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GENERAL PRINCIPLES OF INTERNATIONAL CIMINAL LAW

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INTRODUCTION

The international criminal law and its general principles are widely recognized by the legal systems across the globe. The law that are commonly found in the legal systems of any State does not automatically acquire the title of the general principle of the international legal order. There are two conditions necessary for a law to be recognised as general principle of international legal order: firstly, the law must represent a legal principle and secondly, the said legal principle must be transferable to the international legal order.

GENERAL PRINCIPLES IN LIEU OF CUSTOMARY INTERNATIONAL LAW

The general principles are based on the customary international law along with the general principles of law which are recognized by the civilized nations. The Rome Statute[1] for the very first time separated the general questions related to law through the definitions of various crimes, which was indeed a very difficult task as it involved various complicated legal issues which had to be overcome. As stated by Werle, '*A direct consequence of the recent codification of general rules of criminal responsibility is the limited "doctrinal maturity" of some of the general principles in the ICC Statute*'. A central challenge before the ICC as of now is to make a clarification regarding them and then to apply those principles in the relevant cases.

The task of clarifying the general principles has been made even more difficult because of a simple fact that the norms which are created for the determination of law in the field of general principles, unlike the definition of crimes, which occurs within a copse of national laws parallel to each other. All legal system has both written and unwritten rules which are related to the general principles of criminal law. The individuals who work in this field have the job of reading

[1]The Rome Statute of the International Criminal Court is the treaty that established the International Criminal Court. It was adopted at a diplomatic conference in Rome, Italy on 17 July 1998 and it entered into force on 1 July 2002. As of November 2019, 123 states are party to the statute

the provisions of the international criminal law thoroughly at first from the perspective of similar national doctrine and terminology.

In addition to this, most of the provisions contained in Part 3 of the Statute of ICC forms an "*unsystematic conglomeration from a variety of legal traditions*". These elements may be traced to the national legal system, like the conceptual similarity of the rules of the international criminal laws for shaping the domestic law may be proved deceptive. Overcoming these difficult issues was not a task which can be easily accomplished in the Rome Conference.

There are specific doctrine for the international crimes, which needs to provide a general standard of liability for such crimes under the international law. This is done by systematic recording and classification of the structural elements which are common to all these crimes. A dual concept of crime has been generated by the international criminal tribunals which is already spread widely in common law. It marks a distinction between the offences which create a ground for criminal liability and consists of a material element (actus reus) as well as a mental element (mens rea), while on the one hand, the defences which rules liability out. The latter includes both substantive grounds for exclusion of criminal responsibility, like necessity and self-defence as well as procedural obstacles for prosecution, like the incapacity of limitations and also structures of limitations.

ROME STATUTE IN REFERENCE TO GENERAL PRINCIPLES UNDER ICC

Rome Statute is considered as the basic foundation for international criminal law. The Statute emphasizes the independence of international criminal law and grounds it in a foundation of its own. The general principles that applicable to the ICC could be analysed by categorizing into the following heads:

A. Principle of Legality (Article 20-24)
   I. Sources of applicable law (Article 21)
   II. Principle of *ne bis in idem* (Article 20)
   III. *Nullum crimen sine lege* (Article 22)
   IV. *Nulla poena sine lege* (Article 23)
   V. Principle of non-retroactivity *ratione personae* (Article 24)

B. Norms providing for Individual Criminal Responsibility (Articles 25, 27, 28, 30).
   I. Criminal responsibility of natural person (Article 25).
   II. Superior responsibility (Articles 27,28)
   III. Mental elements (mens rea) of criminal responsibility (Article 30) (also material elements - actus reus).

C. Substantive Grounds for excluding Criminal Responsibility (Article 26, 29, 31-33)

PRINCIPLES OF LEGALITY

The principles of legality are the new shape of the international criminal justice system emerging from the practice of the international tribunals. The principles deal with the justifications for criminalizing conduct of an individual. It recognizes specific inculpatory doctrines relating to conduct, rather than position, or general matters underlying a rule of law criminal justice system. The principle of legality makes prosecution compulsory and discretion in charging impermissible unless specifically authorized by statute.

The legality principle played a major role at the Nuremberg trials. The Nuremberg International Military Tribunal took the defences of ex post facto argument as an opportunity to examine and affirm the criminal nature of crimes against peace at the time the acts were committed by the defendants. The validity of the principle frequently affirmed by the Yugoslavia and the Rwanda tribunals. The principle consists of the norms that must have existed at the time the crime had been committed upon which the criminality of certain conduct is based. The ICTY states that the principle of legality aims at preventing the prosecution and punishment of an individual for acts which he reasonably believed to be lawful at the time of their commission. For many European jurists, the legality principle is a new concept and therefore, is the object of much study.

