

Sentencing Criteria in International Criminal Law: Towards Consistency, Certainty and Fairness



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PART 1: Introduction

1.1. CONTEXT

Over the last 20 years a number of international courts/tribunals exercising criminal jurisdiction over the most heinous crimes have been established (the ICC being a notable example). The jurisprudence of these bodies, often involving the conviction of heads of state and other major state representatives, has led to the formation of international norms concerning both the substantive part of international criminal law (ICL), and the procedural guarantees in favour of the parties involved in the trial.

However, in the face of gaps in the statutes, courts often exercise broad judicial discretion to fill them in. Criticism has focussed on the alleged lack of consistency and predictability of sentencing, which has resulted in disparities between similar cases before the same jurisdiction, and before different jurisdictions competent for the same crimes.¹ Concerns have been raised that this may ultimately seriously threaten the credibility of their judicial authority and of ICL itself. This particularly arises with regard to sentencing criteria, which are very broadly defined in the statutes of the courts and tribunals.

As three of the most significant tribunals have come to a close – the SCSL formally closed on 2 December 2013, followed by the ICTR on 31 December 2015 and the ICTY on 31 December 2017 – the time is right to examine the extent to which the evolution of ICL has incorporated legal arguments based on rule of law principles as core components of criminal justice, and to draw lessons for the future.

This report is part of a research project commissioned by the **British Academy/Leverhulme Small Research Grants** scheme, which supports independent primary research in the humanities and social sciences.

¹ A notable statistical analysis of sentences imposed by the ICTY and the ICTR is contained in D'Ascoli S., *Sentencing in International Criminal Law: The UN ad hoc Tribunals and Future Perspectives for the ICC*, Oxford: Hart Publishing, 2011. The study reveals apparent inconsistencies regarding the severity of the sentences rendered by the ICTR and the ICTY for the same type of crime, mode of liability, or type of participation.

1.2. OBJECTIVES

The report pursues two complementary aims, which are to:

- i. analyse the extent to which the sentencing criteria employed by the SCSL, ICTY, ICTR and ICC are explicit, consistent and appropriate;
- ii. suggest solutions for the effective functioning of the international criminal jurisdiction in compliance with criminal justice principles and guarantees based on the rule of law.

1.3. METHODOLOGY

The conceptual framework of the study relies on the law and practice of ICL and the extent to which it is informed by liberal criminal justice principles in relation to sentencing. The report draws on desk-based research and analysis of traditional doctrinal/jurisprudential documents and on a set of semi-structured interviews.

A. Desk-based review

Applying traditional doctrinal and jurisprudential legal research methods, the report analyses two sets of documentary records that provide insight into sentencing criteria and outcomes: (i) the statutes, rules of procedure and judgments of the international tribunals; (ii) supplementary sources such as written and oral transcripts, extra-judicial comments, guidelines etc.

The analysis has focussed on three crosscutting themes:

(1) detecting whether the evolution of sentencing criteria (if any) has been informed by consolidated principles of criminal justice based on ROL principles – eg, no penalty without law (*nulla poena sine lege*), legal certainty and proportionality;

(2) ascertaining distinctions that may arise in the practice of the ad-hoc tribunals and of the ICC, given the differences between them with regard to establishment (Security Council resolution rather than international treaty), length of mandate, and type of jurisdiction vis à vis domestic criminal jurisdiction (exclusive and complementary);

(3) comparing the practices of the different institutions to examine whether sentencing models have circulated between them. This will highlight lessons that can be drawn from the approaches of the tribunals and how these might be taken forward at the ICC.

B. Interviews

The empirical strand of the research consists of 10 in-person and online semi-structured interviews designed by the Bingham Centre for the Rule of Law to be completed in 40-60 minutes, with some sections being adapted to the professional background of the interviewees. The in-person interviews with experts in the field took place mainly in The Hague, seat of the main institutions addressed in this project.

We conducted interviews with:

- 2 current/former judges at the ICC
- 1 former legal officer at the ICTY
- 3 officers having served at the prosecution office in one of the ad-hoc tribunals
- 4 lawyers practicing as defence counsels at the ICC, ICTR, ICTY, MICT or STL.

Where the report draws on comments made in interviews (paraphrasing or quoting), there will be a generic reference to "the interviewee/s" so that they cannot be identified by name or context, unless permission was granted during the interviews.

The interviews were carried out to (i) assess whether and how non-written practices or customs apply in this field and (ii) test the preliminary findings from the documentary research, evaluating them against the practical experience of those applying the law. This component of the research has enabled the collection of qualitative information and the study of tribunal/court practice that is not immediately discernible from documentary research.

1.4. STRUCTURE OF THE REPORT AND OTHER RESOURCES

This introduction explains the project's context and aims. Part 2 outlines the rules and criteria for determining sentences – with possible differences - as set out mainly in the respective statutes and the rules of procedure and evidence of the tribunals and the ICC. Part 3 constitutes the core of the report as it contains an analysis of how the rules analysed in Part 2 have been implemented in practice, both procedurally and substantially. It discusses main ROL challenges in ICL, in the light of the case law and the information elicited during the interviews. It also includes technical-legal suggestions for the effective functioning and credibility of the international criminal jurisdiction in compliance with criminal justice principles and guarantees based on the rule of law.

PART 2: Sentencing framework

2.1. INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

The ICTR Statute sets out that Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.² The penalty imposed by the ICTR Trial Chamber shall be limited to imprisonment.³ In determining the term of imprisonment, the ICTR Statute makes clear that Trial Chambers have recourse to the general practice regarding prison sentences in the courts of Rwanda, and that Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.⁴

The ICTR Rules of Procedure and Evidence (RPE) set out that if the Trial Chamber convicts the accused on a guilty plea, the Prosecutor and the Defence may submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence.⁵ The ICTR Rules of Procedure and Evidence establish that a person convicted may be sentenced to imprisonment for a fixed term or the remainder of his life.⁶ The Trial Chamber shall take into account the factors mentioned in the ICTR Statute, as well as such factors as: (i) any aggravating circumstances; (ii) any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction; (iii) the general practice regarding prison sentences in the courts of Rwanda; (iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 9 (3) of the Statute.⁷

² Article 22.1 ICTR Statute.

³ Article 23.1 ICTR Statute.

⁴ Article 23.2 ICTR Statute.

⁵ Rule 100 (A) ICTR Rules of Procedure and Evidence.

⁶ Rule 101 (A) ICTR Rules of Procedure and Evidence.

⁷ Rule 101 (B) ICTR Rules of Procedure and Evidence.

2.2. INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

The ICTY Statute sets out that the Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.⁸ The ICTY Statute also establishes that the penalty imposed by the Trial Chamber shall be limited to imprisonment.⁹ In determining the terms of imprisonment, ICTY Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia. When imposing sentences, ICTY Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.¹⁰ In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.¹¹

The ICTY Rules of Procedure and Evidence state that if the ICTY Trial Chamber convicts an accused on a guilty plea, the Prosecutor and the defence may submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence.¹² The rules also set out that a convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person's life.¹³

In determining the sentence, the ICTY Trial Chamber shall take into account the factors mentioned in the ICTY Statute, as well as such factors as: (i) any aggravating circumstances; (ii) any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction; (iii) the general practice regarding prison sentences in the courts of the former Yugoslavia; (iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in the ICTY Statute.¹⁴

⁸ Article 23.1 ICTY Statute.

⁹ Article 24.1 ICTY Statute.

¹⁰ Article 23.2 ICTY Statute.

¹¹ Article 23.3 ICTY Statute.

¹² Rule 100(A) ICTY Rules of Procedure and Evidence.

¹³ Rule 101 (A) ICTY Rules of Procedure and Evidence.

¹⁴ Rule 101 (B) ICTY Rules of Procedure and Evidence.

2.3. MECHANISM FOR INTERNATIONAL CRIMINAL TRIBUNALS (MICT)

With a view, inter alia, to avoid impunity after the closure of the two ad-hoc tribunals – the ICTR closed on 31 December 2015 and the ICTY on 31 December 2017 - the United Nations Security Council established the International Residual Mechanism for Criminal Tribunals (also known as MICT or “the Mechanism”) as a “a small, temporary and efficient structure, whose functions and size will diminish over time, with a small number of staff commensurate with its reduced functions”.¹⁵ The Mechanism started operating on 1 July 2012 in Arusha (Tanzania) inheriting functions from the ICTR, and on 1 July 2013 in The Hague (the Netherlands) inheriting functions from the ICTY. The Mechanism has operated in parallel with the tribunals and after their closure.

