

***NULLUM CRIMEN NULLA POENA SINE LEGE* PRINCIPLE AND THE ICTY AND ICTR**

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Volume 15, numéro 1, 2002

URI : <https://id.erudit.org/iderudit/1069418ar>

DOI : <https://doi.org/10.7202/1069418ar>

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Éditeur(s)

Société québécoise de droit international

ISSN

0828-9999 (imprimé)

2561-6994 (numérique)

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Citer cet article

Endo, G. (2002). *NULLUM CRIMEN NULLA POENA SINE LEGE* PRINCIPLE AND THE ICTY AND ICTR. *Revue québécoise de droit international / Quebec Journal of International Law / Revista quebequense de derecho internacional*, 15(1), 205–220. <https://doi.org/10.7202/1069418ar>

Résumé de l'article

Comparativement à d'autres sujets relevant de la juridiction du TPIY et du TPIR, le régime des peines des tribunaux *ad hoc* n'a pas fait l'objet de maintes discussions dans la littérature spécialisée. Les statuts respectifs des tribunaux *ad hoc* prévoient, entre autres, une référence au droit national en ce qui a trait aux peines. Selon l'auteur, l'application des articles des statuts et des règlements de preuve et de procédure, contreviendrait à certains égards au principe *nullum crimen nulla poena sine lege*. En effet, l'objectif en matière de peine sous-tendant les précédents issus de la deuxième guerre mondiale ne reflète plus les normes actuelles du droit international. De plus, une interprétation incongrue des peines applicables aux TPIR et TPIY engendre une apparence d'injustice, ce qui compromet l'héritage des Tribunaux *ad hoc*. Enfin, un accusé pourrait en toute légitimité attaquer la légalité de l'article 101 des règles de preuve et de procédure, qui fait référence au concept d'emprisonnement à perpétuité, et ce en plaidant la violation du principe de légalité. Par conséquent, les dispositions des Statuts du TPIR-TPIY doivent être amendées.

NULLUM CRIMEN NULLA POENA SINE LEGE PRINCIPLE AND THE ICTY AND ICTR

*By Guillaume Endo**

Not many scholarly writings deal with sentencing practices of the ICTY and the ICTR¹. When compared to frequently discussed topics within the subject matter jurisdiction of the *ad hoc* Tribunals, they are relatively scarce. Both of these Tribunals' Statutes provide a sentencing regime encompassing, *inter alia*, a reference to national sentencing practice. It is the author's view that the provisions of the statutes and rules of procedure and evidence may violate the *nullum crimen nulla poena sine lege* principle in certain respects. Without a doubt, the rationale underlying the Second World War precedents with respect to sentencing does not accurately reflect the status of international law norms today. As such, the evolvement of human rights law must be reflected in the current sentencing practice of the *ad hoc* Tribunals. Moreover, the ICTY and ICTR interpretation of the international sentencing mechanism provides inconsistent justice, which in turn harms the legacy of these *ad hoc* Tribunals. In fact, an accused could successfully argue that life imprisonment as provided by rules 101 of the Rules of Procedure and Evidence of both ICTY and ICTR are not prescribed by law. Accordingly, the ICTY and ICTR provisions regarding sentencing should be amended.

Comparativement à d'autres sujets relevant de la juridiction du TPIY et du TPIR, le régime des peines des tribunaux *ad hoc* n'a pas fait l'objet de maintes discussions dans la littérature spécialisée. Les statuts respectifs des tribunaux *ad hoc* prévoient, entre autres, une référence au droit national en ce qui a trait aux peines. Selon l'auteur, l'application des articles des statuts et des règlements de preuve et de procédure, contreviendrait à certains égards au principe *nullum crimen nulla poena sine lege*. En effet, l'objectif en matière de peine sous-tendant les précédents issus de la deuxième guerre mondiale ne reflète plus les normes actuelles du droit international. De plus, une interprétation incongrue des peines applicables aux TPIR et TPIY engendre une apparence d'injustice, ce qui compromet l'héritage des Tribunaux *ad hoc*. Enfin, un accusé pourrait en toute légitimité attaquer la légalité de l'article 101 des règles de preuve et de procédure, qui fait référence au concept d'emprisonnement à perpétuité, et ce en plaidant la violation du principe de légalité. Par conséquent, les dispositions des Statuts du TPIR-TPIY doivent être amendées.

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The author would like to thank Sandra Leduc and Martin Petrov, who previously served as law clerks at the ICTY, for their collaboration and constructive comments on earlier versions of this article.

The views expressed herewith are those of the author in his personal capacity and do not necessarily represent those of any organizations with which he was affiliated.

¹ The full names of the ICTY and the ICTR are the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, hereinafter ICTY and ICTR, respectively.

Introduction

Amid serious violations of international humanitarian law committed in the territory of the former Yugoslavia and in the territory of Rwanda, the UN Security Council created two *ad hoc* International Criminal Tribunals in accordance with Chapter VII of the United Nations Charter². The only two modern precedents were the Nuremberg and Tokyo Tribunals, which differed greatly from the Rwandan and Yugoslavian International Tribunals on issues ranging from jurisdiction to the defendants targeted³. Article 27 of the Statute of the Nuremberg Military Tribunals provided that “[t]he tribunal shall have the right to impose upon a Defendant, on conviction, death or such other punishment as shall be determined by it to be just”⁴. Since the promulgation of article 27, the mechanisms with respect to the penalties set forth in international criminal law have evolved significantly. For one, the death penalty has clearly been excluded as a potential sentence⁵. Nevertheless, it remains to be seen whether the underlying rationale behind article 27 of the Statute of the Nuremberg Military Tribunals has really changed, and is, at the very least, in line with current international human rights norms.