SOURCES OF APPLICABLE LAW

Article 21 of the ICC Statute brings about a hierarchy of the source of applicable law upon which the jurisdiction of the ICC may draw. As part of the international legal order, the provision of applicable law to the ICC originates from the same legal sources as international law. The statute itself cannot provide answer to situation likely to arise in future before the court. Judges of the

court will have to take recourse and guidance elsewhere, just as they do under national law when respective criminal code leave questions ambiguous or only unanswered.

The statute of the International Court of Justice (ICJ) has already made a general response to the issue of sources of law. The ICJ statute encompasses three primary sources of international law: international treaties, customary international law, and the general principles of law recognized by the world's major legal systems. It recognizes equal value of the three sources and there is no hierarchy among them. The statute enumerates judicial decisions and juristic writings as subsidiary means for determining the rules of law. It also makes the provision for international legal rules that can be created by unilateral acts, such as a declaration or a reservation.

The Rome Statute creates a three-tiered hierarchy as far as sources of law are concerned. The first source is the statute itself, that accompanied by the Elements of Crimes and the Rules of Procedure and Evidence. The Rome Statute was adopted at the 1998 Rome Diplomatic Conference, whereas the Elements and Rules were drafted by the subsequent Preparatory Commission (Prep Com.) session, in 1999 and 2000, and subsequently confirmed by the Assembly of States Parties (ASP) at its first session in September 2002. Although as a source of applicable law, Article 21 of the Rome Statute recognizes equal importance among the statute, the Elements of Crimes and the Rules of Procedure and Evidence, Article 51(5) of the statute makes it clear that in case of conflict, the Elements (Article 9) and the Rules (Article 51) are overridden by the statute itself.

The Elements of Crimes clarify the definitions of crimes in Article 6 to 8. They aid the ICC in interpreting and applying the provisions. The Rules of Procedure and Evidence supplement and clarify the rules of procedure contained in the statute itself. The Rules of Procedure and Evidence are binding on the court and all state parties.

As additional sources consists of 'applicable treaties and the principles and rules of international law including established principles of the international law of armed conflict'. There is no express mention of customary international law; it is implicit from the reference to 'principles and rules of international law'.

Since the provisions of the statute have been clarified by the Element of Crimes and the Rules of Procedure and Evidence, which in terms of sources can be described as a reciprocal influx of customary international law.

Consequently customary international law has reached a new status of consolidation in terms of sources through partial codification by treaty. For example, the principle of nullum crimen sine lege (Article 22) is part of customary international law.

By inclusion of international law of armed conflict, it provides an opening for a detailed and increasingly sophisticated body of law of which The Hague Conventions of 1899 and 1907 as well as the Geneva Conventions 1949 are the centrepiece. The court recognizes certain defences, such as reprisal and military necessity, which does not mention in the ICC Statute.

In addition, another source of applicable law to the ICC encompasses domestic law that recognises the major legal systems of the world. Where the aforementioned two sources failed to resolve the facts in question and do not provide applicable rules or assistance, as a matter of last resort, the ICC may take recourse to the general principles of criminal law derived from the national laws of the world's legal system, which are consistent with international criminal justice system. Article 21(C) articulates the following sources:

"[*General principles of law derived by the Court from national laws of legal systems of the world, including, as appropriate, the national laws of states that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norm and principles*.]"

In the event the court is unable to fill a legal lacuna on an issue pertaining to international law, it may turn to individual legal systems. The ICC may not choose a particular law or provision for application before the court; rather, it is bound to extract relevant principles from the rules of the legal system under consideration.

Although, not every law found in several or all legal systems are automatically a general principle of law and a component of the international legal order. The dual conditions are that they represent a legal principle and that it be transferable to the international legal order.

The significance of the national law with regard to the international criminal justice system has been observed by the ICTY as follows:

"Whenever international criminal rules do not define a nation of criminal law, reliance upon national legislation is justified, subject to the following conditions: (i) ... international courts must be drawn upon the general concepts and legal institutions common to all the major legal systems of the world [not only common-law or civil-law states] ....; (ii) ... account must be taken of the specificity of international criminal proceedings when utilizing national law notions. In this way a mechanical importation or transportation from national law into international criminal proceedings is avoided".