The MICT Statute sets out that the penalty imposed on persons shall be limited to imprisonment.¹⁶ In determining the terms of imprisonment, the Single Judge or the Trial Chamber shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia and in those of Rwanda, respectively.¹⁷ When imposing sentences, the Single Judge or Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.¹⁸

The MICT Rules of Procedure and Evidence set out in a separate section details about guilty pleas, specifying that if the MICT Trial Chamber convicts an accused on a guilty plea, the Prosecutor and the Defence may submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence.¹⁹ The MICT Rules of Procedure and Evidence also establish that convicted person may be sentenced to imprisonment for a term up to and including the remainder of their life.²⁰ In determining a sentence, the Trial Chamber shall take into account the factors mentioned

15 Resolution 1966 (2010) Adopted by the Security Council at its 6463rd meeting, on 22 December 2010, S/RES/1966 (2010),

16 Article 22.1 MICT Statute.

17 Article 22.2 MICT Statute

18 Article 22.3 MICT Statute.

19 Rule 124 (A) MICT Rules of Procedure and Evidence.

20 Rule 125 MICT Rules of Procedure and Evidence.

in the MICT Statute, as well as such factors as: (i) any aggravating circumstances; (ii) any mitigating circumstances, including the substantial cooperation with the Prosecutor by the convicted person before or after conviction; (iii) the general practice regarding prison sentences in the courts of the former Yugoslavia or in the courts of Rwanda; (iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served.²¹

The MICT has yet to render judgement. The MICT Trial Chamber is currently hearing the re-trial of *Stanišić and Simatović*.²² Considering the nature of the MICT as a residual mechanism of the ICTR and ICTY it is likely that it will follow the same procedure in determining criminal responsibility and sentencing (see below, Part III).

2.4. SPECIAL COURT FOR SIERRA LEONE

The Statute of the Special Court for Sierra Leone ("SCSL Statute") sets out separate sentencing procedures for juvenile and adult accused. Specifically, for juveniles, imprisonment is not an option, but the SCSL could order any of the following: care guidance and supervision orders, community service orders, counselling, foster care, correctional, educational and vocational training programmes, approved schools and, as appropriate, any programmes of disarmament, demobilization and reintegration or programmes of child protection agencies.²³

For adults, the SCSL Statute states that the SCSL Trial Chamber shall impose upon a convicted person, "imprisonment for a specified number of years".²⁴ In determining the terms of imprisonment, the SCSL Trial Chamber, as appropriate, has recourse to the practice regarding prison sentences at the ICTR and the national courts of Sierra Leone.²⁵ In imposing the sentences, the SCSL Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.²⁶ In

21 Rule 125 (B) MICT Rules of Procedure and Evidence.

22 For more information see MICT website <http://www.unmict.org/en/cases/mict-15-96>.

23 Article 7.2 SCSL Statute

24 Article 19 SCSL Statute

25 Article 19 (1) SCSL Statute.

26 Article 19 (2) SCSL Statute.

addition to imprisonment, the SCSL Trial Chamber may order the forfeiture of the property, proceeds and any assets acquired unlawfully or by criminal conduct, and their return to their rightful owner or to the State of Sierra Leone.²⁷

Sentencing procedure is also covered under Section 4 of the SCSL Rules of Procedure and Evidence. Specifically, if the Trial Chamber convicts the accused or the accused enters a guilty plea, the Prosecutor shall submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence no more than 7 days after such conviction or guilty plea.²⁸ The defendant shall thereafter, but no more than 7 days after the Prosecutor's filing, submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence. Where the accused has entered a guilty plea, the SCSL Trial Chamber shall hear submissions of the parties at a sentencing hearing. Where the accused has been convicted by a Trial Chamber, the Trial Chamber may hear submissions of the parties at a sentencing hearing.²⁹

The Rules of Procedure and Evidence also establish that in determining the sentence, the SCSL Trial Chamber should take into account the factors mentioned in the SCSL Statute,³⁰ as well as: (i) any aggravating circumstances; (ii) any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction; (iii) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 9 (3) of the SCSL Statute.³¹ The SCSL Rules of Procedure and Evidence allow for multiple sentences to be served consecutively or concurrently.³² Any period during which the convicted person was detained in custody pending his transfer to the SCSL or pending trial or appeal, shall be taken into consideration on sentencing.³³

27 Article 19 (3) SCSL Statute.

28 Rule 100 (A) SCSL Rules of Procedure and Evidence.

29 Rule 100 (B) SCSL Rule of Procedure and Evidence.

30 Referring to Article 19 (2) SCSL Statute.

31 Rule 101 (B) SCSL Rules of Procedure and Evidence.

32 Rule 101 (C) SCSL Rules of Procedure and Evidence.

33 Rule 101 (D) SCSL Rules of Procedure and Evidence.

2.5. INTERNATIONAL CRIMINAL COURT

The ICC Rome Statute dedicates a specific section – Part III – to “General principles of Criminal Law”, including the principle of legality, comprising the *nullum crimen sine lege* principle (art. 22) and the *nulla poena sine lege* principle (art. 23). According to article 23 of the Rome Statute, a person convicted by the Court may be punished only in accordance with the Statute.

The ICC Statute sets out that it may impose one of the following penalties on a convicted person: (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or (b) a term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.³⁴ In addition to imprisonment, the ICC may order: (a) A fine under the criteria provided for in the Rules of Procedure and Evidence; and (b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.³⁵

In determining the sentence, the ICC shall consider such factors as the gravity of the crime and the individual circumstances of the convicted person.³⁶ When a person has been convicted of more than one crime, the ICC shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment.³⁷ This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years' imprisonment or a sentence of life imprisonment.

Under the ICC Rules of Procedure and Evidence, the ICC shall (a) bear in mind that the totality of any sentence of imprisonment and fine, as the case may be, must reflect the culpability of the convicted person; (b) balance all the relevant factors, including any mitigating and aggravating factors and consider the circumstances both of the convicted person and of the crime; and (c) in addition to the factors mentioned in the ICC Statute, give consideration, *inter alia*, to the extent of the damage caused, in particular

³⁴ Article 77.1 ICC Statute.

³⁵ Article 77.2 ICC Statute.

³⁶ Article 78.1 ICC Statute.

³⁷ Article 78.3 ICC Statute.

the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person.³⁸

In addition to the factors mentioned above, the ICC shall take into account, as appropriate, mitigating circumstances such as: (i) the circumstances falling short of constituting grounds for exclusion of criminal responsibility, such as substantially diminished mental capacity or duress; (ii) the convicted person's conduct after the act, including any efforts by the person to compensate the victims and any cooperation with the Court.³⁹ The ICC will also consider aggravating circumstances, such as : (i) any relevant prior criminal convictions for crimes under the jurisdiction of the Court or of a similar nature; (ii) abuse of power or official capacity; (iii) commission of the crime where the victim is particularly defenceless; (iv) commission of the crime with particular cruelty or where there were multiple victims; (v) commission of the crime for any motive involving discrimination on any of the grounds referred to in article 21, paragraph 3; (vi) other circumstances which, although not enumerated above, by virtue of their nature are similar to those mentioned.⁴⁰ Life imprisonment may be imposed when justified by the extreme gravity of the crime and the individual circumstances of the convicted person, as evidenced by the existence of one or more aggravating circumstances.⁴¹

2.6. SUMMARY CONSIDERATIONS ON THE SENTENCING FRAMEWORK

The overview of the rules and criteria for determining sentences set out in the respective statutes and rules of procedure and evidence of the SCSL, ICTR and ICTY has shown that the relevant provisions say very little with regard to

³⁸ Rule 145.1 ICC Rules of Procedure and Evidence.

³⁹ Rule 145.2 ICC Rules of Procedure and Evidence.

⁴⁰ Rule 145.2 ICC Rules of Procedure and Evidence.

⁴¹ Rule 145.3 ICC Rules of Procedure and Evidence.

sentencing. They provide scarce/minimum guidance, thus leaving very large discretion to judges to exercise when imposing sentences.

The ICTY has clearly made this point when affirming that “[n]either the Statute nor the Rules specify a concrete range of penalties for offences under the Tribunal’s jurisdiction. Determination of the appropriate sentence is left to the discretion of each Trial Chamber, although guidance as to which factors should be taken into account is provided by both the Statute and the Rules.”⁴²

As it has been authoritatively commented, the criteria for determining sentences, which are provided in the Statute or in the Rules of Procedure and Evidence, are “a flawed attempt, to deal with the problem of legality in respect of punishment.”⁴³ This conclusion has been indirectly confirmed in the ICTY *Krstić* appeal judgement where the Appeals Chamber stated that “it is “inappropriate to set down a definitive list of sentencing guidelines for future reference,” given that the imposition of a sentence is a discretionary decision.”⁴⁴

By contrast, thanks to a successful process of negotiations, the Rome Statute and the related instruments are more sophisticated with regard to sentencing because they contain both provisions that deal specifically with the sentencing phase of the trial (see *infra*) and provisions related to the post trial phase of sentencing enforcement. However, despite the effort to respect the *nulla poena sine lege* principle which is established separately in article 23 of the ICC Statute, it may still be questioned whether merely fixing the maximum penalty that can be imposed on a convicted person is sufficient to guarantee rationality and fairness in sentencing.⁴⁵

⁴² ICTY, *Prosecutor v. Dragan Nikolić*, Appeals Judgement on Sentencing Appeal, IT-94-2-A, 4 February 2005, para. 75.

⁴³ Van Zyl Smit D., *Life Imprisonment as the Ultimate Penalty in International Law: A Human Rights Perspective*, in *Criminal Law Forum*, 9, 1999, p. 14. The author refers specifically to art. 24(1) ICTY Statute, but the statement remains valid also for the ICTR.

⁴⁴ ICTY, *Prosecutor v. Krstić*, Appeal Judgement, IT-98-33-A, 19 April 2004, para. 242. See also *Čelebići* Appeal Judgement, IT-96-21-A 20, February 2001, paras. 715-18; *Furundžija* Appeal Judgement, IT-95-17/1-A, 21 July 2000, para. 238.