The principle of *nulla poena sine lege* requires that no punishment be carried out unless done so in accordance with a law that is certain and unambiguous. Since the creation of international criminal tribunals, this principle has received much support at the international and domestic stagefront. Given this, one must seriously question the wisdom behind certain provisions of the ICTY and ICTR Rules of Procedure and Evidence (hereinafter the “Rules”). While a plain reading of these provisions does not violate the *nulla poena sine lege* principle *per se*, subsequent interpretation has certainly cast doubt on the legality of the provisions. This article focuses on the accused’s perspective as to whether the respect of the *nulla poena sine lege* principle is guaranteed by the sentencing practice of the current international criminal tribunals and raises other problematic issues relating to the sentencing regime of the ICTY and ICTR.

² See United Nations Security Council Resolution 827 on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, SC Res. 827, UN SCOR, 1992, Supp. No. 48, UN Doc. S/RES/827 (1992); See also United Nations Security Council Resolution 955 Establishing the International Tribunal for Rwanda (with Annexed Statute), SC Res. 955, UN SCOR, Supp. No. 49, UN Doc. S/RES/955 (1994).

³ See *First Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991*, UN SCOR, 1994, Supp. No. 29, UN Doc. A/49/342 - S/1994/1007 (1994), para. 10, 19-21 [*First Annual Report*]; See also Michael Scharf and Valerie Epps, “The International Trial of the Century? A Cross-Fire Exchange on the First Case Before the Yugoslavia War Crimes Tribunal” (1996) 635 *Cornell Int’l L.J.* 644 [Scharf/Epps].

⁴ Article 27 of the Nuremberg Charter in *Trials of war criminals before the Nuremberg Military Tribunals under Control Council law no. 10 : Nuremberg, October 1946-April 1949, Procedure and Practice and Administration*, Volume XV, Washington : U.S. Govt. Print. Off., 1949-1953 at 16.

⁵ See *First Annual Report*, *supra* note 3 at para. 25.

The first and second Part summarize the *nullum crimen nulla poena sine lege* principle and its evolution in international law. The third, fourth, and fifth Part review the legality of the current system by analyzing, criticizing and refuting ICTY and ICTR practice with regards to rule 101 of the Rules and the use of national practice provisions. Finally, the sixth and seventh Part address elements of comparative law and other issues relating to sentencing disparity.

I. The Maxim Nullum Crimen Nulla Poena Sine Lege

Authors have usually dealt with the principle of *nulla poena sine lege* together with its counterpart *nullum crimen sine lege*⁶. Both are referred to as the principle of non-retroactivity in common law jurisdictions, and the *principe de légalité en droit pénal* in civil law systems⁷. These principles developed during the enlightenment period as protection against arbitrary acts and extraordinary penalties⁸, state that “substantive crimes [*nullum crimen*] and punishments [*nulla poena*] must be enacted before the commission of an offence [*sine lege*] and that the criminal tribunal must be established by law”⁹. In other words, they “[require] that punishments for criminal acts must be laid down in law when the crime was committed in order that the Court may mete out the punishment”¹⁰. Put another way, “there can be no crime or punishment unless it is in accordance with law that is certain, unambiguous and not retroactive”¹¹. The Supreme Court of Canada explains:

The rationale underlying this principle is clear. It is essential in a free and democratic society that citizens are able, as far as is possible, to foresee the consequences of their conduct in order that persons be given fair notice of

⁶ See William A. Schabas, “Perverse effects of the Nulla Poena principle : National Practice and the Ad Hoc tribunals” (2000) 11 E.J.I.L. 522 [Schabas, “Perverse effects of the Nulla Poena principle”]; See in general Robert Kolb, “The jurisprudence of the Yugoslav and Rwandan Criminal Tribunals on their jurisdiction and on International Crimes” (2000) 71 Brit. Y.B. Int’l L. [Kolb]; Kai Ambos, “Establishing an International Criminal Court and an International Criminal Code- Observations from an International Criminal Law Viewpoint” (1996) 7 E.J.I.L. [Ambos]; Daniel Mac Sweeney, “International Standards of Fairness, Criminal Procedure and the International Criminal Court” (1997) 68 Rev. I.D.P. 233 [Mac Sweeney]; Patrice Rolland, “Article 7” in Louis-Edmond Pettiti, Emmanuel Decaux and Pierre-Henri Imbert, *La Convention européenne des droits de l’homme - Commentaire article par article*, 2nd ed. (Paris: Economica, 1999) 293, at 293 [Rolland]; M. Cherif Bassiouni and Christopher L. Blakesley, “The Need for an International Criminal court in the New International World Order” (1992) 25 Vand. J. Trans’l L. 176 [Bassiouni/Blakesley]; William A. Schabas, “Sentencing by international tribunals: a human rights approach” (1997) 7 Duke J. Comp. & Int’l L. 509. [Schabas, “Sentencing by international tribunals”].

⁷ See Mac Sweeney, *supra* note 6 at 266.

⁸ See Kolb, *supra* note 6 at 261 and also at 20 where the author further adds: “The formula was coined by J.P.A. von Feuerbach (Lehrbruch des peinlichen Rechts (1801))”.

⁹ See Mac Sweeney, *supra* note 6 at 266.

¹⁰ See Schabas, “Sentencing by international tribunals,” *supra* note 6 at 469.

¹¹ *Reference Re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 [*Reference case*].

what to avoid, and that the discretion of those entrusted with law enforcement is limited by clear and explicit legislative standards [...].¹²

In Europe, the *nullum crimen nulla poena sine lege* principle is “absolute”¹³ to the extent that Art. 15§2 of the *European Convention on Human Rights* (ECHR) prohibits derogation from it “in times of war or other public emergency threatening the life of the nation”¹⁴. The European Court of Human Rights addresses the issue in terms of *accessibility and foreseeability*¹⁵. Furthermore, the principle is entrenched in many other international instruments, such as the Universal Declaration of Human Rights¹⁶, the *African Charter*¹⁷, and the *International Covenant on Civil and Political Rights*¹⁸.

