Punishing atrocities

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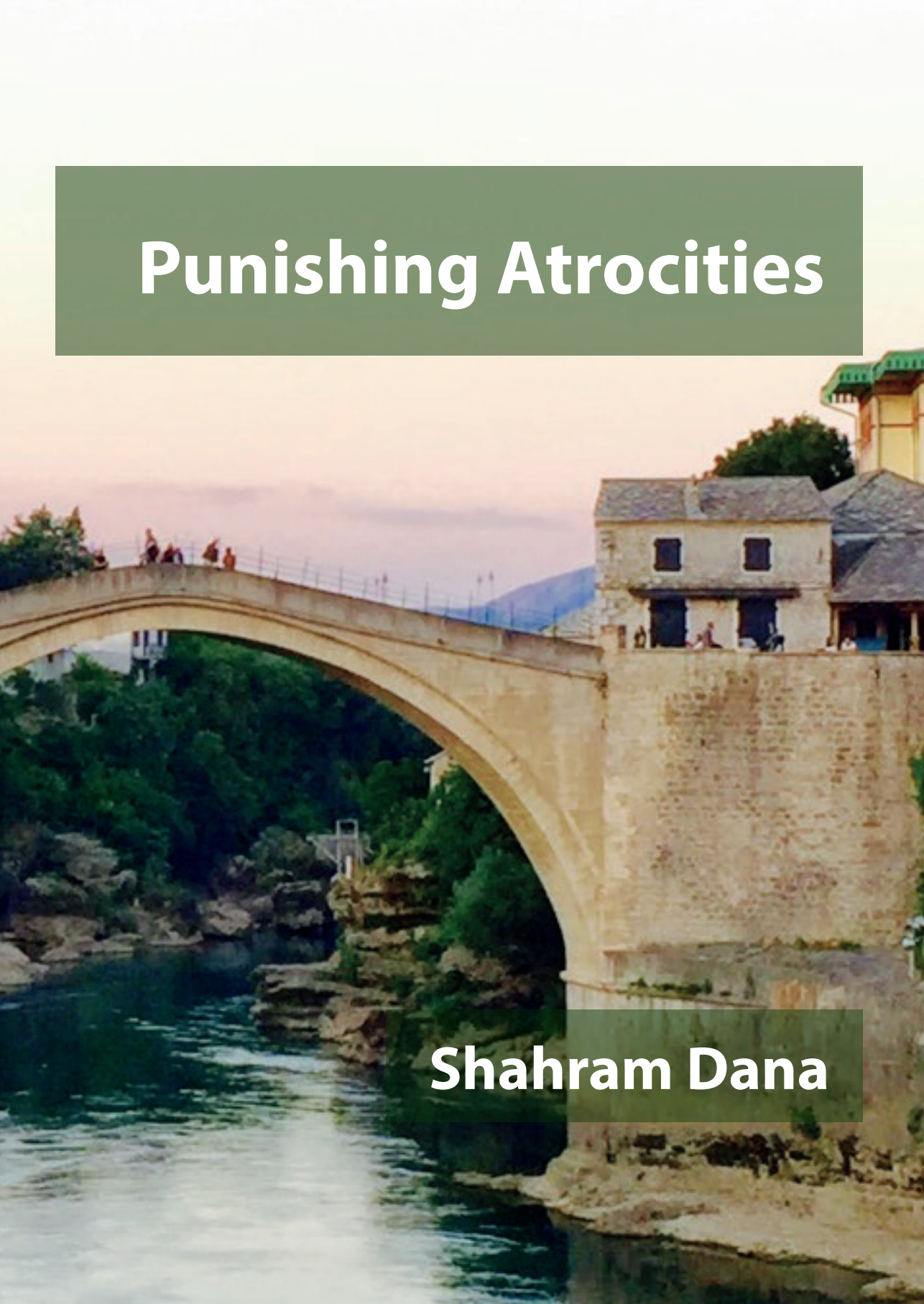

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PUNISHING ATROCITIES

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DISSERTATION

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PUNISHING ATROCITIES

SHAHRAM DANA

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CHAPTER ONE
INTRODUCTION

A person who commits murder will likely be put to death or put in prison for a very long time. But a person responsible for deaths of tens of thousands will likely receive an invitation to peace talks in Geneva, or so went a popular expression of post-war sentiments in Sarajevo. It was not always so. At the Nuremberg and Tokyo trials following World War II, those bearing the greatest responsibility for atrocity crimes were punished with death by hanging or life imprisonment.[1] Today, perpetrators of atrocity crimes and gross violations of human rights generally receive much lower sentences,[2] perhaps ironically in part because of the influence of human rights on our notions of humane punishment, among other reasons.[3]

The union of international law with criminal law has proven complex. International criminal justice must serve two masters. It must satisfy longstanding principles of criminal law as well as competing diplomacy and policy goals of a pluralistic global community. International criminal justice operates in a turbulent vortex between international law and criminal law, bodies of law with divergent characteristics. Criminal law is coercive. International law is consensual. Power, not the rule of law, has historically dictated the theater of operation for international criminal justice. For this reason, international criminal justice has been pejoratively called *victor's justice*, *neo-colonial justice*, or justice with *double standards*.[4] These are not shortcomings of

[1] All but four of the convicted Nazi defendants were sentenced to death at the Nuremberg trial of major war criminals. *See* INTERNATIONAL MILITARY TRIBUNAL (NUREMBERG), JUDGMENT AND SENTENCES, *reprinted in* 41 AMERICAN J. INT'L L. 172 (1947); *See also* RICHARD H. MINEAR, VICTORS' JUSTICE: TOKYO WAR CRIMES TRIAL (1971); MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW (2007).

[2] Mirko Bagaric & John Morss, *International Sentencing Law: In Search of a Justification and Coherent Framework*, 6 INT'L CRIM. L. REV. 191, 253 (2006) (stating that international tribunal sentences are "breathtakingly light"). The average sentence at the ICTY for the 82 finalized sentences is 15 years (this average excludes the five life sentences imposed). *See also* Barbora Hola *et al.*, *International Sentencing Facts and Figures: Sentencing Practice at the ICTY and ICTR*, 9 J. INT'L CRIM. J. 411, 420 (2011).

[3] *See further* Margaret M. DeGuzman, *Harsh Justice for International Crimes?* 39 YALE J. INT'L L. 1 (2014) (calling for ICL judges to look to human rights norms in developing "global norms of sentence severity").

[4] William Schabas, *Introduction* in: THE CAMBRIDGE COMPANION TO INTERNATIONAL CRIMINAL LAW 3 (William Schabas ed., 2016).

international criminal law (ICL), its institutions, or atrocity trials *per se* but design flaws in an international legal order convulsing to free itself from its Westphalian orientation.[5]

Moreover, their fundamentally different natures and attenuating cultures, language, and modalities pose challenges to their astriction. International law recognizes norms of conduct and legal obligations beyond what is expressed in its instruments of positive law. Conversely, criminal law favors limiting punishable conduct (*punishability*) to violations of norms codified in positive law. Indeed, most modern codes of criminal law expressly claim exclusivity over punishable behavior and prohibit reliance on custom or common law. Classically understood, the law of nations is a body of law delineating rights and obligations between states.[6] Legal obligations in international law have been traditionally directed at states. The international criminal justice system, on the other hand, focuses on criminal responsibility for individuals.[7] International criminal law's jurisdictional reach is presently framed in terms of individual criminal responsibility rather than state criminal responsibility.[8] Despite this legal constriction, atrocity crimes typically implicate the state, its government, its military, and other state agencies. Atrocity perpetrators high up in a state's political or military hierarchy have historically enjoyed impunity for their crimes.

So, within this legally complex and politically uncertain landscape, international criminal justice seeks to protect the universal values of a divided global community. International criminal justice mechanisms aim to end impunity for unspeakable atrocities victimizing the peoples of the world.[9] Along with certainty of prosecution, justice in punishment constitutes an integral component of ending impunity.[10] The sentencing practice of international criminal courts is the public face of the international community's resolve against perpetrators of gross violations of human rights and international humanitarian law. Thus, the law of atrocity sentencing is important not only for achieving international justice but also for re-enforcing values fundamental to

[5] Cherif Bassiouni, *Human Rights and International Criminal Justice in the Twenty-First Century: The End of the Post-WWII Phase and the Beginning of an Uncertain New Era*, in ARCS OF GLOBAL JUSTICE: ESSAYS IN HONOUR OF WILLIAM A. SCHABAS 3 - 38 (MARGARET M. DEGUZMAN AND DIANE MARIE AMANN eds. 2018).
[6] Bassiouni, *Beginning of an Uncertain New Era* (2018) at 7-10.
[7] *E.g.* Article 1, Statute of the International Criminal Court ("ICC").
[8] *E.g.* ICC Article 25(1).
[9] *See* Preamble of the Rome Treaty establishing the International Criminal Court; Preamble of Security Council Resolutions establishing the International Criminal Tribunals Rwanda and the former Yugoslavia.
[10] Joseph W. Doherty & Richard H. Steinberg, *Punishment and Policy in International Criminal Sentencing: An Empirical Study*, 110 AMERICAN J. INT'L L. 49 (2016).

the solidification of the peoples of the world as citizens of a single global community whose lives, freedoms, and security are valued equally regardless of wealth, ethnicity, religion, class or culture.

The purpose of this opening chapter is to provide an understanding as to why the subject of atrocity sentencing was selected for extensive research; the context in which international sentencing operates; the characteristics of ICL sentencing; and its limitations. Examination of the sentencing jurisprudence of ICL courts and tribunals illuminates deeper questions about international criminal justice and global values. ICL judgments addressing the accused's criminal liability are, as expected, legalistic in their discourse, focusing on a review of evidence establishing the legal elements of the crimes and the modes of liability. But in their judgments on punishment, in order to arrive at a just sentence in a particular case, international judges demonstrate greater willingness to be more reflective on a wide range of topics and themes such as the relationship between law and peace, the role of atrocity trials, justice, war, wrongdoing, accountability, the responsibility of enablers, equal justice reflected in consistent punishment, and cycles of violence.[11] In sentencing judgments, judicial narratives often consider matters beyond legalism.

For punishment to contribute to the prevalence of justice, the sentencing law of any criminal justice system must demonstrate qualities of fairness and be principally guided.[12] The sentencing regime must at minimum clarify the types of punishment that may be imposed, the scope or maximum penalty applicable to each proscribed conduct, and factors determinative of the quantum of punishment.[13] Just punishment is more readily achieved when sentencing regimes contain (1) positive law that correlates the quantum of punishment with seriousness of the harm and individual culpability; (2) general agreement on and systemic implementation of the purpose of punishment; (3) a structured and coherent framework to guide consideration of various factors that are outcome determinative; and (4) guidance for the exercise of judicial discretion.[14] All four

[11] Prosecutor v. Delalić ("*Čelebići Case*"), Case No. IT-96-21-A, Judgment, para. 756 (Feb. 20, 2001).
[12] *See* KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW VOLUME II: CRIMES AND SENTENCING 267-271 (2014); *See generally* JÜRGEN HABERMAS, LEGITIMACY CRISIS (1975).
[13] *See generally* ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE (2010).
[14] *Id. See also, See* COUNCIL OF EUROPE, DISPARITIES IN SENTENCING: CAUSES AND SOLUTIONS, COLLECTED STUDIES IN CRIMINOLOGICAL RESEARCH Vol. XXVI (1989); Ralph Henham, *Developing Contextualized Rationales for Sentencing in International Criminal Trials*, 5 J. INT'L CRIM. JUSTICE 757 (2007); Jan Nemitz, *The Law of Sentencing in International Criminal Law: The Purposes of Sentencing and the Applicable Method for the Determination of the Sentence*, 4 YEARBOOK OF INT'L HUMANITARIAN L. 87 (2001).

features are absent or underdeveloped in the international criminal justice system, challenging the achievement of consistent and lucid sentencing. Yet, the importance of justice and consistency in sentencing has been acknowledged by international tribunals:

> Public confidence in the integrity of the administration of criminal justice (whether international or domestic) is a matter of abiding importance to the survival of the institutions which are responsible for that administration. One of the fundamental elements in any rational and fair system of criminal justice is consistency in punishment. This is an important reflection of the notion of equal justice. The experience of many domestic jurisdictions over the years has been that such public confidence may be eroded if these institutions give an appearance of injustice by permitting substantial inconsistencies in the punishment of different offenders, where the circumstances of the different offences and of the offenders being punished are sufficiently similar that the punishments imposed would, in justice, be expected to be also generally similar.[15]

Furthermore, there is also broad agreement among scholars of international criminal justice that consistency in sentencing bears significantly on the integrity of atrocity trials, and thus by extension on the realization of its goals.[16] Although, some commentators believe that the importance of consistency is overstated and perhaps even undesirable.[17] Regardless of the normative views on the desirability of consistency in ICL sentencing, its actual realization faces challenges. A characteristic of international law that bears significantly on punishing atrocities is the paucity of positive or customary sources of law specifically addressing the appropriate quantum of punishment for atrocity crimes.[18] In addition to a lack of guidance from international law, ICL sentencing lacks features of a mature penal system that are common in domestic criminal justice

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[15] *Čelebići* Appeals Judgement, para. 756. *See also Prosecutor v Mucić et al.*, Judgment, IT-96-21-A, para. 756 (20 February 2001).

[16] *See e.g.* AMBOS ICL TREATISE II (2014) at 268; Pascale Chifflet and Gideon Boas, *Sentencing Coherence in International Criminal Law: The Cases of Biljana Plavsic and Miroslav Bralo*, 23 CRIM. L. FORUM 135, 147 and 154 (2012); Jennifer J. Clark, Note, *Zero to Life: Sentencing Appeals at the International Criminal Tribunals for the Former Yugoslavia and Rwanda,* 96 GEO. L.J. 1686, 1687 (2008) (claiming that "commentators largely agree that consistency in sentencing is important to international criminal law"); DRUMBL, ATROCITY, *supra* note 1. Mark B. Harmon & Fergal Gaynor, *Ordinary Sentences for Extraordinary Crimes*, 5 J. INT'L CRIM. JUSTICE 683 (2007); OLAOLUWA OLUSANYA, SENTENCING WAR CRIMES AND CRIMES AGAINST HUMANITY UNDER THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (2005) Allison Marston Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, 87 VA. L. REV. 415 (2001) (arguing that "it is especially important that the Tribunals seek to sentence defendants in a consistent manner").