⁴⁵ Broomhall B., *Nulla Poena Sine Lege*, in Triffterer O. (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Beck-Hart-Nomos, 1999, p. 44; Werle G., *Principles of International Criminal Law*, TMC-Asser Press, 2005; Ambos K., *Nulla Poena Sine Lege in International Criminal Law*, in Haveman R., Olaoluwa O. (eds.), *Sentencing and Sanctioning in Supranational Criminal Law*, Intersentia, 2006, p.23.

PART 3: ROL principles as a common thread in sentencing

3.1. RULE OF LAW PRINCIPLES RELEVANT IN (INTERNATIONAL) CRIMINAL JUSTICE

There is a dynamic scholarly production of theoretical and empirical work on the rule of law, across the areas of law, political science and economics, driven by renewed interest in the institutional and legal foundations of peace as a precondition to long-term growth.⁴⁶ A clear and concise definition of the rule of law and its core ingredients is articulated in Lord Bingham's book "The Rule of Law".⁴⁷ The eight ingredients of his definition have been further distilled into four, essential rule of law components: (i) legality, (ii) legal certainty, (iii) equality and (iv) access to justice and rights.⁴⁸

Applied in the context of criminal law, such ingredients inform the *consistency, certainty and fairness principles* that traditionally characterise criminal justice. Accordingly, intrinsic in the concept of justice is the idea that impunity should be combatted, including by putting in place fair and expeditious legal mechanisms to prosecute persons accused of crimes, whether at the domestic or international level. The principles of legality and legal certainty require that crimes and the related punishments are established in the law (*nullum crimen* and *nulla poena*). Punishments should be proportional to the crimes committed, equal, fair and predictable.

International criminal law represents a *sui generis* case, due to its historical development, the seriousness and gravity of ICL violations and the absence of detailed sentencing guidelines in positive law instruments in this area. The analysis that follows answers two basic questions: (i) what are the main challenges to consistency, predictability and fairness in sentencing, which emerge from the practice and the case law of international criminal courts and tribunals, and (ii) how can these be addressed to promote the effective functioning of international criminal justice based on the ROL.

⁴⁶ For a literature review see Haggard S. and Tiede L., *The Rule of Law and Economic Growth: Where Are We?*, in 39 *World Development*, 2011, p. 674.

⁴⁷ Lord T. Bingham, *The Rule of Law*, Penguin Books, London, 2010, p. 8.

⁴⁸ J. Jowell, *The Rule of Law and Its Underlying Values*, in J. Jowell and D. Oliver (eds.), *The Changing Constitution*, 7th edn, Oxford University Press, 2011, p. 16.

3.2. ANALYSIS OF TRIBUNAL SENTENCES

A. International Criminal Tribunal for Rwanda

Sentencing Methodology

The ICTR RPE in their original formulation (Rule 100) provided that the parties would be able to submit 'information' relevant for sentencing after a Trial Chamber found the accused guilty but since June 1998, this procedure has only applied to guilty pleas.⁴⁹ Moreover, the ICTR RPE set out that sentencing could be kept distinct from judgment on guilt if the Appeals Chamber chose to remand the issue of sentencing to a Trial Chamber after reversing an acquittal, but this is not common practice.⁵⁰

The ICTR has thus usually used a one-stage sentencing methodology: i.e. sentencing an accused in the same judgement as criminal culpability is established. In this regard, it is worth noting that the ICTR Practice Directions state that the filing of a closing brief for a single accused trial should not exceed 30,000 words, whilst in multi-accused trials, Defence briefs shall not exceed 30,000 words each. The Prosecutor can file a consolidated brief which shall not exceed 30,000 words for one accused and 20,000 words for each additional accused.⁵¹ Given the lack of a two-stage approach, these closing briefs therefore must address both the guilt or innocence of the accused, as well as sentencing issues in the event of conviction. This process meant that sentencing submissions from parties were extremely limited. The one-stage process also meant that no sentencing hearing occurred.

The main exceptions to the one-stage process of sentencing at the ICTR have been in relation to guilty pleas.⁵² Nine persons charged before the

⁴⁹ Third Annual Report of the ICTR, UN Doc. A/53/429-S/1998/587, 23 September 1998, para. 15.

⁵⁰ G. Acquaviva, N. Combs, M. Heikkila, S. Linton, Y. McDermott, S. Vasiliev, 'Trial Process', in Goran Sluiter, Hakan Friman, Suzannah Linton, Salvatore Zappala, and Sergey Vasiliev (eds) *International Criminal Procedure: Principles and Rules*, p. 535.

⁵¹ Practice Direction on Length and Time of Closing Briefs and Closing Arguments, ICTR, 3 May 2010, section 1.3 available at <http://unictr.unmict.org/sites/unictr.org/files/legal-library/pd-closing-briefs-closing-arguments.pdf>.

⁵² In *Kayishema* (1999) the ICTR produced a separate sentencing and trial judgement but were rendered on the same day

Tribunal elected to plead guilty.⁵³ In these cases, following the lodging of a guilty plea the ICTR allowed sentencing submissions to be filed, followed by a sentencing hearing. Guilty pleas also allowed the ICTR Trial Chambers to hear character witnesses and admit evidence of character at sentencing hearings.⁵⁴ It appears therefore that accused who plead guilty were at a distinct advantage in terms of sentence-specific evidence and submissions, over and above any discount they may have expected in their sentence for pleading guilty.

In the majority of cases the ICTR Trial Chamber has also handed down a single sentence encompassing all convictions, rather than separate sentences for each crime, so it is often difficult to ascertain precise sentences for crimes. In most cases, accused were convicted of multiple crimes, under multiple modes of liability for several different events. Despite this complicated web of convictions, the ICTR maintained a sentencing practice of handing down a single term of imprisonment.

There are, however, some ICTR cases which provide more accurate information. Firstly, the ICTR Trial Chamber in some cases did elect to issue sentences for each separate crime. Whilst these cases are very much in the minority, they do provide parties with some understanding of sentencing and thus provide some predictability for future sentences. Examples in these regards consist of *Kajelijeli*, *Kamuhanda*, *Kayishema*, *Muhimana*, *Imanishimwe*, *Ruggiu*, *Semanza* and *Zigiranyirazo*. In these cases, the ICTR Trial Chamber elected to hand down separate sentences for each conviction, all to run concurrently. Secondly, some accused were only convicted of one crime. In these cases, understanding the sentence is much easier by default. These two categories are very much in the minority, however.

As to the length of sentence, the ICTR utilised sentences ranging from 6 years to life imprisonment. The largest fixed-term sentences handed down by the ICTR are the 47-year sentences for Nyiramasuhuko, Ntahobali and

⁵³ Michel Bagaragaza, Paul Bisengimana, Jean Kambanda, Joseph Nzabirinda, Juvénal Rugambarara, Georges Ruggiu, Vincent Rutaganira, Joseph Serugendo, and Omar Serushago,

⁵⁴ See for example, Bagaragaza Sentencing Judgement, para. 12.

Ndayambaje received on appeal as reductions from their life sentences imposed by the ICTR Trial Chamber.

Factors Considered in Sentencing

As per the ICTR Statute and ICTR Rules of Procedure and Evidence, the criteria that need to be taken into consideration in sentencing include on the one hand the gravity of the offence, and on the other individual circumstances, such as aggravating and mitigating factors. Because aggravating factors may play an important role in the determination of the sentence, they must be proved 'beyond reasonable proof'.

In terms of gravity of offences, the ICTR Chambers consider gravity as a crucial factor in the determination of the sentence.⁵⁵ Thus the sentence should be proportional to the gravity of the offence. As stated in the *Akayesu* case "a sentence must reflect the predominant standard of proportionality between the gravity of the offence and the degree of responsibility of the offender".⁵⁶ In the absence of indications in the Statute, the assessment of the gravity of the crime in the specific case has been left to the judges' discretion. In practice the ICTR (alongside the ICTY) has examined it through the gravity of the conduct (e.g. objective gravity of genocide as compared to crimes against humanity) and through the gravity of the criminal event, such as the form and degree of participation of the accused in the crime.

As regards the individualization of the sentence through taking into account any aggravating and mitigating circumstances, there is broad discretion on the part of the Chambers but, generally these are of secondary importance, compared to the gravity of the crime.⁵⁷ Lack of mercy and respect of the dignity of the dead, and attack to religious spaces (a sanctuary) used as shelters were considered aggravating factors in *Kajelijeli* and *Kumahanda*.

⁵⁵ See for instance Trial Chambers ICTR, *Prosecutor v. Gacumbitsi*, Judgement, 17 June 2004, para. 344; ICTR, *Prosecutor v. Serugendo*, Judgement, 12 June 2006, para. 39; ICTR, *Prosecutor v. Karera*, Judgement and Sentence, ICTR-01-74-T, 7 December 2007, para. 583; and Appeal Chambers ICTR, *Prosecutor v. Kamuhanda*, Appeals Judgement, ICTR-00-54-A, 19 September 2005, para. 357; ICTR, *Prosecutor v. Mibimana*, Appeals Judgement, 21 May 2007, para. 233; ICTR, *Prosecutor v. Nahimana et al.*, Appeals Judgement, ICTR-00-52-A, 28 November 2007, para. 1060.