In domestic jurisdictions, the maxim *nullum crimen nulla poena sine lege* has developed around the doctrine of “impermissibly vague laws”¹⁹ - vague laws that are deemed void because they constitute a denial of due process of law²⁰. In the United States, the *nullum crimen nulla poena sine lege* principle encapsulated in the Constitution’s Ex Post Facto Clause²¹. At the domestic level, the right is entrenched in 92 national constitutions²². Despite this overwhelming recognition, international law and municipal law seem to have evolved differently.

II. Status of the Principle Nullum Crimen Nulla Poena Sine Lege Today: The Ad Hoc Tribunals

Respect of the principle and its application have not always been clearly set out in international law: “It has even been suggested that the [*nullum crimen nulla poena sine lege*] principle had no standing in the international criminal procedure”²³.

¹² *R. v. McDonnell*, [1997] 1 S.C.R. 948.

¹³ Rolland, *supra* note 6 at 297.

¹⁴ See Council of Europe, C.A., U.N.T.S. 213, 1950 *European Convention of Human Rights*, (1950) at s. 7(1) [ECHR].

¹⁵ See *Baskaya and Okcuoglu v. Turkey* (1999), IV Eur. Ct. H.R. (Ser. A) 263 at para. 36 [Baskaya].

¹⁶ See *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948), s. 11 [UDHR].

¹⁷ See OAU, *African [Banjul] Charter on Human and Peoples’ Rights*, OAU Doc. CAB/LEG/67/3 s. 7.

¹⁸ See *International Covenant on Civil and Political Rights*, Dec. 19, 1966, 999 U.N.T.S. 171, arts. 9-14, s. 15 [ICCPR].

¹⁹ See e.g. *Reference case*, *supra* note 11; *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972) [Papachristou].

²⁰ See e.g. *Reference case*, *supra* note 11; *Papachristou*, *ibid.*; *Baskaya*, *supra* note 15 at para. 36; *Cantoni v. France* (1996), IV Eur. Ct. H.R. (Ser. A) 1627 (“...the S.W. and C.R. v. the United Kingdom judgments of 22 November 1995, Series A nos. 335-B and 335-C, pp. 41-42, § 35, and pp. 68-69, § 33, respectively.” at para. 29).

²¹ See e.g. *Wilbert K. Rogers, Petitioner v. Tennessee, On writ of certiorari to the supreme court of Tennessee, Western division*, 992 S.W. 2d 393 (U.S. 14 May, 2001).

²² See *Mac Sweeney*, *supra* note 6 at 266.

²³ See Kolb, *supra* note 6 at 261, footnote 11; See also William A. Schabas, “International sentencing: From Leipzig (1923) to Arusha (1996)” in Cherif Bassiouni, *International Criminal Law*:

With respect to the *nulla poena sine lege* principle in particular, according to professor Schabas:

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. 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.²⁴

Thus, the argument that the crimes were sufficiently grave was enough to deprive a defendant of a clearly set out punishment²⁵. In other words, “the attacker must know that he is doing wrong, and so far from being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished”²⁶.

The *ad hoc* tribunals seem to have followed this line of reasoning. In *Delalic*²⁷, the Appeals Chamber held: “[T]he governing consideration for the operation of the *nullum crimen sine lege* principle is the existence of a punishment with respect to the offence. There can be no doubt that the maximum sentence permissible under the Rules is “imprisonment for [...] the remainder of a convicted person’s life” for crimes prosecuted before the tribunal, and any sentence up to this, does not violate the principle of *nulla poena sine lege*²⁸. Therefore, the position taken by the *ad hoc* tribunal is bound to be challenged as the Tribunal applies a very lenient test of legal conformity to the *nulla poena sine lege* requirement, and upholds the traditional “heavier penalty” rationale of the Nuremberg and Tokyo tribunals.

Enforcement, 2nd edition, vol.3 (Ardsley N.Y.: Transnational Publishers, Inc., 1999) at 175 [Schabas/Bassiouni, “International sentencing”].

²⁴ See Schabas, “Perverse effects of the Nulla Poena principle,” *supra* note 6 at 523.; See also *Report of the International Law Commission regarding its Forty-Eighth Session, 6 May –26 July 1996*, UN Doc A/50/10, 29-30.

²⁵ See the explanation given by the Appeals Chamber in *The Prosecutor v. Zejnil Delalic et al. (Celibici)*, *Appeal Judgement* (2001), Case No. IT-96-21A (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber) at footnote 1398 [*Celibici*]; See also the Nuremberg Judgement which found that it is “a principle of justice above all; where there can be no doubt that the defendants knew that they were committing a wrong condemned by the international community, it is not unjust to punish them despite the lack of highly specified international law.” *1 Trial of the Major War Criminals Before the International Military Tribunal*, 218-223 (1947). See *Nuremberg Judgement*, at 49. Affirmed in Report of the Sixth Committee, UN GAOR, 1st Sess, pt. 2, 55th Plen mtg at 1144, U.N.Doc. A/236 (1946), GA Res. 95, UN Doc A/64/Add.1 (1946)”.

²⁶ See Schabas, “Perverse effects of the Nulla Poena principle,” *supra* note 6 at 523.

²⁷ See *Celibici*, *supra* note 25 at para. 817.

²⁸ *Ibid.*

III. The statutory and regulatory provisions

Since the provisions of both *ad hoc* tribunals are the same, save a few minor exceptions, reference will be made to the ICTY articles.

Article 24 of the Statute of the ICTY provides:

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 (ICTR: “in the courts of Rwanda”)
2. In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.
3. In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.

Rule 101 of the ICTY:

- (A) A convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person’s life. (ICTR: “for a fixed term or the remainder of his life”).
- (B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in article 24, paragraph 2, of the Statute, as well as such factors as:
 - (i) Any aggravating circumstances;
 - (ii) Any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction;
 - (iii) The general practice regarding prison sentences in the courts of the former Yugoslavia;
 - (iv) The extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in article 10, paragraph 3, of the Statute.
- (C) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal.

