reading of the provision, the tribunals had little to go on. There had only been a few isolated prosecutions for such crimes in the former Yugoslavia, and none in Rwanda.

Yugoslavia's criminal legislation provided for capital punishment in the case of genocide and crimes against humanity, although the death penalty was abolished in Slovenia, Croatia and Macedonia in 1990 and 1991, and in Bosnia in 1995. In Yugoslavia, the punishment for genocide and war crimes was imprisonment of not less than five years or by death. There was no statutory provision for crimes against humanity and therefore no penalty for the offence. Yugoslav law imposed a maximum custodial sentence of 20 years in cases where capital punishment was not ordered.²⁸ The only two significant trials for genocide in Yugoslavia, of *Milhailovic et al.* in 1946 and *Artukovic* in 1986, had resulted in death sentences, although Artukovic died in prison of natural causes before being executed. Prior to the 1994 genocide, Rwanda had no particular legislation to deal with those international crimes falling within the subject matter jurisdiction of the Tribunal. The Geneva Conventions, the 1977 Protocols and the Genocide Convention had all been ratified and published in the official gazette, but no implementing legislation of these non-self-executing treaties

²⁷ 'Letter from the Permanent Representative of the Russian Federation to the United Nations Addressed to the Secretary-General (April 5, 1993)', UN Doc. S/25537.

²⁸ Federal Penal Code of Former Yugoslavia, Articles 141–151, 154 and 155.

was ever enacted. For the serious predicate offences such as murder and rape, Rwanda's *Code pénal* imposed capital punishment or life imprisonment, although the country had *de facto* abolished the death penalty. On a visit to Kigali Central Prison in January 1993, the author learned that there were no prisoners who had spent more than 10 years or so in detention.

The exclusion of the death penalty by the International Tribunal was a particularly sore point with Rwanda. In the Security Council, Rwanda claimed there would be a fundamental injustice in exposing criminals tried by its domestic courts with execution if those tried by the international tribunal — presumably the masterminds of the genocide — would only be subject to life imprisonment.²⁹ 'Since it is foreseeable that the Tribunal will be dealing with suspects who devised, planned and organized the genocide, these may escape capital punishment whereas those who simply carried out their plans would be subjected to the harshness of this sentence', said Rwanda's representative. 'That situation is not conducive to national reconciliation in Rwanda.'³⁰ But to counter this argument, the representative of New Zealand reminded Rwanda that '[f]or over three decades the United Nations has been trying progressively to eliminate the death penalty. It would be entirely unacceptable — and a dreadful step backwards — to introduce it here.'³¹ But, despite Rwanda's statement about the 'fundamental injustice' of imposing the death penalty under national law, it did precisely that, conducting public executions of 22 offenders in April 1998, over the protests of the High Commissioner for Human Rights and international non-governmental organizations.

Because the Statute of the Yugoslavia Tribunal excluded the death penalty, 'general practice' would appear to dictate a maximum available sentence of 20 years. This issue was well-known to the Security Council when it adopted the Statute, and had been discussed in the comments on the CSCE draft.³² In the Security Council, the United States Permanent Representative to the United Nations, Madeleine Albright, declared that her government considered life imprisonment to be the maximum penalty, because in a sense it replaced the death penalty.³³ This was not as obvious as it might seem, however. Many states that have abolished capital punishment do not replace it with life imprisonment, on the belief that perpetual detention is also a form of cruel, inhuman and degrading punishment. Yugoslavia itself seems to have eliminated life imprisonment for this reason, although continuing to retain the death penalty for serious cases. The Rome Statute of the International Criminal Court, although authorizing life imprisonment 'when justified by the extreme gravity of the crime and the individual circumstances of the convicted person', subjects it to mandatory parole review after 25 years.³⁴ Yet although the statutes of the ad hoc tribunals also provide for parole, this depends upon the applicable law in the state

²⁹ UN Doc. S/PV.3453, 16.

³⁰ *Ibid.*

³¹ *Ibid.*, at 5.

³² Corell, Türk and Thune, *supra* note 24, at 69.

³³ UN Doc. S/PV.3217 (1993).