[17] Nancy A. Combs, *Seeking Inconsistency: Advancing Pluralism in International Criminal Sentencing*, 41 YALE J. INT'L L. 1 (2016).

[18] For example, even as the four Geneva Conventions of 1949 call upon states to criminalize grave breaches, they stop short of suggesting what that penalty range should be instead simply calling for "effective penal sanctions". *See e.g.* Articles 49-54, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31.

systems. These shortcomings and other characteristics particular to atrocity sentencing are addressed further below. After setting the stage with a discussion of these preliminary matters, this opening Chapter presents the study's research questions and methodology, followed by an overview of the organization of the book and its chapters.

I. International Criminal Justice in Context

The enterprise of international criminal justice is carried out in a political and legal context quite different from the process of domestic criminal justice. The extant international order lacks a central sovereign authority with comprehensive and effective police powers. It also lacks a monopoly on the use of force. Sporadic enforcement of the law is systemic. In international criminal justice in particular, norms and procedural rules are underdeveloped. Shared moral values among the diverse peoples of the world, even where they exist, are obscured by other interests.[19]

While the International Criminal Court (ICC) is entrusted with the distribution of international justice, it operates in the face of significant legal impediments. For example, it lacks direct authority to exercise police powers of law enforcement such as collecting evidence, deposing witnesses, arresting suspects, and executing sentences. It is therefore significantly dependent on the cooperation of states, including the state constituting the *locus delicti* of atrocity crimes where the current government, political leadership, and military leaders may be implicated in criminality and are therefore unwilling to cooperate with an investigation or prosecution. This structural weakness will make the discharge of its duties more arduous, despite legal obligations placed upon state parties to the Rome Treaty to cooperate with the ICC. Support of the Security Council will be critical for overcoming obstructionist tactics from uncooperative governments, assuming of course that a permanent member of the Security Council itself is not opposed to the investigations for one reason or another. The Security Council's support, however, is not predictable or reliable and is not stimulated by legal obligations but moved by political considerations.

[19] *See also* Bassiouni, *Beginning of an Uncertain New Era* (2018) at 6, 12-16, 24-26, and 34-38. Additionally, shared intuitions, values, and community norms shape perceptions about the fairness of the quantum of punishment. *See further* Paul Robinson, *Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical*, 67 Cambridge L. J. 145 (2008); Paul Robinson *et al*., *The Origins of Shared Intuitions of Justice*, 60 Vand. L. Rev. 1633 (2007).

Consequently, the ICC is compelled to administer justice in a political and legal environment far more complicated and uncertain than that facing domestic criminal justice systems.[20] It is within this context that the organs of the ICC will make decisions, rulings, and judgments on what conflicts to investigate, who to prosecute, what punishment to impose, and how to enforce its sanctions. As will be discovered, this political environment, in which the international criminal justice system must operate, also impacts the practice of punishing and sentencing atrocities.

II. ABSENCE OF GUIDANCE FROM INTERNATIONAL SOURCES

When the international community revived the institution of atrocity trials in the 1990s, after decades of hibernation, with international prosecutions through *ad hoc* tribunals, a body of law on punishing atrocity crimes and principles relevant to international sentencing were largely absent.[21] The sources of international law that provided the normative basis for the substantive crimes within the jurisdiction of international criminal courts did not provide penalties applicable to these prohibited acts nor did they provide rules on how to determine a suitable punishment.[22] International conventions governing the laws of armed conflict and international humanitarian law[23] as well as crime specific conventions (e.g. genocide,[24] torture,[25] terrorism[26]) lack penalty

[20] *See generally* STEVE ROACH, POLITICIZING THE INTERNATIONAL CRIMINAL COURT: THE CONVERGENCE OF POLITICS, ETHICS, AND LAW (2006).
[21] Pascale Chifflet & Gideon Boas, *Sentencing Coherence in International Criminal Law: The Cases of Biljana Plavšić and Miroslav Bralo*, 23 CRIM. L. F. 135, 139 and 144 (2012) (stating that ICL judges "have been given very little guidance" on the difficult task of sentencing").
[22] CHERIF BASSIOUNI & PETER MANIKAS, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 269 (1996) (finding that "none of the 315 international criminal law instruments" provides for specific penalties).
[23] *E.g.* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949, 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287; Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277.
[24] Convention on the Prevention and Suppression of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereafter the Genocide Convention].
[25] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereafter the Torture Convention].
[26] International Convention for the Suppression of Terrorist Bombings, 1998, 37 I.L.M. 249, *reprinted in* INTERNATIONAL CRIMINAL LAW: A COLLECTION OF INTERNATIONAL AND EUROPEAN INSTRUMENTS; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, 974

provisions or sentencing norms. They provide normative standards of conduct that States are obliged to respect but provide nothing on applicable penalties or sanctions. Even those provisions that called for States to apply penal sanctions were silent on any guidance regarding the applicable punishment. Likewise, the jurisprudence of Nuremberg tribunals provided little guidance for the development of sentencing principles in international law, according to both international law scholars and criminal law experts.[27] Thus, international sources – treaties, international judgments, etc. – offer little guidance on a range of issues relevant to sentencing perpetrators of atrocity crimes.

III. KEY CHARACTERISTICS OF ATROCITY SENTENCING

The key feature of ICL sentencing is the wide discretion given to international judges.[28] ICL judges assert this power with some force, even claiming authority to go beyond the law of their own statutes.[29] Unlike domestic criminal law, the statutes of international criminal courts do not contain sentencing tariffs.[30] Likewise, there is no agreed upon priority regarding the rationale of punishment for atrocity sentencing. Moreover, a common legal and cultural background that is generally shared by judges in a national system is absent in international criminal justice.[31] Thus, in atrocity trials and punishment, "the broad discretion ascribed to trial chambers has led to significant discrepancies in sentencing."[32]

U.N.T.S. 177; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 860 U.N.T.S. 105 [hereafter collectively anti-terrorism conventions].

[27] *See* DRUMBL, ATROCITY, *supra* note 1. Mirko Bagaric & John Morss, *International Sentencing Law: In Search of a Justification and Coherent Framework*, 6 INT'L CRIM. L. REV. 191, 192 (2006); William A. Schabas, *Sentencing by International Criminal Tribunals: A Human Rights Approach*, 7 DUKE J. COMP. & INT'L L. 461 (1997).

[28] *See* JAMES DAVID MEERNIK & ROSA ALOISI, JUDGMENT DAY: JUDICIAL DECISION MAKING AT THE INTERNATIONAL CRIMINAL 152-153 (2017); *See also, Prosecutor v. Kayishema & Ruzindana*, Sentence, ICTR-95-1-T (21 May 1999), para. 4; *Prosecutor v. Hadzihasanovic & Kubura*, Judgment, IT-01–47-T (15 March 2006), para 2068.

[29] Kayishema Trial Sentence, para. 4 ("This chamber also finds that it possesses unfettered discretion to go beyond the circumstances stated in the Statute and Rules to ensure justice in the matters of sentencing."); Hadzihasanovic Trial Judgment, para. 2068 ("The Statute and Rules do not exhaustively define the points of fact and law which the Trial Chambers may consider when determining sentences. Chambers have broad discretionary power in determining such matters.).

[30] *See* Ralph Henham, *Developing Contextualized Rationales for Sentencing in International Criminal Trials*, 5 J. INT'L CRIM. JUSTICE 757, 774 (2007); Chifflet & Boas, *Sentencing Coherence in ICL*, *supra* note 21, at 138.

[31] THEODOR MERON, THE MAKING OF INTERNATIONAL CRIMINAL JUSTICE, A VIEW FROM THE BENCH: SELECTED SPEECHES 278-285 (2011).

[32] Chifflet & Boas, *Sentencing Coherence in ICL*, *supra* note 21, at 155.

Another dominant characteristic of punishing atrocities has been the practice of "global" or "single" sentences.[33] In the case of multiple convictions, the *ad hoc* tribunals did not impose a penalty for each conviction. Instead, they rendered only a single global sentence representing a combined punishment for all crimes committed. It is surprising that this practice has not raised sharper criticism, especially given that it contravened the Rules of Procedure and Evidence (RPE) when first introduced.[34] This methodology of global sentencing presents a barrier to the maturation of ICL sentencing norms. One may expect this practice to end when the ICC commences its sentencing practice given that its statute requires trial chambers to first render a penalty for each crime that the accused is found guilty of before rendering a total aggregate sentence.[35] Given that this obligation is explicitly stated in the ICC statute, and not just in the Rules of Procedure and Evidence as it was at the ICTR and ICTY, judges cannot unilaterally remove this obligation at their pleasure as they could at the *ad hoc* tribunals. This should avoid the experience of the *ad hoc* tribunals where judges act contrary to the RPE but they then subsequently amended the RPE *post hoc* to reflect the departure. Another characteristic of atrocity sentencing that challenges its maturation is that the trial chambers typically do not indicate the actual weight given to mitigating factors.[36] Only in a few cases has a trial chamber indicated what the penalty would have been in the absence of mitigating factors.[37] The net result of these characteristics is variable or unpredictable sentencing results.

Modern international criminal courts exhibit significant differences regarding the appropriate quantum of punishment for atrocity crimes. For example, at the United Nations International Criminal Tribunals for the former Yugoslavia (ICTY), the median sentence for perpetrators of genocide, crimes against humanity, and war crimes is fifteen (15) years of imprisonment.[38] The median sentence at the United Nations International Criminal Tribunals for Rwanda (ICTR) is 33.5 years, more than a 200% increase over the ICTY.[39] It may be tempting to attribute this sharp disparity to the greater number of

[33] Shahram Dana, *Revisiting the Blaškić Sentence: Some Reflections on the Sentencing Jurisprudence of the ICTY*, 4 INT'L CRIM. L.R. 321 (2004).
[34] *Id*. at 326 footnotes 26 and 27.
[35] ICC Article 78(3).
[36] Doherty & Steinberg, *ICL Empirical Study* (2016), *supra* note 10 at 76.
[37] *E.g. Prosecution v. Dragan Nikolic*, Sentencing Judgment, IT-94-2-S (18 December 2003) para. 214.
[38] Hola *Facts and Figures ICTY and ICTR* (2011), *supra* note 2 at 420.
[39] *Id.* Hola assigns a numerical value of 55 years to sentences of life imprisonment.

genocide convictions at the ICTR,[40] but that explanation would fall short.[41] For example, the Special Court for Sierra Leone (SCSL) did not convict any defendant of genocide,[42] but it nevertheless imposed punishments more than twice as severe as the ICTY. The average sentence at the SCSL is 36 years.[43]

If we zoom in even closer – moving from a cross-tribunal comparison to an intra-tribunal perspective – the image becomes murkier rather than clearer. Not uncommonly, a senior political or military leader receives a significantly lower sentence than a minor foot soldier.[44] Such perceived irregularities are often unaccompanied by explanatory analysis that could elucidate such outcomes. For example, Biljana Plavšić arrived at the ICTY facing charges of genocide.[45] Several factors in her case warranted a severe punishment. First, Plavšić was convicted of a crime of the "utmost gravity" for a brutal campaign of ethnic cleansing and religious persecution.[46] Second, Plavšić, known as the "Iron Lady," was one of the highest ranking political figures in the Bosnian Serb wartime leadership. Third, she acted with discriminatory intent, provoking hatred against non-Serbs. The Iron Lady threw the weight of her considerable reputation as a highly-accomplished scientist to publically advance the insidious view that Bosnian Muslims are genetically inferior. In order to mobilize and justify violence against Muslims, she claimed that the Serb leadership could not negotiate with Bosnian Muslims due to the latter's inferior genetics.[47] With an air of scientific authority, she repeatedly stated that Serbs were racially superior to Muslims.[48] Regardless of whether she was genuinely committed to these views or posturing for personal and political advantage, such words are powerful instigators of atrocities.[49] In nearly every municipality under the control of her party, the Muslim population was annihilated or the areas were ethnically cleansed of Bosnian

[40] Doherty & Steinberg, *Empirical Study* (2016), *supra* note 10.
[41] Mark Drumbl, *Punishment and Sentencing*, in THE CAMBRIDGE COMPANION TO INTERNATIONAL CRIMINAL LAW 86 (William Schabas ed., 2016) [hereafter Drumbl *Punishment* 2016]
[42] The statute for SCSL did not include the crime of genocide.
[43] Shahram Dana, *The Sentencing Legacy of the Special Court for Sierra Leone*, 42 GEORGIA J. INT'L & COMP. L. 615, 659 (2014).
[44] Chifflet & Boas, *Sentencing Coherence in ICL*, *supra* note 21 (claiming that the reason for this can be attributed to ICL judges identifying more with older, well-educated, well-spoken perpetrators than with low level soldiers.)
[45] She subsequently convinced the Prosecutor to remove the crime of genocide from her indictment.
[46] *Prosecutor v. Plavšić*, Sentencing Judgment, IT-00-39&40/1-S (27 February 2003).
[47] MAYA SHATZMILLER, ISLAM AND BOSNIA: CONFLICT RESOLUTION AND FOREIGN POLICY IN MULTI-ETHNIC STATES 58 (2002).
[48] FRANKE WILMER THE SOCIAL CONSTRUCTION OF MAN, THE STATE AND WAR: IDENTITY, CONFLICT, AND VIOLENCE IN FORMER YUGOSLAVIA 217 (2002).
[49] For a comprehensive study of the relationship between inflammatory and hate speech and atrocity crimes *see*, Gregory S. Gordon, ATROCITY SPEECH LAW: FOUNDATION, FRAGMENTATION, FRUITION (2017).

Muslims.[50] Thus, Plavšić's criminality incarnated a frightful combination of wrongdoing, demanding a severe punishment under the sentencing laws of the ICTY: a crime of great gravity, committed by a person in the presidency, carried out with discriminatory intent, and ruthlessly effective in ethnic cleansing. For this unimaginable evil, Plavšić was sentenced to eleven (11) years of imprisonment and released six years later. At the time of her sentence, Plavšić was the most senior political figure to be punished by the ICTY. Shortly thereafter, low-level foot soldier Miroslav Bralo and camp commander Dragan Nikolić, without bargaining, unconditionally plead guilty to crimes against humanity. Both were sentenced to twenty (20) years of imprisonment.[51] Thus, the ICTY punished Bralo and Nikolić almost twice as harshly as Plavšić, who was among those bearing the greatest responsibility for the atrocities.[52]

The troubling questions raised by this illustration goes beyond these cases. They signal difficult issues that are not isolated to a few cases but constitute endemic problems regarding how atrocities are punished across ICL tribunals. Is there a just distribution of punishment among those that bear the greatest responsibility for the atrocities compared to other actors? What criteria is used to determine who bears the greatest responsibility? Does gravity adequately explain differences in ICL sentencing outcomes? These questions, as well as the broader observations above, highlight an urgent need for more doctrinal and theoretical studies of atrocity sentencing.

