NULLUM CRIMEN SINE LEGE IN INTERNATIONAL CRIMINAL LAW: MYTH OR FACT?

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Abstract

Nullum crimen sine lege is the moral principle of legal system which means that a person cannot punished except for an act that was criminalized by law before he has performed the act. This principle of legality has found an importance place in the domestic legal system of almost all the countries. The notion of nullum crimen sine lege has also found its place in many international documents, however; its implication is very weak as many acts punished by the international criminal tribunal were of ambiguous legality as per situation in which they were committed. The aim and object of this paper is to find the principle of nullum crimen sine lege in various international laws and see that how far this principle is actually implemented.

Key words: Criminalized, International law, legality, Nullum crimen sine lege, Punishment.

1. INTRODUCTION

The maxim nullum crimen sine lege literally means ‘no crimes without law.’ It means that without any previous criminal law, a conduct cannot come within the definition of crime. This maxim reads with another maxim, i.e., nulla poena sine lege which means ‘no punishment without a previous penal law.’ Taking these two maxims together it can be commented that one cannot be punished for doing something that is not prohibited by law. This principle is accepted as just and upheld by the penal codes of constitutional states, including virtually all modern democracies. It is related to the principle called "Nullum crimen, nulla poena sine praevia lege poenali", which means penal law cannot be enacted retroactively.

The question regarding the maxim nullum crimen sine lege found its importance during the Second World War, when International Military Tribunal was set up in Nuremberg and Tokyo for prosecuting the Second World Wars criminals. Thereafter vast development was made to this maxim. During the course of this paper in the first chapter, the author will discusses the importance of the international human rights instruments and the relevant provisions dealing with the notion of nullum crimen sine lege. In the succeeding chapter, the

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4 Ibid.
author develop upon the aspect of International Military Tribunals and the reason for the establishment of the same, their jurisdiction and the aspect of *nullum crimen sine lege* is projected in these tribunals. Thereafter in the following chapter, the author discusses the role of the Ad Hoc Tribunals and the concept of *nullum crimen sine lege*. How this principle has been dealt with the International Criminal Tribunal for Former Yugoslavia and the International Military Tribunal for Rwanda; similarly its place and position under customary international law will also be discussed by referring its discussion in comparison with other concept like ‘joint criminal enterprise’ and ‘command responsibility’ in light of discussion rendered in the case of Tadic and Yamashita. Further to conclude the discussion after examining various aspects pertaining to *nullum crimen sine lege*, an comparative study of the concept of *nullum crimen sine lege* will be undertaken with International Criminal Court, with special emphasis being placed upon Article 22 and 23 of the Rome Statute.

2. INTERNATIONAL HUMAN RIGHTS INSTRUMENT AND NOTION OF *NULLUM CRIMEN SINE LEGE*

The notion of *nullum crimen sine lege* has been enumerated in various international human rights instruments, which set up a standard applicable to the legal system of each state party. For this purpose this chapter discusses the two important international human rights instrument, i.e., Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights and the relevant provisions included in it.

2.1. *UNIVERSAL DECLARATION OF HUMAN RIGHTS AND NULLUM CRIMEN SINE LEGE*

After the experience of the Second World War, the United Nations General Assembly adopted Universal Declaration of Human Rights on December 10, 1948. It has been proclaimed “as a common standard of achievement for all peoples and all nations.” The Declaration is said to be the expression of the United Nation to safeguard human rights. In order to protect the human rights of a person it is necessary that he shall not be made accountable for any *ex post facto* laws. Article 11 of the Declaration explicitly deals with this right. First paragraph of this Article says that no one is guilty unless proved guilty. Whereas the second paragraph says that no penal action can be taken for any act, unless it is declared as offence.
2.2. THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS
AND NULLUM CRIMEN SINE LEGE

The International Covenant on Civil and Political Rights was adopted by the United Nations General Assembly on December 16, 1966, which came into force from March 23, 1976. The position of this convention is that, unlike Universal Declaration of Human Rights, it creates a binding obligation upon the state parties. Under Article 40 of the Covenant, the States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights. The Optional Protocol to the present Covenant included individual complaint procedure and thus any individual whose right under the present Covenant is been violated can by a petition approach to the Human Rights Committee.

Article 15(1) of the International Covenant on Civil and Political Rights includes a notion of *nullum crimen sine lege*. This provision not only provides protection against ex post facto legislation, but also restricts the national and international body to impose any heavier penalty which was not applicable at the time when the criminal offence was committee. Thus this provision gives respect to both the notions, i.e., *nullum crimen sine lege* and *nulla poena sine lege*.