It means vast majority of fundamental general principles of national laws, such as prohibition of retroactive laws and principle of legality, have matured into customary and treaty norms. The elements of international criminal law are not all the legal norms upon which major legal systems agree, but only the general principles upon which the norms are based.

It has been accepted by the IMTs - Nuremberg and Tokyo, as well as by contemporary international judicial bodies, such as the European Court of Justice (ECJ), that for a domestic principle to be regarded as generally accepted it must be recognized by most legal systems, but not all. It suggests that the practice of international tribunals had been to explore all the means available at the international level before turning to national law.

Although the Rome Statute does not formally recognize the importance of international human rights treaties and declarations as a source of applicable law, it is implicit from Article 21 (1) (b), which includes the applicable treaties and principles and rules.

Article 21 (3) of the statute provides that the application and interpretation of law 'must be consistent with internationally recognized human rights'. Consequently, it extends its scope with regard to the rights of the accused and the victims as well. The recognition of the prevailing norms of international human rights law that evolve continuously will help to innovative interpretation of the Rome Statute in future

Article 21 (2) of the ICC Statute provides that the ICC 'may apply principles and rules of law as interpreted in its previous decisions'. The decisions of international courts have left a lasting

impression on the shape of existing international law. Accordingly, while the ICC may refer and even rely on a previous decision of the ICC, it is not obligated to do so. Although, in practice, the ICC will follow its previous decisions and only depart from them in limited circumstances. Since the jurisprudence of the ICC is not a source of international law, it is likely that it will be of a highly persuasive authority, emanating from an international criminal court applying international criminal law.

The Rome Statute not only restates and clarifies the existing body of law in the field of international criminal law, which is often unclear and unsatisfactory, but it contains many elements of progressive development of substantive criminal law. For example, Article 7 of the statute sets out a much broader definition of crimes against humanity as those contained in the Nuremberg Charter or in the ICTY and the ICTR statutes. In addition, the Rome Statute to some extent goes beyond simply reflecting and systematizing customary law, and makes it own independent contribution to the development of international law.

PRINCIPLES OF *NE BIS IN IDEM*

Article 20 of the Rome Statute curves out the principle of *ne bis in idem*, which states that same person cannot be tried and punished more than once for the same act or crime that forms the basis of crimes within the jurisdiction of the ICC. The principle is recognized in the law of most national criminal justice systems and it has also been incorporated in various international convention, like the International Covenant on Civil and Political (ICCPR) Rights (Article 14 (7)) and the European Convention on Human Rights (Article 4 Protocol 7), as well as the conventions dealing with cooperation in criminal matters, such as extradition conventions and conventions on mutual assistance. Consequently, the principle is considered as a generally accepted principle of fairness of criminal justice system and even as a principle of customary international law.

Since the principle in national legislation widely differs from international instruments, that could not define the rule in such a way that it would reflect the positive law of most nations or of conventional international law. While most states entrusted many qualifications and restrictions to the principle that it is difficult to describe its states in international law or in comparative criminal law. Here, it is impossible to analyse as aspects of the principle systematically, for the

present purpose, the chapter limits itself to the most important aspects of the rule together with its applicability in the statutes of ad hoc international criminal tribunals in general, and of Article 20 of the Rome Statute in particular.

Ne bis in idem is an internationally protected human rights principle. Article 14 (7) of the International Covenant on Civil and Political Rights (ICCPR), states that 'no one shall be liable to be tired or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country'. In a national contest, the principle operates within single jurisdictional unit. In an international context, *ne bis in idem* problems may arise from situations where there is concurrent jurisdiction of more than one state over the same person. In some situations, it has been argued that criminal proceedings in one state should not be hampered by the law or proceedings undertaken in another state. By refusing to exercise criminal proceedings because another state has already adjudicated it, may even amount to giving up of sovereign power of a state.

Protocol 7, Article 4 of the European Convention on Human Rights (1950) guarantees the right that "*No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same state for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of the state*". The protocol states that it is an absolute right and no derogation, even in time of national emergency, is permitted. The provision refers to criminal proceedings within the jurisdiction of the same state that does not exclude a second trial of the same crime by another state. Similar provisions are to be found in the American Convention on Human Rights (1969) and in the United Nations Standard Minimum Rules for the Treatment of Prisoners.

On the subject, Article 14 of the ICCPR is not explicit and it could be interpreted in a less restrictive manner. The UN Human Rights Committee stated that '*Article 14 (7) of the Covenant [...] does not guarantee ne bis in idem with regard to the national jurisdiction of two or more states*'. The committee also recognizes that '*this provision prohibits double jeopardy only with regard to an offence adjudicated in a given state'*.