⁵⁶ Trial Chamber ICTR, *Prosecutor v. Akayesu*, Judgement, ICTR-96-4, 2 September 1998, para. 40.

⁵⁷ Schabas W. A., *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, Cambridge University Press, 2006, p. 563.

In *Muhimana*, a savage attack against a pregnant woman was considered a highly aggravating factor by the Trial Chamber. In *Kayishema*, abuse of power (the accused was the Prefect of the city) and betrayal of high office duties, alongside to the zeal with which the accused executed his crimes, constituted the most significant aggravating circumstances.

Mitigating circumstances taken into account by the ICTR Trial Chamber relate mainly to the cooperation of the accused with the Office of the Prosecutor (e.g. *Kayishema*, *Niyitegeku*), especially when the accused pleaded guilty (e.g. *Ruggiu*), and when the accused surrendered voluntarily to the Tribunal (e.g. *Ntahobali*, *Seromba*). Remorse on the acts committed, assistance to victims, young age of the accused and the possibility of rehabilitation were also considered as mitigating circumstances (e.g. *Ruggiu*, *Seromba*).

In any case, as earlier noted, because the ICTR Trial and Appels Chambers have tended to hand down one single sentence for several crimes, apart from the examples mentioned above, it is difficult to detect sentencing patterns as regards both the gravity of the offence and the individual circumstances.

B. International Criminal Tribunal for the former Yugoslavia

Sentencing Methodology

The ICTY sentencing procedure has changed over the years. In the first trials to take place at the ICTY, the ICTY Trial Chamber used a two-stage process, rendering first a judgement on the criminal culpability of the accused, and then sentencing, in a different hearing. However, following a revision of the ICTY RPE (Rules 99 and 100) in July 1998, the bifurcated structure was replaced by the single stage process, for the purpose of simplifying the trial scheme 'without jeopardising respect for the rights of accused persons'.⁵⁸

⁵⁸ Fifth Annual Report of the ICTY, UN Doc. A/53/219-S/1998/737, 10 August 1998, paras 106–108. For a broader analysis see G. Acquaviva, N. Combs, M. Heikkila, S. Linton, Y. McDermott, S. Vasiliev, 'Trial Process', in Goran Sluiter, Hakan Friman, Suzannah Linton, Salvatore Zappala, and Sergey Vasiliev (eds) *International Criminal Procedure: Principles and Rules*, pp. 534-543.

Therefore, in most subsequent cases the ICTY Chambers have rendered judgement and sentence at the same time in the case of conviction. In this regard, it should be noted that the Practice Directions state that the length of a final trial brief should not exceed 60,000 words.⁵⁹ As it was earlier discussed in relation to the ICTR, this approach led to a lack of sentence-specific submissions and/or a sentencing hearing, and was identified by some interviewees as the biggest concern with the sentencing practice of the ICTY. The Chambers themselves, even after the change of the RPE, have occasionally addressed the issue of the 'rights of the accused' in relation to the single stage and the separate sentencing judgements. Notably, in the *Tadic* case,⁶⁰ after the Trial proceedings decided under the bifurcated rule, the Appeals Chamber entered a number of new convictions in its Judgment, and because the new modified Rules which had intervened in the meantime could, in its view, limit the rights of the accused, it remanded sentencing to the Trial Chamber.⁶¹

Where persons are charged with so many crimes under several modes of liability it is difficult, if not impossible, to tailor sentencing submissions accurately before knowing precisely which crime, under which mode of liability an accused is convicted of. Moreover, strategically, given the word limit mentioned above, the defence and the Prosecution, and as a consequence the Chambers, chose to place major emphasis on assessing the elements of the crime and the individual circumstances rather than on sentencing considerations.

Similar to the ICTR, the only cases which do maintain a two-stage process are those where the accused plead guilty. In such cases, the Trial Chamber allowed for pleas to be taken and then at a later stage sentences were handed down. The retention of the two-stage process for those who plead guilty allowed both prosecution and defence to concentrate solely on sentencing aspect of the proceedings. Indicative evidence of a trend of

⁵⁹ ICTY Practice direction on the length of briefs and motions, Section 4, 16 September 2005 available at http://www.icty.org/x/file/Legal%20Library/Practice_Directions/it184_briefsandmotions_procedure_rev2_en.pdf.

⁶⁰ ICTY, *Prosecutor v. Tadić*, IT-94-1.

⁶¹ G. Acquaviva, N. Combs, M. Heikkila, S. Linton, Y. McDermott, S. Vasiliev, 'Trial Process', in Goran Sluiter, Hakan Friman, Suzannah Linton, Salvatore Zappala, and Sergey Vasiliev (eds) *International Criminal Procedure: Principles and Rules*, pp. 535.

additional care with which sentencing factors are evaluated in relation to guilty pleas, as opposed to ordinary trials, can also be drawn from a simple comparison of the number of pages (and most likely the time spent in deliberations) devoted to sentencing factors in sentencing judgments on the one hand, and ordinary judgments, on the other.⁶²

With regards to sentences themselves, in many cases the ICTY also adopted the practice of handing down one sentence for multiple crimes. This overarching sentence often covered not only multiple crimes, but involved multiple events involving crimes committed under various modes of liability. Similar to the ICTR, this approach provides no opportunity to assess the sentences for each individual crime an accused is found guilty of. As to terms of sentence, the ICTY handed down sentences ranging from 6 years imprisonment to life imprisonment. The longest fixed-term sentence was 46 years in the case of *Krstić*, although this was later reduced by the ICTY Appeals Chamber to 35 years imprisonment.

Factors Considered in Sentencing

The ICTY jurisprudence confirms that the gravity of the offense is a 'factor of primary importance in the determination of the sentence'⁶³ and that it provides 'the litmus test in the imposition of the appropriate sentence'⁶⁴.

Among the mitigating circumstances affecting the sentence the ICTY chambers have taken into account behaviour and statements of remorse (*Erdemović, Kunarac, Todorović*); the desire to surrender to the Tribunal/and or cooperate with the Prosecution (*Erdemović, Tadić M., Zarić, Babić*); limited or no direct participation in murders and tortures (*Mucić, Aleksovski, Kvočka*); absence of discriminatory behaviour before the conflict (*Aleksovski, Nikolić*); assistance to the victims (especially detainees in the camp cases) and benevolent behaviour (*Bala, Lukić, Tadić M., Zarić, Brdanin*).

⁶² *Ibid.*

⁶³ ICTY Trial Chamber, *Prosecutor v. Krstić*, IT-98-33, Judgement 2 August 2001, para. 698.

⁶⁴ ICTY Trial Chamber, *Prosecutor v. Zejnil Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo*, IT-96-21-T, Trial Judgement 16 November 1998, para 1225.

Instead, among aggravating factors, disregard for the dignity of the victims and sadistic character of the accused were considered essential elements in sentencing in *Delić* and *Landžo*. Other aggravating individual circumstances considered by the ICTY Chambers include the active role of the accused in mass executions or in particularly heinous acts (*Erdemović*, *Furundžija*, *Josipović*, *Šantić*, *Radić*); abuse of official position and breach of public duty (*Todorović*, *Radić*, *Nikolić*, *Deronjić*, *Brdanin*, *Martić*, *Galić*); the vulnerability of the victims (*Kunarac*, *Kovac*, *Vuković*, *Simić*, *Tadić M*, *Nikolić*, *Mirđa*) and the victim impact (*Blagojević*, *Jokić*).

C. Special Court for Sierra Leone

Sentencing Methodology

The original SCSL RPE (7 March 2003) departed from the single procedure and reverted instead to the original ICTY and ICTR two-stage scheme: first rendering judgement on the criminal culpability of the accused, and then later handing down a judgement on sentencing. This process that allowed for separate consideration of the appropriate sentence in the event of conviction was particularly helpful since accused were charged with multiple crimes under multiple modes of liability. It was only on conviction that parties knew precisely which crimes had resulted in convictions and under which modes of liability. The two-stage approach allowed for submissions on sentencing to be properly tailored to the crimes. The SCSL also provided for a sentencing hearing at which all parties could make further oral arguments on the issue of sentencing, again allowing the parties and also the bench to look at the issue of sentencing through a post-conviction lens. This two-stage process continued throughout the life of the SCSL. However, in the light of the practice of the ICTR and the ICTY, the time limits were tightened (RPE Rule 100), to avoid criticism that the bifurcated approach might render the proceedings unnecessarily longer.

