

Nulla poena nullum crimen sine lege

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A. Concept

- 1 The principle of legality or *nullum crimen, nulla poena sine lege* covers both prohibited criminal conduct (*nullum crimen sine lege*) and sanctions for it (*nulla poena sine lege*). In its broadest sense, the principle of legality encompasses the following in respect of criminal provisions: (1) the principle of non-retroactivity (*nullum crimen, nulla poena sine lege praevia*); (2) the prohibition against analogy (*nullum crimen, nulla poena sine lege stricta*); (3) the principle of certainty (*nullum crimen, nulla poena sine lege certa*); and (4) the prohibition against uncoded, ie unwritten, or judge-made criminal provisions (*nullum crimen, nulla poena sine lege scripta*). In sum, this means that an act can be punished only if, at the time of its commission, the act was the object of a valid, sufficiently precise, written criminal law to which a sufficiently certain sanction was attached.

B. Theoretical Foundations

- 2 Various theories exist in support of the principle of legality. Among these, four broad currents are discernible which are not mutually exclusive.

1. Guarantee of Individual Liberties against State Arbitrariness

- 3 Most importantly, the *nullum crimen* principle is considered an indispensable tool for safeguarding individual liberties (Permanent Court of International Justice *Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City [Advisory Opinion of 4 December 1935]* 56). The enjoyment of individual liberties requires that citizens know

in advance their limits and the consequences for transgressing them. Here, the principle is destined to protect against State arbitrariness and provides individuals with foreseeability and calculability in the exercise of their rights. This protection is crucial within the realm of criminal law because this body of law expresses the highest legal condemnation of acts in a society and provides for the highest legal sanctions. While this approach may provide a plausible explanation for the principles of non-retroactivity, certainty, and the prohibition against analogy, it fails to serve as a theoretical foundation for the prohibition against uncodified criminal provisions, because it does not predetermine the legitimate originator of such a provision.

2. The Need for Fairness in Criminal Law

- 4 Given the function of criminal law in society, it is also an essential requirement of substantial fairness that the individual must be able to know beforehand whether his acts are liable to punishment. The legality principle is thus an important legitimacy factor of any system of criminal law.

3. Democracy and Separation of Powers

- 5 Concerned foremost about the separation of powers, philosophers of the Enlightenment derived the principle of legality from the social contract doctrine. In a state of nature, citizens agree to accept limitations to their liberties only in so far as this is necessary to ensure peaceful coexistence with other members of society. The legislator is the direct representative of the parties to the social contract and therefore the legitimate institution to limit liberties and determine which conduct is punishable. Consequently, it must be the legislator in these societies who defines as precisely as possible criminal conduct and sanctions for it. Judges may only apply laws enacted by the legislator. From this perspective, the *nullum crimen* principle serves to prevent judicial arbitrariness and activism. This approach, however, has difficulties explaining the prohibition against retroactive criminal legislative provisions, as these do not offend the separation of powers doctrine. Moreover, there is a tension between this explanation of the legality principle and the more recent developments of → *international criminal law* which are not created by an international legislature, but which are mainly driven by State governments. This does also not explain the acceptance of judicial law-making in the common law systems.

4. Purposes of Criminal Law

- 6 A fourth current of ideas locates the theoretical foundation of the legality principle in the specific characteristics of criminal law. This approach is closely linked to different conceptions of the purposes of criminal law. If the function of criminal law is to deter citizens from engaging in socially undesirable conduct (*negative Generalprävention*), criminal conduct and any consequent sanctions must be defined with sufficient precision before the commission of such criminal act. The prohibition against customary criminal provisions does not, however, seem to be logically entailed by this concept. The execution of a criminal penalty is less intended to deter potential delinquents than to stabilize shattered public confidence in the undiminished validity of the norm transgressed by an offender (*positive Generalprävention*). Such a reaction only seems to be necessary if the offender violated a pre-existing and sufficiently certain criminal provision.
- 7 The legality principle may finally be presented as a prerequisite of punishment as a just retribution for a wrongful act. This presupposes, however, that the concept of wrongfulness is understood in a legal manner. Conversely, in cases where the concept of wrongfulness is understood in moral rather than legal terms, the idea of retribution for moral wrongdoing through criminal law may give rise to calls for admitting exceptions to the legality principle.