IV. Research Question and Methodology

This research explores the norms of atrocity sentencing with the aim of stimulating fundamental rethinking about theoretical, doctrinal, and philosophical aspects of punishment for atrocity crimes. The chapters offer descriptive claims and critical analysis of ICL sentencing jurisprudence, advancement of an international standard for the principle of legality *nulla poena sine lege*, critical reflection on rationales and ideologies influencing atrocity sentencing, systematization and conceptualization of

[50] Chifflet & Boas, *Sentencing Coherence in ICL*, *supra* note 21, at 149. The indictment against her contained fours schedules that documented thousands of murders, complete ethnic destruction of 850 villages, and extreme physical and mental abuse in 408 detention centers.
[51] *Prosecutor v. Miroslav Bralo*, Sentencing Judgment, IT-95-17-S (7 December 2005); *Prosecution v. Dragan Nikolic*, Sentencing Judgment, IT-94-2-S (18 December 2003).
[52] *Prosecutor v. Plavšić,* Sentencing Judgment, IT-00-39&40/1-S (27 February 2003).

sentencing factors, and normative arguments towards a guiding theory for punishing atrocities.

Beyond offering analysis that verifies or critiques claims in academic scholarship and ICL jurisprudence, the research aims to develop a normative framework to guide the exercise of judicial discretion in sentencing atrocity perpetrators. To that end, the main research question may be formulated as: what ought to be the determinants of ICL punishment and sentencing for atrocity crimes? Determinants of ICL punishment may be grouped into three categories:[53] (1) international human rights standards;[54] (2) perceived aspirations of international criminal prosecutions;[55] and (3) sentencing factors pertinent to atrocity crimes.[56] Accordingly, the main research question was organized according to three different inquiries: (1) Regarding international human rights standards, what role should *nulla poena sine lege* have in international criminal justice and how does international law conceptualize this fundamental human rights standard and foundational principle of criminal law? (2) Regarding the mandates of international criminal courts, what impact have aspirations associated with atrocity trials had in determining sentencing allocations? And what role should they have? (3) Do differences in the quantum of punishment mirror differences in gravity of the crime? If not, can the difference be theoretically explained by some other criteria? In building towards its normative claims on these questions, this book also offers description claims about the extant practice of punishing atrocity perpetrators.

The central research questions are largely examined through a critical analysis of the jurisprudence and case law of international courts. Thus, the methodology of this

[53] Other studies on ICL sentencing have likewise grouped the determinants into three categories which are organized differently but captured by this study. For example, Silvia D'Ascoli categorizes them into (1) "general influential factors" (e.g. the purpose of punishment and national sentencing practice); (2) "case-related factors" (e.g. gravity); and (3) "proceeding-related factors" (e.g. guilty plea and cooperation). Jan Philipp Book structures ICL sentencing determinants into (1) gravity of the offence, (2) aggravating factors, and (3) mitigating factors. *See respectively* SILVIA D'ASCOLI, SENTENCING IN INTERNATIONAL CRIMINAL LAW: THE UN *AD HOC* TRIBUNALS AND FUTURE PERSPECTIVES FOR THE ICC (2011) and JAN PHILIPP BOOK, APPEAL AND SENTENCE IN INTERNATIONAL CRIMINAL LAW (2011).

[54] *See* William Schabas, *Sentencing by International Tribunals: A Human Rights Approach*, 7 DUKE J. COMP. & INT'L L. 461 (1997) (arguing that international human rights law places limits on atrocity sentencing by international criminal tribunals);

[55] *See* COUNCIL OF EUROPE, DISPARITIES IN SENTENCING: CAUSES AND SOLUTIONS, COLLECTED STUDIES IN CRIMINOLOGICAL RESEARCH Vol. XXVI (1989); ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE (2010); Jan Nemitz, *The Law of Sentencing in International Criminal Law: The Purposes of Sentencing and the Applicable Method for the Determination of the Sentence*, 4 YEARBOOK OF INT'L HUMANITARIAN L. 87 (2001).

[56] *See* Ralph Henham, *Developing Contextualized Rationales for Sentencing in International Criminal Trials*, 5 J. INT'L CRIM. JUSTICE 757 (2007); SILVIA D'ASCOLI, SENTENCING IN INTERNATIONAL CRIMINAL LAW: THE UN *AD HOC* TRIBUNALS AND FUTURE PERSPECTIVES FOR THE ICC (2011).

study is largely inductive. The primary focus is on the International Criminal Court and the International Criminal Tribunals for Rwanda and the former Yugoslavia.[57] The so-called "hybrid" tribunals initially were excluded. However, a number of reasons compel the inclusion of the Special Court for Sierra Leone (SCSL) in any major study of atrocity sentencing. First, the SCSL Prosecutor pursued a distinctive strategy of conducting a single trial for each warring party in the armed conflict. Multiple co-perpetrators from the same fighting group were prosecuted under a single indictment for exactly the same charges, underlying facts, and violations of law. In each trial, the same crimes and counts were charged against all defendants regardless of rank. This afforded a rare opportunity to analyze sentencing outcomes where perpetrators occupying different positions in the hierarchy of an organization are held criminally responsible for the same underlying charges. Second, the SCSL is the only international court to sentence a former head of state.[58] Thus, its jurisprudence includes the unique application of ICL sentencing law, norms, and principles to a head of state. A comprehensive study of atrocity sentencing cannot ignore the only international court to punish a head of state. Third, the ICC cited the SCSL sentencing decisions giving them continuing relevance to ICL.[59] Finally, very few studies have focused on the SCSL, and its sentencing jurisprudence in particular has been largely overlooked.[60] Thus, by selecting the SCSL's jurisprudence as the subject of research inquiry, Chapter Four makes an important and new contribution to scholarly literature on international criminal law.

Notwithstanding the acknowledged importance of punishing atrocities, the law of sentence in ICL remains under-examined and under-developed.[61] A few studies undertook the difficult task of seeking to empirically explain what factors influence sentencing outcomes.[62] These thoughtful studies contribute helpful and new knowledge

[57] The research began with a critical analysis of the jurisprudence of situation specific international tribunals. The particularities of the conflicts that occurred in Rwanda and Yugoslavia as well as the prosecution strategy, in particular the selection of persons to indict, appears to have had an impact on the diversity of sentencing issues addressed in the jurisprudence of each tribunal respectively. For this reason, the sentencing jurisprudence of the ICTY has received more attention.

[58] *Prosecutor v. Charles Taylor,* Sentencing Judgment, Case No. SCSL-03-01-T, (30 May 2012).

[59] *Prosecutor v. Thomas Lubanga Dyilo*, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/04-01/06, 13 July 2012 ("Lubanga Trial Sentencing Judgment").

[60] *See e.g.* Shahram Dana, *The Sentencing Legacy of the Special Court for Sierra Leone*, 42 GEORGIA J. INT'L & COMP. L. 615, 659 (2014); *See further* Charles Jalloh (ed.), THE SIERRA LEONE SPECIAL COURT AND ITS LEGACY: THE IMPACT FOR AFRICA AND INTERNATIONAL CRIMINAL LAW (2014).

[61] AMBOS ICL TREATISE II (2014) at 270 (concluding that ICL sentencing law and practice needs improvement).

[62] Joseph W. Doherty and Richard H. Steinberg, *Punishment and Policy in International Criminal Sentencing: An Empirical Study*, 110 AMERICAN J. INT'L L. 49 (2016); Barbora Hola, *Consistency and Pluralism of International Sentencing: An Empirical Assessment of the ICTY and ICTR Practice* in PLURALISM IN

about atrocity sentencing, even though some of their findings are in disagreement with each other.[63] Citing these studies, Pascale Chifflet and Gideon Boas, both former ICTY legal officers, claim that "[t]here is discordance in empirical studies" on ICL sentencing.[64] Others criticize the coherence of the "overlapping" categories used by the empiricists that "do not sit well with the written law and existing sentencing practice."[65] Indeed, one empirical study by Joseph Doherty and Richard Steinberg sharply criticizes earlier studies "as being undertheorized, containing methodological errors, and testing an incomplete set of hypothesized factors."[66] Yet, while Doherty & Steinberg criticize the other empirical studies for excluding the ICTR, they themselves ignore the SCSL. This study does not.[67]

Furthermore, the authors of these studies themselves dutifully admit the limits of an empirical examination of atrocity sentencing. For example, in one detailed and careful empirical study, the authors proffered a compelling model demonstrating that ICTY sentences "can to a certain extent be predicted by the examined legal factors" but they also frankly acknowledged that the model left 40% of sentencing variations "unexplained."[68] Moreover, in the words of one of the world's leading criminal law and ICL scholars, Kai Ambos, "empirical research can never fully reveal the underlying reasons and factors for concrete sentencing decisions."[69] Likewise, Ralph Henham, a strong advocate of empirical studies, considers empirical research limited because it "cannot re-conceptualize, rationalize or reposition the justifications for international sentencing decisions."[70] The purpose of this study, therefore, is to re-conceptualize, reimagine, and re-orientate key determinants of atrocity sentencing. It aims to drive a fundamental rethinking of the norms, laws, and doctrines pertinent to ICL sentencing, a

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INTERNATIONAL CRIMINAL LAW 187-207 (Elies van Sliedregt & Sergey Vasiliev eds. 2014); SILVIA D'ASCOLI, SENTENCING IN INTERNATIONAL CRIMINAL LAW: THE UN *AD HOC* TRIBUNALS AND FUTURE PERSPECTIVES FOR THE ICC (2011); Uwe Ewald, *Predictably Irrational - International Sentencing and its Discourse against the Backdrop of Preliminary Empirical Findings on ICTY Sentencing Practices*, 10 INT'L CRIM. L. REV. 365 (2010); Barbora Hola *et al*., *Is ICTY Sentencing Predictable? An Empirical Analysis of ICTY Sentencing Practice*, 22 LEIDEN J. INT'L L. 79 (2009); James Meernik & Kimi King, *The Sentencing Determinants of the International Criminal Tribunal for the Former Yugoslavia: An Empirical and Doctrinal Analysis*, 16 LEIDEN J. INT'L L. 717 (2003).

[63] Chifflet & Boas, *Sentencing Coherence in ICL* (2012), *supra* note 21, at 148.

[64] *Id*.

[65] AMBOS ICL TREATISE II (2014) at 270 and 285.

[66] Doherty & Steinberg, *Empirical Study* (2016), *supra* note 10, at 52.

[67] This may very well be the first in-depth study on atrocity sentencing that incorporates the jurisprudence of the SCSL and the jurisprudence of the ICTR and ICTY in a single study.

[68] Hola *et al*., *Empirical Analysis ICTY Sentencing*, *supra* note 62 at 89.

[69] AMBOS ICL TREATISE II (2014) at 270.

[70] *See e.g.* Henham *Developing Contextualized, supra* note 56 at 778.

task that remains incomplete in the extant scholarship and literature. The overarching objective of this research project is to foster development of the law and norms of atrocity sentencing.

In analyzing ICL sentencing jurisprudence, the first task of the research was to determine what the international criminal courts are actually doing in their sentencing practice, not merely what they claimed to be doing although this too was observed and analyzed. The results of this investigation are presented in an integrated manner, focusing on areas where the former departs from the latter. Additionally, their claimed aspirations are scrutinized against their sentencing outcomes. While every effort has been made to be comprehensive, and empirical data has been compiled and considered, the study does not claim or intend to cover in detail all sentencing decisions. The reason for this is because, after a close examination, some judgments did not offer anything new to the analysis. Thus, cases are prioritized for closer scrutiny owning to their propensity to verify or falsify claims arising from scholarly literature or for analysis pertinent to the research questions. Nevertheless, international judges, practitioners, and academics may find useful the extensive gathering and analysis of raw data on atrocity sentencing into a single study. Likewise, while comparative research informed the background and context of the analysis presented here, it will not be reproduced in this book because the study does not aim to explain atrocity sentencing from a comparative national perspective.[71] Furthermore, comparative methodologies are not meaningfully employed by international judges in their sentencing rationalizations and thus, do not appear to be influential in punishing atrocity at international tribunals. Nevertheless, the reader will periodically find references to national laws.[72]

The advancement of the study's central claims at times required exposing the shortcomings of the proffered sentencing justifications by international courts, or criticizing well-intended but misconceived approaches, or demonstrating inconsistent

[71] For comparative studies of sentencing for international crimes in national systems *see* Ulrich Sieber (ed.), THE PUNISHMENT OF SERIOUS CRIMES: A COMPARATIVE ANALYSIS OF SENTENCING LAW AND PRACTICE VOL. 2 (2004) (analyzing punishment reports from various countries); Daniel B. Pickard, Note, *Proposed Sentencing Guidelines for the International Criminal Court*, 20 LOY. L.A. INT'L & COMP. L. REV. 123, 126 (1997) (providing examples of national penalties for international crimes).

[72] Sentencing of international crimes is also carried out by national courts. However, as explained above in Section II, the context in which international criminal justice mechanisms operate is quite different from national criminal law enforcement. Additionally, as observed in Section III, national sentencing law and practice is far a more developed, more mature penal regime with a deeper history and tradition. Given these contextual and practical differences, it was decided to focus exclusively on atrocity sentencing by international tribunals in this study.

application of concepts from case to case. This too has determined which cases received more detailed consideration. It is important to note, however, that these criticisms are not intended to belittle the institutions of international justice or the dedicated individuals serving them. Nor are critiques presented for the sake of criticism alone. To the extent possible, this book attempts to avoid the culture of cynicism that appears to be esteemed in many circles as the hallmark of scholarship. Where criticism is raised, the analysis also seeks to address alternative considerations, approaches, or solutions.