All the instruments mentioned above limit themselves to the national level. It means that the ne bis in idem protection is only guaranteed within one and the same state. No international ne bis

in idem protection exists under the international human rights instruments. Consequently, the international human rights protection is limited in scope and does not guarantee a transitional ne bis in idem protection.

The Nuremberg Charter and the statutes of the ICTY and the ICTR provide for priority of the international prosecution system over national system. The military tribunals-Nuremberg and Tokyo, and the recent ad hoc tribunals are considered to be hierarchically superior to national courts, therefore, decisions of such tribunals have priority over decisions rendered by national courts, what is called the principle of verticality. Unlike the tribunals, the jurisdiction of the permanent ICC will be complementary to the jurisdiction of national courts and the ICC will have no priority over national proceedings whether pending or terminated in the form of a final judgment.

Whilst the verticality principle would folly be applied, the judgments of an international criminal court would have a 'downward' ne bis in idem effect, and it would prevent states from repeating, starting, or even continuing prosecutions of crimes that come within the jurisdiction of the court. In such a situation, national jurisdictions would have no (or only a limited) 'upward' ne bis in idem effect which would not prevent the international criminal court from reopening a case that was already prosecuted by a national court. Since the Rome Statute does not introduce such type of 'verticality' between the ICC and national criminal justice systems, consequently, the 'downward' and 'upward' effects between decisions of the ICC and national courts does not exist.

The Nuremberg Charter and the statues of the ad hoc tribunals have been conceived from a predominantly 'vertical' perspective, in which the international prosecution system takes priority over national systems. The Nuremberg Charter does not explicitly lay down a downward ne bis in idem rule, although it seems to imply such a rule by allowing new national prosecutions only in one particular case. By virtue of Article 10 of the Charter such new prosecutions are possible where a person had been tried by the IMT for membership of a criminal organisation. In that case, the person concerned could be retried before the national court, but not for the 'membership of a criminal organisation-offence'.

It suggests that the Nuremberg Charter guarantees a limited ne bis in idem protection, that is, a conviction by the International Military Tribunal (IMT) would prevent a new trial before a national or military court for the same crime except in the case of Article 10 {downward ne bis in idem). The Nuremberg Charter does not provide on any possible upward ne bis in idem and nowhere does it state that national prosecutions would exclude prosecutions before the IMT.

The statutes of the recent ad hoc tribunals -the ICTY and the ICTR, provide ne bis in idem rule both in a downward and in an upward direction. With regard to the downward ne bis in idem rule, Article 10 (1) of the ICTY Statute provides that no person shall be tried before the national court for acts consisting serious violations of international humanitarian law under the statute for which he or she has already been tried by the international tribunal.

Similarly, both the statutes provide for the upward ne bis in idem rule. Article 10(2) of the ICTY statute provides that a person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the international tribunal only in two cases : a) the act for which he or she was tried as characterized as an ordinary crime; or b) the national court proceedings were not impartial or independent, and they were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

Article 10(2) seems to suggest that the upward effect of ne bis in idem rule is limited in national decisions. It does not apply where the act for which the defendant was already tried by a national court was characterized as an ‘ordinary crime’. According to the rule, a retrial of the same conduct is possible when the charges are based on crimes that fall within the jurisdiction of the ICTY war crimes, genocide, and crime against humanity. For example, a person tried for murder, an ordinary crime, by a national court could be retried for genocide by the ICTY or the ICTR on the basis on the same conduct.

By contrast, when the national conviction or acquittal was based on war crimes or crimes against humanity, not ordinary crimes, a retrial before the ICTY or ICTR would not be possible.

The other situation where a retrial is possible is the case where the national court proceedings were not impartial or independent, and those were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted. In both the cases

the national trial was a so-called 'shame-trial', with the consequence that a retrial by the ICTY is possible.

In case of a retrial by the ICTY, the tribunal must apply the deduction of sentence rule. As Article 10 (3) provides that, in considering the penalty to be imposed on a person convicted of a crime under the present statute, the tribunal shall take into account the extent to which any penalty imposed by a national court on the same person for the same act which has already been served.

In the 1994 ILC draft statute for a permanent ICC which preceded Article 20 of the Rome Statute, adopted the same rule that contained in the statutes of the ad hoc tribunals. The 1953 draft statute for an international criminal court recognized that everyone who had been judged or acquitted by the ICC could not be tried again before a national criminal court, without mentioning what would happen when a national court had already tried the case and the ICC wished to try it again.