³⁴ 'Rome Statute of the International Criminal Court', UN Doc. A/CONF.183/9, Articles 77(1)(b) and 101.

where the sentence is being served.³⁵ Consequently, a judge who imposes sentence of life imprisonment has no assurance that this will not be a mandatory term without any possibility of parole. This may well be inconsistent with international human rights norms that prohibit cruel, inhuman and degrading treatment or punishment.³⁶

Nevertheless, the judges of the Yugoslavia Tribunal accepted Madeleine Albright's position. Despite the silence of the Statute on this point, and the possible breach of both the *nulla poena* rule as well as the prohibition of cruel treatment, they recognized a maximum penalty of life imprisonment in Article 101(A) of the Rules: 'A convicted person may be sentenced to imprisonment for a term up to and including the remainder of his life.' M. Cherif Bassiouni has written that this provision may 'violate the principles of legality and the prohibition against *ex post facto* laws', at least with respect to Yugoslavia. He has argued that it should be amended, presumably to limit sentences to 20 years' imprisonment.³⁷ To date, the judges of the Yugoslavia Tribunal have eschewed life sentences, confining themselves to a maximum of 20 years. But with the successful appeal by the prosecutor of the acquittal of Dusko Tadić for grave breaches of the Geneva Conventions,³⁸ the Appeal Chamber will have to consider whether it should exceed the maximum custodial term provided for under Yugoslav law. Tadić has already been sentenced to 20 years' imprisonment; arguably, with additional convictions for grave breaches, this sentence should now be increased.

3 Judicial Interpretation of the 'National Law' Provision in the Statutes

The Yugoslavia Tribunal was somewhat unexpectedly plunged into sentencing matters in May 1996 when Dražan Erdemović, a participant in the Srebrenica massacres of July 1995, offered a guilty plea to charges of crimes against humanity. A number of mitigating factors outweighed the overall horror of Erdemović's active role in summary executions, and the Trial Chamber initially sentenced him to a term of 10 years. The Trial Chamber considered the effect of the reference to national practice in some detail. Its first difficulty was the absence of any text dealing with crimes against humanity in Yugoslav law. Surely the drafters of the Statute had, in their haste, overlooked this rather inconvenient detail. Indeed, what sense would it make to associate sentences of an international tribunal with those of domestic law, all of this in the name of the principle of legality, if the crime itself was not even recognized in the national code?

The Trial Chamber resolved this problem with an interesting stratagem:

³⁵ 'Statute of the International Criminal Tribunal for the Former Yugoslavia', *supra* note 20, Article 28; 'Statute of the International Criminal Tribunal for Rwanda', *supra* note 2, Article 27.

³⁶ See, for example, Van Zyl Smit, 'Life Imprisonment as the Ultimate Penalty in International Law: A Human Rights Perspective', 9 *Criminal Law Forum* (1998) 5.

³⁷ M. Cherif Bassiouni and Peter Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (1995) 701–702.

³⁸ *Prosecutor v. Tadić* (Case No. IT-94-1-A), Judgment, 15 July 1999 (Shahabuddeen, Cassese, Wang Tieya, Nieto-Navia, Mumba).

The Trial Chamber notes that a crime against humanity as defined in Article 5 of the International Tribunal's Statute is not, strictly speaking, provided for in the Criminal Code of the former Yugoslavia. Upon examination of this code, however, the Trial Chamber is of the opinion that the only principle which should be given weight is this: that the code reserve its most severe penalties for crimes, including genocide, which are of a similar nature to crimes against humanity.³⁹

This reasoning is attractive, reflecting largely the philosophy of the Nuremberg judges. The only problem is that it seems to contradict both the letter and the spirit of Article 25 of the Statute. The rationale of the drafters of Article 25 was to ensure a defendant was not sentenced to a term of imprisonment that did not exist in national law at the time it was committed. Their intent was to guarantee a defendant would not receive an overly harsh sentence. It most certainly was not intended as an instruction to the judges to favour harsh and retributive sentences.

Reference to the Penal Code provisions was not enough, however, especially in light of the plain words of Article 25, which spoke of the 'general practice regarding prison sentences'. The Trial Chamber recognized that this dictated recourse to the case law of the Yugoslav courts.⁴⁰ Here, too, the myopia of the Statute's drafters became apparent because of the paucity of relevant jurisprudence for the cognate offences of genocide and war crimes. The result: 'in light of the limited number of decisions available, the Trial Chamber cannot draw significant conclusions as to the sentencing practices for crimes against humanity in the former Yugoslavia.'⁴¹ The Tribunal had, in effect, concluded that Article 25 — at least, as it had been intended by the drafters — was for all practical purposes inapplicable.