V. Overview of Chapters

The organization of this manuscript is structured to mirror the organization of the central research question into the three sub-inquiries as presented above. In his excellent and comprehensive treatise on international criminal law, Kai Ambos observes that in order to properly take account of all that vexes ICL sentencing, "one must first take a closer look at the *nulla poena* principle."[73] Accordingly, in Chapter Two, this study begins with an examination of the principle of legality *nulla poena sine lege* in international law and international criminal justice. It starts by addressing a core conflict, arising from the divergent natures of international law and criminal law mentioned above, that must be considered before theoretical and doctrinal issues pertaining to *nulla poena sine lege* can be properly addressed. Analyzed further in the next chapter, the tension concerns the impact of international law-making methodology on identifying state obligations. Briefly and simply stated, this methodology places the state central in creating normative obligations.[74] But what if the context was not merely about the state's relationship to another co-equal (state), but to an individual? Does that call for rethinking how we identify norms at the international level that limit state action against the individual? Or what if the context concerns the relationship between a collective of states and a single individual? If wisdom and experience from national law and human rights law tells us that certain safeguards must be upheld in the relationship between a state and an individual, how does that experience inform such considerations when the actions involve a collective of states against an individual? These considerations map well onto

[73] Kai Ambos, Treatise on International Criminal Law Volume II: Crimes and Sentencing 270 (2014).
[74] Permanent Court of International Justice, *Lotus* Case (1927), PCIJ Rep. Series A, No. 10.

existing discourses and trends pointing to a slow, but clear, shift re-orientating the foundations of international law in a manner that would make the human interest less peripheral.[75]

The chapter's methodology deconstructs the *nulla poena sine lege* maxim into its underlying legal principles, investigates sources of international law pertaining to each principle and, based on the analysis, reconstructs an international *nulla poena sine lege* maxim. Chapter Two hypothesizes that a fuller appreciation of the function and purpose of *nulla poena sine lege*, gained through an elucidation of its underlying legal principles, can facilitate a more penetrating analysis of its normative development in international law as well as identify areas of positive contribution to atrocity sentencing. Thus, the chapter explores three underlying sub-questions: (1) what are the legal principles underlying *nulla poena sine lege*? (2) Are these principles found in sources of international law? And (3) based on the substantive content of each principle defined through sources of international law, can we articulate an international standard for *nulla poena sine lege*?[76] The second chapter also seeks to push the extant discourse on the principle of legality further. Is it possible to re-imagine the role of *nulla poena sine lege* beyond its simple caricature as a principle of negative rights designed to limit abuse of authority.[77] Is there support for conceiving *nulla poena* as encompassing a "positive justice" dimension focused on improving the quality of justice rendered?[78] The chapter ends with a critical study of the provisions of the Rome Statute of the International Criminal Court[79] pertaining to *nulla poena sine lege* and sentencing.

The third chapter interrogates sentencing rationales and ideologies advanced as pertinent to punishing atrocities. It begins by placing the enterprise of international criminal justice into its political and legal context with a view on how this may impact rationales for punishment. As noted above, international criminal justice seeks to achieve

[75] REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY (2001).
[76] KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW VOLUME II: CRIMES AND SENTENCING 271 (2014) (observing that "it is unclear what exactly the *nulla poena* principle requires" in international criminal justice).
[77] The concept of "negative liberty", in contrast to "positive liberty", was elaborated by Isaiah Berlin in his inaugural lecture delivered before the University of Oxford. *See*, I. Berlin, Two Concepts of Liberty (1958). The analysis assumes that the reader is already familiar with the distinction between negative justice and positive justice.
[78] Although not conceptualized as "positive justice" dimensions of the principle of legality, attempts to improve predictability in other phase of the criminal justice process have done so by applying the principle of legality. *See* Michiel J.J.P. Luchtman, *Towards a Transnational Application of the Legality Principle in the EU's Area of Freedom, Security and Justice?* 9.4 UTRECHT L. REV. 11 (2013).
[79] UN Doc. A/CONF. 183/9. For a full text of the ICC Statute *see* International Legal Materials (1998) p. 999; *see also*, www.icc-cpi.int (hereafter referred to as the 'Rome Statute', 'ICC Statute', or 'Statute'.)

punitive goals such as retribution and deterrence[80] while also advancing restorative policy goals that include at times conflicting international and national priorities.[81] The research outcomes offer both descriptive claims and normative critiques. Four sub-themes are specifically addressed in this chapter: (1) Among the many aspirations associated with ICL, which rationales and ideologies have found their way into the sentencing phase? What purposes have been tied to ICL punishment? (2) Do international judges implement sentences in accordance with their proffered rationales? When determining sentencing allocations, do the factors they consider reflect their stated objectives? (3) How can we understand the vacillation of purpose or orientation? What does it tell us about how international criminal justice self-identifies; and (4) What impact have particular avowed ICL aspirations had on the quantum of punishment and, importantly, what is their impact on how general sentencing principles are conceived and implemented?

Chapter Four focuses on two normative tasks: (1) can an optimal framework be constructed to synchronize the many sentencing factors bearing upon the quantum of punishment? (2) can a guiding principle be identified to offer direction to judicial discretion in a manner that harmonizes sentencing outcomes with judicial narratives? As developed in detail in Chapter Four, the process by which judges consider the various sentencing factors lacks a methodical approach. Thus, one of the innovative research outcomes of this project is the creation of a sentencing framework for punishing atrocities. Another outcome of this research project are considerations towards theoretical development of ICL sentencing. Chapter Four offers an original normative claim for punishing atrocity perpetrators: the concept of the enabler. I vet this claim with three interrogations to test whether the enabler claim contributes to our understanding of punishing atrocities: (1) can the concept of the enabler illuminate seemingly inconsistent and unsatisfying sentencing results? (2) can the enabler factor close the gap between judicial narratives about the gravity of atrocity crimes and sentence outcomes in cases where the two appear incongruent? (3) does the enabler factor help explain why judges vacillate between divergent purposes of ICL punishment?

[80] For an excellent study of the deterrent capacity of international criminal justice through the lens of a ten conflict or post-conflict countries *see* Jennifer Schense & Linda Carter (eds.), TWO STEPS FORWARD, ONE STEP BACK: THE DETERRENT EFFECT OF INTERNATIONAL CRIMINAL TRIBUNALS 1 (2016).
[81] *See e.g.* Jack Goldsmith & Stephen D. Krasner, *The Limits of Idealism*, 132 Daedalus 47 (2003).

The book's conclusion recaps the research outcomes, key normative claims, and doctrinal and theoretical insights developed throughout the study. The key outcomes of this research study can be summarized into three contributions to understanding atrocity sentencing. One of the innovative outcomes of this research project is explaining atrocity sentencing through the enabler factor or "enabler responsibility." The enabler factor closes the explanatory gap on perceived sentencing disparities in ICL. Another original contribution of this study is the normative, doctrinal, and theoretical development of *nulla poena sine lege*, reviving its significance and relevance to punishing atrocities.[82] A final research outcome is the advancement of a sentencing framework to guide judicial discretion. Through these three key contributions, the research produces pathways for overcoming challenges and criticisms vexing ICL sentencing and punishment both in theory and practice.

VI. LIMITATIONS

Among the various challenges associated with researching and writing a book of this nature is the appreciation of limitations. Exploring doctrinal and normative aspects of atrocity sentencing requires acceptance of the limits of the subject matter, the limits of international law, and the limits of criminal law and criminal justice systems. Moreover, international criminal justice does not operate in a vacuum. The limits of international law as a legal order and the acceptance of the observable influence and impact of international politics on law's independence cannot be ignored at the present stage of its development. Many appear resigned to this current state of affairs and accept it as an unavoidable factor in the administration of law in the international context; while others regard it as a tumor in the international legal order and suggest various proposals for the remedy. However, this is not a debate that will be entertained here.

At the same time, criminal law and its associated institutions are not the panacea to mass criminality, and consequently, cannot claim a monopoly on appropriate responses to atrocity crimes. Appreciating this limitation does not mean that sentencing in international law should not be the subject of scholarly study. Justice is a key

[82] According to criminal law theorist and ICL scholar, Kai Ambos, "the Nuremberg precedent" prepared the ground for "reduc[ing] the relevance of the *nulla poena* principle in general." *See* KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW VOLUME II: CRIMES AND SENTENCING 275 (2014).

ingredient in the foundations of a peaceful society.[83] In the context of "seeing justice done", the punishment and sentence are features of atrocity trials that are often in the public spotlight.[84] They are, in a sense, the "external affairs officers" of international criminal justice. Thus, atrocity sentencing is intimately linked to achieving the goals of the international community and the purpose of international atrocity trials.[85] The point in acknowledging the limits of what can be achieved through law and legal mechanisms is two-fold. First, post-harm (or post-conflict) measures, such as international criminal justice mechanisms, can never be a substitute for the failure of world leaders to take all necessary measures to prevent mass atrocities[86] nor serve as an escape route for world leaders in the face of legitimate questions regarding their failed leadership.[87] The creation of international forums for prosecution of atrocity crimes does not, obviously, alleviate us of our obligation to police ominous situations and to respond decisively when confronted with warning signals. Nations must equally commit to early action to genuinely prevent mass atrocities.[88] Otherwise, we run the risk that international trials become little more than monumental memorials for the dead. Second, in rebuilding a society victimized by ethnic violence, a comprehensive response would not be limited to criminal justice and may include financial restoration, peace programs, moral education, and other means of rebuilding community cohesion.

In light of these limitations, why undertake an in-depth examination of atrocity sentencing? As suggested by the above passages, it is not because of a fanciful belief that a perfect sentencing practice is the key heuristic to halting atrocities such as genocide, crimes against humanity or war crimes. The ensuing research revealed an important

[83] *Prosecutor v Kambanda*, Sentencing, ICTR-97-23-S, para. 58 ("Just sentences contribute to respect for the law and maintenance of a just, peaceful and safe society.")

[84] *See further* KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW VOLUME II: CRIMES AND SENTENCING 302 (2014) (noting that sentencing decision are of the utmost importance to the parties of international criminal proceedings, to both the defendant and the prosecutor, as well as the victims").

[85] *Prosecutor v Aleksovski*, Judgment, IT-95-14/1-T (25 June 1999) para. 243 (stating that "in order to implement the Tribunal's mandate, it is crucial to establish a gradation of sentences"); Kambanda Trial Sentencing Judgment, *supra* note 83, para 58; Doherty & Steinberg, *Empirical Study* (2016), *supra* note 10, at 50.

[86] Sadly, we witness the same failures re-occurring. Although the UN Security Council referred the situation in Darfur to the International Criminal Court (ICC), it failed to take any serious and effective measures to halt the violence which consequently spread into Chad, threatening to collapse that country into a failed state. *See*, Stephanie Hancock, 'Rebels and robbers rampage in eastern Chad', BBC News, eastern Chad, 20 April 2006, *available at* http://news.bbc.co.uk/2/hi/africa/4925978.stm.

[87] *See generally*, Romeo Dallaire, Kishan Manocha & Nishan Degnarain, *The Major Powers on Trial*, 3 J. INT'L CRIM. JUSTICE, 861 (2005); J. Kamatali, *The Challenge of Linking International Criminal Justice and National Reconciliation: The Case of the ICTR*, 16 LEIDEN J. INT'L L. 115 (2003).

[88] *See further* Robert I. Rotberg, *Deterring Mass Atrocity Crimes: The Cause of Our Era* in MASS ATROCITY CRIMES: PREVENT FUTURE OUTRAGES 1-24 (Robert I. Rotberg (ed.) 2010).

recurring theme: the contribution of sentencing, and arguably the role of criminal justice in general, in preventing mass atrocities is somewhat dwarfed by the greater pertinence of other mechanisms, outside the criminal justice process, which bare closer proximity to the goal of preventing mass atrocities.[89] Prosecution and punishment are but one phase on a continuum of initiatives and efforts that are needed, from initiatives in the early pre-crisis phase prior to the onset of violence to enterprises that seek to heal the wounds of society in a post-conflict setting.[90]

The merits of various responses will not be debated here. For our purposes, it is sufficient to recognize that the international community has selected international criminal justice to be one of the mechanisms employed (if not the dominate). And within this system, incarceration has emerged as the preferred choice for punishing atrocities.[91] With those decisions taken, the focus then will be on strengthening the quality of justice rendered through international atrocity trials and sentencing. In this context, punishing atrocity perpetrators has an important function to fill. As noted already, sentencing is the public face of international criminal law. Judicial narratives in sentencing judgments communicate the community's values. They aim to represent justice. They seek to strengthen both. Scholarship on atrocity trials and sentencing can contribute to these processes. Sentencing has, *inter alia*, a symbolic function. But that should not be taken to mean that it is illusory.

Sentencing by international courts and tribunals ought to be linked with the objectives of international criminal justice.[92] Thus, a solid theoretical and doctrinal foundation must be established. The international judge may be seen as a codifier and protector of international values. Given that they are not formally acting as representatives of states, like members of the Security Council or General Assembly do, they have the opportunity to speak as the conscious of humanity in building shared values. Their judgments provide an opportunity to advance norms essential to the survival and prosperity of humanity.

On the other hand, ill-conceived sentencing narratives and outcomes undermine international justice and weaken confidence in the international legal order. An unsound

[89] On the limited role of sentencing in crime prevention in the domestic context *see* ANDREW ASHWORTH, SENTENCING AND CRIMINAL JUSTICE (2010).
[90] For objections to overreliance on criminal law as the centerpiece in responding to mass atrocities s*ee* Mark Osiel, *Why Prosecute? Critics of Punishment for Mass Atrocity*, 22 HRQ 118 (2000).
[91] *See e.g.* Henham *Developing Contextualized, supra* note 56 at 774.
[92] *See*, Aleksovski Trial Judgment, *supra* note 85 at para. 243.

sentencing practice can be a target for critics and opponents of the International Criminal Court, weakening the support necessary for the continued development of the rule of law at the international level. On an individual level, a failed sentencing policy may result in the miscarriage of justice.[93] Punishment is an integral part of international prosecutions, and thus, like all other elements of the process such as definitions of crimes, scope of prosecutorial and judicial powers, and rights of the accused, it must be based on sound principles, policies, and rules supported by scholarly studies. Furthermore, for the institution of international punishment to play its role, those obstacles that prevent its maturation must be identified and rooted out.