C. Historical Development

1. Roman and Medieval Law as well as the *Jus Commune* in Continental Europe

- 8 Only rudimentary features of the legality principle can be found in Roman and Medieval Law. Criminal law was not confined to statutory regulation. To the extent that criminal offences were laid down in written form, a distinction that can be traced back to Cicero, was often made between statutes that constituted crimes and statutes that were merely declaratory of inherently criminal behaviour (*mala per se*). Non-retroactivity did not apply to the latter category. In the same vein, the *Constitutio Criminalis Carolina* (1532), the most important codification of criminal law in Germany at the time of the *jus commune*, contained a few elements pointing towards a growing adherence to the legality principle but clearly fell short of a full acceptance of this principle.

2. Enlightenment

- 9 Acceptance of the legality principle in its comprehensive sense is rooted in the period of Enlightenment and the social contract doctrine. It was the goal of limiting judicial power—as per the separation of powers doctrine—that paved the way for the first codifications of the legality principle. Montesquieu and, with specific regard to criminal law, Beccaria were key figures in this movement. It was Feuerbach, however, who first coined the Latin adagium *nullum crimen, nulla poena sine lege*.

3. The Development of the Common Law

- 10 The idea of law limiting the arbitrary exercise of the executive power first gained prominence in the Charter of Liberties of Henry I (1100), at a time when the baronial and knightly class opposed the arbitrary power of the monarchs. This Charter laid the foundation for Art. 39 of the Magna Carta Libertatum (1215), which guaranteed that no free man shall be deprived of his rights unless by legal judgment of his peers or by the law of the land. Whether and to what extent the Magna Carta can be seen as an early expression of the legality principle remains controversial. In spite of this guarantee, the Star Chamber operated for 200 years until 1641 and punished certain behaviour considered morally reprehensible irrespective of positive or common law. More importantly, the Magna Carta did not exclude customary law as the basis of criminal provisions. In fact, the major common law felonies, such as murder, rape, and burglary came into existence through case law. Over time, however, the theory of precedent and concern for legal certainty produced a fairly stable, predictable, and known set of crimes, much in line with the ideas underlying the *nullum crimen* principle. Because all felonies were punishable by death, this system did also not conflict with the main idea underlying *nulla poena*. This careful development of the law was accompanied by powerful statements of authoritative writers such as Locke and Blackstone against retroactive law-making. Blackstone, in particular, considered it cruel and unjust to convert an action, innocent when it was done, into criminal conduct through a subsequent law. He also emphasized the need for the law's foreseeability through notification. Still, the British Parliament occasionally enacted ex post facto criminal laws well into the 19th century. Only in 1973 did the House of Lords abolish the doctrine of residual judicial discretion to create common law crimes (*Kneller [Publishing, Printing and Promotion] Ltd v Director of Public Prosecutions [Judgment] House of Lords [14 June 1972] [1973] The Law Reports [Appeal Cases] [GB] 435*). Today, most common law countries have statutory definitions of crimes. However, certain concepts of crimes or elements of the definition of a crime might continue to develop through judge-made law.

4. The Development in Islamic Law

- 11 While the existing canon law contains an important exception to the legality principle in Can. 1399 Codex Iuris Canonici (1983), foreseeability of incriminating conduct is often considered to be intrinsically tied to Islam. The Koran states that God does not punish humans before having sent a Messenger to warn them. This idea explains why the Koran and the Sunnah contain the definition of, and punishment for, certain crimes (*hudud, qesas, diyya*). Traditional *sharia* does, however, recognize punishment in the discretion of Islamic judges for certain crimes (*ta'azir*) contrary to the *nullum crimen* principle. Yet, it is noteworthy that very few Islamic States still apply traditional *sharia*. Most countries have adopted the legality principle introduced by colonial powers. Even in those States still applying *sharia* principles, there is a tendency to restrain the discretionary powers of judges for *ta'azir* crimes by codifying criminal conduct and maximum penalties (see also → *Islamic Approach to International Law*)