Here the Tribunal made an interpretative leap, based on its conviction that the reference to national practice of the Yugoslav courts must be given 'a logic and a practical effect'.⁴² But while the canon of the *effet utile* is helpful to the construction of instruments like the Statute, whether it ought to prevail over contextual and teleological approaches, not to mention the rule of strict construction of penal legislation, is most questionable. Courts that feel compelled to devise legal effects for puzzling provisions often embark on a perilous adventure of judicial invention and, it is submitted, this was the course chosen by the Yugoslavia Tribunal. In *Erdemović*, the Trial Chamber wrote:

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 recognizing the criminal nature

³⁹ *Prosecutor v. Erdemović* (Case No. IT-96-22-T), Sentencing Judgment, 29 November 1996, 108 ILR (1998) 180 (Jorda, Odio Benito, Riad), para. 35. See Green, 'Drazen Erdemović: The International Criminal Tribunal for the Former Yugoslavia in Action', 10 *Leiden Journal of International Law* (1997) 363; Swaak-Goldman, 'Prosecutor v. Erdemović', 92 *AJIL* (1998) 282; Turns, 'The International Criminal Tribunal for the Former Yugoslavia: The *Erdemović* Case', 47 *ICLQ* (1998) 461; Sien Ho Yee, 'The Erdemović Sentencing Judgment: A Questionable Milestone for the International Criminal Tribunal for the Former Yugoslavia', 26 *Georgia Journal of International and Comparative Law* (1997) 263.

⁴⁰ *Prosecutor v. Erdemović*, *supra* note 39, at para. 37.

⁴¹ *Ibid.*

⁴² *Ibid.*, at para. 38.

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 recognized by the community of nations.’ On this point, the 1949 Netherlands Special Appeals court, seized of a line of defence based on the principle *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’ (Rauter, Special Appeals Court, Netherlands, 12 January 1949, ILR 1949, pp. 542–543).⁴³

In effect, then, the Trial Chamber construed Article 25 not as an entrenchment of principles derived from the *nulla poena* norm but as its opposite, that is, a message from the Security Council that penalties for crimes within the Tribunal’s subject matter jurisdiction should be extremely severe. According to the court, ‘[i]n conclusion, the Trial Chamber finds that reference to the general practice regarding prison sentences applied by the courts of the former Yugoslavia is, in fact, a reflection of the general principle of law internationally recognized by the community of nations whereby the most severe penalties may be imposed for crimes against humanity’.⁴⁴ But while the conclusion that Article 25 cannot readily be applied given the lacunae in Yugoslav law seems eminently reasonable, the subsequent step, by which Article 25 is taken as tempering the *nulla poena* rule, seems far more difficult to sustain. There can be no doubt that it is in flagrant contradiction with the intent of the drafters and their rationale for such a provision.

The *Erdemović* sentence was overturned on appeal on grounds unrelated to the *nulla poena* issue.⁴⁵ Subsequently, a different Trial Chamber sentenced Erdemović to five

⁴³ *Ibid.*, at para. 38.

⁴⁴ *Ibid.*, at para. 40.

⁴⁵ *Prosecutor v. Erdemović* (Case No. IT-96-22-A), Sentencing Appeal, 7 October 1997, 111 ILR (1998) 298 (Cassese, McDonald, Li, Stephen, Vohrah).

years' detention. Its ruling made no mention whatsoever of the issue of national practice.⁴⁶

The Yugoslavia Tribunal returned to the national practice issue in July 1997 in its sentence of Dusko Tadić. As in *Erdemović*, there were no directly applicable provisions in Yugoslav law. Tadić had been convicted under Article 3 of the Statute of serious violations of the laws and customs of war. He was acquitted of charges under Article 2, grave breaches of the Geneva Conventions. Yugoslav penal law dealt only with grave breaches, and not with war crimes in a more general sense. But, as it had done in *Erdemović*, the Tribunal considered all of the crimes in the Statute to be analogous to those set out in the part of the Yugoslav Penal Code dealing with 'Crimes Against Peace and International Law'.⁴⁷ The Tribunal declared that it was authorized to impose sentences up to and including life imprisonment, even though such a sentence was not part of Yugoslav law. It said this would not violate the *nulla poena* rule:

The practice of courts in the former Yugoslavia does not delimit the sources upon which the Trial Chamber may rely in reaching its determination of the appropriate sentence for a convicted person. Rather, the Trial Chamber has had recourse to the sentencing practice of the courts of the former Yugoslavia except where the Statute, international law, or special considerations including the special nature and purpose of the International Tribunal require otherwise. Article 24(1) of the Statute limits the International Tribunal to penalties of imprisonment or confiscation of wrongfully acquired property. Consequently, for crimes which, in the courts of the former Yugoslavia, would receive the death penalty, the International Tribunal may only impose imprisonment but it may impose a maximum penalty of life imprisonment in its stead, consistent with the practice of States which have abolished the death penalty and with the commitment by States progressively to abolish the death penalty under the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty (GA res. 44/128, annex, 44 UN GAOR Supp. (No. 49) at 207 UN Doc. A/44/49 (1989); entered into force July 11, 1991). This is the understanding given to the Statute both by the members of the Security Council (see statement by Mrs Madeleine Albright to the Security Council, Provisional Verbatim Record of the Three Thousand Two Hundred and Seventeenth Meeting, 25 May 1993, UN Doc. S/PV. 3217, p. 17) and Rule 101(A) of the Rules. There is thus no violation of the *nullum crimen sine lege, nulla poena sine lege* principle. Consequently, the sentencing practice of courts of the former Yugoslavia at the date of the commission of the offences for which Dusko Tadić was found guilty, the practices in effect as of the date of the adoption of the Statute by the Security Council on 25 May 1993, as well as changes in those sentencing practices which would necessitate the imposition of a less severe punishment consistent with internationally recognized human rights standards, and the effect of the Statute and international law more generally, have been considered.⁴⁸