Regarding limits on the scope of this research project, this study focuses on the nominal sentence imposed by international criminal courts in their disposition at the conclusion of the trial and appeals process. Aside from a few references to provide context, this study does not examine in-depth the execution and enforcement of ICL sentences, including issues concerning selection of state where the sentence will be served, prison conditions, early release and detention regime.[94] These matters naturally bear upon the harshness and effective length of incarceration.[95] However, as this study focuses on the norms, laws, and doctrines determining the nominal sentence, enforcement issues fall outside of its scope. Such an undertaking would have required a substantial new direction in the research given the vast range circumstances in various states that have signed agreements to enforce ICL sentences.

Finally, a brief note about the use of a couple of terms may be helpful at the outset. "Atrocity" is used throughout the book in reference to "atrocity trials", "atrocity sentencing", "punishing atrocities", and "atrocity perpetrators". David Scheffer, a leading scholar of international law who was at the forefront of efforts to establish international criminal tribunals in the Balkans, Rwanda, Sierra Leone, and Cambodia during his time as U.S. Ambassador-at-Large for War Crimes Issues, describes "atrocity crimes" as "high-impact crimes of severe gravity that are of an orchestrated character, shock the

[93] *See* KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW VOLUME II: CRIMES AND SENTENCING 270 (2014) (calling for improvement in ICL sentencing because "the sentencing decision is the most important decision in any criminal trial from the perspective of the defendant").

[94] Responsibility for oversight of the enforcement of ICTY and ICTR sentences, including issues concerning early release, are among the functions of the United Nations International Residual Michanism for Criminal Tribunals ("Michanism"). During its initial years, the Michanims operated parallel to the ICTY and ICTR, both of which have closed. *See*, www.unmict.org

[95] DeGuzman *Harsh Justice* (2014), *supra* note 3, at 8-9 (discussing how persons convicted by international courts face "vastly different norms regarding early release" and "imprisonment conditions [that] vary greatly").

conscience of humankind, result in a significant number of victims or large-scale property damage, and merit an international response to hold at least the top war criminals accountable under the law."[96] Zachary Kaufman claims that "in both international relations and international law, the term 'atrocities' has referred to genocide, war crimes, and crimes against humanity."[97] I used "atrocities" in this sense also, as it corresponds to the crimes under the jurisdiction of the courts examined herein.

It is also helpful to note at the outset that, in the context of this study, when a penalty is characterized as "severe" or "lenient", this is usually from an internal comparative perspective, unless stated otherwise. In other words, the assessment is made relative to other sentences imposed by international criminal courts. It is not assessed relative to penalties in national systems which can be more severe. It is necessary to draw attention to the usage of such terms as "lenient" or "severe" because of the potential reaction it may invoke from certain communities, including victims. One of the challenges in researching and writing on punishments for atrocity crimes is to not lose sight of the fact that we are often dealing with large scale, extremely horrific and inhumane crimes. The reader should never confuse any analysis, argument or criticism in this book as apologetics for mass atrocities or the individuals that perpetrate them, or as a lack of empathy for the victims. It is important to acknowledge this prior to the substantive analysis because at times the arguments may appear very matter-of-fact or even cold. Additionally, at other times, comparisons may be drawn between various perpetrators regarding the relative severity of their punishments. None of this is intended to diminish, even in the slightest, the wrongs and suffering visited upon the victims. Such analysis is simply a necessary step towards advancing the law of atrocity sentencing.

Of course, in reply to all this, one could simply retort that atrocity perpetrators have all committed very serious crimes – can't we just impose the maximum punishment or a very severe penalty and be done with it? Indeed, we *could*, but the real issue is whether the *courts actually do* so. And the simple answer is no. ICL judgments are littered with examples of sentences less than 5 years of imprisonment, or sentences less than 10 years, or even penalties of 15 years of imprisonment where the perpetrator was found

[96] DAVID SCHEFFER, ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS 429-30 (2012).
[97] ZACHARY KAUFMAN, UNITED STATES LAW AND POLICY ON TRANSITIONAL JUSTICE: PRINCIPLES, POLITICS, AND PRAGMATICS 2 (2016).

guilty of multiple murders. Indeed, the average sentence at the ICTY is 15 years for persons convicted of atrocity crimes. Thus, it is important to explore why this is happening, to question whether it should be happening, and to reimagine an approach to punishing atrocities that reflects our notions of justice.

CHAPTER TWO
REIMAGINING *NULLA POENA SINE LEGE*

If an international court were to be set up, it would be unwise to give it the very wide power to determine the penalty to be applied to each crime.

- Mr. Carlos Salamanca Figueroa,
International Law Commission (1954)

I. INTRODUCTION

Only the innocent deserve the benefits of the principle of legality. This statement naturally offends our notions of justice and fairness. By today's human rights standards, it would be unacceptable for a legal system to institutionalize such an approach. Yet, in the context of prosecuting mass atrocities, genocide, crimes against humanity, and war crimes, international criminal law appears to be resigned to such a principle, if not openly embracing it. Although ranking among the most fundamental principles of criminal law, *nulla poena sine lege* (no punishment without law) has received surprisingly little attention in international criminal justice. So little, in fact, that it may be considered the poor cousin of *nullum crimen sine lege* (no crime without law) which has attracted far greater consideration in scholarship and jurisprudence.[1] Whereas *nullum crimen sine lege* addresses the *punishability* of the conduct in question, *nulla poena sine lege* deals with the legality of the actual punishment or penalty itself. Given that both are at the core of the principle of legality,[2] the neglect of *nulla poena* is difficult

[1] *See* C.R. v. United Kingdom, App. No. 20190/92, 335 Eur. Ct. H.R. (1996) at 68-69; S.W. v. United Kingdom, App. No. 20166/92, 335 Eur. Ct. H.R. (1996), at 41-42; THOMAS RAUTER, JUDICIAL PRACTICE, CUSTOMARY INTERNATIONAL CRIMINAL LAW AND *NULLUM CRIMEN SINE LEGE* (2017); M. CHERIF BASSIOUNI, CRIMES AGAINST HUMANITY IN INTERNATIONAL CRIMINAL LAW (1999); MACHTELD BOOT, GENOCIDE, CRIMES AGAINST HUMANITY AND WAR CRIMES: NULLUM CRIMEN SINE LEGE AND THE SUBJECT MATTER JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT (2002); STANISLAW POMORSKI, AMERICAN COMMON LAW AND THE PRINCIPLE NULLUM CRIMEN SINE LEGE (Elżbieta Chodakowska trans., 2d ed. 1975); L. C. Green, *The Maxim* Nullum Crimen Sine Lege *and the Eichmann Trial*, 38 BRIT. Y.B. INT'L L. 457 (1962); John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189 (1985); Jordan J. Paust, *It's No Defense:* Nullum Crimen*, International Crime and the Gingerbread Man*, 60 ALB. L. REV. 657 (1997); Mohamed Shahabuddeen, *Does the Principle of Legality Stand in the Way of Progressive Development of Law?*, 2 J. INT'L CRIM. JUST. 1007 (2004); Beth Van Schaack, Crimen Sine Lege*: Judicial Lawmaking at the Intersection of Law and Morals*, 97 GEO. L. J. 119 (2008).

[2] Susan Lamb, Nullum Crimen, Nulla Poena Sine Lege *in International Criminal Law*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 773, 773-74, 756 (Antonio Cassese, Paola Gaeta & John R. W. D. Jones eds., 2002); Paul H. Robinson, *Legality and Discretion in the Distribution of Criminal Sanctions*, 25 HARV. J. ON LEGIS. 393, 396-97 (1988); William A. Schabas, Nulla Poena Sine Lege, *in*

to justify, although not entirely without explanation.[3] As renowned legal scholar Jerome Hall observed, *nulla poena sine lege* "affects only proven criminals" while *nullum crimen sine lege* "protects the mass of respectable citizens."[4] Commenting on the traditional approach of strict adherence to *nullum crimen* combined with a cavalier attitude towards *nulla poena*, eminent criminal law professor Paul Robinson observed that such a practice "bestows the benefits of legality on innocent people and denies it only to the criminals."[5] While most national criminal justice systems have made considerable efforts over the years to close this gap, international criminal justice has not. The potential contribution of *nulla poena* has been largely overlooked on the international level by policy makers, drafters, and judges.[6] Likewise, there exists a lacuna in academic scholarship on this subject.[7] Under-theorization of *nulla poena* in international criminal justice stalls the maturation in international law of this long standing criminal law principle, keeps dormant its contribution to justice, and challenges the legitimacy of international prosecution and punishment. This Chapter aims to remedy this lacuna by undertaking three distinct tasks. First, it develops the normative content of *nulla poena* under international law. Second, this Chapter critically evaluates whether the statutes of international criminal courts and their sentencing jurisprudence adhere to this standard. Third, I advance a new understanding of the role and potential contribution of *nulla poena* in international law that goes beyond its simple caricature as a principle of negative rights, designed merely to prevent retroactive punishment, to one that captures its role as a *quality of justice* principle, aimed at realizing justice in the distribution of punishment.

The Chapter's methodology deconstructs the *nulla poena* maxim into its underlying legal principles, examines sources of international law pertaining to each principle, and then reconstructs an international *nulla poena* maxim. The inquiry takes the approach that a fuller appreciation of the function and purpose of *nulla poena*, gained through an elucidation of its underlying legal principles, can facilitate a more penetrating analysis of its normative development in international law. Accordingly, Part II of this Chapter examines the purpose of

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COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 463, 463 (Otto Triffterer ed., 1999).

[3] *See generally* Francis A. Allen, *The Erosion of Legality in American Criminal Justice: Some Latter-Day Adventures of the* Nulla Poena *Principle*, 29 ARIZ. L. REV. 385 (1987).

[4] JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 55 (2d ed. 2005).

[5] Robinson, *supra* note 2, at 398.

[6] KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW VOLUME II: CRIMES AND SENTENCING 272 (2014) (arguing that the legitimacy of international criminal tribunals can be enhanced by a more faithful observance of *nulla poena*).

[7] *Id.* at 271 (observing that "it is unclear what exactly the *nulla poena* principle requires" in international criminal justice).

and interests protected by *nulla poena* and draws attention to its modern function.[8] The analysis then connects these functions and protected interests with the underlying attributes of the maxim, formulated as legal principles. I argue that the goal of *nulla poena* is not merely to prevent retroactive punishment or abuse of power[9] but that it also has a quality of justice function: it contributes to realization of equality before the law, justice in the distribution of punishment, and consistency in sentencing.[10] The former reflects a narrow understanding of *nulla poena* whereas the latter manifests a modern approach.[11]

Part III investigates sources of international law in order to determine the international standard for *nulla poena* through an analysis of international and regional conventions, customary international law, general principles of law, and international judicial precedent. Rather than giving a desultory treatment of *nulla poena* under international law, this Part examines sources of international law as they pertain to the four underlying attributes of *nulla poena*: *lex praevia* (the prohibition against retroactive application), *lex scripta* (punishment must be based on written law), *lex certa* (the form and severity of punishment must be defined with clarity), and *lex stricta* (the prohibition against applying a penalty by analogy). Drawing upon this analysis, this Chapter advances an international standard for *nulla poena* integrating the particularities of international law with the requirements of criminal justice.

In Part IV, the Chapter moves its examination of *nulla poena* into the context of international criminal justice. This Part critically analyzes the statute and case law of international criminal courts and tribunals. The discussion begins with the sentencing jurisprudence of post-World War II atrocity trials; continues with an examination of the UN Security Council created *ad hoc* Tribunals of the 1990s;[12] and culminates in a critique of the

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[8] As the historical background of *nulla poena sine lege* has been covered by other authors, it will not be further revisited here. *See* Kai Ambos, *Nulla Poena Sine Lege in International Criminal Law*, *in* SUPRANATIONAL CRIMINAL LAW: A SYSTEM SUI GENERIS 17-22 (Roelof Haveman, Olga Kavran & Julian Nicholls eds., 2003); Bassiouni, *supra* note 1, at 127-35. *See generally* CARL LUDWIG VON BAR, THE HISTORY OF CONTINENTAL CRIMINAL LAW (Thomas S. Bell trans., Rothman Reprints 1968) (1916); Pomorski, *supra* note 1; Jerome Hall, *Nulla Poena Sine Lege*, 47 YALE L.J. 165 (1937); Aly Mokhtar, *Nullum Crimen, Nulla Poena Sine Lege: Aspects and Prospects*, 26 STATUTE L. REV. 41 (2005).

[9] For the sake of shorthand, I refer to these protections as "negative rights" safeguarded by *nulla poena*. By negative rights and positive rights, I draw on the distinction between "negative liberty" and "positive liberty" discussed by Isaiah Berlin in his inaugural lecture delivered before the University of Oxford. *See*, ISAIAH BERLIN, TWO CONCEPTS OF LIBERTY (1958). The analysis assumes that the reader is already familiar with the distinction between negative justice and positive justice.

[10] For sake of shorthand, I refer to these features as *nulla poena's* "positive justice" function or "positive rights" or "quality of justice" function.

[11] The broader approach to *nulla poena* is associated with its "positive justice" dimension or "quality of law" function. *See infra* notes 18 & 20 (discussing a broader approach).

[12] The "International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991" was established by the U.N. Security Council, acting under Chapter VII of the Charter of the United Nations, in 1993 pursuant to Resolution 827. *See* Statute of the International Tribunal for the Former Yugoslavia, S.C. Res. 827,

International Criminal Court, representing a new era of a permanent treaty-based mechanism for international criminal justice. The treatment of *nulla poena* by international criminal courts is examined against the backdrop of the analysis developed in Parts II and III. The ICTR and ICTY share effectively the same statutory provisions on punishment and sentencing. Moreover, the two tribunals shared a common Appeals Chamber and thus, its conceptualization of *nulla poena*, sentencing principles, and statutory interpretation served a guidance for judges at both tribunals. Given that the first war criminal sentenced from this period was a defendant before the ICTY, its sentencing judgment and discussion of *nulla poena* and the national law provision merit detailed examination because its interpretations and ruling on these principles and provisions were upheld by the Appeals Chamber and subsequently followed by both tribunals.

Next, the Chapter critiques the provisions of the Rome Statute of the International Criminal Court (ICC)[13] pertaining to *nulla poena* and sentencing. Here, the Chapter elucidates the strengths and weaknesses of the ICC Statute in light of the international standard for *nulla poena* and its potential contribution to international criminal justice. It concludes that while one of the rationales underlying *nulla poena*, for example preventing retroactive punishment, may not raise serious concerns for international punishment of individuals guilty of war crimes, crimes against humanity, and genocide, this does not mean that *nulla poena* has lost relevance to international criminal justice. Other rationales underlying the maxim, in particular those connected with its positive justice function, such as equal treatment before the law, consistency in sentencing, and improving the quality of justice, continue to require a rethinking of the role of *nulla poena* in advancing international law and justice.