In the *CDF* trial, Judgement was rendered on 2 August 2007, with the accused *Moinina Fofana* and *Allieu Kondewa* convicted of several counts

of war crimes.⁶⁵ Before handing down sentence, a sentencing hearing took place on 19th September 2007 prior to which all parties submitted statements relating to sentencing, such as character evidence, but were prohibited from entering evidence at the sentencing stage that went to acts or conduct of the accused.⁶⁶ The SCSL Trial Chamber did consider the Defence application for one witness to be called, but deemed it unnecessary.⁶⁷ Following this hearing, the Trial Chamber rendered a judgement on sentencing on 9 October 2007, and handed down separate sentences for each crime, ordering sentences to run concurrently.⁶⁸

In the *RUF* case, the SCSL Trial Chamber took a similar approach to the CDF trial, relying on a two-stage process of assessing first criminal culpability, then sentencing in the event of conviction. The *RUF* Judgement on criminal

⁶⁵ In particular, Fofana was convicted of violence to life, health and physical or mental well-being of persons, in particular murder and cruel treatment, as violations of Article 3 common to the Geneva Conventions and of Additional Protocol II; pillage as a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; Collective Punishments, as a violation of Article 3 common to the Geneva Convention and of Additional Protocol II. Kondewa was convicted of violence to life, health and physical or mental well-being of persons, in particular murder and cruel treatment, as violations of Article 3 common to the Geneva Conventions and of Additional Protocol II; pillage as a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; Collective Punishments, as a violation of Article 3 common to the Geneva Convention and of Additional Protocol II; and Enlisting children under the age of 15 years into armed forces or groups and/or using them to participate actively in hostilities, another serious violation of international humanitarian law. See *Prosecutor v. Moinina Fofana and Allieu Kondewa*, Judgement, SCSL-04-14-T, 2 August 2007 hereinafter 'CDF Trial Judgement'. See also *Prosecutor v. Moinina Fofana and Allieu Kondewa*, Judgement on the Sentencing of Moinina Fofana and Allieu Kondewa, SCSL-04-14-T, 9 October 2007, p. 33, hereinafter "CDF Sentencing Judgement" available at <http://www.rscsl.org/Documents/Decisions/CDF/796/SCSL-04-14-T-796.pdf>.

⁶⁶ CDF Sentencing Judgement, para. 13.

⁶⁷ CDF Sentencing Judgement, para. 13.

⁶⁸ Fofana received six years imprisonment for violence to life, health and physical or mental well-being of persons, in particular murder, as violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; six years imprisonment for violence to life, health and physical or mental well-being of persons, in particular cruel treatment, as violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; three years imprisonment for pillage as a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; Four years imprisonment for collective punishments, as a violation of Article 3 common to the Geneva Convention and of Additional Protocol II all to run concurrently. See CDF Sentencing Judgement, pp. 33-34. Kondewa was sentenced to eight years imprisonment for violence to life, health and physical or mental well-being of persons, in particular murder, as violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; eight years imprisonment for violence to life, health and physical or mental well-being of persons, in particular cruel treatment, as violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; five years imprisonment for pillage as a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II; Six years imprisonment for collective punishments, as a violation of Article 3 common to the Geneva Convention and of Additional Protocol II; and seven years imprisonment for enlisting children under the age of 15 years into armed forces or groups and/or using them to participate actively in hostilities, another serious violation of international humanitarian law, all to run concurrently. See CDF Sentencing Judgement, p. 34.

culpability was rendered on 25 February 2009, in which the SCSL Trial Chamber found the three accused guilty of multiple counts of war crimes and crimes against humanity.⁶⁹ Post-conviction, the SCSL Trial Chamber considered sentencing submissions from the Prosecution and all convicted persons. A 93-page Sentencing Judgement was then rendered on 8 April 2009. The *RUF* Trial Chamber handed down specific sentences for each crime convicted, ordering sentences to run concurrently.⁷⁰

⁶⁹ In particular, Sesay, Kallon were convicted on 16 charges: Acts of Terrorism, in violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 1); Collective Punishments, a violation of Article 3 Common to the Geneva Convention and of Additional Protocol II (Count 2); Extermination as a Crime Against Humanity (Count 3); Murder as a Crime Against Humanity (Count 4); Violence to life, health and physical or mental well-being of persons, in particular murder as a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 5); Rape as a Crime Against Humanity (Count 6); Sexual Slavery as a Crime Against Humanity (Count 7); Other Inhuman Acts as a Crime Against Humanity (Count 8); Outrages upon personal dignity, a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 9); Violence to life, health and physical or mental well-being of person, in particular mutilation, a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 10); Other inhuman acts as a Crime Against Humanity (Count 11); Conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities, an Other Serious Violation of International Humanitarian Law (Count 12); Enslavement as a Crime Against Humanity (Count 13); Pillage a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 14); Intentionally directing attacks against personnel involved in a humanitarian assistance or peacekeeping mission, in accordance with the Charter of the United Nations, an Other Serious Violation of International Humanitarian Law (Count 15); and Violence to life, health and physical or mental well-being of persons, in particular murder, a violation of Article 3 Common of the Geneva Conventions and of Additional Protocol II. (Count 17).

Gbao, was convicted of fourteen charges: Acts of terrorism, in violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 1); Collective Punishments, a violation of Article 3 Common to the Geneva Convention and of Additional Protocol II (Count 2); Extermination as a Crime Against Humanity (Count 3); Murder as a Crime Against Humanity (Count 4); Violence to life, health and physical or mental well-being of persons, in particular murder as a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 5); Rape as a Crime Against Humanity (Count 6); Sexual Slavery as a Crime Against Humanity (Count 7); Other inhuman acts as a Crime Against Humanity (Count 8); Outrages upon personal dignity, a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 9); Violence to life, health and physical or mental well-being of person, in particular mutilation, a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 10); Other inhuman acts as a Crime Against Humanity (Count 11); Enslavement as a Crime Against Humanity (Count 13); Pillage a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 14); Intentionally directing attacks against personnel involve in a humanitarian assistance or peacekeeping mission, in accordance with the Charter of the United Nations, an Other Serious Violation of International Humanitarian Law (Count 15);

⁷⁰ Specifically, Sesay received: 52 years imprisonment for acts of terrorism, in violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 1); 45 years imprisonment for Collective Punishments, a violation of Article 3 Common to the Geneva Convention and of Additional Protocol II (Count 2); 33 years imprisonment for Extermination as a Crime Against Humanity (Count 3); 40 years imprisonment for Murder as a Crime Against Humanity (Count 4); 40 years imprisonment for violence to life, health and physical or mental well-being of persons, in particular murder as a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 5); 45 years imprisonment for Rape as a Crime Against Humanity (Count 6); 45 years imprisonment for Sexual Slavery as a Crime Against Humanity (Count 7); 40 years imprisonment for Other inhuman acts as a Crime

Against Humanity (Count 8); 35 years imprisonment for outrages upon personal dignity, a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 9); 50 years imprisonment for violence to life, health and physical or mental well-being of person, in particular mutilation, a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 10); 40 years imprisonment for other inhuman acts as a crime against humanity (Count 11); 50 years imprisonment for conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities, an Other Serious Violation of International Humanitarian Law (Count 12); 50 years imprisonment for enslavement as a Crime Against Humanity (Count 13); 20 years imprisonment for pillage a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 14); 51 years imprisonment for intentionally directing attacks against personnel involve in a humanitarian assistance or peacekeeping mission, in accordance with the Charter of the United Nations, an Other Serious Violation of International Humanitarian Law (Count 15); and 45 years imprisonment for Violence to life , health and physical or mental well-being of persons, in particular murder, a violation of Article 3 Common of the Geneva Conventions and of Additional Protocol II. (Count 17). Kallon received: 39 years imprisonment for acts of terrorism, in violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 1); 35 years imprisonment for Collective Punishments, a violation of Article 3 Common to the Geneva Convention and of Additional Protocol II (Count 2); 28 years imprisonment for Extermination as a crime against humanity (Count 3); 35 years imprisonment for murder as a crime against humanity (Count 4); 35 years imprisonment for violence to life, health and physical or mental well-being of persons, in particular murder as a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 5); 35 years imprisonment for rape as a crime against humanity (Count 6); 30 years imprisonment for sexual slavery as a crime against humanity (Count 7); other inhuman acts as a crime against humanity (Count 8); 28 years imprisonment for outrages upon personal dignity, a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 9); 35 years imprisonment for violence to life, health and physical or mental well-being of person, in particular mutilation, a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 10); 30 years imprisonment for other inhuman acts as a crime against humanity (Count 11); 35 years imprisonment for conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities, an Other Serious Violation of International Humanitarian Law (Count 12); 35 years imprisonment for enslavement as a crime against humanity (Count 13); 15 years imprisonment for pillage a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 14); 40 years imprisonment for intentionally directing attacks against personnel involve in a humanitarian assistance or peacekeeping mission, in accordance with the Charter of the United Nations, an Other Serious Violation of International Humanitarian Law (Count 15); and 35 years imprisonment for Violence to life , health and physical or mental well-being of persons, in particular murder, a violation of Article 3 Common of the Geneva Conventions and of Additional Protocol II. (Count 17). Gbao received: 25 years imprisonment for acts of terrorism, in violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 1); 20 years imprisonment for Collective Punishments, a violation of Article 3 Common to the Geneva Convention and of Additional Protocol II (Count 2); 15 years imprisonment for Extermination as a crime against humanity (Count 3); murder as a crime against humanity (Count 4); 15 years imprisonment for violence to life, health and physical or mental well-being of persons, in particular murder as a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 5); 15 years imprisonment for rape as a crime against humanity (Count 6); 15 years imprisonment for sexual slavery as a crime against humanity (Count 7); 10 years imprisonment for other inhuman acts as a crime against humanity (Count 8); 10 years imprisonment for outrages upon personal dignity, a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 9); violence to life, health and physical or mental well-being of person, in particular mutilation, a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 10); 11 years imprisonment for other inhuman acts as a crime against humanity (Count 11); 25 years imprisonment for enslavement as a crime against humanity (Count 13); 6 years imprisonment for pillage a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 14); 25 years imprisonment for intentionally directing attacks against personnel involve in a humanitarian assistance or peacekeeping mission, in accordance with the Charter of the United Nations, an Other Serious Violation of International Humanitarian Law (Count 15).