5. First Codifications in the Western World

- 12 First allusions to the legality principle can be found in Arts 7 and 8 Virginia Declaration of Rights (1776). Art. 15 Constitution of Maryland (1776) contained the first explicit prohibition against ex post facto laws, which later found its way into Art. I(9)(3) Constitution of the United States of America. The breakthrough of the legality principle in Europe was initiated by Part I Art. 1 Austrian Criminal Code (*Constitutio Criminalis Josephina*) enacted by Joseph II in 1787 and by Art. 4 French Penal Code (*Code pénal*) adopted in 1810, which was inspired by Arts 7 and 8 French Declaration of the Rights of Man and of the Citizen (*Déclaration des droits de l'homme et du citoyen*) adopted in 1789. The Bavarian Penal Code (*Strafgesetzbuch für das Königreich Bayern*, adopted 16 May 1813), which was heavily influenced by Feuerbach, laid down the legality principle in its Art. 1. It was also codified in Art. 2 Penal Code of the German Empire (*Strafgesetzbuch für das Deutsche Reich*, adopted 1871), which employed a wording very similar to that of the French Penal Code of 1810.

6. Setbacks during Totalitarianism

- 13 Totalitarian regimes of the 20th century hindered the development of the legality principle. In 1935 the German National Socialists amended Art. 2 Penal Code of the German Empire and henceforth admitted punishment not only for conduct

explicitly defined therein, but also for acts 'deserving of penalty according to the fundamental conceptions of a penal law and sound popular feeling' (*nullum crimen sine poena*; translation by the author). This disposition was declared inapplicable by the Allies in 1945 and abolished in 1946. The broad application of the *nullum crimen* principle in Germany today may be a result of lessons learned from Nazi abuses.

- 14 In Russia the principle was abolished during the Russian Revolution. According to the earliest Communist decrees, criminal courts were to render judgment on the basis of 'revolutionary legal spirit' (*revolutionäres Rechtsbewusstsein*). The Soviet Penal Codes of 1922 and 1926 permitted the criminalization of 'socially dangerous acts' through far-fetched reasoning by analogy. The *nullum crimen* principle was formally reintroduced in 1958 (Art. 6 Fundamental Principles of Criminal Legislation of the USSR and the Union Republics) but still remained inapplicable in practice for minor offences treated by non-professional Comrades' Courts. Today, the principle of legality is guaranteed in Art. 54 Constitution of the Russian Federation of 1993.

7. International Influences towards Universal Acceptance after 1945

- 15 A key contributor to the—eventual—universal acceptance of the *nullum crimen* principle is the international human rights movement after 1945. By 1948, the General Assembly of the United Nations recognized the principle in Art. 11 (2) → *Universal Declaration of Human Rights* (UNGA Res 217 A (III) [10 December 1948] GAOR 3rd Session Part I Resolutions 71). Subsequent legally binding international and regional conventions also contained the principle (for example Art. 99 Geneva Convention relative to the Treatment of Prisoners of War [adopted 12 August 1949, entered into force 21 October 1950] 75 UNTS 135; Art. 65 and 67 Geneva Convention relative to the Protection of Civilian Persons in Time of War [adopted 12 August 1949, entered into force 21 October 1950] 75 UNTS 287; Art. 7 → *European Convention for the Protection of Human Rights and Fundamental Freedoms [1950]* ['ECHR'] [signed 4 November 1950, entered into force 3 September 1953] 213 UNTS 221; Art. 15 → *International Covenant on Civil and Political Rights [1966]* ['ICCPR'] [adopted 19 December 1966, entered into force 23 March 1976] 999 UNTS 171; Art. 9 American Convention on Human Rights [signed 22 November 1969, entered into force 18 July 1978] 1144 UNTS 123; Art. 7 (2) → *African Charter on Human and Peoples' Rights [1981]* [adopted 27 June 1981, entered into force 21 October 1986] 1520 UNTS 217; Art. 40 (2) (a) Convention on the Rights of the Child [adopted 20 November 1989, entered into force 2 September 1990] 1577 UNTS 3; Art. 15 → *Arab Charter on Human Rights [2004]* [revised] [adopted 22 May 2004, entered into force 15 March 2008] [2005] 12 IHRR 893). Within the European Union, the Court of Justice of the European Communities considers the *nullum crimen* principle to be a general principle of law (Case C-75/95 *Criminal Proceedings against X* [1996] ECR I-6609; Case T-129/95 *Neue Maxhütte Stahlwerke GmbH and Lech-Stahlwerke GmbH v Commission* [1999] ECR II-17). This is confirmed by Art. 49 → *Charter of Fundamental Rights of the European Union (2000)* (7 December 2000 (2001) 40 ILM 266).