Essentially, these provisions stipulate that sentences be limited to imprisonment up to the remainder of a person’s life, and that the Trial Chamber take into account the “general practice” of the criminal courts in the former Yugoslavia or

Rwanda. Case law has defined “general practice” as provision of general guidance which does not bind a Trial Chamber to act exactly as a court of the former Yugoslavia would; and which “only obliges the Trial Chambers to take account of that practice”²⁹.

IV. Nulla Poena Sine Lege: Prescribed by Law?

The *Delalic*³⁰ judgement cited above assumes that the term “life” (imprisonment), encompassed in the rules, is sufficient to safeguard the accused’s rights as the penalty is prescribed by law. However, the rationale only works if the assumption is accurate. Legislative bodies can only act within the boundaries of their statutory authority³¹. Thus, judges’ jurisdiction to “adopt rules of procedure and evidence”³² cannot exceed what is provided for by statute. The ICTY Statute stipulates that “[t]he penalty imposed by the Trial Chamber shall be limited to imprisonment”³³, without further specifying the scope of the penalties. article 15 of the Statute provides judges with legislative powers, but only in regards to adopting rules of procedure and evidence for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters. Therefore, statutory penalties are clearly excluded³⁴. Why, then, does rule 101 of the rules add a statutory requirement of life imprisonment? This is particularly troublesome in light of the fact that from the outset, some representatives to the International Law Commission opposed life imprisonment³⁵. Moreover, the Security Council resolutions 808 and 827 do not provide judges with legislative powers of such a substantial nature³⁶. By way of

²⁹ See *Celibici*, *supra* note 25 at para. 813; *Affirming Prosecutor v. Omar Serushago, Sentencing Appeal Judgement* (2000), Case No. IT-98-39-A (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber) at para. 30; See also *Prosecutor v. Dusko Tadic Judgement in Sentencing Appeals* (2000), Case No. IT-94-1 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) at para. 21 [*Tadic in Sentencing Appeals*].

³⁰ See *Celibici*, *supra* note 25 at para. 817.

³¹ See *Prosecutor v. Dusko Tadic, Decision on the Defence Motion on Jurisdiction* (1995) Case No. IT-94-1 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) (“Support for the view that the Security Council cannot act arbitrarily or for an ulterior purpose is found in the nature of the Charter as a treaty delegating certain powers to the United Nations. In fact, such a limitation is almost a corollary of the principle that the organs of the United Nations must act in accordance with the powers delegated them. It is a matter of logic that if the Security Council acted arbitrarily or for an ulterior purpose it would be acting outside the purview of the powers delegated to it in the Charter” at para. 15). See also *Prosecutor v. Dusko Tadic, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction* (1995), Case No. IT-94-1-A (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber) at para. 28.

³² ICTY Statute, s. 15.

³³ ICTY Statute, s. 24.

³⁴ See the preamble of the International Criminal Tribunal for the Former Yugoslavia Statute, online: United Nations <<http://www.un.org/icty/basic/statut/statute.htm>> which specifically states that the Tribunal “shall function in accordance with the provision of the present statute”.

³⁵ See American Bar Association, *Task Force on an International Criminal Court* (Washington: American Bar Association, 1995) at 276 [American Bar Association].

³⁶ See *United Nations Security Council Resolution 827 on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law*

analogy, could a rule create a new crime? Since life imprisonment was deemed cruel in the former Yugoslavia³⁷, the rule-adjusted-penalty enshrined in rule 101 is arguably in violation of the statutory reference to the “general practice regarding prison sentences in the courts of the former Yugoslavia” and thus is not *prescribed by law*. Since the ICTR has already handed down several life imprisonment sentences³⁸, appeals to these sentences may be launched on the grounds that the principle of legality has been violated³⁹. But there is more. In fact, other grounds of challenge stem directly from human rights concerns.

V. Nullum Crimen Nulla Poena Sine Lege and the International Human Rights Law

The way in which sentencing provisions of the statutes and rules have been drafted also begs the question as to whether they are sufficiently clear and precise to safeguard the accused’s fundamental rights. While *ad hoc* Tribunals are not human rights bodies charged with the general responsibility of upholding human rights⁴⁰, they are not authorized to dismiss human rights law⁴¹ :

Human rights law has its own contribution to make to the debate, by its prohibition of punishment which is ‘cruel, inhuman and degrading’.

Although this is a norm which remains subject to a degree of vagueness and imprecision, and one which is also liable to evolve over time, clearly punishment which is disproportionate or arbitrary is unacceptable.⁴²

Committed in the Territory of the Former Yugoslavia, SC Res. 827, UN SCOR, 1992, Supp. No. 48, UN Doc. S/RES/827 (1992); *Security Council Resolution 808 on Yugoslavia*, SC Res. 808, UN SCOR, 1993, Supp. No. 1 UN Doc. SC/5558 (1993).

³⁷ See Schabas, “Perverse effects of the Nulla Poena principle,” *supra* note 6 at 478.

³⁸ See e.g. *Prosecutor v. Akayesu, Judgement* (1998) Case No. ICTR-96-4-T (International Criminal Tribunal for Rwanda, Trial Chamber) [*Akayesu*]; *Prosecutor v. Kayishema and Ruzindana, Judgement* (1999), Case No. ICTR-95-1-T (International Criminal Tribunal for Rwanda, Trial Chamber) [*Kayishema*]; *Prosecutor v. Jean Kambanda, Judgement* (1998), Case No. ICTR 97-23-S (International Criminal Tribunal for Rwanda, Trial Chamber) [*Kambanda*].

³⁹ Here, though, the argument regarding the general practice is tempered for the case of Rwanda since the Rwandan legislation envisaged life imprisonment.

⁴⁰ See *Prosecutor v. Blagojevic, Obrenovic and Jokic, Decision on Application for leave to Appeal*, (2002), Case No. It-02-53-A65 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber) at 11.