The Trial Chamber seemed to consider that life imprisonment was acceptable as a replacement for capital punishment, thereby respecting the *nulla poena* rule, an issue that has been raised in the appeal and that has yet to be addressed by the Appeal

⁴⁶ *Prosecutor v. Erdemović* (Case No. IT-96-22-S), Sentencing Judgment, 5 March 1998, 37 ILM (1998) 1182 (Mumba, Shahabuddeen, Wang Tieya).

⁴⁷ *Prosecutor v. Tadić* (Case No. IT-94-1-S), Sentencing Judgment, 14 July 1997, 112 ILR (1999) 286, para. 8 (McDonald, Stephen, Vohrah).

⁴⁸ *Ibid.*, at para. 9.

Chamber.⁴⁹ Moreover, unlike the *Erdemović* Trial Chamber, in *Tadić* the court did not question the rationale behind Article 25 as being to ensure respect of *nulla poena*. The *Tadić* Trial Chamber was considerably more restrained in its analysis of Article 25 than the *Erdemović* Trial Chamber had been the previous year. In its consideration of relevant sentencing practice, it also took note of mitigating and aggravating factors applicable under Yugoslav law.⁵⁰ Here there were no surprises: these factors generally respect judicial practices throughout the world, and are confirmed by international war crimes case law.

In the *Delalić* ('Celebici') case, the Tribunal observed that the reference to 'general practice' was aimed 'at uniformity of the length of sentences, not necessarily the consideration of their imposition'.⁵¹ Like the *Tadić* court, it noted that capital punishment was provided for in the Yugoslav penal code, although it had been abolished in some of the republics. Consequently, under Yugoslav law the maximum available term was 20 years, an apparent contradiction with rule 101(A) which allowed for sentences of life imprisonment. The Trial Chamber seemed to suggest that the conflict was a real one, but then affirmed that the Tribunal was entitled to depart from Yugoslav practice because:

Rule 101 was made under, and by virtue of, Article 15 of the Statute and should be read in this light. So construed, sub-Rule 101(A) is not in violation of Article 24(1) which merely requires the Trial Chamber to have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.⁵²

For the Trial Chamber, this meant that the 'recourse' to Yugoslav law intended by the Security Council was not mandatory or binding.⁵³ The Trial Chamber contended that abolitionist states replace the death penalty with life imprisonment, a questionable proposition that is contradicted by practice in a number of jurisdictions, including the constituents of the former Yugoslavia. Many systems, considering life imprisonment to be a form of cruel, inhuman and degrading treatment or punishment, have banished it from their penal law. The Trial Chamber disagreed with Professor Bassiouni's complaint that, in allowing for life imprisonment, rule 101(B)(iii) is at odds with the *nulla poena* rule because such sentences were not permitted under Yugoslav law. The Trial Chamber said this was an 'erroneous and overly restricted view' of the principle of legality.⁵⁴

The *Delalić* Trial Chamber referred to the first sentencing judgment in *Erdemović*, citing its conclusion that Article 25 was 'in fact, a reflection of the general principle of

⁴⁹ The appellant's brief contained the following ground: 'The Trial Chamber erred by failing to take into account the general practice regarding prison sentences in the courts of the former Yugoslavia, as required by Article 24 of the Statute of the International Tribunal. Under this practice, a 20-year sentence is the longest sentence that can be imposed, but only as an alternative to the death penalty.' See *Prosecutor v. Tadić*, *supra* note 38, at 9, para. 23.

⁵⁰ *Ibid.*, at para. 10.

⁵¹ *Prosecutor v. Delalić et al.* (Case No. IT-96-21-T), Judgment, 16 November 1998, 38 ILM (1999) 57 (Karibi-Whyte, Odio Benito, Jan), para. 1192.

⁵² *Ibid.*, at para. 1193.

⁵³ *Ibid.*, at para. 1194.