8. International Criminal Law

- 16 The legality principle was at the heart of the debate about the legitimacy of the Nuremberg and Tokyo Judgments (→ *International Military Tribunals*) because the pre-existence of the crime of → *aggression* and → *crimes against humanity* was very doubtful. Even with respect to → *war crimes*, their criminalization directly under international law could hardly be said to be firmly established before 1945. The Judgment of the International Military Tribunal for the Trial of German Major War Criminals ([30 September and 1 October 1946] 172; 'Nuremberg Judgment') dealt with the matter in some detail regarding the crime of aggression. It held that the legality principle was not binding upon it as a matter of strict law. In a famous passage, it observed that

[t]he maxim 'nullum crimen sine lege' is not a limitation of sovereignty but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring states without warning is obviously untrue for 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 (Nuremberg Judgment 217).

Hence, the Nuremberg Judgment let the doctrine of substantive justice trump the idea of legality. That aggression was already a crime under international law before 1939 was only a subsidiary argument. The International Military Tribunal for the Far East ('IMTFE') subscribed to this approach in its Majority Judgment, without adducing any new reasoning ([29 April 1946–12 November 1948] 48436–48439 reprinted in N Boister and R Cryer [eds] 79–81; 'Tokyo Judgment'). To this, Justice Pal voiced his famous dissent, which was based on the belief that no retroactive legislation was admissible and that no crime of aggression existed under international law at the material time (*The United States of America and others v Araki Sadao and others [Judgment of The Hon'ble Mr Justice Pal]* International Military Tribunal for the Far East [29 April 1946–12 November 1948] 26 and 69–153 reprinted in N Boister and R Cryer [eds] 822 and 840–874). In the trials under Control Council Law No 10 'Punishment of Persons Guilty of War Crimes, Crimes against Peace

and against Humanity' (done 20 December 1945), some attention was also given to the application of crimes against humanity in light of the legality principle. One important argument advanced in support of legality was to state that crimes against humanity were at the same time common crimes as understood in national laws, including that of the accused (*The United States v Altstoetter [Judgment and Sentences of the International Military Tribunal] [Nuremberg]* [5 June 1947] in Nuernberg Military Tribunal *Trials of War Crimes before the Nuernberg Military Tribunals* vol 3 [United States Government Printing Office Washington 1951]; *The United States of America v Ohlendorf [Judgment and Sentences of the International Military Tribunal] [Nuremberg]* [8–10 April 1948] *ibid* vol 4).

- 17 While the critique of a violation of the legality principle overshadowed the post-World War II jurisprudence, the UN Secretary-General was determined to prevent it from tainting the work of the → *International Criminal Tribunal for Rwanda (ICTR)* and of the → *International Criminal Tribunal for the Former Yugoslavia (ICTY)*. To this end, he included the following passage in his report on the establishment of the ICTY: 'In the view of the Secretary-General, the application of the principle *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise' (UNSC 'Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 [1993]' [3 May 1993] UN Doc S/25704 para 34). In spite of this mandate, the ICTY Statute contained broad and vaguely phrased heads of jurisdiction. The consequent need to delimit their exact scope afforded judges considerable room for judicial creativity. In one of its first decisions, the ICTY Appeals Chamber made use of that scope and established the existence of war crimes committed in non-international armed conflicts (→ *Armed Conflict, Non-International*) directly under → *customary international law* (*Prosecutor v Tadić [Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction]* IT-94-1-AR72 [2 October 1995] paras 96–135; → *Tadić Case*). Unlike the Nuremberg and Tokyo tribunals, the ICTY did not question the applicability of the legality principle. There can be no doubt, however, that the manner in which customary international criminal law was discerned and held to exist made the *Tadić Case* a creative precedent susceptible to criticism under a strictly construed principle of non-retroactivity.
- 18 With the entry into force of the Rome Statute of the → *International Criminal Court (ICC)* ([adopted 17 July 1998, entered into force 1 July 2002] 2187 UNTS 90) the international criminal law tradition of directly applying customary law by resting it on pertinent case law and relevant State practice was replaced with an essentially code-based approach to criminal law that comes quite close to the legality principle in its broadest form. The Rome Statute codifies the applicable customary law in statutory definitions (Arts 6–8 Rome Statute) and precludes their retroactive application (Arts 11 and 24 Rome Statute). The Rome Statute also explicitly prohibits judges from applying the law by analogy to the detriment of the accused and requires that ambiguities be resolved in favour of the accused (Art. 22 (2) Rome Statute). These imperatives were highlighted by the ICC at the first occasion (*Prosecutor v Lubanga Dyilo [Decision on the Confirmation of Charges]* ICC-01/04-01/06 [29 January 2007] para. 303).