⁴¹ See *Prosecutor v. Dusko Tadic, Appeal Judgement on Allegations of Contempt Against Prior Counsel, Milan Vujin* (2001), Case No. IT-94-1-A-AR77 (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber) “...the rules must be interpreted in conformity with the International Tribunal’s statute which, as the United Nation’s secretary-General states in his report of 3 May 1993(S/25704) must respect the *internationally recognized standards regarding the rights of the accused* including article 14 of the International Covenant on Civil and Political Rights... [...] ... article 14 of the International Covenant reflects an imperative norm of international law to which the Tribunal must adhere” at para. 13. See Schabas, “Perverse effects of the Nulla Poena principle”, *supra* note 6.

⁴² See Schabas, “Perverse effects of the Nulla Poena principle”, *supra* note 6 at 506.

The delicate act of balancing human rights concerns and desires to punish impunity has long been subject to debate. Professor Schabas explains:

That Article 25(1) was inspired by the *nulla poena* principle can be seen clearly in the *travaux préparatoires* of the Statute...The three CSCE *rapporteurs*, Hans Corell, Helmu 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. 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 not⁴³.

Evidently, the drafters of the ICTY Statute settled on the view that the *nulla poena sine lege* principle only required the establishment of a general penalty and a definite set of penalties was unnecessary⁴⁴. Hence, despite warnings, the drafters decided to exclude any precise sentencing norm⁴⁵, while inserting a reference to national practice. This scheme coupled with subsequent judicial interpretation⁴⁶ has been highly criticized. According to professor Bassiouni :

A more serious problem arises in that penalties for international crimes, such as those contained in articles 2 through 5, are only punishable by a maximum of 20 years under the applicable national criminal codes. A

⁴³ See *ibid.*, *supra* note 6 at 525.

⁴⁴ See Ambos, *supra* note 6 at 529.

⁴⁵ See for a detailed analysis regarding arguments opposing the exclusion of precise norms Schabas, "Perverse effects of the Nulla Poena principle," *supra* note 6 at 522-528. See also *American Bar Association*, *supra* note 35 ("The court should itself impose the sentence under a schedule of penalties specified by the court's statute. The penalties imposed would be severe but they would not include the death penalty" at 276); Bassiouni/Blakesley, *supra* note 6 ("The state whose substantive law, the general part, applies will also have its penalties apply. This will avoid the problem of codifying the general part of criminal law in view of the diversity of the various national criminal justice systems and in view of the diversity of penalties. It also provides a rational and logical nexus between the application of the law and the imposition of penalties to the place where the crime was committed. The notion of justice and fairness would be satisfied by this formula" at 175).

⁴⁶ See e.g. *Prosecutor v. Zejnil Delalic et al (Celibici)*, *Judgement* (1998), Case No. IT-96-21-T (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) at para. 1210 [*Celibici Judgement*]; *Prosecutor v. Todorovic, Sentencing Judgement* (2001), Case No. IT-95-9/1 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) at para. 107. See also *Tadic in Sentencing Appeals*, *supra* note 29 ("The question whether the Trial Chamber's discretion to impose a sentence of greater than 20 years is thus curtailed has been conclusively resolved by the Appeals Chamber, which has interpreted the relevant provisions of the Statute and Rules to mean that, while a Trial Chamber must consider the practice of courts in the former Yugoslavia, its discretion in imposing sentence is not bound by such practice" at para. 20).

higher penalty, which appears to be authorized by Rule 101(A), would violate principles of legality and the prohibition of *ex post facto* laws. Consequently, Rule 101 should be amended.⁴⁷

Furthermore, a mere reference to national law has often become somewhat of a fishing expedition for international judges⁴⁸. For instance, according to Morris, in two ICTR decisions, the ICTR judges wrongly interpreted and applied Rwandan law⁴⁹. According to the same author,

[p]erhaps most egregious, the ICTR, still in *Kambanda*, claims that 'according to the list drawn up by the Attorney General of Rwanda [...] Kambanda figures in Category One'. But the 'list' in question, drawn up pursuant to the Organic Law, is a list of persons *suspected* of Category One offences. To use that list as a legal finding that someone is a Category One perpetrator flagrantly violates the presumption of innocence and the core of due process.

⁴⁷ Cherif Bassiouni and Peter Manikas, *Law of the International Tribunal for the Former Yugoslavia*, (Ardley N.Y.: Transnational Publishers, 1995) at 702. *Contra Celibici Judgement*, *supra* note 46 ("The Trial Chamber disagrees with the above opinion as representing an erroneous and overly restrictive view of the concept of *nullum crimen sine lege*. This concept is founded on the existence of an applicable law. The fact that the new maximum punishment exceeds the erstwhile maximum does not bring the new law within the principle" at para. 1210).

⁴⁸ See Schabas, "Perverse effects of the Nulla Poena principle," *supra* note 6 ("Courts that feel compelled to devise legal effects for puzzling provisions often embark on a perilous adventure of judicial intervention and, it is submitted, this was the course chosen by the Yugoslavia Tribunal." at 529). See also Hervé Ascencio et Rafaëlle Maison, "L'activité des tribunaux pénaux internationaux" (1998) 44 A.F.D.I. 409-410 [Ascencio/Maison].

⁴⁹ Madeline H. Morris, "Rwandan Justice and the International Court" (1998-99) 5 ILSA J. Int'l & Comp. L. "And these inaccuracies are not trivial. For instance, in its *Kambanda* decision, the ICTR states: "Rwanda like all states that have incorporated crimes against humanity in their domestic legislation, has envisaged the most severe penalties in the criminal legislation for those crimes." In fact, Rwanda, has never enacted criminal legislation for genocide. While it has ratified the genocide convention, Rwanda never enacted implementing legislation. For that reason, when drafting the Organic Law to govern the genocide-related cases, we had to carefully avoid retroactivity and apply the regular Penal code offence elements and penalties to the crimes committed. Also, in the *Kambanda* decision, the ICTR actually misquotes the Rwandan Organic Law provision that defines *Category One* as the most culpable category of perpetrators who will be subject to the death penalty. The ICTR states that *Category One* perpetrators include those who *committed acts of sexual violence*. But that is not how the Organic Law reads. Rather, it reads: those who *committed acts of sexual torture*. The difference is very significant under Rwandan law. *Torture* committed in the course of another crime, gives rise to the death penalty under the Rwandan Penal Code; *violence* does not. Since *Category One* defendants are subject to the death penalty, the Organic Law would enact a retroactive increase in penalties if it reads *sexual violence* rather than *sexual torture*." at 352-353 [Morris].