⁵⁴ *Ibid.*, at para. 1209.

law internationally recognized by the community of nations whereby the most severe penalties may be imposed for crimes against humanity'.⁵⁵ It concluded:

The Trial Chamber is of the opinion 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. As has been stated by the Appeals Chamber in the *Tadić Jurisdiction Decision*:

... violations were punishable under the Criminal Code of the Socialist Federal Republic of Yugoslavia and the law implementing the two Additional Protocols of 1977. The same violations have been made punishable in the Republic of Bosnia and Herzegovina by virtue of the decree-law of 11 April 1992. Nationals of the former Yugoslavia as well as, at present, those of Bosnia-Herzegovina were therefore aware, or should have been aware, that they were amenable to the jurisdiction of their national criminal courts in cases of violation of international humanitarian law.

The fact that the new punishment of the offence is greater than the former punishment does not offend the principle. Furthermore, the contention that the *Tadić Sentencing Judgment*, which imposed a sentence of 20 years imprisonment, was wrong for not following the former Yugoslavian sentencing procedure would appear to the Trial Chamber to be misconceived. There is no jurisprudential or juridical basis for the assertion that the International Tribunal is bound by decisions of the courts of the former Yugoslavia. Article 24(1) of the Statute does not so require. Article 9(2), which vests primacy in the Tribunal over national courts, indeed implies the contrary.⁵⁶

In *Prosecutor v. Furundzija*, of 10 December 1998, the Trial Chamber made only ephemeral references to the national practice issue. It alluded to the Yugoslav penal code provision on mitigating and aggravating factors,⁵⁷ citing the *Tadić* sentencing judgment but making no reference to the more thorough, although much different, treatment of the issue in *Erdemović* and *Delalić*, suggesting its disagreement with those judgments. In contrast with the punitive message of *Erdemović*, the Trial Chamber in *Furundzija* seemed remarkably clement. It invoked the words of the great Italian penal reformer, Cesare Beccaria, who said 'punishment should not be harsh, but must be inevitable'.⁵⁸ The Trial Chamber's support of rehabilitative programmes for the offender was also recalled.⁵⁹

The *Furundzija* Trial Chamber addressed another issue relevant to national practice, the treatment of multiple convictions. Following models in continental legal systems, the Yugoslav courts first imposed a sentence for each of the crimes, and then in a second stage determined the principal punishment. They were empowered to impose a penalty that constituted an aggravation of the most severe punishment assessed, but this could never be as high as the total of the sentences it had already determined.⁶⁰ The Trial Chamber recalled that it was not bound by the practice of the Yugoslav courts, and that in numerous legal systems the maximum that could be imposed in the

⁵⁵ *Ibid.*, at para. 1197.

⁵⁶ *Ibid.*, at para. 1212. References omitted.

⁵⁷ *Prosecutor v. Furundzija* (Case No. IT-95-17/1-T), Judgment, 10 December 1998, 38 ILM (1999) 317 (Mumba, Cassese, May), para. 285.

⁵⁸ *Ibid.*, at para. 290.

⁵⁹ *Ibid.*, at para. 291.

⁶⁰ *Ibid.*, at para. 293.

case of multiple convictions for the same criminal transaction was the punishment assessed for the most serious offence. This approach was taken in the sentencing decisions in *Tadić* and *Delalić*, and the Trial Chamber said it was ‘inclined to follow the practice of the Tribunal’ in those cases.⁶¹

In *Aleksovski*, the Trial Chamber took note of sentencing practice in Yugoslavia, but said it was only indicative and not mandatory.⁶²

Reference to national practice in Rwanda is imposed by an identical provision in the Statute of the International Criminal Tribunal for Rwanda. Some of the problems faced by the Trial Chambers in The Hague do not arise for the Arusha counterpart. First, Rwandan law provides for terms of life imprisonment for particularly serious crimes, such as murder and rape.⁶³ Secondly, the crimes within the subject matter jurisdiction of the Tribunal were not enacted within Rwanda’s penal code, even partially, although the relevant treaties had been ratified and published in the official gazette. Thirdly, a combination of underdevelopment and an historic culture of impunity means that there is essentially no relevant case law upon which to draw.

Inspired by jurisprudence from The Hague, the Rwanda Tribunal has noted that the reference to sentencing practice in Rwanda is not mandatory and merely a guide for the Tribunal.⁶⁴ Thus, ‘while referring as much as practicable to the general practice regarding prison sentences in the courts of Rwanda, the Chamber will prefer, here too, to lean more on its unfettered discretion each time that it has to pass sentence on persons found guilty of crimes falling within its jurisdiction, taking into account the circumstances of the case and the standing of the accused persons’.⁶⁵ Within the context of their discussion of national practice, Trial Chambers of the Rwanda Tribunal have commented on the scale of sentences and the sentencing practice of national courts in Rwanda with respect to the 1994 genocide.⁶⁶ While nothing specific in the text of Article 25 of the Statute imposes a temporal criterion for recourse to national practice, given that the provision was intended to ensure respect of the *nulla poena* rule it seems self-evident that the reference is to practice prior to commission of the crime. This, at any rate, is how the provision has been applied by the Yugoslav Tribunal. Indeed, the latter has never, in all of its sentencing judgments, even mentioned the existence of trials or punishment in the former Yugoslavia for crimes subsequent to 1991. The Rwanda Tribunal seems to have approached this issue rather differently.