D. Applicable International Law

- 19 Arguably, the Nuremberg Tribunal was correct to question the view that the legality principle formed part of international law in 1945 (for the same view see *Attorney-General of the Government of Israel v Eichmann [Judgment]* Supreme Court of the State of Israel [29 May 1962] 36 ILR 5; → *Eichmann Case*). Meanwhile, however, the legality principle has grown into an internationally recognized human right which also governs international criminal law. In light of the widespread State adherence to the principle through a variety of international treaties, the almost uniform recognition of the principle in national laws (for a comprehensive documentation see Gallant 411–424) and the more recent developments in international criminal law, the legality principle has become part of customary international law. At the same time, it constitutes a general principle of law within the meaning of Art. 38 (1) (c) Statute of the International Court of Justice ([adopted 26 June 1945, entered into force 24 October 1945] 145 BSP 832). There is even room for the suggestion put forward in a leading treatise on the subject that the legality principle is beginning to emerge as a → *ius cogens* norm (Gallant 402). All of these qualifications, however, do not apply to the legality principle in its broadest version, but only to its rather narrow core content.

1. Field of Application

- 20 The *nullum crimen* principle applies to criminal offences, including the general principles on the forms of individual criminal liability and, as a rule, circumstances excluding criminal responsibility. The *nulla poena* principle applies to penalties. To determine the international scope of the legality principle, these terms must be interpreted autonomously. Although the severity of the sanction or the formal qualification of the conduct under relevant national law can serve as prima facie evidence of a criminal offence, the determination under international law is ultimately based on the actual substance of the impugned national law. As a general rule, a national criminal offence consists of prohibited conduct to which a retributive and/or deterrent sanction (penalty) attaches. Under this approach, imprisonment in lieu

of a fine is subject to the legality principle (*Jamil v France [Judgment]* [ECtHR] Series A No 317 B para. 32) and the confiscation of assets in connection with a criminal conviction has been qualified as a penalty despite having elements of prevention and reparation (*Welch v The United Kingdom [Judgment]* [ECtHR] Series A No 307 A paras 29–30). As a general rule, disciplinary measures for public employees or soldiers are not considered criminal offences (UN HRC ‘Communication No 1001/2001, *Strik v The Netherlands*’ [29 June 1999] UN Doc CCPR/C/76/D/1001/2001 para. 7.3) but the qualification may change where the sanction is particularly severe (*Engel and others v the Netherlands* [ECtHR] Series A No 22 paras 82–85). Preventive detention is not covered by the international application of the *nullum crimen* principle (*Lawless v Ireland [Judgment]* [ECtHR] Series A No 3 para. 19). The situation is less clear, however, with regard to preventive detention triggered by conviction for a criminal offence (for a qualification as a ‘penalty’ within the meaning of Art. 7(1) ECHR under certain circumstances see *M v Germany [Judgment]* [ECtHR] App 19359/04 paras 122–133). The legality principle does not apply to rules of criminal procedure, including limitation periods (*Coëme and others v Belgium [Judgment]* [ECtHR] App 32492/96, 32547/96, 32548/96, 33209/96, 33210/96 Reports 2000-IV paras 148–151 with a caveat at para. 149 as regards an extension of the limitation period after the originally applicable limitation period has already expired). Finally, rules concerning the enforcement of sentences are not affected by the legality principle (see *Grava v Italy [Judgment]* [ECtHR] App 43522/98 para. 51) as long as they do not amount to dispositions characterizing the penalty itself.