II. THE NATURE OF *NULLA POENA SINE LEGE*

A. VALUES: INTERESTS PROTECTED AND PURPOSES SERVED

Nulla poena sine lege and its counterpart, *nullum crimen sine lege*, serve as the bedrock of the principle of legality. They protect one of the most treasured individual rights of all —

U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute], *reprinted in* INTERNATIONAL CRIMINAL LAW: A COLLECTION OF INTERNATIONAL AND EUROPEAN INSTRUMENTS 53 (Christine Van den Wyngaert ed., 3d ed. 2005).

[13] Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9 (July 1, 2002) [hereinafter ICC Statute]; United Nations: Rome Statute of the Criminal Court, 37 I.L.M. 999 (1998). The full text of the statute is also available at http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE94-0A655EB30E16/0/Rome_Statute_English.pdf.

the right to liberty. In legal positivism, their emergence is connected with the struggle against the dangers of unbridled and absolute power.[14] Hence, they developed alongside other doctrines, such as *trias politica*, that were likewise designed to curb abuses of centralized power, although their application is not theoretically limited to a particular form of government.[15] In a *trias politica* system, the principle of legality places obligations and limitations on the powers of all three branches of the government. For example, they oblige the law-making body to define as precisely and clearly as possible the penalty applicable to a particular crime, including the form and severity of the punishment. They place on the judiciary the obligation to limit sanctions to those explicitly provided for by the legislature and prohibit judges from applying penalties retroactively. It may even be argued that *nulla poena* requires the judiciary to articulate reasons in support of the selected penalty.[16]

Nulla poena protects interests similar to those protected by *nullum crimen*.[17] First, it protects an individual's interest in being free from abuse of power leading to loss of life, liberty, or property. For example, *nulla poena* protects an individual's right to liberty by requiring codified limits on the length of imprisonment. Second, it safeguards the principle of fair notice. Fairness and justice in the administration of criminal law demand that individuals know, or at least have the opportunity to know, the specific consequence for violating a particular law. *Nulla poena* serves this purpose by making the punishment for a crime foreseeable. In most national systems, this is expressed through codified penalty ranges for each crime.

Another interest protected by *nulla poena* is legal certainty. Legal certainty may be considered the sum of the first two interests. However, society's interest in legal certainty and modern justifications for respecting *nulla poena* are broader than the goals of providing notice and preventing abuse of power, and include, for example, justice in the distribution of punishment and consistency in sentencing.[18] The fact that *nulla poena sine lege* has outgrown

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[14] *See also* Hall, *supra* note 8, at 165-72; Mokhtar, *supra* note 8.

[15] *See* M. CHERIF BASSIOUNI & PETER MANIKAS, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 270-80 (1996); Hall, *supra* note 8, at 167-70; *see also* FARHAD MALEKAIN, THE CONCEPT OF ISLAMIC INTERNATIONAL CRIMINAL LAW: A COMPARATIVE STUDY 20-22, 179-80 (1994) (noting the relevance of *nulla poena sine lege* and *nullum crimen sine lege* in Islamic legal traditions).

[16] At least one judge of the ICTY Appeals Chamber voiced concern in this regard, remarking that ICTY judgments "should be more elaborate on the reasons as to how a Chamber comes to the proportional sentence." Prosecutor v. Krnojelac, Case No. IT-97-25-A, Separate Opinion of Justice Schomburg, para. 1 (Sept. 17, 2003). Upon entering new convictions on appeal, the Appeals Chamber doubled the sentence without providing any substantive reasoning as to how it determined the new penalty. *Id.* at Judgment, para. 264.

[17] *See In re* Rauter, Spec. Crim. Ct., The Hague (May 4, 1948), *reprinted in* H. LAUTERPACHT, ANNUAL DIGEST AND REPORTS OF PUBLIC INTERNATIONAL LAW CASES 526, 542-43 (1949) (recognizing two interests protected by *nulla poena*: legal security and individual liberty); *see also,* Robinson, *supra* note 2, at 396-97 ("The rationales that support precise written rules governing assignment of liability and its degree apply as well to criminal sentencing.").

[18] The common trends in reform of domestic penal policy, for example in the United States during the 1950s and 1960s with the proclamation of the Model Penal Code and again in the late 1980s with the Federal Sentencing

its "negative" justice dimension[19] and developed a "positive" justice attribute[20] is evidenced by movements in various countries to reform sentencing laws, which began in the 1970s and built momentum over the last two decades.[21] Undertaken in both civil law and common law countries, these reforms in sentencing policy transcend the traditional dichotomy between adversarial and inquisitorial legal systems.[22] One common element emerging from the movements is that, in undertaking these reforms, the concern of policymakers is not that the state has abusively employed its power against individuals, but rather the concern has been to achieve justice and equal treatment in sentencing.[23] In post-human rights reforms of domestic penal policy, greater emphasis has been placed on the positive values protected by *nulla poena*. For example, in the mid-1970s, Finland started reforming its criminal justice system, focusing on legal security, proportionality, predictability, and equal treatment.[24] Likewise, common law countries have moved away from unfettered judicial discretion in sentencing in favor of gradation by statutory law.[25] The reason for this, according to Kai Ambos, is "gradation by normative decree (statute, binding guidelines) guarantees more certainty than gradation by judge-made law."[26] This reflects a broader approach to *nulla poena sine lege.*

Accordingly, a modern approach to the principle of legality appreciates *nulla poena's* utility for not only limiting judicial authority, but also safeguarding it by preventing factors such as popular prejudice, political pressure, or immediate public opinion from influencing the sentence. It partly restrains these potential threats to justice in sentencing as well as the

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Guidelines, in Scandinavian countries in the 1970s, and in Eastern European countries following the Cold War, all suggest constant and increasing movement towards placing greater emphasis on the values protected by the "positive" features of *nulla poena sine lege*. For further contemplation of the broader relevance and importance of *nulla poena sine lege*, see Allen, *supra* note 3, at 385-412.

[19] For example, the prevention of abuse of power and application of retroactive penalties.

[20] Take, for example, equality before the law, consistency in sentencing, proportionality, and predictability. *See* Robinson, *supra* note 2, at 394 ("While commentators do not always include it as a traditional purpose of the legality principle, another important effect is to assure some degree of uniformity among decision makers—both judges and juries—in imposing criminal sanctions in similar cases.").

[21] *See* Daniel B. Pickard, Note, *Proposed Sentencing Guidelines for the International Criminal Court*, 20 LOY. L.A. INT'L & COMP. L. REV. 123, 126 (1997).

[22] The 1976 revisions of the Finnish Penal Code provide an illustrative example of such reforms in a civil law system. *See* U.S. SENTENCING GUIDELINES MANUAL (1991) (containing examples of reforms in a common law system); Pickard, *supra* note 21; Bill Mears, *Rehnquist Slams Congress Over Reducing Sentencing Discretion*, CNN.COM, Jan. 1, 2004, http://www.cnn.com/2004/LAW/01/01/rehnquist.judiciary/ (reporting the reaction by the Chief Justice of the United States Supreme Court). The author acknowledges that some national systems face an ongoing debate about how much discretion to give judges. Moreover, it is not the author's intention to advocate a blanket endorsement of the methods underlying the U.S. Federal Sentencing Guidelines for the purpose of international sentencing.

[23] *See* Pickard, *supra* note 21. Significantly, in the context of international criminal justice, current and former judges of the ICTY have expressed concern that lack of consistency in atrocity sentencing may undermine confidence in international prosecutions. *See* Rachel S. Taylor, *Sentencing Guidelines Urged*, INST. WAR & PEACE REPORTING, Mar. 8, 2004.

[24] *See* Pickard, *supra* note 21.

[25] AMBOS, ICL TREATISE II (2014), *supra* note 6 at 286.

[26] AMBOS, ICL TREATISE II (2014), *supra* note 6 at 286.

appearance of such an influence. Thus, in addition to safeguarding the rights of a defendant, *nulla poena* also protects the integrity of the criminal justice process. It provides a legal framework in which consistency in sentencing can be more readily achieved in practice. By creating a statutory framework for penalties, *nulla poena* actually preserves judicial independence, safeguarding judges from pressures arising from non-legal influences. Most importantly, the positive justice dimensions of *nulla poena* contribute to justice in sentencing, which "calls for *equality*, that is, the equal treatment of equal cases and the unequal treatment of unequal ones."[27] In short, a broad approach to *nulla poena sine lege*, in tune with its modern development and recognizing its characteristic as a quality of justice principle, affords several interconnected benefits including advancing consistency in sentencing, safeguarding judicial authority, protecting the integrity of criminal justice, and upholding justice in the eyes of the public.

B. ATTRIBUTES: LEGAL PRINCIPLES UNDERLYING *NULLA POENA*

The extent of protection accorded to these interests depends in part upon the degree of adherence to four attributes of *nulla poena sine lege*. They consist of two threshold requirements on the quality of criminal law and two prohibitions on its application.[28] The threshold requirements are expressed in the legal principles of *lex scripta* (punishment must be based on written law) and *lex certa* (the form and severity of punishment must be clearly defined and distinguishable). The two prohibitions can be described as *lex praevia* (the prohibition against retroactive application) and *lex stricta* (the prohibition against applying a penalty by analogy).

As to the quality of law, *lex scripta* and *lex certa* work in tandem and are recognized requirements of *nulla poena* in most legal systems.[29] Continental European legal systems interpret the *lex scripta* principle as requiring penalties to be based upon written laws provided

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[27] AMBOS, ICL TREATISE II (2014), *supra* note 6 at 286.

[28] BASSIOUNI, *supra* note 1, at 123-26; Hall, *supra* note 8, at 165; Roelof Haveman, *The Principle of Legality*, *in* SUPRANATIONAL CRIMINAL LAW: A SYSTEM SUI GENERIS 39, 40 (Roelof Haveman, Olga Kavran & Julian Nicholls eds., 2003); Lamb, *supra* note 2, at 733-66; *see also,* Boot, *supra* note 2, at 94-102. In commentaries on the principle of legality, these four attributes have been discussed as they relate to the *nullum crimen* principle. They are also useful in analyzing the substance of the *nulla poena* principle. As applied to *nullum crimen*, these attributes address the punishability of a particular conduct. Applied to *nulla poena*, they place limits and set standards for the punishment itself.

[29] Haveman, *supra* note 28, at 40-43; *see also* Prosecutor v. Tadić, Case Nos. IT-94-1-A & IT-94-1-A*bis*, Judgement, Separate Opinion of Judge Cassese, para. 4 (Jan. 26, 2000) ("[T]he *nulla poena sine praevia lege poenali* principle . . . is generally upheld in most national legal systems . . . . Under this principle, for conduct to be punishable as a criminal offence, the law must not only provide that such conduct is regarded as a criminal offence, but it must also set out the appropriate penalty . . . .").

by the legislature.[30] Although common law traditions historically permitted "written law" to include judge-made law, the United States, in addition to most common law countries,[31] follows a continental law approach to *lex scripta*, as evidenced by the practice of relying on statutory law in the application of criminal penalties.[32] Many states within the United States have enacted legislation that specifically states that the criminal code, as promulgated by the legislator is the exclusive source of criminal law. Accordingly, it may be concluded that *lex scripta* requires that the law, which is relied on by judges for their legal authority to punish the accused, be written and provided for by the legislature. Thus, *nulla poena* limits the use of custom for the determination of a sentence. Here, *nulla poena* protects not only against abuse of power, but it also guards against the influence of prejudicial factors, such as transient emotional outrage or politically charged motives.

Lex certa requires that the law authorizing the nature (form) and degree (severity) of punishment be specific, definite, and clear. This includes specifying the type of punishment that a judge is authorized to impose on an accused.[33] Punishment that is not specifically authorized by the legislator is prohibited. *Lex certa* also requires the law to differentiate between the severity of crimes by specifying maximum penalties applicable to different crimes.[34] *Lex certa* also promotes accountability by establishing clear standards against which the conduct of leaders measured.[35] Finally, it would mean that the law of penalties should also distinguish between different forms of participation in criminal conduct such as commission, attempt, aiding and abetting, and so on. The majority of states follow this approach in their domestic legal systems, and it typically includes the practice of articulating a maximum penalty specific to each criminal offense. By requiring definite and precise law on penalties, the *lex certa* requirement of *nulla poena sine lege* protects the individual's interest in legal certainty. Thus, working together, *lex certa* and *lex scripta* can improve the quality of justice in the application of sentencing laws.

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[30] *See* Haveman, *supra* note 28, at 41.

[31] Roelof Haveman claims that Scotland is a remaining exception, where the High Court claims declaratory power to create new crimes. *See id.* at 41 n.6.

[32] *See id.* at 41.

[33] For example, death, incarceration, forced labor, fines, and so on.

[34] Hereinafter referred to as either "precise," "specific," or "individualized" penalties. By use of these terms herein, I mean the practice of providing a penalty range or maximum penalty per crime. I do not argue for *exact* penalties (that is, for example, fifteen years exactly for a particular crime, no more and no less). Moreover, while the law in the first instance sets the outer limits of a penalty, the determination of the actual sentence within that range in a given case is influenced by a number of factors. However, an analysis of all sentencing factors is beyond the scope of the present contribution.

[35] KENNETH S. GALLANT, THE PRINCIPLE OF LEGALITY IN INTERNATIONAL AND COMPARATIVE CRIMINAL LAW 30 (2009).

Turning to the prohibition characterized as *lex praevia*, *nulla poena* requires strict adherence to the principle of non-retroactivity as to the nature and degree of the imposed punishment.[36] It prohibits the imposition of a penalty heavier than the one applicable at the time the crime was committed. The principle of non-retroactivity is a fundamental feature of any criminal justice system[37] and has been explicitly recognized in international human rights declarations and treaties.[38] Moreover, the *lex praevia* attribute of *nulla poena* is consistently among the non-derogable provisions of these international instruments, prompting some commentators to argue that it ranks among the core human rights protections.[39] In the context of *nullum crimen sine lege*, writers from the civil law tradition described the *lex stricta* element as a prohibition on interpretation by analogy.[40] Jurists from the common law tradition explain *lex stricta*, more generally, as the requirement of strict interpretation.[41] This includes the notion that penal statutes should not be extended to the detriment of the accused. Accordingly, whereas the *lex stricta* component of *nullum crimen* prohibits expansion of criminal laws by analogy to cover conduct not within the law, the *lex stricta* attribute of *nulla poena* would prohibit substituting an alternative penalty by analogy.[42]

III. *NULLA POENA SINE LEGE* IN INTERNATIONAL LAW

Interrogating the normative force of principles of legality in international law immediately triggers the incapability of two bodies of law, as raised in the opening chapter. Principles of legality and international law operate on desperately different frameworks in relation to the

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[36] United Nations General Assembly, Mar.-Apr. & Aug. 1996, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, para. 189, U.N. Doc. A/51/22 (1996) [hereinafter ICC Prep. Committee's 1996 Report]; *see also* Schabas, *supra* note 2, at 463.