Article 20 of the Rome Statute lays down the principle of ne bis in idem, which states that same person, cannot be tried and punished more than once for the same act or crime that forms the basis of crimes within the jurisdiction of the ICC. The principle of ne bis in idem of the Rome Statute is a corollary of the principle of complementarity contained in Article 17, which prevents the court from asserting jurisdiction when a competent national legal system has: already accepted the same jurisdiction.

A trial before the ICC is only admissible if the state which has jurisdiction is not willing or able to try the case itself. Unlike the ICTY and the ICTR, the permanent ICC will have no compulsory jurisdiction and will have no priority over national criminal court.

Article 20 (1) of the Rome Statute provides that, except as provided in the statute, no person shall be tried before the ICC with respect to conduct which formed the basis of the crimes for which the person has been convicted or acquitted by the ICC itself. The article recognizes the general ne bis in idem protection within one and the same jurisdiction.

The rule is not absolute. Article 81 of the ICC statute may operate as an exception to the rule. The article allows prosecutorial appeals against both convictions and acquittals. While most of

civil law countries don't consider it as an exception to the ne bis in idem principle, many common law countries signify it as a fundamental 77 derogation of the principle.

Another exception of the principle is Article 84 of the statute on revision of conviction or sentence. Upon application of the persons as mentioned in the article, it empowers the Appeal Chamber to revise the final judgement of conviction or sentence on two grounds. The first ground is where new evidence has been discovered that was not available at the time of the trial and such unavailability was not wholly or partly attributable to the party making the application. The evidence in question must be sufficiently important that, if it had been proved at trial, it would have been likely to have resulted in a different verdict. The second ground is where there has been a fundamental defect in the previous proceeding, a retrial may be held when one of the judges who participated in the trial has committed, in that case, an act of serious misconduct or serious breach of duty of sufficient gravity to justify the removal of the on judges in question.

By contrast, Article 20 (2) encompasses the operation of ne bis in idem principle in the context of jurisdiction of national court. It provides that an accused cannot be retried by another court for a crime referred to in Article 5 of the Rome Statute, for which he has been convicted acquitted by the ICC. It states that once the crime in question formed the basis of crimes within the Article 5 of the ICC Statute, the defendant is ultimately absolved from any further prosecution by another court.

The downward ne bis in idem effect of judgements of the ICC is absolute, once the ICC has convicted or acquitted a person; national courts are bound by the decision. Although the Rome Statute does not provide for the compulsory jurisdiction of the ICC, the judgments of the ICC must accept and enforce by the respective states, once they have been pronounced by the court.

Since Article 20 (2) is limited to crimes that fall within the jurisdiction of the court- genocide, crimes against humanity, war crimes, and aggression. It means that a person who has been acquitted by the ICC for genocide, for example, because the dolus special is that is required to entail the criminal responsibility for the crime of genocide could not be established, may be retried before national courts on charges of multiple murders. Consequently, the 'downward' ne bis in idem effect of judgemnets rendered by the ICC is restricted to the heinous crimes as mentioned in the Rome Statute.

From the perspective of national jurisdiction, when a case has already been tried by a competent national court, the complementarity mechanism, in such a case, reflected the ne bis in idem principle, which requires only a test of whether the national trial proceedings were genuine. Article 20 (3) of the Rome Statute affirms the upward ne bis in idem principle that no person who has been tried by another court for conduct prescribed under Articles 6, 7 or 8 of the statute shall be retried by the ICC with respect to the same conduct . The article stipulates that the judgment of the national court bars a prosecution by the ICC except in case of sham trials, where the national proceedings were for the purpose of shielding the person from criminal responsibility for crimes within the jurisdiction of the ICC (Article 20 (3) (a)) or whilst national proceedings were not conducted in an independent and impartial manner [Article 20(3) (b)].

It is the ICC, and not the national court, which decides whether Article 20 (3) (a) or (b) of the Rome Statute applies in the national proceeding. The ICC must have the competence to decide whether it is competent in a specific case, without which the no states would have much freedom in setting up sham trials.

Article 20 (3) of the Rome Statute does not include the crime of aggression, whereas it has been incorporated in the downward ne bis in idem rule contained in Article 20 (2). The rationale behind it may be that the drafters of the Rome Treaty have chosen not to give a ne bis in idem effect to national judgements on charges of aggression, because it is impossible to conduct such trials on a national level. Consequently, national judgements based on charges of aggression have no upward ne bis in idem affect at all. It means that such judgments never bind the ICC, even if they are the product ofreal trials, not of shame trials.