2. The Concept of Law

- 21 Law within the meaning of the international legality principle means national as well as international law. The international legality principle does not preclude the direct application of international criminal law by national courts (see also → *International Law and Domestic [Municipal] Law*). National (constitutional) laws may, however, set up a stricter standard in that regard. In many legal systems, the legality principle is considered to comprise the interdiction of customary criminal provisions, requiring that the criminalization results from a written law that can be traced back to the legislator (*nullum crimen sine lege scripta*). This is, however, not a part of the international concept of the legality principle. Notably with respect to common law States and international criminal law, none of the international conventions prohibit the application of customary criminal law as determined by judges.

3. Non-retroactivity (*nullum crimen sine lege praevia*)

- 22 The legality principle finds expression in international conventions through the prohibition of retroactive criminal laws. A criminal sanction may only be imposed if the conduct in question existed under the relevant law at the time when the impugned conduct occurred. Thus, legislators may not enact *ex post facto* criminal laws and judges may only apply criminal provisions that were in force at the time when the conduct occurred. Notice of the law is also implicit and is normally understood to mean that the law is published. The principle does not, however, prohibit a judicial modification of the interpretation of an existing statute as long as it respects statutory wording and the nature of the offence, the outcome being reasonably foreseeable (for a case on unforeseeability see *Pessino v France [Judgment]* [ECtHR] App 40403/02 para. 36).
- 23 The principle of non-retroactivity also applies with regard to common law. The international legality principle prohibits the retroactive creation of new crimes through the judiciary. At the same time, the prohibition of retroactivity does not exclude the progressive development of criminal law through judicial law-making in the sense of gradually clarifying the rules of criminal liability through judicial interpretation from case to case. This is considered an entrenched and necessary part of the legal tradition of common law countries. The result of such progressive development must, however, be consistent with the essence of the offence and must be reasonably foreseeable (*SW v The United Kingdom [Judgment]* [ECtHR] Series A No 335 B para. 36; *CR v The United Kingdom [Judgment]* [ECtHR] Series A No 335 C para. 34). While the legality problems raised in the common and civil law systems are arguably not fundamentally different, the common law system is perhaps more vulnerable to the danger of overstretching the concept of a reasonably foreseeable legal evolution. Two cases that have sparked considerable discussion in this regard are the above mentioned cases of *SW v The United Kingdom* and *CR v The United Kingdom* in which the → *European Court of Human Rights (ECtHR)* held that the abolishment of the common law marital defence to rape did not violate the legality principle.
- 24 On the level of international criminal law, even greater difficulties with the principle of non-retroactivity arise where a court determines on the basis of a relatively sparse international practice, and by references to fundamental principles, whether a crime under customary international law has come into existence. The ‘creative precedent’ set by the ICTY in the *Tadić Case* (see para. 17 above) constitutes the most prominent recent example of such ‘evolutive adaptation’ of international criminal law (A Cassese *International Criminal Law* [2nd edn OUP Oxford 2008] 45).
- 25 While the national standard is often stricter, the international prohibition of non-retroactivity does not preclude the formally retroactive application of a national statute to conduct that was criminal under international law at the time of

its commission. It is less certain whether there is still room for the argument made in some cases under Control Council Law 10 (see para. 16 above) that there is no violation of the international prohibition of non-retroactivity where an act that was a crime under national law binding the actor is retroactively re-characterized as a crime under international law. While this old line of reasoning was referred to by a Trial Chamber of the ICTR (*Prosecutor v Akayesu [Judgment]* ICTR-96-4-T [2 September 1998] para. 617; → *Akayesu Case*), the decision did not actually turn upon the issue. Instead, the emphasis was placed, as in the *Tadić Case* (see paras 17 and 24 above), on a creative determination of a customary norm applicable at the time of the commission of the act (for a slightly different view see Gallant at 367). In any event, retroactive re-characterization of a national crime as a crime under international law would usually pose serious jurisdictional questions.