Under Article 4(1) of the Covenant, the States Parties to the present Covenant may, in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, take measures derogating from their obligations under the present Covenant. But this provision is subject to Article 4(2) of the Covenant and thus a state cannot derogate from their obligation mentioned in Article 15 even during the period of emergency.

The *nullum crimen sine lege* principle in the Covenant founds its importance in the time of war. There are certain elements of rights of fair trial enumerated in the Covenant, guarantees

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5 Article 15(1) of the International Covenant on Civil and Political Rights states: No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

6 Article 4(1) of the International Covenant on Civil and Political Rights states: In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

7 Article 4(2) of the International Covenant on Civil and Political Rights states: No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.
international humanitarian law during armed conflict and there is no justification from those guarantees even during emergency situation.

3. WAR CRIMES TRIALS CONDUCTED AFTER THE SECOND WORLD WAR AND THE NOTION OF NULLUM CRIMEN SINE LEGE

This portion addresses the various trials held after the Second World War such as the Nuremberg trials, the Tokyo trials, the Yugoslavia tribunal and the Rwanda tribunal and discusses how much respect has been given by these courts to the notion of nullum crimen sine lege.

3.1. THE INTERNATIONAL MILITARY TRIBUNAL AT NUREMBERG

3.1.1. The Nuremberg Charter

After the end of the Second World War, plans were made to try war criminals. In response of the plan, the Allies set up an International Military Tribunal to try the major war criminal in August 1945. The Tribunal consists of four members, each with an alternate. One member and one alternate shall be appointed by each of the Signatories. The alternates shall, so far as they are able, be present at all sessions of the Tribunal. In case of illness of any member of the Tribunal or his incapacity for some other reason to fulfill his functions, his alternate shall take his place. The Charter itself authorizes the Tribunal to “impose upon a Defendant, on conviction, death or such other punishment as shall be determined by it to be just.”

According to Article 9 of the Nuremberg Charter, the tribunal had the power to declare group or organization of which accused individual was a member to be criminal organization.

8 Article 2 of Nuremberg Charter.
9 Article 27 of Nuremberg Charter.
the charge regarding “crime against humanity” should be regarded as crime under the international law.

The following section expresses the way in which these controversies were addressed in the Nuremberg judgment.

a) Crimes against peace

Article 6(a) of the Nuremberg Charter defines “crimes against peace” which includes planning, preparation, initiation or waging of a war of aggression. The objection concerning “crimes against peace” was that Article 6 of the Nuremberg Charter constitutes as ex-post facto laws and was therefore in conflict with the principle nullum crimen sene lege. However this contention was rejected by the Tribunal with the argument that “The maxim … 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 treaty and assurance have attacked neighboring 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 unjust if his were allowed to go unpunished. Occupying the position they did in the government of Germany, the defendant, or at least some of them must have known of the treaties signed by Germany, outlawing resources to war for the settlement of international disputes; they must have known that they were acting in defiance of all international law when in complete deliberation they carried out their design of invasion and aggression. On this view of the case alone, it would appear that the maxim has no application to the present facts.”

The Tribunal referred to various treaties and declarations, according to which aggression was an international crime already before the constitution of the Charter, such as two Hague Convention of 1899 and 1907 relative to the pacific settlement in international disputes and the Versailles Treaty of 1919. According to the Tribunal “The charge in the indictment that the defendants planned and waged aggressive wars are charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent states alone but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulation evil of the whole.

10 Nuremberg Judgment, at pp. 39.
The first act of aggression referred to in the indictment is the seizure of Austria and Czechoslovakia; and the first war of aggression charged in the Indictment is the war against Poland begun in 1 September 1939.”

It was further argued that the acts in question are the act of the sovereign state and they cannot be made personally liable and are protected by the doctrine of the sovereignty of the state. The Tribunal rejected this argument by stating that it has long been recognized that international law imposes duties and liabilities upon individuals as well as upon states, referring to the Article 228 of the 1919 Treaty of Versailles.

b) War crimes and crimes against humanity

Article 6(b) of the Charter which deals with “war crimes” was drawn from the Hague Convention of 1907 and from the Geneva Convention of 1929. Regarding this provision it was argued that some of the countries involved were not parties to the Hague Convention and that therefore according to Article 213 of the Convention the Germans were not bound by those Convention with regard to the countries who are not parties to the Convention. In the second argument it was submitted that, since the laws of war only applied to belligerents, they were not applicable to countries which “Germany had completely occupied and made part of the German Reich.”