In the AFRC case, the Judgement on criminal responsibility was rendered on 20 June 2007, convicting all three accused of multiple counts of war crimes and crimes against humanity.⁷¹ Sentencing submissions were made by the Prosecution, and all three convicted persons. A sentencing hearing was then conducted on 16 July 2009 with sentencing judgement handed down on 19 July 2007. At the sentencing hearing, oral submissions were made from all the parties as well as statements from the convicted persons.⁷² In a departure

⁷¹ *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, Judgement, SCSL-04-16-T, 20 June 2007 hereinafter 'AFRC Judgement' available at <http://www.rscsl.org/Documents/Decisions/AFRC/613/SCSL-04-16-T-613.pdf>. See also *Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu*, Judgement, SCSL-04-16-T, Sentencing Judgement, 19 July 2007 hereinafter 'AFRC Sentencing Judgement' available at <http://www.rscsl.org/Documents/Decisions/AFRC/624/SCSL-04-16-T-624.pdf>. In particular, Brima was convicted of: Acts of Terrorism, a Violation of Article 3 common to the Geneva Convention and of Additional Protocol II (Count 1); Collective Punishments, a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (count 2); Extermination as a Crime Against Humanity (Count 3); Murder as a Crime Against Humanity (Count 4); Violation to life, health and physical or mental well-being of person, in particular murder, a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 5); Outrages on person dignity a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 9), Violence to life, health and physical or mental well-being of persons, as mutilation, a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 10); Conscripting children under the age of 15 years into an armed groups and/or using them to participate actively in hostilities, as other serious violation of international humanitarian law (Count 12); Enslavement as a Crime Against Humanity (Count 13); Pillage a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 14); Rape as a Crime Against Humanity (Count 6). Kamara was convicted of Acts of Terrorism, a Violation of Article 3 common to the Geneva Convention and of Additional Protocol II (Count 1); Collective Punishments, a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (count 2); Extermination as a Crime Against Humanity (Count 3); Murder as a Crime Against Humanity (Count 4); Violation to life, health and physical or mental well-being of person, in particular murder, a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 5); Rape as a Crime Against Humanity (Count 6); Outrages on person dignity a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 9); Violence to life, health and physical or mental well-being of persons, as mutilation, a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 10); Conscripting children under the age of 15 years into an armed groups and/or using them to participate actively in hostilities, as other serious violation of international humanitarian law (Count 12); Enslavement as a Crime Against Humanity (Count 13); Pillage a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 14). Kanu was convicted of of Acts of Terrorism, a Violation of Article 3 common to the Geneva Convention and of Additional Protocol II (Count 1); Collective Punishments, a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (count 2); Extermination as a Crime Against Humanity (Count 3); Murder as a Crime Against Humanity (Count 4); Violation to life, health and physical or mental well-being of person, in particular murder, a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 5); Rape as a Crime Against Humanity (Count 6); Outrages on person dignity a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 9); Violence to life, health and physical or mental well-being of persons, as mutilation, a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 10); Conscripting children under the age of 15 years into an armed groups and/or using them to participate actively in hostilities, as other serious violation of international humanitarian law (Count 12); Enslavement as a Crime Against Humanity (Count 13); Pillage a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Count 14).

⁷² AFRC Sentencing Judgement, para. 2.

from the *CDF* and *RUF* cases, the SCSL Trial Chamber handed down single sentences encompassing all criminal convictions.⁷³

In the case of Charles Taylor, the SCSL Trial Chamber again elected to pursue a two-stage process, rendering a judgement on criminal culpability first, and then an additional sentencing hearing and judgement. The Trial Judgement was rendered on 26 April 2012, in which Taylor was convicted of eleven counts of war crimes and crimes against humanity, with the written judgement filed on 18 May 2012.⁷⁴ On 16 May 2012 the SCSL Taylor Trial Chamber held a sentencing hearing.⁷⁵ The Sentencing judgement was rendered on 30 May 2012, where the Trial Chamber sentenced Taylor to a single term of imprisonment of 50 years.⁷⁶

It is interesting to note such divergence in sentencing practice during the SCSL's existence. The approach used in the *CDF* and *RUF* cases, where the SCSL Trial Chamber handed down individual sentences for each crime convicted, with the sentences to run concurrently, provides clarity in terms of sentencing and had several advantages. Firstly, parties could review the sentences and consider the possibility of appeal, either by the defence if the sentence was considered too long, or the prosecution if the sentence was considered not long enough. Secondly, victims and other civil society groups are provided with a better understanding of the individual's criminal culpability, allowing for a greater chance of the tribunals achieving its aims of peace and reconciliation.

As to the sentences themselves, The SCSL sentenced convicted persons to a wide range of terms of imprisonment. From the lower end of the spectrum of practice of international criminal tribunals, for instance, *Fofana* (*CDF* trial) received a sentence of six years for various war crimes to run concurrently. The SCSL has also rendered the largest fixed-term sentences of any of the tribunals. These sentences have included *Sesay* (*RUF* trial) receiving 52 years'

⁷³ Brima was sentenced to 50 years imprisonment, Kamara sentenced to 45 years imprisonment and Kanu sentenced to 50 years imprisonment. See *AFRC Sentencing Judgement*, p. 36.

⁷⁴ See *Prosecutor v. Charles Ghankay Taylor, Judgement*, SCSL-03-01-T, 26 April 2012 hereinafter 'Taylor Judgement'. See also *Prosecutor v. Charles Ghankay Taylor, Sentencing Judgement*, SCSL-03-01-T, 30 May 2012 hereinafter 'Taylor Sentencing Judgement' available at <http://www.rscsl.org/Documents/Decisions/Taylor/1285/SCSL-03-01-T-1285.pdf>.

⁷⁵ Taylor Sentencing Judgement, para. 2.

⁷⁶ See Taylor Sentencing Judgement, p. 40.

imprisonment for war crimes similar to those to which *Fofana* was found guilty. Whilst the two cases can be differentiated by several factors, the wide range of sentences is nonetheless notable. It should also be noted that the high fixed-term sentences, disproportionate in length to other international criminal tribunals, can also be explained by the absence of a 'life imprisonment' option for sentencing under the SCSL statute, and the requirement that sentences lay down a specific number of years.

Factors Considered in Sentencing

The SCSL took into account mitigating and aggravating factors when considering sentences in all of its trials. In terms of mitigating factors, in the *CDF* case, the SCSL considered the accused empathy with the victims, their subsequent conduct in fostering peace, and a lack of criminal record.⁷⁷ In the *RUF* case, the Trial Chamber considered no prior criminal convictions, family circumstances, and occasional assistance to civilians during conflict but these were given very limited weight as mitigating factors. Mitigating factors which appear to have been given full weight are subsequent, post-conflict conduct in restoring peace in Sierra Leone and expression of sincere remorse. In the *Taylor* case however, the SCSL Trial Chamber was unwilling to consider Taylor's contribution to the peace process as a mitigating factor given its findings that at the same time he was fuelling conflict.⁷⁸ The *Taylor* Sentencing Judgement also makes clear that expressions of remorse should be centred on remorse for crimes committed by the individual, not a general sense of remorse as to the situation or conflict more general.⁷⁹ In the *AFRC*, case it is notable that the Trial Chamber found no mitigating factors.

With regards to aggravating factors, the *AFRC* case provides the most detail. Here, the SCSL Trial Chamber detailed several factors which it considered were aggravating, including the vulnerability of victims, such as children, and the particularly brutal and heinous nature of the crimes. This can be

⁷⁷ See *CDF* Sentencing Judgement. However, on appeal, the SCSL Appeals Chamber stated that motive or civic duty in relation to the conflict itself are not mitigating factors.

⁷⁸ *Taylor* Sentencing Judgement, para. 88.

⁷⁹ *Taylor* Sentencing Judgement, para. 91.

contrasted with the *RUF* case, where no aggravating circumstances were identified.

D. International Criminal Court

Sentencing Methodology

The ICC Statute does not seem to rule out, in principle, the single sentencing procedure, as it states that in the event of a conviction, the ICC Trial Chamber shall consider the appropriate sentence to be imposed and shall take into account the evidence presented and submissions made during the trial that are relevant to the sentence (Article 76.1). However, it also sets out that before the completion of the trial, the ICC Trial Chamber may, on its own motion, and shall, at the request of the Prosecutor or the accused, hold a further hearing to hear any additional evidence or submissions relevant to the sentence (Article 76.2).⁸⁰ Thus the ICC Statute allows for any additional hearing related to sentencing (Article 76.3), including one where the Chamber seeks the views of the victims and representations therefrom (Article 75 and 76.3, and Rule 93 RPE). According to Rule 143 of the ICC RPE, the presiding judge shall set the date for such further hearing(s).