Unlike the statutes of the ICTY and the ICTR, the Rome Statute of the permanent ICC does not provide an exception for ‘ordinary crimes’. A new trial, before the ICC, does not expressly permit in the case where the person was tried by a national court for an act constituting a serious violation of international humanitarian or law. The national proceedings must characterize it as an ordinary crime only.

In addition, the Rome Statute, in contrast to the statutes of ad hoc tribunals, does not lay down the deduction of sentence principle in cases where the statute 165 permits a retrial of the same case. The statutes of the ICTY and the ICTR provide that, in case of a retrial, the tribunal shall

take into account the extent to which any penalty imposed by a national court on the same person for the same act that has already been served.

The principle is absent in Article 20 of the Rome Statute and it transferred to the Article 78(2), which deals with penalties and sentencing. The article stipulates that, at the time of determining the sentence, the ICC may deduct any time otherwise spent in detention in connection with conduct underlying the crime.

It suggests that, unlike the ad hoc tribunals, which enumerates a mandatory deduction of sentence rule, the permanent ICC sets out the rule in an optional manner. Wyngaert and Ongena observe that, "it is highly regrettable that the minimum minimorum protection, which was contained in the Statutes of the ad hoc Tribunals, has not been included in the Rome Statute". It is a setback of Article 20 as compared to the statutes of ad hoc tribunals.

NULLUM CRIMEN SINE LEGE

The maxim *nullum crimen sine lege* prescribes that an individual shall not be considered criminally responsible unless the conduct in question was unambiguously criminal at the time of its commission within the jurisdiction of the court. The principle is explicitly laid down in Article 20 of the Rome Statute, which states that a person can only be punished for an act which was codified in the statute at the time of its commission that was defined with sufficient clarity and was not extended by analogy.

The principle and its sentencing counterpart nulla poena sine lege are considered as the fundamental principles of criminal justice. The nulluem crimes principle provides that criminal responsibility can only be based on a pre-existing prohibition of conduct that is understood to have criminal consequences. The principle originated in national law and subsequently it was entrenched in international law, following the World War II and its aftermath.

The principle of nullum crimen is explicitly laid down in it four different forms : a) a person can only be punished for an act which was codified in the statute at the time of its commission, that is, a written law; b) the act in question was defined with sufficient clarity, that is the value of legal certainty; c) it was not extended by analogy, that is, the prohibition on analogy; and d) the criminal act was committed after the law entry into force, that is, non-retroactivity.

The notions of certainty and of prohibition of analogy entail the consequence that ambiguities are to be resolved in favour of the suspect. In addition, the principles of written law and of non-retroactivity give the suspect the right to rely on the law which was codified and valid at the time of commission. In case of a change of the law before the final judgment the law more favourable to the accused has to be applied.

Since Nuremberg, the principle nullum crimen has been interpreted in a more liberal way in the arena of international penal justice. There was absence of an international criminal law regime prior to 1945.

The International Military Tribunal (IMT) argued that Article 6 (c) of the London Agreement merely codified a nascent rule of general international law that prohibited crimes against humanity. Unlike the IMT argument, the article constituted new law.

Following the Nuremberg, Tokyo, and subsequent CCL 10 proceedings, several states enacted national criminal legislations to prosecute individuals responsible for commission of crimes against humanity and other serious violations of international humanitarian law. It seems strict legal prohibitions of ex post facto law does not appear to comprise a general principle of law universally accepted by all states. Albeit in most countries of the world, the retroactive application of criminal law is prohibited, no automatic spill-over from national legal systems into international law can be said to have occurred.

Since 1946, the principle gained widespread recognition in the international human rights regime as a result of its incorporation in new substantive instrument. The first international instrument that recognized the nullum crimen principle was the Universal Declaration of Human Rights (UDHR) of 1948. It was later reaffirmed in Article 15 of the International Covenant on Civil and Political Rights (ICCPR) of 1966.

In addition, in the regime of international law of armed conflict, Article 99 of the Third Geneva Convention of 1949, and Article 6 (c) of Additional Protocol 11 prohibit prosecution under an ex post facto or retroactive law. Regarding the human rights instrument in regional contexts, Article 7 of the 1950 European Convention on Human Rights (ECHR), Article 9 of the American Convention on Human Rights of 1969, and Article 7 (2) of the African Charter of Human and

People's Rights of 1981 recognise a prohibition of expost facto law i.e. use of force or preventive measures like through coercion.