Moreover, Schabas asks :

In the case of the Former Yugoslavia, the Statute was adopted on May 25, 1993, more than a year after the break-up of Yugoslavia. Is it the Statute's intent to contemplate general practice in Yugoslavia before its break-up or general practice in the successor states? This distinction could be relevant where the death penalty is concerned, because it was abolished in Slovenia, Croatia and Macedonia in 1990 and 1991.⁵⁰

While these authors outline a few shortcomings in the current ICTY and ICTR sentencing regime, ultimately, the question is whether the law is being coherently interpreted by the courts. When confronted with the reference to national practice, the Trial Chamber in *Erdemovic*⁵¹ was obviously ill-at-ease in dealing with a crime – in that case, crimes against humanity – which did not even exist in Yugoslavian law. For the Trial Chamber, “the only principle which should be given weight is this: that the code reserves its most severe penalties for crimes, including genocide, *which are of a similar nature to crimes against humanity*”⁵² (emphasis added). In a recent ruling, the European Court of Human Rights specifically warned member States that sentences construed by analogy could violate the *nulla poena sine lege* principle⁵³. Not only is a reasoning by analogy questionable, but it potentially violates the accused’s fundamental right to benefit from the lighter penalty⁵⁴.

Similarly, while clearly excluded from the range of penalties of the *ad hoc* Tribunals, the death penalty has continually raised problems. Since capital punishment prevails in Rwanda, the ICTR has tended to render harsher sentences⁵⁵. While the Statute is mute with respect to the death penalty, for Schabas, “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”⁵⁶. Arguably, it would be difficult for the Trial Chambers to find support in more recent interpreting tools.

VI. The Rome Statute of the International Criminal Court

The International Criminal Court (ICC) will be the first independent, permanent International Criminal Court in relationship with the United Nations system to have jurisdiction over the most serious crimes of concern to the international community as a whole. Given the current push for international

⁵⁰ See Schabas, “Perverse effects of the Nulla Poena principle”, *supra* note 6.

⁵¹ See *Prosecutor v. Drazan Erdemovic, Sentencing Judgement* (1996), Case No. IT-96-22 (International Tribunal for the Former Yugoslavia, Trial Chamber) [*Erdemovic Judgement*].

⁵² See *Erdemovic Judgement*, *supra* note 51 at para. 35.

⁵³ See *Baskaya*, *supra* note 15 at para. 42.

⁵⁴ See e.g. *ICCPR*, *supra* note 18 at s. 15; *UDHR*, *supra* note 16 at s. 11.

⁵⁵ See *Kayishema*, *supra* note 38 at para. 6-7; *Prosecutor v. Omar Serushago, Sentence* (1999) Case No. ICTR-98-39-S (International Criminal Tribunal for Rwanda, Trial Chamber) at para. 17.

⁵⁶ Schabas, “Perverse effects of the Nulla Poena principle,” *supra* note 6 at 539.

recognition of the ICC, one may endeavour to draw a parallel with the Rome Statute of the ICC⁵⁷. In comparison to the ICTY Statute, the Organic Law of the Rome Statute specifically provides imprisonment for a specified number of years, which may not exceed a maximum of thirty years, or a term of life imprisonment *when justified by the extreme gravity of the crime and the individual circumstances of the convicted person*⁵⁸. Thus, article 77 of the Rome Statute, which specifies the scope of the penalties is a significant beacon of reference with respect to the *nulla poena* principle⁵⁹. The Appeals Chamber in *Tadic*⁶⁰ explains the relevancy of the Rome Statute as follows:

[...] the [Rome] Statute [...] possesses significant legal value. The Statute was adopted by an overwhelming majority of the States attending the Rome Diplomatic Conference and was substantially endorsed by the Sixth Committee of the United Nations General Assembly. This shows that that text is supported by a great number of States and may be taken to express the legal position i.e. *opinio juris* of those States.⁶¹

In light of the fact that the Rome Statute has specifically avoided similar potential problems by, *inter alia*, precluding recourse to national practice provisions⁶² and providing clear guidelines, this begs the question as to whether article 24(1) of the ICTY Statute and article 23(1) of the ICTR Statute should be amended to provide similar safeguards for the accused. At least from a practical standpoint, more precise penalties would seem warranted.

VII. The need for better guidelines

Irrespective of whether or not both *ad hoc* Tribunals violate the *nullum crimen nulla poena sine lege* principle, the difficulties encountered thus far should weigh in favour of a Rule change. In fact, the question of hierarchy of crimes has not yet been settled: it seems that the ICTR has established a hierarchy of crimes in the following manner :

⁵⁷ *Rome Statute of the International Criminal Court*, 7 July 1998, U.N. Doc. A/CONF.183/9.

⁵⁸ See *Rome Statute of the International Criminal Court*, 7 July 1998, U.N. Doc. A/CONF.183/9, s. 77(1).

⁵⁹ See *Prosecutor v. Dusko Tadic, Appeal Judgement* (1999), Case No. IT-94-1-A (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber) at para. 223 [*Tadic Appeal*].

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

⁶² See Cherif Bassiouni, *The statute of the International Criminal Court : a documentary history / compiled by M. Cherif Bassiouni* (Ardsley N.Y.: Transnational Publishers, 1998), ("Moreover, the view was held that this kind of provision [Applicable national legal standards] should be avoided altogether"; and article 23 of the Rome Statute : "A person convicted by the Court may be punished only in accordance with this Statute" at 289, footnote 248).