- 26 Art. 15(2) ICCPR and Art. 7(2) ECHR provide that the principle of non-retroactivity shall not prejudice the punishment of a person for an 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 civilized nations. While this exception was historically destined to justify the Nuremberg and Tokyo trials, it is hardly possible to confine its application to World War II cases. Often, the paragraph is understood to justify the formally retroactive application of a national statute to conduct that was criminal under international law at the time of its commission (*Fédération nationale des déportés et internés résistants et patriotes and others v Barbie* Cour de Cassation [Court of Cassation] [Paris 20 December 1985] 78 ILR 125 132; *Polyukhovich v Commonwealth* High Court of Australia [Canberra 14 August 1991] 172 Commonwealth Law Reports 501 para. 18). The problem with this interpretation is that it makes the exception superfluous, since Art. 15(1) ICCPR and Art. 7(1) ECHR already explicitly declare international law to be a legitimate source of incrimination. An alternative legal view is to understand the phrase ‘criminal according to the general principles of law recognized by the community of nations’ as acts that do not amount to the qualification of a crime under international criminal law, but which constitute a criminal offence in the national law of a wide and representative number of States. Such an interpretation is in line with the wording of Art. 15(2) ICCPR and Art. 7 (2)ECHR and ensures that these provisions have an independent scope of application. The problem with this approach is the danger of giving too wide a scope of application to the non-retroactivity exception and of going well beyond the drafters' intentions. One possible way out of this dilemma is to confine the exception to non-retroactivity to the adjudication of serious human rights violations that do not reach the level of crimes under international law but are subject to an international duty to prosecute. Under this interpretation, Art. 15(2) ICCPR and Art. 7(2) ECHR would be relevant, in particular, in situations of transitional justice. For example, it would have provided the reunited Germany (→ *Germany, Unification of*) with a legal basis to retroactively declare punishable those responsible for the planning and implementation of the former East German border regime. The ECtHR has not taken this approach. Instead, the ECtHR re-interpreted the East German law applicable at the time and considered those acts to be punishable under this law, irrespective of the fact that they formed part of a policy of East Germany (*Streletz Kessler and Krenz v Germany* [ECtHR] Reports 2001-II paras 56–64). The German Constitutional Court followed a reasoning that is closer to the above-considered interpretation of Art. 7(2) ECHR. It accepted an exception to the non-retroactivity principle for reasons of substantial justice where a democratic regime has to deal with serious violations of internationally recognized human rights based on the policy of a past oppressive regime (2 BvR 1851, 1853, 1875, 1852/94 Bundesverfassungsgericht [German Federal Constitutional Court 2nd Senate] [24 October 1996] 95 BVerfGE 96).
- 27 The principle of non-retroactivity does not apply to rules that are favourable to the accused. Thus, the application of a law enacted after the commission of the offence that decriminalizes conduct or reduces the penalty for such conduct does not violate this principle. In fact, some international conventions such as Art. 15 (1) ICCPR and Arts 9 and 15 Arab Charter on Human Rights ([adopted 15 September 1994] [1997] 18 HRLJ 151; → *Arab Charter on Human Rights [2004]*) expressly require the application of the law that is more favourable to the accused in such cases. The temporal scope of this duty is problematic, with possible limits being the final conviction of the accused or the end of a sentence being served (for a more detailed analysis see Opsahl and de Zayas).

4. The Interdiction of Analogy (*nullum crimen sine lege stricta*)

- 28 The prohibition against analogy in criminal law is directly linked to the prohibition against retroactivity and hence a generally accepted component of the *nullum crimen* principle (*Kokkinakis v Greece* para. 52). This means that a judge must not fill a gap in the criminal law by applying a statute beyond its wording or by extending a precedent through the creation of a new unwritten crime.

5. The Principle of Certainty (*nullum crimen sine lege certa*)

- 29 Although the need for criminal provisions to be certain is not expressed in international conventions containing a legality provision, certainty is generally considered to be a natural component of the legality principle (*Kokkinakis v Greece* para.