[37] The views expressed by states during the ICC preparatory meetings confirm this principle as a primary feature of their national legal systems. *See* ICC Prep. Committee's 1996 Report, *supra* note 36, para. 189.

[38] *See* International Covenant on Civil and Political Rights, G.A. Res. 2200A at 55, art. 15.1, U.N. GAOR, 21st Sess., 1496th plen. mtg., U.N. Doc. A/6316 (adopted and opened for signature, ratification and accession on Dec. 16, 1966) (entered into force on Mar. 23, 1976) [hereinafter ICCPR]; Universal Declaration of Human Rights, G.A. Res. 217A, at 73, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR]. For regional international treaties, see African (Banjul) Charter on Human and People's Rights art. 7(2), June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 [hereinafter African Charter]; Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter ACHR]; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 7(1), Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR].

[39] *See* Lamb, *supra* note 2, at 757.

[40] BOOT, *supra* note 1, at 94, 100-02; Haveman, *supra* note 28, at 46-48.

[41] *See* Hall, *supra* note 8, at 165.

[42] In the *Erdemović* case, an ICTY trial chamber succumbed to this type of interpretation when it made comparisons between genocide and crimes against humanity. Discussed in full *infra* Part IV(B). *See* Prosecutor v. Erdemović, Case No. IT-96-22-T, Sentencing Judgment, paras. 35-40 (Nov. 29, 1996). While most national legal systems allow for some judicial discretion in the application of penalties, this discretion is strictly limited by legislative parameters. As noted by one commentator, "only a few permit resorting to analogy outside legislatively enacted penalties." *See* BASSIOUNI, *supra* note 1, at 124.

notion of sovereignty. Principles of legality approach state sovereignty from the perspective of the individual. Here, the stakeholders are in a hierarchical vertical relationship to each other. International law, on the other hand, approaches sovereignty from the perspective of the states.[43] Here the stakeholders (states) are in a horizontal relationship of co-equals to each other. From the standpoint of the former, the object is to protect the individual from the state. Generally speaking, the state cannot do what it is not permitted to do. From the standpoint of the latter, the object is to free the state from any interference in its activities by another state. The state is generally free to do that which it is not prohibited from doing.[44]

While the resulting rules orientate differently, they are not in tension because their underlying concerns are in harmony. In both cases, the rule seeks to protect the weaker from the more powerful. In the case of the former, the concern historically has been to protect the individual from abuse by the state. In the case of the latter, the rule protects a weaker state from a more powerful state.

Accordingly, this study approaches principles of legality in the context of international criminal justice from the perspective of the individual. This is in harmony with the underlying rationale of both perspectives (international law and criminal law): protection of the weaker participant. This choice has consequences for the methodology of this section. In seeking to identify a rule of international law, international legal analysis normally follows the methodology of exploring international treaties and customary international law. If analysis of these sources does not reveal an obligation, then the typical conclusion presumptively is that the state is not bound by an international rule on the matter in its relation to other co-equals (*i.e.* states).[45] This methodology places the state central. But what if the context was not merely about the state's relationship to another co-equal, but to an individual? Or the relationship between a collective of states to a single individual? Principles of legality, however, place the individual central. If wisdom and experience tell us that certain safeguards must be upheld in the relationship between a state and an individual, then the reasons are equally, if not more, compelling when the situation involves action by a collective of states against an individual. The nature of principles of legality is to seek balance and justice in the relationship between

[43] Although, normative and institutional developments in international law evidence a slow trend to re-orientate the foundations of international law in a manner that would make the human interest less peripheral. *See* REPORT OF THE INTERNATIONAL COMMISSION ON INTERVENTION AND STATE SOVEREIGNTY (2001).

[44] Permanent Court of International Justice, *Lotus* Case (1927), PCIJ Rep. Series A, No. 10.

[45] General principles of law also provide a source of international law, however, they are generally rules relevant to adjudication of a dispute between states and typically do not impact the obligation of one state towards another state in the realm of performance.

the individual and the state, not between two states.[46] Therefore, these divergent orientations must be considered in the weighing the sources of international law.

A. INTERNATIONAL HUMAN RIGHTS CONVENTIONS: AN INCOMPLETE CODIFICATION?

According to some scholars, the principle of legality has been "integrated into the concept of fundamental human rights in criminal justice."[47] Regarding national legal systems, this proposition seems beyond serious debate. But what about the character and content of *nulla poena sine lege* in international law and international criminal justice? When analyzing human rights instruments for an understanding of the principle of legality in international law, commentators typically begin with Article 11 of the Universal Declaration of Human Rights (UDHR) (1948):

> No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal 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 the penal offence was committed.[48]

Nearly identical language is found in several international and regional human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR) (1966),[49] the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (1950),[50] and the American Convention on Human Rights (ACHR) (1969).[51] This language also appears in the 1977 Additional Protocols I and II to the Geneva Conventions of 1949.[52] Several commentators consider the second sentence to represent the incorporation of *nulla poena sine lege* in international law as a fundamental human rights principle.[53] This

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[46] This should not be misunderstand as claiming that this vertical relationship between the individual and the state is the *only* concern of *nulla poena*; as discussed above, *nulla poena* also has a horizontal dynamic.

[47] BASSIOUNI & MANIKAS, *supra* note 15, at 265; *see also* MANFRED NOWAK, U.N. COVENANT ON CIVIL AND POLITICAL RIGHTS: CCPR COMMENTARY 358 (2d ed. 2005) (1993); Schabas, *supra* note 2, at 463.

[48] UDHR, *supra* note 38.

[49] ICCPR, *supra* note 38, art. 15(1) ("[N]or shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed."); *see* NOWAK, *supra* note 47, at 358-68 (providing a general commentary on this article).

[50] ECHR, *supra* note 38, art. 7(1) ("[N]or shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."); *see* DAVID J. HARRIS, MICHAEL O'BOYLE & COLIN WARBRICK, LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 274-82 (1995) (providing a general commentary on Article 7).

[51] ACHR, *supra* note 38, art. 9 (stating that a heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed); *see also* JO M. PASQUALUCCI, THE PRACTICE AND PROCEDURE OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS (Thomas Buergenthal ed., 2003).

[52] *See*, Additional Protocol I, Article 75(4)(c); Additional Protocol II, Article 6(2)(c).

[53] *See* NOWAK, *supra* note 47, at 359. *See generally* KENNETH S. GALLANT, THE PRINCIPLE OF LEGALITY IN INTERNATIONAL AND COMPARATIVE CRIMINAL LAW (2009).

provision is consistently among the non-derogable provisions of these international human rights treaties.[54] Moreover, all three conventions codify the provision in an article separate from other procedural guarantees in criminal law, indicating "its special significance for criminal trials . . . as well as for legal certainty in general."[55] Its formulation further indicates that the international *nulla poena sine lege* prohibits both retroactive and retrospective punishment.[56]

The text itself explicitly incorporates into international law one attribute of *nulla poena*, namely the *lex praevia* principle: the prohibition of *ex post facto* penal laws and retroactive application of penalties.[57] The European Court of Human Rights (European Court), however, held that this provision includes the *lex stricta* prohibition against application of penalties by analogy, as well as the *lex certa* attribute of *nulla poena sine lege*:

> Article 7 embodies, *inter alia*, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy. From these principles it follows that an offence *and the sanctions* provided for it must be clearly defined in the law.[58]

Here, the European Court took a broad approach to *nulla poena*, viewing it not merely as a protectionist principle but also as a quality of law principle.[59] Although the case involved a situation in which "it may be difficult to frame laws with absolute precision and [a] certain degree of flexibility may be called for," the European Court did not hesitate to apply a strict

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[54] *See* ICCPR, *supra* note 38; ACHR, *supra* note 38, art. 27(2); ECHR, *supra* note 38. It also appears in international humanitarian law treaties. *See e.g.*, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 75(4)(c), Aug. 12, 1949, 1125 U.N.T.S. 3.

[55] NOWAK, *supra* note 47, at 358.

[56] *See* Adamson v. United Kingdom, App. No. 42293/98, 28 Eur. H.R. Rep. CD209 (1999); Welch v. United Kingdom, App. No. 17440/90, 16 Eur. H.R. Rep. CD42 (1996). "Retroactivity" generally refers to making a certain conduct, innocent at the time it was performed, criminal and punishable after the fact, in other words creating a *new* crime *ex post facto*; whereas "retrospectivity" refers to an *ex post facto* change in the legal effect or consequence of a conduct that was already criminal. For further reading, see *Bouterse Case*, Amsterdam Court of Appeals, Opinion of Professor C.J.R. Dugard, para. 8.4.5 (July 7, 2000) (on file with author).

[57] The Fourth Geneva Convention of 1949 on the protection of civilian persons in time of war also prohibits retroactive application of penalties. See GCIV Articles 65 and 67.

[58] Başkaya v. Turkey, App. Nos. 23536/94 & 24408/94, 31 Eur. H.R. Rep. 10, para. 36 (1999) (emphasis added).

[59] This is consistent with the court's approach to Article 7 in general. For example, in *Kokkinakis v. Greece*, the court interpreted the general scope of Article 7(1) to include the principles of *lex certa*, *lex scripta*, and *lex stricta* in a case concerning the "punishability" of the conduct. *See* App. No. 14307/88, 17 Eur. H.R. Rep. 397, 411 (1994) ("[Article 7(1)] also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty . . . and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law."). However, in the context of national prosecutions, the court ruled that Article 7 was not violated where the "punishability" of the conduct was foreseeable in light of the interpretations of national courts. Problems with applying the foreseeability test in the context of international law are addressed below.

standard for *nulla poena sine lege* and rejected the use of analogy in fixing a penalty even where *nullum crimen sine lege* had been respected.[60] Likewise, leading commentators consider the *nulla poena* provision of ICCPR Article 15(1), ECHR Article 7(1), and ACHR Article 9 as also giving rise to the *lex scripta* (written law), *lex certa* (certain and predictable), and *lex stricta* (prohibition of analogy) attributes of *nulla poena sine lege*, in addition to explicitly incorporating *lex praevia* (prohibition of retroactivity).[61]

The passive language of these provisions also leaves open to interpretation the notion of "law." What "law" satisfies the *lex scripta* requirement of *nulla poena sine lege* when determining the penalty "applicable" at the time of the offense? [62] The European Court stated, *obiter dictum,* that "[w]hen speaking of 'law' Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statutory as well as case-law."[63] In cases dealing with the *nullum crimen* principle,[64] the European Court has applied the test of accessibility and foreseeability when determining whether the conduct in question falls within the scope of a criminal statute.[65] However, caution should be taken before mechanically applying the foreseeability test to penalties in international prosecutions.[66] First, international adjudication accepts a wider range of sources of law than the two types referred to by the European Court. In addition to treaty law, other

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[60] *Başkaya*, 31 Eur. H.R. Rep. paras. 39, 42.

[61] *See, e.g.*, NOWAK, *supra* note 47, at 359-60.

[62] A few decisions address this question in interpreting the *nullum crimen* principle set forth in the first clause of Article 7(1). *See* C.R. v. United Kingdom, App. No. 20190/92, 335 Eur. Ct. H.R. at 68-69 (1996); S.W. v. United Kingdom, App. No. 20166/92, 335 Eur. Ct. H.R. at 41-42 (1996). In these cases, the European Court of Human Rights held that so long as the law is "accessible" and "foreseeable," then the *nullum crimen* principle is respected. *See also*, *Coëme and others v. Belgium*, App. Nos. 32492/96 et al., Judgment, 22 June 2000) para. 145.

[63] *Başkaya*, 31 Eur. H.R. Rep. para. 36. Note, however, that in this case as well as in the *Welch* and *Adamson* cases, the *lex scripta* principle was not directly in issue. The issue in the latter two was not whether judge-made law could serve to satisfy the *nulla poena* principle in Article 7(1), but whether the measure constituted a "penalty" within the meaning of the Convention. The legislation in question in both cases was held to have retrospective effects and therefore, if the measure was deemed to be punitive, it would be held to violate the second clause of Article 7(1). Adamson v. United Kingdom, App. No. 42293/98, 28 Eur. H.R. Rep. CD209, 1 (1999); Welch v. United Kingdom, App. No. 17440/90, 16 Eur. H.R. Rep. CD42, paras. 26-27 (1996). In *Welch*, the court held that the confiscation provision of the Drug Trafficking Offenses Act of 1986 were penalties within the meaning of Convention, and therefore its retrospective application to the defendant violated the *nulla poena sine lege* principle within Article 7. 16 Eur. H.R. Rep. paras. 33-35. In *Adamson*, however, the majority court held that the application was inadmissible because the challenged measure under the Sex Offenders Act of 1997, although also resulting in retrospective consequences, did not violate Article 7(1) because the measure was not a penalty. 28 Eur. H.R. Rep. at para. 1.

[64] That is, whether the conduct in question is punishable in the first place, or in other words whether the conduct falls within the scope of a criminal statute.

[65] C.R. v. United Kingdom, App. No. 20190/92, 335 Eur. Ct. H.R. (1996); S.W. v. United Kingdom, App. No. 20166/92, 335 Eur. Ct. H.R. (1996); Kokkinakis v. Greece, App. No. 14307/88, 17 Eur. H.R. Rep. 397, 411 (1994).

[66] Some writers have no trouble relying on the *nullum crimen* cases to perfunctorily apply the foreseeability test to a *nulla poena* analysis. *See, e.g.*, Schabas, *supra* note 2, at 463. However, the fact that such authors do not cite cases where the court itself applies the accessibility and foreseeability test to a *nulla poena* issue is revealing. The absence of cited case law applying the test to penalties is neither surprising nor without possible explanation. *See infra* text accompanying notes 70-72.

sources of international law include international custom and general principles of law.[67] While the court has given a liberal interpretation to the notion of "law," state practice and *opinio juris* is presumably not what the court had in mind when referring to "case-law." The diverse sources of international law and the complexities surrounding international law-making processes challenge a straightforward application of the accessibility and foreseeability test.