The International Law Commission (ILC) incorporated the nullum crimes sine lege principle under Article 21 of its 1994 Draft Statute for an International Criminal Court. The ILC's Draft Statutes, Article 39 enunciated that an accused would not be held guilty of genocide, aggression, serious violations of the laws and customs applicable in armed conflict, or crimes against humanity unless the act or omission in question constituted a crime under international law at the time it occurred

The 1996 Preparatory Committee of the ICC, suggested that 'the crimes within the jurisdiction of the court should be defined with clarify, precision and specificity required for criminal law in accordance with the principle of legality (nullum crimen sine legey) and that the fundamental principles of criminal law and the 'general and most important rules of procedure and evidence' should be clearly set out in the statute for the same reasons. Following the year, 1997, the Prep-Com itself modified its 1996 proposals.

Article 22 of the Rome Statute brings out the core prohibition on the retroactive application of the criminal law, together with the rule of strict construction, including the forbidding of extension by analogy of the definitions of crimes. The article reads as follows:

1. A person shall not be criminally responsible under this statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the court.
2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.
3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

The rule embodies that ambiguities are to be resolved in favour of the suspect or accused. The principle requires that the behaviour be laid down as clearly as possible in the definition of the crime, that is, conduct is criminal only if, at the time of commission, the conduct in question be well suited the definition of a crime under Article 5 of the ICC Statute.

By virtue of Article 21 of the ICC Statute, it is clear that the fundamental source for ascertaining conduct punishable by the ICC is the statute itself. Although 172 the article gives priority to the ICC statute as the basis for the definition of crimes, customary law is not completely excluded as a source.

As an impediment on law-making, the principle of legality was relied upon by those seeking to have the crimes within the jurisdiction of the ICC defined expressly in the Rome Statute, rather than leaving the court to interpret general international law. The rationale was that general international law might not set out the elements of the offences with sufficient precision, in particular, where the crime in question was not defined by treaty, such as the crime of aggression.

Article 22 (2) of the ICC Statute is in many respects a reaction to the liberal approach to interpretation taken by the judges of the ICTY. The article in paragraph 2 prohibits the rule of strict construction which entails consequence including the forbidding of extensions by analogy of the definitions of crimes and the requirement that ambiguities are to be resolved in favour of the person being investigated or prosecuted.

In addition, Article 22 will not affect the characterisation of any conduct as criminal under international law independently of the Rome Statute. Paragraph 3 of Article 22 of the statute makes it clear that, while the nullum crimen principle is one of general rules of international law, the effects of its incorporation in the article are limited to the statute only. It ensures that the ICC statute should not have an undesirable effect upon the independent evolution of customary international law.

Although the purpose of Article 22 (3) of the Rome Statute is similar to that underlying Article 10, the two provisions are clearly distinct in their scope and effect. Article 22 (3) applies to limit any perceptions as to the impact of Article 22 alone, while Article 10 does not so with respect to all of Part 2 of the ICC Statute with regard to jurisdiction admissibility and applicable law. Article 22 (3) applied only to the characterization of conduct as criminal under international law; where Article 10 applies to all existing and developing rules of international law in so far as the statute 191 might be required to impact on them.

NULLA POENA SINE LEGE

Article 23 of the Rome Statute recognizes nulla poena sine lege principle declaring that a person convicted by the court may only be punished with penalties laid down in the statute. The article sets out that there is no punishment except in accordance with the law, with regard to the jurisdiction of the ICC. The principle requires that there are defined penalties attached to criminal prohibitions.

Various international human rights instruments have incorporated the nulla poena principle, and prohibit the imposition of a punishment that is heavier than the one applicable at the offence was committed. For example, Article 15 (1) of the ICCPR incorporates the nulla poena principle, in the form of a non-derogable provision, which forms part of the core human rights protection.

One of the reason to raise the issue of nulla poena is that international law, till World War II, has in certain instance recognized the death penalty as a maximum 1 sentence in the case of a war crimes.

The ILC has considered the nulla poena principle since the beginning of its work on the codification of international criminal law, and has suggested including the precise sentencing guidelines within the ILC's Draft Statute for an International Criminal Court.

The ILC, in the 1951 Draft Code of Offences against the Peace and Security of Mankind proposed that penalties 'shall be determined by the Tribunal exercising jurisdiction over the individual accused, taking into account the gravity of the offence', which was contrary to the rule of nulla poena. Although a General Assembly Committee accepted that 'it would be desirable that the court, in exercising its power to fix penalties, should take into account the penalties provided in applicable 1 "77 national law [which could] serve as some guidance for its decision'.