In response of the argument the Tribunal said that the rule regarding “war crimes” mentioned in the Convention are the rule recognized by all civilized states and thus comes within the definition of law under the international law.

The words “before or during the war” indicates that the crimes against humanity could be committed even before the war. However, it is very difficult to gather the evidence of the crime committed before the war. Von Schirach was convicted for the crimes against humanity which was partly committed before the war, i.e. prior to 1 September 1939.

3.2. THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST

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11 Nuremberg Juggment, at pp. 13.
12 Article 228 of the Treaty of Versailles reads: “The German Government recognizes the right of the Allied and Associated powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishment laid down by law ...”; Treaty of peace between the Allied and Associated powers and Germany, Versailles, 28 June 1919 (entry into force 10 January 1920).
13 Article 2 of the Hague Convention provides that the provisions contained in the regulations (Rules of Land Warfare) as well as in the Convention itself “do not apply except between contracting powers, and then if all the belligerents are parties to the Convention.”
Differentiating from the Nuremberg Charter, the Tokyo Charter was not part of a treaty or agreement among the Allies but it was significantly similar to the Nuremberg Charter. A foremost exception was that Emperor Hirohito was excluded from being tried for crimes against peace, crimes against humanity and war crimes.

3.2.1. The Tokyo Charter
After the Nuremberg Tribunal, the International Military Tribunal for the Far East Charter (IMTFE Charter), also known as the Tokyo Charter, was established to set down the laws and procedures by which the Tokyo Trials were to be conducted.\textsuperscript{14} The permanent seat of the Tribunal was in Tokyo.\textsuperscript{15} The Tribunal shall consist of not less than six members nor more than eleven members, appointed by the Supreme Commander for the Allied Powers from the names submitted by the Signatories to the Instrument of Surrender, India, and the Commonwealth of the Philippines. The Tribunal shall have the power to try and punish Far Eastern war criminals that as individuals or as members of organizations are charged with offences which include Crimes against Peace.\textsuperscript{16}

There were two major differences between the Tokyo Charter and the Nuremberg Charter. The Tokyo Charter adds the categories of persons to be held liable and it does not make "persecution" subject to "religious" grounds.\textsuperscript{17} The first difference is only in the drafting of Article 5(c) of the Tokyo Charter defining crimes against humanity since the same responsibility basis exists in the Charter thought not in Article 6(c) of the Nuremberg Charter. The second difference is because of the fact that the Nazi crimes against the Jews did not have a counterpart in the Asian conflict.\textsuperscript{18}

3.2.2. Tokyo judgment
The offences charged to the perpetrators at the Tokyo trial were similar to that of the Nuremberg trial. It was held that the principle \textit{nullum crimen sene lege} was not a limitation of sovereignty that would prevent \textit{ex-post facto} trials; rather it is a principle of justice. The tribunal thus found that an individual can be subject of international law and that the principle of international law which under certain circumstances prevents the representatives of the

\textsuperscript{14} Bassiouni, M. Cherif, “\textit{Crimes Against Humanity in International Criminal Law}”, Wolters Kluwer, 1999, at p. 32
\textsuperscript{15} \textit{Ibid.}
\textsuperscript{16} Article 5, paragraph 1 of the IMTFE Charter.
\textsuperscript{18} \textit{Ibid.}
state shall not left alone for the acts which are criminal under the international law. In this respect, the president of the Tribunal, Sir William Webb, concluded that “The view that aggressive war is illegal and criminal must be carried on its logical conclusions, e.g., a soldier or civilian who opposed war but after it began decided it should be carried on until a more favorable time for making peace was guilty of waging aggressive war. There are no special rules that limit the responsibility for aggressive war, no matter how high or low the rank or status of the person promoting or taking part in it, provided he knows, or should know, it is aggressive.”

Philippine judge also rejected the objection concerning the prohibition of convictions on the basis of ex post facto law. He considered nullum crimen, nulla poena sine lege not applicable to international law, distinguishing between national laws and national violators of those laws on the one hand, and authors of international crimes on the other. He nonetheless emphasized that, long before the war, the act of Japan and its leaders had been the subject of strong and repeated protests and warnings on the part of the allied powers. They knew that, in case of their defeat, they would be brought to justice and the fact that they had accepted those terms of the Allied Powers would make the defense of ex post facto law unsustainable.