- (i) the 'crime of crimes' i.e., genocide;
- (ii) crimes of an extreme seriousness, i.e., crimes against humanity; and
- (iii) crimes of a lesser seriousness, i.e., war crimes.⁶³

Interestingly, the ICTY has rejected such a scheme.⁶⁴

Arguably, the problem with the above approach lies in its lack of direction: A scale of seriousness of crimes would provide a basis for a precise hierarchy of crimes and provide better guidance on the determination of the sentences⁶⁵. For instance, in *Kvočka et al*⁶⁶, Dragoljub Prcać and Milojica Kos, were sentenced to five and six years respectively for, *inter alia*, persecution for murder, torture and beating, sexual assault and rape, harassment, humiliation and psychological abuse and confinement in inhumane conditions as a crime against humanity⁶⁷, while Zoran Zigic was sentenced to twenty years, albeit for the exact same statutory crimes⁶⁸. Convicted of crimes against humanity and war crimes, in *Jelisić*⁶⁹, the accused received a sentence of forty years imprisonment. Initially, Zlatko Alekovski⁷⁰ received a lenient sentence of two and a half years for a Violation of the Laws or Customs of War (outrages upon personal dignity)⁷¹. In *Krstić*⁷², for a conviction of Genocide, the accused General received a sentence of forty-six years. However, for the crime of Genocide, ICTR convictions have carried life-imprisonment term⁷³. Such

⁶³ Rolf Einar Fife, "Penalties" in Roy S. Lee, ed., *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (Ardsley N.Y.: Transnational Publishers Inc, 2001) 560 [Fife].

⁶⁴ See *Prosecutor v. Drazen Erdemovic, Judgement (Judge McDonald and Judge Vohrah)* (1997), Case No. IT-96-22-A (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber) at para. 20 [*Erdemovic Separate Opinion*]; *Prosecutor v. Antonio Furundzija, Appeal Judgement* (2000), Case No. IT-95-17/1A (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber) at para. 242 [*Furundzija*] citing *Tadic Appeal*, *supra* note 58 at para. 69 (emphasis added). Further argument in support of this view was set out in the Separate Opinion of Judge Shahabuddeen in *Furundzija*. See also *Prosecutor v. Dusko Tadic* (1999), Case No. IT-94-1-Tbis-R117 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber) Judge Robinson expressed the view that there is no basis for "the conclusion that, as a matter of principle, crimes against humanity are more serious violations of international humanitarian law than war crimes" at 10; *Prosecutor v. Drazen Erdemovic, Judgement* (1997), Case No. IT-96-22-A (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber) "The gravity of a criminal act, and consequently the seriousness of its punishment, are determined by the intrinsic nature of the act itself and not by its classification under one category or another." at para. 19; Fife, *ibid*.

⁶⁵ See Fife, *ibid*.

⁶⁶ See *Prosecutor v. Miroslav Kvočka et al, Judgement* (2001), Case No. IT-98-30/1 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber).

⁶⁷ *Ibid*.

⁶⁸ *Ibid*.

⁶⁹ See *Prosecutor v. Goran Jelisić, Judgment* (1999), Case No. IT-95-10-T (International Criminal Tribunal for the former Yugoslavia, Trial Chamber).

⁷⁰ See *Prosecutor v. Zlatko Aleksovski, Judgment* (1999), Case No. IT-95-14/1-T (International Criminal Tribunal for the former Yugoslavia, Trial Chamber) [*Alekovski*].

⁷¹ The Appeals Chamber subsequently imposed a sentence of seven years. See *Alekovski, ibid*.

⁷² *Prosecutor v. Radislav Krstić, Judgment* (2001), Case No IT 98-33 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber).

⁷³ See *Akayesu, Kayishema, Kambanda, supra* note 38.

discrepancies are the result of many variables, as there are no hard and fast rules on the point⁷⁴. Nevertheless, the vagueness of the statutory provisions combined with the lack of clear beacons of reference⁷⁵ from the trial chambers exacerbate the weaknesses of the sentencing regime⁷⁶. The Council of Europe in its recommendation No. R(92) acknowledged that in general, “unwarranted disparity and perceptions of injustice might bring the criminal justice system into disrepute”⁷⁷. This is particularly true in light of the fact that the Tribunals were ultimately established to restore and maintain peace⁷⁸. Moreover, disparity in sentencing raises the issues of proportionality in criminal punishment⁷⁹, equality before the law⁸⁰, as well as the accused’s right to benefit from the lighter penalty⁸¹ -three principles recognized in many international documents⁸². It is submitted that the current sentencing system of the ad hoc Tribunals raises various difficult questions of fairness for the accused. Therefore, we are of the view that in order to implement the

⁷⁴ See *Prosecutor v. Goran Jelusic, Appeal Judgment* (2001), Case No. IT 95-10-A (International Criminal Tribunal for the former Yugoslavia, Appeals Chamber) at para. 96.

⁷⁵ For instance, in *Erdemovic Separate Opinion, supra* note 64 at para. 20, a majority of the Appeals Chamber found that Crimes Against Humanity should attract a harsher penalty than War Crimes. The Appeals Chamber in *Furundzija, supra* note 63 at para. 242, later revised its earlier decision and held that “[T]here is in law no distinction between the seriousness of a crime against humanity and that of a war crime”. The Appeals Chamber found neither the Statute nor the Rules of the International Tribunal – construed in accordance with customary international law – provided any basis for such a distinction. The Court also determined that the authorized penalties were the same – the level in any particular case being fixed by reference to the circumstances of the case.