The statutes of the ad hoc tribunals have incorporated the nulla poena principle. Article 24 (1) of the ICTY statute states that 'The penalty imposed by the Trial Chamber shall be limited to imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences to the general practice regarding prison sentences in the courts of the former Yugoslavia'. The article excluded the death penalty and the tribunal can impose a maximum available sentence 20 years. Despite the silence of the ICTY statute on the issue, the judges of the ICTY recognized a maximum penalty of life imprisonment in Rule 101 (A) of the Rules of Procedure and Evidence.

Article 23 (1) of the ICTR statute stipulates an identical provision referring to the sentencing practice of Article 24 of the ICTY Statute. The Rwanda tribunal reiterated the declaration made by the Yugoslavia tribunal that the reference to sentencing practice in Rwanda is not mandatory and is merely a guide for the tribunal.

The ILC Draft Statute of 1994 contained a general sentencing provision allowing for terms of detention up to life imprisonment, specified period of imprisonment and a fine. For doing so, the court had to consider the national law of the state of which the offender was a national, the state where the crime was committed, and the state with custody of and jurisdiction over the accused.

The ICC Statute provides a general nature of the penalties, such as imprisonment up to thirty years or life together with fine and forfeiture of property, where the nulla poena principle is only partly complied with. The Rome Statute does not provide specific penalties for crime of genocide, crimes against humanity, war crime and aggression. The proposed penalties do not certainly comply with the standards of certainty and strictness of penalties common to national criminal law that 176 they do not specify distinct sanctions depending upon the offences within the jurisdiction of the ICC (Article 5-8).

The ICC statute specifies the terms of imprisonment and the criteria for their imposition, as well as the possibility of imposing fines and the forfeiture of proceeds, the role of time served prior to sentencing, and the treatment of multiple sentences'. As a result, Article 23 serves as a limit on the discretionary powers of the court. The court cannot impose penalty which is not enumerated in the ICC Statute, or provided in accordance with the Rules of Procedure and Evidence. Further, the statute prevents state parties from imposing additional punishment upon those who have already been convicted by the court. Still, unlike the previous international criminal law instruments, the Rome Statute complies with the nulla poena requirement as it is understood in international law.

PRINCIPLE OF NON-RETROACTIVITY

One of the elements of the principle of legality and the corollary of the nullum crimen sine lege principle is the rule of non-retroactivity. According to the rule, no person shall be convicted of any offence except for violation of law in force at the time of the commission of the act charge as

an offence within the jurisdiction of the ICC. It means conduct may be punished only on the basis of a norm that came into force prior to when the conduct occurred.

Under Article 24 the long-standing legal principle of non-retroactivity is included. Article 24 (1) of the ICC statute states that the court cannot exercise its jurisdiction to the individuals criminally responsible for the conduct that occurred prior to the entry into force of the statute. It reads as follows:

1. No person shall be criminally responsible under this statute for conduct prior to the entry into force of the statute.
2. In the event of a change in the law applicable to a given case prior to a final judgment, the law more favorable to the person being investigated, prosecuted or convicted shall apply.

The article spells out that with regard to the states that become parties to the statute subsequent to its entry into force, the ICC has jurisdiction over crimes committed after the Rome Statute entry into force with respect to such states. Article 24 regulates the temporal limits of criminal responsibility.

In the preparatory process of the ICC Statute, Article 22 on nullum crimen and what became Article 24 on non-retroactivity were combined. In 1997, they were split into separate articles. Despite the clear overlap between the two provisions, differences in application can be identified. Article 22 (1) makes a finding of criminal responsibility in respect of any given conduct conditional upon the existence of an appropriate statutory prohibition at the time the conduct occurs; by contrast, Article 24 (1) makes a finding of criminal responsibility of any given conduct conditional upon the prior entry into force of the statute.

In addition, the principle prohibits inflicting ‘a penalty greater than that which he might have been subjected to at the time of the commission of the offence. The decisive question is the date on which the ICC statute entered into force, to be determined under Article 11 and 126 of the statute.

Article 24 (2) of the Rome Statute sets out that if the legal provision changes between the time the crime committed and the punishment of the accused, the law more favourable to the person

being prosecuted shall apply. The ICC statute provides an exception to the principle of non-retroactivity. By virtue of Article 12 (3) of the ICC Statute, it is possible for a state to make an ad hoc declaration recognizing the court's jurisdiction over a particular case within the ICC Statute even the material state is not a party to the statute. In such a situation, the ICC without jurisdiction 178 could prosecute a crime committed to entry into force of the statute with respect to the non-party state.