Judge Pal, however, maintained a dissenting opinion and held that the rule concerning crime against peace constituted ex post facto legislation. He stated that a victor nation is, under international law, competent to set up a tribunal for the trial of war criminals, but such a conqueror is not competent to legislate on international law. Regarding crimes against peace, for which no internationally accepted definition existed, he stated that any trial such as that conducted by the International Military Tribunal for the Far East was merely the judgment of the victors on the vanquished.

### 3.3. OTHER WAR CRIMES TRIALS

#### 3.3.1. Control Council Law No. 10

As of 20 December 1945, the jurisdiction to try the war criminals and other similar offenders, other than those dealt with by the International Military Tribunal was based on Allied Control Council Law no.10. According to this law, each occupying authority, i.e., the United States,

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Great Britain, France, and Russia had the right within its own zone to bring to trial persons accused of committed crimes during the Second World War.

It was argued that accused cannot be prosecuted as the crime and the punishment was not prescribed at the time of the commission of the act and the violation of *nullum crimen sine lege*. However, the Tribunal rejected the argument on the ground that at the time of the alleged offence the act of the accused did in fact constitute punishable violation of international law.

During this trial, charges of “crimes against humanity” were particularly subject of legal argument with regard to the *ex post facto* laws. Article 2(c) of the Control Council Law No. 10 does not include the requirement that crimes against humanity be committed in connection with other crimes included in this law. This has made several authors to criticize that the restriction included in the Nuremberg Charter was lifted by the four powerful states by deleting this qualifying ground.

Generally it has been held by the US Military Tribunal that Control Council Law No. 10 did not constitute *ex post facto* legislation and thus does not violate the principle of *nullum crimen sine lege*. They further said that ex post facto prohibition is in essence a principle of justice and can therefore not be applied in war crimes trials where the ends of justice would be violated with its application.

### 3.3.2. Nullum crimen sine lege

Apart from the applicability of the principle of *nullum crimen sine lege* in international law, question was raised concerning the exercise of the criminal jurisdiction and the claim of *ex post facto laws* and since the relevant law would constitute *ex post facto laws*, the various Military Tribunal and court would have no jurisdiction to try them. In this regard it was held that, according to natural law the said act was already criminal and thus the plea of *ex post facto* will not be applicable. A French judge holds that:

“There is no doubt in my mind that such a war is and always has been a crime in the eyes of reason and universal conscience. Expression of natural law upon which an international Tribunal can and must base itself to judge the conduct of the accused tendered to it.”

In so far as international jurisdiction was concerned, it was held that the international law does not apply to offences for which the criminal code of any well ordered state makes

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adequate provisions. This case could be tried by the International Tribunal only if the state law fails to prosecute the accused or not willing to punish the accused. The United Nation War Commission later on submitted that “the right to punish war crimes is not confined to the state whose nationals have suffered or whose territory the offence took place but is possessed by any independent state whatsoever, just is the right to punish the offence of privacy.” According to this doctrine, under international law, every independent state has jurisdiction to punish war criminals in custody, regardless of the nationality of the victim or of the place where the offence was committed.23

According to the Moscow Declaration and the London Declaration, the war criminals other than the major war criminals were to be sent back to the countries in which their alleged act were done in order they may be judged and punished according to law of the liberated countries and free Government that will be created therein.

3.4. DEBATE ON INTERNATIONAL LAW AND THE NULLUM CRIMEN SINE LEGE

Based on the Nuremberg trials, Tokyo Trials and the judgment made the tribunal there was a debate whether the thesis of nullum crimen sine lege apply to international law or not? The writer who negated the application of doctrine in international law said that the doctrine is applicable to the legal system which has a static and written law. Since the international law is a developing law and is based on the practice of the various states, the thesis of nullum crimen sine lege is not applicable to the international law and thus the Nuremberg Tribunal and the Tokyo Tribunal have not violated any law.