⁷⁶ Van Schaak notes that: “For example, in the Erdemovic case, the defendant was sentenced on appeal to only five years imprisonment for participating in the summary execution of potentially more than 1000 people in the aftermath of the fall of Srebrenica. The tribunal justified this result on the grounds that the accused had admitted liability, demonstrated genuine contrition, and co-operated with the prosecution by providing testimony against other accused; and on the basis of other personal circumstances of the accused.” *in*: Beth Van Schaak, “The Establishment of the Permanent International Criminal Court: an International Symposium” (1998-1999) 17 *Chinese Y.B. Int’l L. & Aff.* 33 [Van Schaak].

⁷⁷ See Council of Europe, “Consistency in Sentencing: Recommendation to Member States and Explanatory Memorandum” (1993) 4.1 *Crim. L.F.* 356. For Mac Sweeney, *supra* note 6, at 234, these goals “to punish those guilty of the most serious international crimes, to create precedents to deter potential future criminals, and to break the cycle of conflict and impunity which has ravaged our century would be brought under disrepute by an unfair system, or by the perception that there is an unfair system.”

⁷⁸ See e.g. *Celibici Judgement, supra* note 46 (“The policy of the Security Council of the United Nations is directed towards reconciliation of the Parties. This is the basis of the Dayton Peace Agreement by which all the parties to the conflict in Bosnia and Herzegovina have agreed to live together. A consideration of retribution as the only factor in sentencing is likely to be counter-productive and disruptive of the entire purpose of the Security Council, which is the restoration and maintenance of peace in the territory of the former Yugoslavia.” at para. 1231). See Leila Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millenium* (Ardsley N.Y.: Transnational Publishers, 2002) at 249 where the author states: “As others have noted, the work of the Court [ICC, which is akin to the work of the two ad hoc Tribunals] is not limited to the prosecution and punishment of individuals, but is intended to contribute to a normative framework to combat impunity, maintain international peace and security, and assist national reconciliation and truth finding. A just, consistent and proportionate practice will advance that goal.”

⁷⁹ See e.g. *ICCPR, supra* note 18, s. 7.

⁸⁰ See e.g. *UDHR, supra* note 16, s. 7.

⁸¹ See e.g. *ICCPR, supra* note 18, s. 15.

⁸² See e.g. *ibid.*, s. 7,15; *UDHR, supra* note 16, s. 7.

Tribunal's mandate, it is crucial that the Trial chambers establish a gradation of sentences⁸³.

* * *

Sentencing severity or leniency has important ramifications on all aspects of the criminal justice system. Thus, Trial Chambers should be highly alert to the practical disadvantages of having an unpredictable system with respect to sentencing. If they are to leave a fortified legacy, the *ad hoc* Tribunals must not appear to render inconsistent justice⁸⁴. Since "the Tribunal bears the strong imprint of the human rights *problématique* of the post-1945 period"⁸⁵, the Nuremberg precedents should not be given undue weight. In fact, "although the Judges of the International Tribunal looked to the Nuremberg and Tokyo tribunals when drafting the Rules, these tribunals provided only limited guidance"⁸⁶. Therefore, the rationale of the World War II military tribunals with respect to sentencing should not serve as the primary basis of analysis. In effect, some prominent human rights advocates now argue that "rigorous imprisonment" of even thirty years could infringe article 7 of the International Covenant, which prohibits cruel, inhuman and degrading punishment⁸⁷. This seems to stand in stark contrast to more traditional sentencing practices in the realm of international law where life imprisonment and the death penalty have prevailed⁸⁸. For Goldstone, "[...] in assessing the work of the *ad hoc* tribunals, the jury is still out. In my view, the members of that jury are the human rights communities of the free world"⁸⁹. If indeed the members of the jury are the human rights communities of the free world, we must be doubly wary of the fact that, as they currently stand, the ICTY and ICTR provisions dealing with sentencing are vague, imprecise, and difficult to interpret and, more importantly, their interpretation has rendered the sentencing

⁸³ See also *Alekovski*, *supra* note 70 at para. 243.

⁸⁴ See Van Schaak, *supra* note 76 ("The ICTY must also refer to the sentencing practice of the former Yugoslavia, although the judges are not bound by this. The result, however, may be the appearance of inconsistent justice" at 33-34).

⁸⁵ See *First Annual Report*, *supra* note 3 at para. 22.

⁸⁶ See *Prosecutor v. Dusko Tadic A/K/A "Dule"* (Decision On The Prosecutor's Motion Requesting Protective Measures For Victims And Witnesses) (1995), Case No. IT-94-I (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) at para. 21.

⁸⁷ See W.A. Schabas, "Sentencing by international tribunals," *supra* note 6 at 509.

⁸⁸ For a detailed analysis, see Schabas/Bassiouni, "International sentencing," *supra* note 23 at 175.

⁸⁹ See Richard Goldstone, "Assessing the work of the United Nations War Crimes Tribunal: Address of the Honorable Justice Richard Goldstone, Former Chief Prosecutor for the Ad Hoc International Tribunals for the Former Yugoslavia and Rwanda, and Justice of the Constitutional Court of South Africa" (1997) 33.1 *Stan. J. Int'l L.* 8. See also *First Annual Report*, *supra* note 3 at para. 25; Frederick Harhoff, "Legal and Practical Problems in the International Prosecution of Individuals" (2000) 69 *Nordic J. Int'l L.* 53-56. See generally Antônio Augusto Cançado Trindade, "The consolidation of the procedural capacity of individuals in the evolution of the international protection of human rights : Present state and perspectives at the turn of the century" (1998) 30.1 *Colum. H.R.L. Rev.* 1-27; Richard May and Marieke Wierda, "Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague and Arusha" (1998) 37 *Colum. J. Transnat'l L.* 732-733, 764-765.

regime less human rights-oriented and more focused on the traditional war-like rationale of sentencing⁹⁰. As the provisions now read, they are likely to provide fertile grounds of challenge for the human rights advocates and defence attorneys of the ICTY and ICTR.

⁹⁰ See Schabas/Bassiouni, "International sentencing," *supra* note 23 at 171.