For example, in *Serushago*, the Tribunal observed:

Rwanda, like all the States which have incorporated crimes against humanity or genocide in

⁶¹ *Ibid.*, at para. 296.

⁶² *Prosecutor v. Aleksovski* (Case No. IT-95-14/1-T), Judgment, 25 June 1999 (Rodrigues, Vohrah, Nieto-Navia), para. 242.

⁶³ See William A. Schabas and Martin Imbleau, *Introduction to Rwandan Law* (1998).

⁶⁴ *Prosecutor v. Kambanda* (Case No. ICTR-97-23-S), Judgment and Sentence, 4 September 1998, 37 ILM (1998) 1411 (Kama, Pillay, Aspergren), para. 23; *Prosecutor v. Serushago* (Case No. ICTR-98-39-S), Sentence, 2 February 1999 (Kama, Pillay, Aspergren), para. 18.

⁶⁵ *Prosecutor v. Kambanda*, *ibid.*, at para. 25.

⁶⁶ *Ibid.*, at para. 24.

their domestic legislation, has envisaged the most severe penalties in the criminal legislation for these crimes. To this end, the Rwandan Organic Law on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity, committed since 1 October 1990, adopted in 1996, groups accused persons into four categories, according to their acts of criminal participation. The first of these categories concerns the masterminds of the crimes (planners, organizers), persons in positions of authority, from persons who have exhibited excessive cruelty to perpetrators of sexual violence. All these people are punishable by a death penalty. The second category concerns perpetrators, conspirators or accomplices in criminal acts, who incur life imprisonment. The third category deals with persons who, in addition to committing a main crime, are guilty of other serious assaults against the person. Their sentence is short. The fourth and last category concerns persons who have committed offences against property.⁶⁷

In the more recent sentencing decision of *Kayishema and Ruzindana*, another Trial Chamber of the Rwanda Tribunal made similar references:

Rwandan law empowers its courts to impose the *death penalty* for persons convicted of being ‘... planners, organizers, instigators, supervisors and leaders of the crime of Genocide ... (or) persons who acted in positions of authority at the national, prefectorial, communal, sector, or cell level ... (or) notorious murders ... by virtue of the zeal or excessive malice with which the committed atrocities ...’ (fn. Art. 2, Organic Law No. 08/96 of August 30, 1996 on the Organization of Prosecutions for Offences constituting the Crime of Genocide or Crimes against Humanity Committed since October 1, 1990 (Organic Law No. 08/96)). This chamber notes that this law applies to acts committed after 1 October 1990. Rwandan law also empowers its courts to impose a *life sentence* for persons convicted of being ‘persons whose criminal acts or whose acts of criminal participation place them among perpetrators, conspirators or accomplices of intentional homicide or of serious assault against the person causing death.’ (fn. *Ibid.*).⁶⁸

Consequently, the Tribunal applied the admonition in the Statute that it have recourse to national law in light of the fact that Rwanda imposes very harsh sentences, including capital punishment: ‘In light of the findings of the Judgment against Kayishema and Ruzindana, this Chamber finds that the general practice regarding prison sentences in Rwanda represents one factor supporting this Chamber’s imposition of the maximum and very severe sentences, respectively.’⁶⁹ The Tribunal continued with a puzzling reference to the death penalty: ‘The fact that criminal statutes in both the former Yugoslavia and in Rwanda provided for capital punishment in the case of intentional homicide has raised problems for both tribunals in their approach towards sentencing, as well as for the domestic tribunals should they ever obtain convictions for such offences.’⁷⁰ Article 25 speaks of ‘the general

⁶⁷ *Prosecutor v. Serushago*, *supra* note 64, para. 17 (reference omitted). The Trial Chamber’s description of the Rwandan legislation is incomplete and misleading. Pursuant to the Organic Law No. 08/96 of 30 August 1996 on the Organization of Prosecutions for Offences Constituting the Crime of Genocide or Crimes Against Humanity Committed Since 1 October 1990, *Journal Officiel* (Rwanda), 35th year, No. 17, 1 September 1996, offenders in all four categories may reduce their sentences by pleading guilty to the charges.

⁶⁸ *Prosecutor v. Kayishema and Ruzindana*, *supra* note 1, para. 6.

⁶⁹ *Ibid.*, at para. 7.