- 52). The certainty requirement is addressed to the originator of criminal provisions. It postulates that the criminal conduct be defined in such a manner that the individual, if need be with the assistance of pre-existing judicial interpretations of the law (*Kokkinakis v Greece* para. 52) and/or the aid of legal counselling, and taking into account possible specific qualifications of the typical addressee (*Cantoni v France [Judgment]* [ECTHR] App 43522/98 Reports 1996-V para. 35), may see from the wording of the definition of the criminal conduct which acts or omissions are prohibited. In practice, international courts are reluctant to hold that a formulation of a crime falls below that standard. Instead, they recognize that the need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague (*Cantoni v France* para. 31). It would not appear that the standard is appreciably stricter in countries such as the United States and Canada, where a void-for-vagueness doctrine is applied (see eg *United States v Petrillo [Judgment]* Supreme Court of the United States [23 June 1947] [1946–47] 332 United States Reports 1; *Canadian Pacific Ltd v Her Majesty the Queen in Right of Ontario [Judgment]* Supreme Court of Canada [24 January 1995] [1995] 2 Supreme Court Reports 1028 [Canada]).
- 30 At times, national or international rules require a degree of reasoning by analogy through the *eiusdem generis* canon of statutory construction (for an example see the crime against humanity of ‘other inhuman acts’ as contained in Art. 7(1)(k) Rome Statute). Such a legislative technique is problematic, though not necessarily in breach of the certainty requirement if the statutory context is such as to give sufficient guidance to the judge in clarifying the content of the rule. The crime against humanity of ‘other inhuman acts’ was accepted as a legal basis for individual criminal liability by the Special Court for Sierra Leone (→ *Mixed Criminal Tribunals [Sierra Leone, East Timor, Kosovo, Cambodia]*) in *Prosecutor v Tamba Brima ([Judgment]* Supreme Court of Sierra Leone [22 February 2008] Case No SCSL-2004-16-A para. 198).
- 31 In some countries—and in the second sentence of Art. 22(2) Rome Statute—the principle of certainty is also considered to guide statutory interpretation through a rule of lenity or strict construction. This rule should not be misunderstood to mean that, wherever there is room for interpretation, the solution most favourable to the accused must be adopted. The effect of strict construction of the provisions of a criminal statute is rather that, where an equivocal word or ambiguous sentence leaves a reasonable doubt of its meaning which the canons of construction fail to solve, the benefit of the doubt should be given to the accused and against the legislature which has failed to explain itself (*Prosecutor v Delalić et al [Judgment]* IT-96-21 [16 November 1998] para. 413; similarly, the Canadian Supreme Court in *Bell Express Vu Ltd Partnership v Rex [Judgment]* Supreme Court of Canada [26 April 2002] [2002] 2 Supreme Court Reports 559 [Canada]). In international law, such a rule of strict construction does not exist. Judicial interpretation must respect the wording defining a crime (see para. 28 above) but may endorse a meaning not favourable to the accused, if the outcome could reasonably be regarded as consistent with the essence of the offence and could reasonably be foreseen by the offender at the material time of the offence (*Jorgic v Germany [Judgment]* [ECTHR] App 74613/01 para. 114).

6. *Nulla poena sine lege*

- 32 *Nulla poena sine lege* forms part of the international legality principle, though with a standard that is very relaxed. The criminal laws of many countries, especially those belonging to the civil law tradition, provide for extensive tariffs of penalties for specific crimes. This strong version of *nulla poena sine lege* goes well beyond the requirements under international human rights law. All that is required by the international legality principle is that no heavier penalty is imposed than the one available under the written or unwritten law applicable at the time the crime was committed.

E. Future Prospects

- 33 As part of the development of international human rights law after 1945, the legality principle has found a secure place in international law. The embodiment of the broad version of the principle in the Rome Statute marks the culmination of this legal evolution. However, this broad version does not form part of current international human rights law. Instead, only the principle's core content has received universal acceptance and the limitative effect of the legality principle under international human rights law should therefore not be overstated. This is particularly true for the principle of *nulla poena sine lege*.
- 34 There is some reason to believe that the broad version of *nullum crimen sine lege* may crystallize into customary international law as international criminal law reaches a stage of consolidation. However, difficult dilemmas such as those encountered in situations of transitional justice are unlikely to disappear for the foreseeable future. Neither can the possibility be excluded that the international community will be faced at some point with atrocities of a new kind, posing another exceptional challenge of substantive justice. In light of the present developments, it is unlikely that a future international criminal tribunal would opt for the approach taken in Nuremberg and let the doctrine of substantive justice openly trump the idea of legality. It is far less certain whether judges would also refrain from stretching the demands of the legality principle by setting ‘creative precedents’ for the development of (customary) international criminal law.

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