In contrast some authors, however, agreed the violation of nullum crimen sine lege by the Nuremberg Tribunal and the Tokyo Tribunal. According to the H. Kelsen, rule against retroactive legislation is not at all valid under international law, but since the internationally illegal acts were certainly and morally most objectionable, and the person who committed these acts were aware of their immoral character, the retroactivity of the law applied to them can hardly be considered as absolutely incompatible with justice. Punishing those who were morally responsible for the international crime of the Second World War may certainly be considered as more important than to comply with the ex post facto laws.24

4. THE AD HOC INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA AND FOR RWANDA AND THE PRINCIPLE OF *NULLUM CRIMEN SINE LEGE*

The practice of the ad hoc tribunal for Yugoslavia and Rwanda are been taken as “precedent” for the International Criminal Court. The practices of these Tribunals are used as a source of law for the International Criminal Court. Thus it is necessary to examine that to what extent these Tribunals satisfied the doctrine of *nullum crimen sine lege*, as well as an examination of what the principle entails in the proceedings before the Tribunals.

This chapter addresses the establishment of the Tribunals and examines what role the notion *nullum crimen sine lege* has played in the determination of the content of their subject matter jurisdiction.

4.1. THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

4.1.1. The Establishment of ICTY

The Tribunal was established for the purpose of prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, by resolution 827 of the United Nation Security Council. According to the Secretary General, the Tribunal should apply the principle of international humanitarian law which is beyond any doubt of customary law, so as to comply with the notion of *nullm crimne sine lege*.

The territorial jurisdiction of the International Tribunal shall extend to the territory of the former Socialist Federal Republic of Yugoslavia, including its land surface, airspace and territorial waters. The ICTY is competent to prosecute individuals responsible for the violation of international law since 1991.

4.1.2. The subject matter jurisdiction of the ICTY

Article 1 of the ICTY deals with the competence of the Tribunal and states that:

The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.

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25 Report of Secretary General on ICTY Statute, para. 34.
26 Article 8 ICTY Statute.
The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

a) Grave breaches of the Geneva Conventions of 1949,\(^{27}\)
b) Violations of the laws or customs of war,\(^{28}\)
c) Crimes against Genocide,\(^{29}\) and
d) Crimes against humanity.\(^{30}\)

The Statute further says that the Tribunal shall have jurisdiction over the natural person\(^{31}\) and a person accused of international crime shall be individually made liable.\(^{32}\)

4.2. **THE INTERNATIONAL MILITARY TRIBUNAL FOR RWANDA**

4.2.1. The Establishment of ICTR

The International Military Tribunal for Rwanda (ICTR) was established for the purpose to prosecute people responsible for the Rwandan Genocide and other serious violations of the international law in Rwanda, or by Rwandan citizens in nearby states, between 1 January and

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\(^{27}\) Article 2 of ICTY: The power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (a) willful killing; (b) torture or inhuman treatment, including biological experiments; (c) willfully causing great suffering or serious injury to body or health; (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power; (f) willfully depriving a prisoner of war or a civilian of the rights of fair and regular trial; (g) unlawful deportation or transfer or unlawful confinement of a civilian; (h) taking civilians as hostages.

\(^{28}\) Article 3 of ICTY: The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to: (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; (e) plunder of public or private property.

\(^{29}\) Article 4 of ICTY: The International Tribunal shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article. 2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group. 3. The following acts shall be punishable: (a) genocide; (b) conspiracy to commit genocide; (c) direct and public incitement to commit genocide; (d) attempt to commit genocide; (e) complicity in genocide.

\(^{30}\) Article 5 of ICTY: The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts.

\(^{31}\) Article 6 of ICTY: The International Tribunal shall have jurisdiction over natural persons pursuant to the provisions of the present Statute.

\(^{32}\) Article 7 of ICTY

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighboring States. Thus, in contrast to the Statute of the ICTY, the territorial jurisdiction of the Rwanda Tribunal is not limited to the territory of Rwanda.

4.2.2. Subject matter jurisdiction of ICTR

The Statute of the Rwanda Tribunal starts with the crime of genocide. Article 2 of ICTR states:

1. The International Tribunal for Rwanda shall have the power to prosecute persons committing genocide as defined in paragraph 2 of this article or of committing any of the other acts enumerated in paragraph 3 of this article.

2. Genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
   a) Killing members of the group;
   b) Causing serious bodily or mental harm to members of the group;
   c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
   d) Imposing measures intended to prevent births within the group;
   e) Forcibly transferring children of the group to another group.
   f) The following acts shall be punishable:
      g) Genocide;
      h) Conspiracy to commit genocide;
      i) Direct and public incitement to commit genocide;
      j) Attempt to commit genocide;
      k) Complicity in genocide.