⁷⁰ *Ibid.*

practice regarding prison sentences', and nothing in its terms indicates that the Tribunals should attribute any relevance to the existence of capital punishment in those states. Yet the implicit message in these decisions of the Rwanda Tribunal is that, given domestic convictions to the death penalty, offenders before the international tribunal should consider themselves lucky to receive terms of life imprisonment.

4 National Practice and the International Criminal Court

The draft statute for an international criminal court submitted by the International Law Commission to the General Assembly in 1994 contained a general sentencing provision allowing for terms of detention up to life imprisonment, a specified period of incarceration, and a fine. In fixing the sanction, the Court was invited to consider the national law of the state of which the offender was a national, the state where the crime was committed, and the state with custody of and jurisdiction over the accused.⁷¹

Delegates to the Ad Hoc Committee of the General Assembly, which met during 1995 to study the International Law Commission draft statute, stated that a procedural instrument enumerating rather than defining the crimes might not respect *nulla poena sine lege*.⁷² They said the statute needed not only maximum but also minimum penalties.⁷³ At the August 1996 session of the Preparatory Committee, some delegations warned that the International Law Commission provision proposal might lead to vagueness and imprecision, which could be contrary to the principle of legality. In addition, they cited the danger of inequality and inconsistency, because national laws vary considerably as to sentences, even for the most severe crimes. Some urged recourse be made to national law on a subsidiary basis, but only if it did not run counter to international criminal law. The report noted: 'One suggestion was that the draft statute should include an international standard for the various crimes; the jurisprudence and the experience of the Court could gradually expand this area. Another view, however, considered that the "renvoi" (referral) to national legislation could constitute a compromise among differing concepts and a solution to the difficult problem of determining the gravity of penalties.'⁷⁴

The Working Group on General Principles of the Preparatory Committee, which met in February 1997, proposed a text recognizing the norm *nullum crimen sine lege*. It did not speak directly to the *nulla poena* portion of the principle of legality except

⁷¹ 'Report of the International Law Commission on the Work of its Forty-Sixth Session', vol. II, UN Doc. A/CN.4/SER.A/1994/Add.1, Article 47.

⁷² 'Report of the Ad Hoc Committee on the Establishment of an International Criminal Court', UN Doc. A/50/2, 11, para. 57.

⁷³ *Ibid.*, at 36, para. 187.

⁷⁴ 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', vol. I, UN Doc. A/51/22, para. 308. The issue of whether customary international law sets out penalties for those who have committed international crimes was also considered by the Preparatory Committee: *ibid.*, at para. 190.

indirectly, stating that '[c]onduct shall not be construed as criminal and sanctions shall not be applied under this Statute by a process of analogy'.⁷⁵

The question of national practice was again discussed at the December 1997 session of the Preparatory Committee. As the chair of the Working Group explained on 10 December 1997, there were two basic approaches but no consensus.⁷⁶ The first option built upon the provision in the International Law Commission draft. Where the Commission had said the Court 'may' refer to national law, the Preparatory Committee considered an alternative, whereby the Court would be required to impose the highest penalty provided for under the applicable national law.⁷⁷ The second option eliminated all reference to national law. The chair also noted that Article 33 of the International Law Commission's draft statute contained a provision entitled 'applicable law' (Article 33), instructing the Court to apply the statute, applicable treaties, general international law and, 'to the extent applicable, any rule of national law'. It was suggested that the reference in Article 33 would be sufficient, and that no further mention of national law in the sentencing provision be included. A footnote to the second option said: 'Consideration could be given to inserting an express provision to this effect.'⁷⁸

At the Rome Diplomatic Conference, only a few states spoke in favour of some recognition of national practice in determining sentences.⁷⁹ Others opposed the provision, some because it raised problems with the right to equality, and others because they believed that the proposed reference to national law as a kind of residual source set out in the provision on applicable law.⁸⁰ It was also argued that the principles behind the provision could be adequately replaced by incorporating a specific article setting out the *nulla poena* rule,⁸¹ which had been proposed by Mexico.⁸² A few days later, the chair urged delegates to agree to delete the national practice provision, 'because there is no consensual basis' and because it rendered discussion of the general sentencing provision more complex. Sudan initially refused to join consensus on this, but backed down after being begged by the chair.⁸³

Thus, the provision dealing with national practice was ultimately deleted from the Rome Statute. The concerns of those who preferred its retention are to some extent reflected elsewhere in the Statute. Subparagraph 21(1)(c) of the provision entitled 'applicable law' describes, as a tertiary source for the Court, 'general principles of law

⁷⁵ 'Decisions Taken by the Preparatory Committee at its Session Held 11 to 21 February 1997', Annex II, UN Doc. A/AC.249/1997/L.5, 18, para. 1; UN Doc. A/AC.249/1997/WG.2/CRP.1.