To date, the ICC Trial Chamber has convicted three accused following trial and has sentenced one accused on the basis of a guilty plea. In all three cases where the ICC Trial Chamber was called upon to sentence the accused, it has used the two-stage process involving a judgement followed by a sentencing decision.⁸¹ In line with Article 78(3) of the Statute, when the accused has been convicted for more than one crime, the Court pronounces a sentence for each crime and a joint sentence specifying the total period of imprisonment.

In the first case before the ICC, concerning the situation in the Democratic Republic of Congo, Thomas Lubanga Dyilo ('Lubanga') was found guilty, as a co-perpetrator, of the charges of conscripting and enlisting children under the age of fifteen years into the UPC/FPLC and using them to participate

⁸⁰ *Lubanga Sentencing Judgement*, para. 20. See also W.A. Schabas, 'Article 76', in Triffterer (ed.), *Commentary on the Rome Statute*, 1413.

⁸¹ It is notable that the ICC refers to the sentencing stage, as a sentencing 'decision' as opposed to the SCSL which referred to a sentencing 'judgement' Cf.

actively in hostilities. The ICC Trial Chamber rendered judgement on Lubanga's criminal culpability on 14 March 2012.

In the period between the trial decision and the sentencing decision, ICC Trial Chamber I held a sentencing hearing on 13 June 2012 following submissions on sentencing from all parties. At the sentencing hearing two witnesses were heard, and oral submissions were made from all parties.

On 10 July 2012, ICC Trial Chamber I reconvened and handed down a joint sentence of 14 years imprisonment. The individual sentences for each crime amounted to: 13 years for the crime of conscripting children under the age of 15 into the UPC, 12 years for the crime of enlisting children under the age of 15, and 14 years for the crime of using children under the age of 15 to participate actively in hostilities.⁸²

In the case of Germain Katanga ('Katanga'), on 7 March 2014 ICC Trial Chamber II found the accused guilty of one count of crime against humanity and 4 counts of war crimes.

ICC Trial Chamber II scheduled a two-day hearing, during which it heard one prosecution witness and two defence witnesses. The Trial Chamber then heard submissions from the Prosecution, the Defence and the Victim's representative.⁸³ Prior to the sentencing hearing ICC Trial Chamber II also emphasised that all care was to be taken to ensure that, during the sentencing hearing, no reference was made to substantive issues which had already been dealt with in the Judgment of 7 March 2014.⁸⁴

ICC Trial Chamber II rendered its decision on sentencing on 23 May 2014, sentencing Katanga to 12 years imprisonment. For his involvement with the crime of murder as a crime against humanity as well as a war crime and the crime of attack against a civilian population as a war crime, the Chamber gave a 12-year sentence, respectively. With regard to the war crimes of destruction of property and pillaging, it decided on a 10 year sentence each.⁸⁵

⁸² Lubanga Sentencing Judgement, para 98.

⁸³ Katanga Sentencing Decision, paras.23-24.

⁸⁴ Katanga Sentencing Decision, para. 14.

⁸⁵ Katanga Sentencing Decision, para 146.

Jean Pierre Bemba Gombo ('Bemba') was found guilty, on 21 March 2016, of two counts of crimes against humanity (murder and rape) and three counts of war crimes (murder, rape, and pillaging). Mr Bemba was acting as a military commander with effective authority and control over the forces that committed the crimes and accordingly was sentenced to 18 years of imprisonment, on 21 June 2016. For each count of murder as a war crime and crime against humanity, the Chamber sentenced Bemba to 16 years respectively. His convictions for rape as a crime against humanity and a war crime resulted in slightly higher sentences with 18 years each. For pillaging he received a 16-year sentence.⁸⁶

Ahmad Al Faqi Al Mahdi ('Al Mahdi') admitted guilt at the trial's opening on 22-24 August 2014 and was thus found guilty as a co-perpetrator of the war crime consisting in intentionally directing attacks against religious and historic buildings in Timbuktu, Mali, in June and July 2012. The Trial Chamber did not indicate the minimum sentence for the crime in question and stated that no previous case law provided meaningful guidance. On 27 September 2016, Trial Chamber VIII sentenced the accused to 9 years' imprisonment (the Prosecution suggested between 9 and 11 years), the time spent by the suspect in detention being deducted from the sentence.

In terms of sentences themselves, in accordance with Article 78.3 of the ICC Statute, the ICC Trial Chambers have pronounced individual sentences for each crime for which an accused is convicted. As to the range of sentences handed down, it should be noted that the ICC remains in its infancy in terms of cases tried and sentences handed down. It is notable that so far, no ICC Trial Chamber has come close to sentencing the maximum of 30 years, let alone impose a life sentence. As earlier noted, Mr Lubanga received a 14-years sentence, Mr Katanga a 12-years sentence, Mr Bemba a 18-years sentence (currently on appeal), and Mr Al-Mahdi received 9 years following a guilty plea.

As one of the interviewees noted, during the initial cases of the ICC, it is essential that explanation in the sentencing judgement is readily available

⁸⁶ Bemba Sentencing Decision, para 94. It should be noted that Bemba has since been acquitted of all charges on appeal. See ICC, *The Prosecutor v. Jean-Pierre Bemba Gombo*, Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", ICC-01/05-01/08 A, 8 June 2018.

and comprehensive, which should serve as guidance for later cases. Moreover, case law from the *ad hoc* Tribunals cannot not be easily used by the ICC because very few cases are based on similar or comparable facts (e.g. the RUF case (Sessay and Kallon) and the CDF case (Kondewa) in relation to the use of child soldiers in *Lubanga*).⁸⁷

Concerns over sentencing consistency were addressed during the *Lubanga* Trial Chamber judgement. In that occasion the office of the Prosecutor had argued that:

“to avoid inexplicable sentencing discrepancies” the sentencing policy of the Court should presume a “consistent baseline” for sentence, which should not be adjusted on the basis that some crimes are less serious than others. It is submitted that the appropriate “baseline” or starting point for all sentences should be set at approximately 80% of the statutory minimum, and this should then be adjusted in accordance with Rule 145 to take into account any aggravating and mitigating circumstances and other factors relevant to the convicted person and the circumstances of the crimes.⁸⁸

The Trial Chamber dealing with the case, however, commented that there is no established principle of law or relevant jurisprudence under Article 21 of the Statute to support this approach, which would bind the judges to a minimum starting point of 24 years in all cases. The principle of proportionality should always inform the determination of the sentence, ‘and an automatic starting point - as proposed by the prosecution - that is the same for all offences would tend to undermine that fundamental principle.’⁸⁹

Factors Considered in Sentencing

As the first case to be decided by the ICC, *Lubanga* provides important indications regarding the factors to be considered in sentencing and the standard of proof.

⁸⁷ See for example Prosecutor v Lubanga, Decision on Sentence, paras. 12-15, and Prosecutor v. Al Mahdi, Decision on Sentence, para. 107.

⁸⁸ Prosecutor v Lubanga, Trial Chamber Judgment, p.35, para. 92.

⁸⁹ *Ibid.*, para. 93.

First, the Court follows the jurisprudence of the *ad hoc* tribunals and clarifies that in the absence of guidance from the ICC Statute and the RPE, since any aggravating factors established by the Chamber may have a significant effect on the overall length of the sentence, they should be established "beyond a reasonable doubt".⁹⁰ Moreover, aggravating circumstances must relate to the crimes upon which a person was convicted and to the convicted person himself. Accordingly, in *Lubanga*, the court considered the punishment of the victims and sexual violence on them as aggravating circumstances but was not able to take these into account in sentencing, because the evidence provided was not sufficient to satisfy the criminal test of the reasonable doubt. In contrast, in the *Bemba* case, the Chamber found beyond reasonable doubt that MLC (Mouvement de libération du Congo) soldiers committed the crimes of rape against 'particularly defenceless victims' and with 'particular cruelty', constituting these aggravating circumstances (Rule 145 RPE).

Secondly, the Court in *Lubanga* clarifies the issue of double counting, and sets out that any factors which are taken into account when assessing the gravity of the crime will not additionally be taken into account as aggravating circumstances.⁹¹ In this regard, the Court rejected the submission of the Prosecutor to consider as aggravating circumstance the fact that the victims were particularly defenceless (by reason of their age), because this was already taken into account in determining the gravity of the crime of conscription. Similarly, in the *Bemba* case, a superior's direct contribution to the crimes was not considered as an aggravating circumstance (departing from previous jurisprudence of the *ad hoc* Tribunals), as the Chamber considered such contribution in determining the gravity of the crime.⁹²

Thirdly, as regards the 'individual circumstances of the convicted person' in line with (Rule 145(c) RPE) the Court considered the 'the age, education, social and economic condition of the convicted person'. It concluded that

⁹⁰ Prosecutor v Lubanga, Decision on Sentence, para. 33.

⁹¹ *Ibid.* para. 35.

⁹² Prosecutor v Bemba, Decision on Sentence, para. 63.

as an intelligent and well-educated individual, Mr Lubanga would have understood the seriousness of the crimes of which he has been found guilty.⁹³

Fourthly, in respect of mitigating circumstances, the Court has clarified that the standard of proof in this case is the 'balance of probabilities' (rather than the reasonable doubt which applied to aggravating circumstances).⁹⁴ Moreover, mitigating circumstances need not be directly related to the crimes and are not limited by the scope of the charges or the judgment on culpability, but there must be a direct link with the convicted person. The Court has a considerable degree of discretion in determining what constitutes a mitigating circumstance and need not do so under any particular heading. More generally, the Court may consider certain factors as being relevant to its assessment of gravity, instead of considering them in mitigation or aggravation of the overall sentence.⁹⁵

⁹³ Prosecutor v Lubanga, Decision on Sentence, para. 56.