This provision is identical to Article 2 and 3 of the Genocide Convention of 1948 and Article 4 of ICTY. In this Statute more emphasis was given on Genocide than on war crimes. Article 3 of the Statute empowers the Tribunal to prosecute persons for the crimes against humanity, which includes:

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33 Article 1 and 7 ICTR Statute.
In contrast to the ICTY Statute, which contains “grave breaches of the Geneva Convention” and “violation of laws or customs of war” in Article 2 and 3 of the ICTY Statute respectively, the ICTR Statute punishes an individual for serious violations of Article 3 common to the Geneva Conventions and of provisions included Additional Protocol II.\textsuperscript{34}

4.2.3. Ad hoc tribunal and the application of nullum crimen sine lege

The ad hoc Tribunals were set up the United Nation Security Council, so it was required that both the Tribunals ensure the right to a fair trial in accordance with the highest UN standard

\textsuperscript{34} Article 4 ICTR: The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to: a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; b) Collective punishments; c) Taking of hostages; d) Acts of terrorism; e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; f) Pillage; g) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples; h) Threats to commit any of the foregoing acts.
at all stages of the proceedings. None of these ad hoc Tribunals contain the provision of *nullum crimen sine lege*. Although the Secretary General had explicitly mentioned the *nullum crimen sine lege* principle in his report, but he fails to further explain the applicability of the principle to the jurisdiction of the International Ad Hoc Tribunal. However, it can be said that the Tribunals are required to follow the customary international law beyond any doubt.

According to a memorandum submitted by President Cassese to the members of the Preparatory Committee on the Establishment of an International Criminal Court:

As is clear from the reference in the Secretary General’s Report to *nullum crimen sine lege*, this is not a definition of the principle of legality, which is well settled but an elaboration as to what applicable law may be applied by the International Tribunal. It follows that the International Tribunal is authorized to apply, in addition to customary international law, any treaty which: (i) was unquestionably binding on the parties at the time of the alleged offence; and (ii) was not in conflict with or derogated from peremptory norms of international law, as are more customary rules of international humanitarian law.35

The principle of “joint criminal enterprise” founded by the ICTY Tribunal in Tadic case was the most disputable case. This doctrine is not mentioned in the ICTY Statute. According to the third category of this doctrine a person who intends to participate in a common design may be guilty of the acts which are outside that common design if such acts are foreseeable by any member of the enterprise. This principle was criticized on the following grounds:

1. The principle of “joint criminal enterprise” is not mentioned in any provision of the Statute.

2. The principle of “joint criminal enterprise” is to some extent similar to Nuremberg criminal organization liability. But the criminal organization charges does make liable to a defendant for the acts of the organization which was not intended. Thus, the principle of “joint criminal enterprise” is a new crime founded by the ICTY Tribunal. It is in violation of the notion of *nullum crimen sine lege*. Moreover, the decision of the Nuremberg Tribunal is itself in dispute, than how can the Tribunal use this principle under the umbrella of “customary international law”. This customary international law was required to clear the test of “beyond any doubt”.

5. INTERNATIONAL CRIMINAL COURT AND THE NOTION OF NULLUM CRIMEN SINE LEGE

The International Criminal Court was established through the Rome Statute, which was adopted by the General Assembly on 17th of July 1998 and it came into force on 1st of July 2002. The establishment of the International Criminal Court was warmly welcomed by international criminal lawyers. Professor Bassiouni, a celebrated expert of international criminal law, said, "the establishment of the ICC symbolizes and embodies certain fundamental values and expectations shared by all people of the world and is, therefore, a triumph for all peoples of the world." Various Chinese scholars also give high praise with comments like "the birth of the Rome Statute is a milestone in the development of international criminal law", or "the establishment of the ICC is an important and epoch-making step in the legal system of International Law." It was established to punish individuals who commit serious international crimes. Before this court there was no permanent international court to deal with serious international crimes.

As we have already seen in the earlier chapter that whenever the problem arise, the United Nation Security Council has to pass a resolution under Chapter VII of the United Nation Charter for the purpose of establishment of an International Tribunal. There are arguments which in against of this Ad Hoc Tribunals, such as:

1. The Ad Hoc Tribunals does not have the proper jurisdiction over the accused,
2. The Ad Hoc Tribunals are based on ex post facto laws, etc.