⁷⁶ Author's notes of 10 December 1997 meeting of Preparatory Committee.

⁷⁷ UN Doc. A/AC.249/1997/WG.6/CRP.9.

⁷⁸ 'Draft Statute for the International Criminal Court', UN Doc. A/CONF.183/2/Rev.1, 123.

⁷⁹ Oman, Kuwait (author's notes of 30 June 1998 a.m. meeting of Working Group).

⁸⁰ Congo (DR), Cuba, France, Hungary, Israel, Portugal, Sierra Leone, Singapore and Uruguay (author's notes of 30 June 1998 morning meeting of Working Group); Chile, the Philippines and the Russian Federation (author's notes of 30 June 1998 afternoon meeting of Working Group).

⁸¹ Russian Federation (author's notes of 1 July 1998 afternoon meeting of Working Group).

⁸² 'Proposal submitted by Mexico', UN Doc. A/CONF.183/C.1/WGP/L.4.

⁸³ Author's notes of 3 July 1998 evening meeting of Working Group.

derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of states that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards'.⁸⁴ Article 23, which was added at the Rome Conference, states succinctly: '*Nulla poena sine lege*. A person convicted by the Court may be punished only in accordance with this Statute.'⁸⁵

5 Conclusions

At Nuremberg, Nazi criminals were executed for crimes that were defined for the first time in the London Agreement, well after the offences had been committed. The closest prior positive norms underpinning these new texts were in the Hague Regulations of 1907, but the latter provided no guidance in terms of appropriate penalties. A breach of the principle of legality? That is what the accused argued, but these pleas were dismissed. In any case, the retroactivity argument can only really be invoked once. As of the International Military Tribunal's judgment of 30 September–1 October 1946, potential offenders have been put on notice that war crimes and crimes against humanity are subject to the most severe sanctions. According to the European Court of Human Rights in a series of recent decisions, this is all that is required by the rule *nullum crimen, nulla poena sine lege*. The law must be 'accessible' and it must be 'foreseeable'.⁸⁶ Since 1946, can any serious human rights offender claim that it is not?

Yet nearly 50 years after Nuremberg, the Security Council was sufficiently troubled by the idea that terms of imprisonment for such crimes might offend the principle that it included a requirement in the statutes of the ad hoc tribunals requiring them to have 'recourse' to 'national practice'. The provisions quickly proved themselves to be virtually unworkable. In the case of the former Yugoslavia some of the crimes were not even defined in national law. In the case of Rwanda, there had been no domestic implementation whatsoever of international crimes. In the result, the tribunals made the unsurprising conclusion that the crimes within their jurisdiction were subject to the most severe penalties, something that was hardly a discovery given that the prevailing view is that the statutes allow for terms of life imprisonment.

The reference to national practice was thus unnecessary, an unfortunate gesture to appease a spirit of zealous positivism, something a Francophone jurist has referred to sarcastically as an *obsession textuelle*. On this point, the Yugoslavia Tribunal in *Erdemović* grasped the problem, cautioning against excessive application of the *nulla poena* rule. Its reference to the Netherlands court in 1949 saying 'there is nothing absolute in that principle' is surely most helpful. It recalls the writing of Hans Kelsen at

⁸⁴ 'Rome Statute of the International Criminal Court', UN Doc. A/CONF.183/9.

⁸⁵ *Ibid.* See Schabas, 'Article 23', in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article* (1999).

⁸⁶ *S.W. v. United Kingdom*, 335-B, ECHR (1995) Series A, §§ 35–36. Also *C.R. v. United Kingdom*, 335-B, ECHR (1995) Series A, §§ 33–34.

the time of Nuremberg, who noted that *nullum crimen nulla poena* was a principle of justice, and that justice required the punishment of the Nazi criminals.⁸⁷

Unfortunately, the tribunals have taken the reference to national practice, which was solely motivated by a desire to ensure respect of the *nulla poena* rule, and stood it on its head. From a provision intended to protect the accused from abusive punishment, the tribunals have twisted it into an additional argument in favour of severity. The International Criminal Tribunal for Rwanda has been particularly at fault in this respect, regularly reminding the convicted prisoner that had the trial taken place under national law the death penalty would be the likely sanction. Yet the Statute says nothing about capital punishment, and instructs the Tribunal to consider 'the general practice regarding *prison* sentences'. Here, the Rwanda Tribunal appears to have made no effort whatsoever to determine what this practice might have been prior to the genocide. If the ad hoc Tribunals intend to send a message of harsh punishment, they should find other support than the national practice provision of their statutes.

⁸⁷ Kelsen, 'Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?', 1 *International Law Quarterly* (1947) 153, at 165.