⁹⁴ *Ibid.*, para. 34.

⁹⁵ Prosecutor v Bemba, Decision on Sentence, para. 19.

3.3. RULE OF LAW CONSIDERATIONS IN INTERNATIONAL CRIMINAL LAW SENTENCING

Considering the elements of consistency, certainty and fairness that underpin rule of law considerations in sentencing at the international level, the research has highlighted three main areas of concern.

I. One-stage Judgement and Sentence

As has been mentioned in the analysis of the ICTR and ICTY sentencing procedure, and in several interviews, the concern with the ICTY's and ICTR's approach of folding together judgement on criminal culpability and sentence into one process is twofold:

- i. Prosecution and Defence are required to address sentencing issues in their final trial brief. The practical concerns here are that final briefs have a word limit, and it is very difficult to dedicate adequate space to sentencing when one must also address the guilt or innocence of an accused too. Addressing sentencing when also addressing guilty/innocence is also difficult to do in the same document. In particular, it impedes specific tailored submissions on sentencing, including, for instance, character witnesses or arguments about mitigating factors. It is an uneasy fit particularly for defence counsel and accused to discuss sentencing when all the efforts at trial have been to prove innocence.
- ii. Often accused are charged with several crimes and several modes of liability. It is not until the judgement is rendered that the accused know precisely what they have been convicted of. Addressing sentencing when one does not know what an accused is actually convicted of is very difficult, if not impossible. A telling example is that of an accused charged with either aiding and abetting a crime, or committing the crime. Arguments put forward on behalf of a convicted person for aiding and abetting (comparatively minimal role, lack of direct perpetration) would not be relevant for a person convicted of committing. Without any recourse to addressing the crimes and modes of liability post-conviction, accused are denied the right to properly litigate the sentencing stage.

II. Single Sentences for Multiple Crimes

This goes to predictability of sentences. It is often difficult to ascertain precise sentences for international crimes, since the SCSL, ICTR and ICTY Trial have tended to hand down one single sentence for several crimes. This issue can be aptly demonstrated in the ICC's *Lubanga* Sentencing Decision, where the Trial Chamber noted that the SCSL had previously sentenced accused for similar crimes of conscripting child soldiers. The *Lubanga* Trial Chamber stated however that the failure of the SCSL Trial Chamber not to address each count separately in its potentially applicable sentencing decision, meant it was "impossible to determine the effect the conviction for the use of child soldiers had on the overall sentences".⁹⁶ This goes to the heart of the problem with handing down a single sentence for several crimes. First, it makes it impossible for the convicted person or Prosecution to appeal specific sentences. Second, it limits the potential that previous sentences can serve as precedent in similar cases in the future.

It should be noted that the ICC Statute has largely dealt with both these concerns. With regards to a single-stage for judgement and sentence, the ICC has adopted a two-stage process in each of its sentencing procedures, which looks likely to be followed in future cases, given the specific mention of the sentencing hearing requirement. The ICC Statute also requires separate sentences for each crime. Again, this means the likely end of single sentences for a multitude of crimes. The concerns raised over these two issues remains, if not with the ICC, then with the creation of domestic and regional international criminal tribunals. For example, the Extraordinary African Chambers, charged with trying the former Chadian leader Hisssein Habré was notable for adopting in large part the ICTR's statute and rules and procedures. This led to the EAC following the ICTR's practice of handing down a single judgement including sentencing, rather than the ICC's model. Also, the Statute for the International Criminal

⁹⁶Lubanga Sentencing Judgement, para. 12.

Division of the African Court on Justice and Human Rights (yet to be in action) does not contain specific procedure for two step procedure.

III. Excessive discretion

The current sentencing procedure across tribunals is governed by broad and vague provisions and no sentencing starting points are provided for any given crime. As a result, there is often a lack of uniformity in the approach to sentencing and individual trial chambers possess significant discretion in rendering their judgment. This precludes the creation of consistent precedent and negatively impacts the predictability of individual sentences.

This is further exacerbated by the different legal cultures amongst the Tribunals' and Court's judges. In the absence of any sentencing guidelines, the prevalent legal culture of any given Chamber (e.g. the US pursue a retributive philosophy, while civil law countries such as Germany endorse a rehabilitative notion of criminal justice) will influence sentencing judgments, with a risk of undermining predictability and creating diverging precedents.

In addition, the discretion trial chambers possess leaves the Prosecution and Defence unclear in terms of what factors determine the gravity of the crime as opposed to counting as an aggravating or mitigating factor. It also enables a Tribunal to dismiss the applicability of mitigating factors in its entirety, as was practiced at the ICTR for example. The current lack of transparency as to what factors impact a sentence negatively or positively makes it incredibly difficult for the Defence to advise clients and predict or argue for a given sentence.

On appeal, these problems are even more significant as a sentence can only be contested on the grounds of being "manifestly disproportionate". However, in the absence of a benchmark or clarity as to what elements count as aggravating or mitigating circumstances, it becomes difficult to indicate what a more "proportionate" sentence would be.

Conclusions and recommendations

Sentencing Methodology

- A two-stage process, consisting of judgement on culpability then sentencing, allows for much more detailed sentencing submissions, and sentencing decisions, meaning more fairness.
- For example the ICTY Practice Directions on final trial briefs must include submissions on the entirety of the evidence and sentencing submissions, and in no more than 30,000 words in total. In contrast, the ICC allows the filing of completely separate sentencing briefs. Once the parties know precisely the crime and the mode of liability for which an accused has been convicted, sentencing submissions can be much more precise.
- The two-stage process also allows for a sentencing hearing at which character witnesses and sentence-specific evidence can be adduced; something that cannot be accommodated in a one-stage process since guilt/innocence is still not determined and therefore the accused will not call character evidence since they are still maintaining innocence. The sentencing hearing also allows for convicted persons to make a statement which they could never do whilst still at trial – this is possibly helpful for peace and reconciliation building (if statement is conciliatory in tone).
- A comparison can also be drawn between the ICTR and ICTY sentencing decisions themselves. At the ICTR and ICTY the norm is that sentencing is dealt with in between 6-10 pages. At the ICC sentencing decisions are significantly longer (for example, the Katanga Sentencing Decision amounting to 67 pages). This tends to demonstrate that the two-step process allows for more detailed investigation of sentencing arguments and considerations.
- It is unlikely that the ICC will use a single judgement on criminal culpability and sentence, since the rules allow for either Prosecution, Defence or the Trial Chamber itself to request a separate sentencing hearing. This is likely to mean that the concerns shared in this report over the ICTR and ICTY sentencing approach will not be replicated at the ICC.
- The concern is that the one-stage process may be adopted at domestic or regional levels to the detriment of the rule of law.

Recommendation: Domestic and regional level prosecution of international crimes should follow the example of the ICC, and previously SCSL, in allowing for a separate sentencing process in the event of conviction.

Predictability and Consistency of Sentence

- The concern remains that single sentences for multiple crimes fails to properly set out sentences and therefore lacks certainty and predictability for the parties in the specific case as well as for future cases.
- It is far more difficult, if not impossible, to appeal single sentences since the sentence awarded for each crime is not known.
- It is also difficult for victims to understand the precise nature of the sentences given out.
- Under the IIC Statute, an ICC Chamber may impose a sentence of imprisonment that may not exceed 30 years, unless "the extreme gravity of the crime and the individual circumstances of the convicted person" warrant a term of life imprisonment. This at the very least provides an indication to an accused as to the length of sentence they can expect (over, or under 30 years).
- The ICC also requires individual sentences for each crime.
- There is also a lack of predictability on sentence. Accused have no way of knowing the consequences of guilty pleas since there is no clear process by which guilty pleas receive a reduced sentence.

Recommendation: Single sentences for several crimes should be avoided since they tend to lack precision.

Sentencing Baseline and Guidelines

- Some form of guidelines with concrete starting points for the sentence of each crime could serve to circumscribe the large discretion currently given to trial chambers, which negatively impacts predictability and consistency of sentences.

- However, such guidelines should not be in the form of hard rules but should provide sufficiently flexibility to account for the factual and legal differences between individual cases and be concretely linked to the ICC's jurisprudence. Chambers should provide a comprehensive explanation in their judgments for the factors determining the sentence.
- While sentencing guidelines should be explored, interviews highlighted that given the relatively limited case law of the ICC at the current state, it may not be possible to create adequate guidelines just yet. The jurisprudence from other tribunals is insufficient in this regard given the diverging set of facts their case law was premised on.
- The main challenge ultimately resides in creating guidelines, which constitute a codification of practice, that are both sufficiently precise to allow for a degree of predictability of sentences whilst at the same time allowing for an appropriate degree of discretion to account for the factual differences between individual defendants.

Recommendation: Sentencing guidelines and the feasibility of sentencing baselines for individual crimes should be explored as they could curb excessive discretion granted to trial chambers due to the current overly general sentencing provisions, and foster predictability and consistency of sentences.

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