There is no doubt that there is a requirement of right to protection from retrospective criminal laws. Keeping in mind the necessity of this right, the drafter of the various international instrument have mentioned this principle in the documents, such as Article 11 of the Universal Declaration of Human Rights, Article 15 of the International Covenant on Civil and Political Rights etc. Nevertheless, there are also the example of certain International Tribunals which have ignored this principle in some and the other way.

Taking the example from the previous experience and the necessity of nullum crimen sine lege principles, the drafter of the Rome Statute have enumerated this principle under this

statute. This chapter will discuss about the notion of *nullum crimen sine lege* in Rome Statute and some positive and negative of the presence of this principle in the Rome Statute.

5.1. **INTERNATIONAL CRIMINAL COURT**

To punish a person who commits serious international crimes, the United Nation Organization established International Criminal Court through the Rome Statute. This Court has the power to exercise its jurisdiction over persons who commits the crime mentioned in the Rome Statute. The International Criminal Court has jurisdiction over the following crimes:

1. The crime of Genocide;
2. Crimes against humanity;
3. War crimes;
4. The crime of aggression.\(^{41}\)

5.2. **NULLUM CRIMEN SINE LEGE: ARTICLE 22**

Article 22 of the Rome Statute explicitly mention about the *nullum crimen sine lege* principle. It states:

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.

Article 23 of the Statute says that a person shall be punished only in accordance with this statute. Thus in one hand it can be said that Rome statute has follows the rule of law and try to have a fair trial within the meaning of law. But, on the other hand, Article 77(1)(a)

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\(^{40}\) Article 1 of the Rome Statute states: An International Criminal Court (‘the Court’) is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

\(^{41}\) Article 5(1) of the Rome Statute states: The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.
authorize court to impose imprisonment for a specified number of years, which may not exceed a maximum of 30 years. This can again be criticized as indirect violation of the notion of *nullum crimen sine lege*, as every person must know the punishment which shall be imposed for violation of any provision of the Rome Statute and marking punishment as zero to thirty years is not appropriate mention of the punishment.

6. CONCLUSION

The notion of *nullum crimen sine lege* has found its place in international human rights documents, such as Article 11 of the Universal Declaration of Human Rights, Article 15 of the International Covenant on Civil and Political Rights etc. Thus, it is clear that the member states are obliged to enumerate the principle of *nullum crimen sine lege* in their national law. This principle founds its importance during the period of war. As there are certain principles, which cannot be derogated even during the period of emergency, such as the principle of fair trial.

The respect to this principle as we found in the current scenario was not same during the period of Second World War. There was lots of criticism regarding the trial conducted in Nuremberg and Tokyo. It has been argued that the Tribunals have no jurisdiction to try the accused and the Tribunals are not following the *nullum crimen sine lege* principle and applying the ex post facto laws. In contrast it was said that international law is a developing law and is based on the practice of the various nations. The notion of *nullum crimen sine lege* is not is not applicable in international law. Many of the judges said that the act was already prohibited according to the natural law principle and does not violate the principle. The perpetrators were aware of the immoral character of the act and are responsible under the international criminal law. It has also been said that it is more important to punish a person who has done an immoral act than to release him on the principle of *nullum crimen sine lege*. Thus, with regard to the Nuremberg trial and the Tokyo trial it can be said that these tribunals had applied the *nullum crimen sine lege* principles in much liberal way than it is applied in national legal system.

The principle of *nullum crimen sine lege* has not been found in any of the Ad Hoc Tribunal Statute. Since, the International Tribunal for Former Yugoslavia was established by the resolution passed by the Security Council, it was expected that the Tribunal will apply only those law which are the part of customary international law. “Beyond any reasonable doubt” was the test which Yugoslavia Tribunal was required to satisfy before applying any
customary law in any case. The same policy was followed by the Rwanda Tribunal. However, even after having so much restriction it has been argued that the Yugoslavia Tribunal, by establishing “joint criminal enterprise” principle in Tadic case, has diluted the theory of ‘mens rea’; which is necessary to be proved before prosecuting any person under the criminal law.

After taking the experience of these two tribunals, the drafter of the Rome Statute has expressly mentioned the principle of *nullum crimen sine lege* under Article 22 of the Rome Statute. However, looking into the consequence of the implication of Article 77 again this principle has been indirectly violated.

Thus, it can be concluded that even the Rome Statute have failed to properly acknowledge the principle of *nullum crimen sine lege*. The international society must take appropriate steps to bring amendment in Article 77 of the Statute so as to fully comply the principle of legality, i.e, *nullum crimen sine lege*