Second, the cases in which this test has been applied involved prosecutions in which the conduct in question and the law applied arose in the same forum. In international prosecutions, the applicability of this test is complicated by the fact that the penalties are rendered in a forum far removed from the *locus delicti*. If the law of the *locus delicti* prohibited the application of a particular penalty, can that penalty still be considered foreseeable? Should the "applicable penalty" be determined by the law of the *locus delicti* or the law of the *locus fori*? The rulings of the International Criminal Tribunal for the former Yugoslavia (ICTY) on this point have been controversial, if not contrary to the intent of the statute's drafters.[68] As discussed in the next section, the drafter's inclusion of the national law provision reflects underlying concerns about foreseeability and fairness in punishment. Yet, through clever stratagem, the ICTY avoided the intent of the drafters and effectively marginalized punitive norms of the *locus delicti*, for example the prohibition of life imprisonment, when laying the foundations for its sentencing practice.[69] Third, the foreseeability test arose in cases dealing with the issue of *punishability* of conduct, and not the punishment itself. In other words, the court was addressing *nullum crimen*, not *nulla poena*.

In fact, judgments by the European Court of Human Rights interpreting *nulla poena sine lege* are scarce.[70] The infrequency of challenges itself suggests the entrenchment of the maxim in municipal law and practice, as do the types of challenges among the few that have come before the European Court. Typically, the challenged measure is found in law passed by the legislature.[71] This is not surprising and reinforces the fact that most states address the issue of criminal sanctions exclusively through written law in the form of legislative enactment, that is within the criminal code itself.[72]

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[67] These sources of international law are discussed in detail *infra* Parts III.B (international custom) and III.C (general principles of law).

[68] *See infra* Part III.B and text accompanying notes 91-96.

[69] *See infra* Part IV.B. The ICTY also applied this methodology in the interpretation of the principle of *lex mitior*. *See* Prosecutor v. Nikolić, Case No. IT-94-2-S, Sentencing Judgment (Dec. 18, 2003).

[70] *See* HARRIS, O'BOYLE & WARBRICK, *supra* note 50, at 274-75 ("Very few cases have been admitted for consideration on the merits under Article 7.").

[71] *E.g.*, Adamson v. United Kingdom, App. No. 42293/98, 28 Eur. H.R. Rep. CD209, para. 1 (1999); Welch v. United Kingdom, App. No. 17440/90, 16 Eur. H.R. Rep. CD42, paras. 9, 12 (1996).

[72] This is true of the current practice of even common law traditions such as the United Kingdom and United States. In both *Welch* and *Adamson*, the challenged measure was found in a law passed by the legislature. In both

B. CUSTOMARY INTERNATIONAL LAW: A POSSIBLE SOURCE FOR STRENGTHENING *NULLA POENA SINE LEGE*?

In addition to international treaties and conventions, international custom may serve to inform the examination of *nulla poena sine lege* under international law. When enforced through *ad hoc* tribunals or the International Criminal Court (ICC), however, international criminal law differs from other branches of public international law in that international norms, standards, and rules are directly applicable to individuals. Moreover, it contains a unique sanction—incarceration of a person—not found in other areas of public international law which, unless exercised lawfully and legally, constitutes a breach of international human rights law.[73] Therefore, a customary rule in international criminal law must satisfy the combined requirements of human rights law and general principles of criminal law.[74] In this sense, international custom can strengthen the rule of law in international criminal justice.

Pursuant to Article 38(1)(b) of the Statute of the International Court of Justice, "international custom, as evidence of a general practice accepted as law" serves as an essential source of law for identifying international standards.[75] "International custom" may be described as a general recognition among States of a certain practice as obligatory.[76] There must exist a degree of uniformity and consistency in the practice of states (i.e., state practice) accompanied with a view that conformity with the practice at issue is obligatory (i.e., *opinio juris et necessitatis*).[77] Complete uniformity in practice among states is not required.[78] According to international law scholars, a state's domestic practice, as expressed in its legislation, constitutes appropriate evidence of state practice.[79] In other words, state practice

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cases, the State (the United Kingdom) chose to approach the subject of criminal sanctions via a legislative act. In the United States, almost all states have codified their penal laws and penal sanctions are specified by the legislature.

[73] The principal distinction between "lawful" and "legal" is that the former contemplates the substance of the law while the latter pertains to the form of law. To say that an act is "lawful" implies that it is authorized by the law, and to say that it is "legal" indicates that it is performed in accordance with the forms and usage of law. *See* BLACK'S LAW DICTIONARY 885, 892 (6th ed. 1990).

[74] *See also* William A. Schabas, *Sentencing by International Criminal Tribunals: A Human Rights Approach*, 7 DUKE J. COMP. & INT'L L. 461 (1997) (arguing that sentencing in international criminal law should measure up to contemporary human rights standards).

[75] *See* Statute of the International Court of Justice, 1999 I.C.J. art. 38(1)(b).

[76] *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 6 (6th ed., 2003); *see also* George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT'L L. 541 (2005) (applying the model of a multilateral prisoner's dilemma to demonstrate, as a rebuttal of critics, that it is plausible that states would comply with customary international law under certain conditions).

[77] BROWNLIE, *supra* note 76, at 6-12.

[78] *See id.* at 7; MALCOLM N. SHAW, INTERNATIONAL LAW 79 (5th ed., Cambridge University Press 2003) (1997).

[79] BROWNLIE, *supra* note 61, at 8.

may be determined not only by the practice followed by states in their external relations, but also the practice followed by states internally.[80]

An examination of criminal sanctions in national legal systems reveals substantial and widespread uniformity in the practice of articulating maximum penalties for each crime individually.[81] As noted above, the criminal codes of most states contain gradated maximums tailored to specific crimes.[82] As to the applicable penalty, they make distinctions not only between types of crimes but also between completed crimes and inchoate crimes.[83] Thus, the *lex scripta* and *lex certa* attributes of *nulla poena sine lege* feature prominently in current state practice. Moreover, a consequence of a system's adherence to these two principles of *nulla poena* is that the need to resort to analogy naturally falls away. This indirect affirmation of the *lex stricta* principle has obviated the need to codify constitutionally the prohibition against punishing by analogy in many national systems. The *lex praevia* attribute of *nulla poena* likewise constitutes a fundamental principle of domestic legal systems and in many cases has been codified in national constitutions or criminal codes.[84] As stated by Theodor Meron, former President and judge of the International Criminal Tribunal for the former Yugoslavia (ICTY), the "prohibition of retroactive penal measures is a fundamental principle of criminal justice, and a customary, even peremptory, norm of international law that must be observed in all circumstances by national and international tribunals."[85] Thus, state practice indicates that *nulla poena sine lege* contains strong *lex scripta*, *lex certa*, *lex stricta* and *lex praevia* features.

On the other hand, after examining international conventions defining international crimes, one may be tempted to conclude that international practice suggests a lack of concern

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[80] Andrea Carcano, *Sentencing and the Gravity of the Offence in International Criminal Law,* 51 INT'L & COMP. L.Q. 583, 587 (2002).

[81] *See* Prosecutor v. Tadić, Case Nos. IT-94-1-A & IT-94-1-A*bis*, Judgement, Separate Opinion of Judge Cassese, para. 4 (Jan. 26, 2000) ("[T]he *nulla poena sine praevia lege poenali* principle is generally upheld in most national legal systems . . . . Under this principle, for conduct to be punishable as a criminal offence, the law must not only provide that such conduct is regarded as a criminal offence, but it must also set out the appropriate penalty."); *see also supra,* Part II.

[82] *See also* WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 162 (2001).

[83] *See* Pickard, *supra* note 17, at 141-62. Pickard provides a comparative overview of a variety of crimes, including genocide, murder, rape, torture, assault, and others, for twelve countries from diverse legal systems. The study indicates that each country makes the said distinctions. These countries include Argentina, China, France, Nigeria, Romania, Russia, United Kingdom, United States, India, Korea, Japan, Germany, Afghanistan, and Turkey. *See also*, KENNETH S. GALLANT, THE PRINCIPLE OF LEGALITY IN INTERNATIONAL AND COMPARATIVE CRIMINAL LAW 8 (2009) (finding that "both *nullum crimen* and *nulla poena* (in reasonably strong – though not the strongest – forms) have become rules of customary international law that bind both states and international organizations.").

[84] The principle of non-retroactive application of penalties is widely adhered to in the internal practice of states, and is considered a fundamental feature of a criminal law system. *See* ICC Prep. Committee's 1996 Report, *supra* note 36, at 43; *see also* M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 290 (1993) [hereinafter Bassiouni Study].

[85] THEODOR MERON, *Ex Post Facto?*, *in* WAR CRIMES LAW COMES OF AGE 244, 244 (1998).

for adherence to *lex scripta* and *lex certa* because international criminal law treaties do not contain provisions for applicable penalties.[86] Such a conclusion, however, would fail to take account of the fact that these international treaties envisioned a system of indirect enforcement whereby states would legislate appropriate maximum penalties within the framework of their domestic criminal codes.[87] These treaties and conventions typically address only one aspect of substantive criminal law. They usually do not contain provisions on general principles of criminal law, such as principles of criminal liability, relevant defenses, or, particularly relevant for our purposes here, specific penalties. Moreover, the absence of an international forum, such as an international criminal court with powers of direct enforcement, meant that articulating precise penalties within the treaties was not a legal necessity. As Kai Ambos notes, the "indirect enforcement" explanation "for the conspicuous absence of sentencing standards" in international treaties "does not justify imprecise and/or overly broad sentencing ranges with the framework of the direct enforcement model [of] international criminal tribunals."[88]

Interestingly, at the preliminary stage of discussions on creating an international forum for the prosecution of international crimes, this deficiency in international criminal law conventions was noted by many states as falling short of adequate respect for *nulla poena sine lege*.[89] Likewise, the International Law Commission (ILC) in its early work on a draft code of international crimes and a draft statute for an international criminal court recognized that precise penalty ranges would be necessary.[90] Therefore, it seems unwarranted to conclude that state practice does not support the requirement for crime–specific maximum penalties in accordance with *nulla poena sine lege* from the mere fact that international criminal law treaties do not contain precise penalties.

As to the question of *opinio juris*, many states have expressed a sense of legal obligation to act in accordance with *nulla poena sine lege*. During the drafting of the ICTY statute, several states, presumably mindful of the quality of law function of *nulla poena*, supported the

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[86] *See* International Convention for the Suppression of Terrorist Bombings, 1998, 37 I.L.M. 249, *reprinted in* INTERNATIONAL CRIMINAL LAW: A COLLECTION OF INTERNATIONAL AND EUROPEAN INSTRUMENTS, *supra* note 12; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sept. 23, 1971, 974 U.N.T.S. 177; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 860 U.N.T.S. 105; Convention on the Prevention and Suppression of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

[87] AMBOS, ICL TREATISE II (2014), *supra* note 6 at 272; BASSIOUNI, *supra* note 1, at 125-26; Haveman *Principle of Legality*, *supra* note 28 at 54; BASSIOUNI & MANIKAS, *supra* note 15, at 689.

[88] AMBOS, ICL TREATISE II (2014), *supra* note 6 at 272.

[89] *E.g.*, *Summary Record of the 17th Meeting*, U.N. Doc. A/C.6/49/SR.17 at 2 (Nov. 17, 1994) (discussing the ILC report on an international criminal court); ICC Prep. Committee's 1996 Report, *supra* note 36, at 63, para. 304.

[90] Schabas, *Article 23* in TRIFFTERER COMMENTARY.

application of national penalties and norms which, in the case of the former Yugoslavia, excluded life imprisonment as cruel and inhumane.[91] For example, with the exception of the death penalty, Italy, Russia, and the Netherlands explicitly referred to national penalties in their proposals. The Netherlands expressed the view that "[a]n appropriate sanction norm has to be created both for war crimes and for crimes against humanity to be applied by the *ad hoc* tribunal. In the opinion of the Netherlands this sanction norm should be derived from the norms which were applicable under former Yugoslav national law."[92] The United States favored the adoption of sentencing guidelines.[93] Italy, in a letter to the U.N. Secretary General, stated that "the *need to respect* the principle *nullum crimen, nulla poena sine lege*, the basis of fundamental human rights, *has induced* the Italian Commission to decide in favor of the penalties set forth by the criminal law of the State of the *locus commissi delicti.*"[94] In this expression of *opinio juris*, Italy decisively accepts the binding nature of *nulla poena* even in international law. In other words, in contemplating action at the international level, Italy's position is that states are legally obligated to fully respect *nulla poena* when acting on a matter within the principle's ambit. Thus, as to the content of the principle, Italy affirmed the *lex scripta* and *lex certa* aspects of *nulla poena sine lege* at the international level. Additionally, Italy characterized *nulla poena* as a fundamental human right. Slovenia called for even greater certainty by suggesting the inclusion of minimum as well as maximum penalties.[95] The Organization of the Islamic Conference said that "the tribunal should promulgate penalties before adjudicating cases, based on its statute and general principles of law of the world's major legal systems."[96] Presumably, it had in mind something more than the final version of Article 24, which merely excludes the death penalty. Thus, among the states making submissions on the issue, the overwhelming majority of nations recognize a *nulla poena* rule that is deeper and extends beyond merely the prohibition of retroactive punishment.

Further insights on the views of states as to the appropriate quality and character of *nulla poena* in international law can be gained from opinions expressed by state delegations during preparatory meetings and negotiations on the statute of the ICC. Numerous states voiced their

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[91] *See* VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS 440-43 (1995).

[92] Schabas, *supra* note 74, at 473 (citing Note Verbale from the Permanent Representative of the Netherlands, to the Secretary-General, United Nations (Apr. 30, 1993) U.N. SCOR, U.N. Doc. S/25716 at 5).

[93] MORRIS & SCHARF, *supra* note 91, at 442.

[94] Letter from the Permanent Representative of Italy, to the Secretary-General, United Nations, at l, art. 7 §§ 1-2, U.N. Doc. S/25300 (Feb. 17, 1993) (emphasis added).

[95] MORRIS & SCHARF, *supra* note 91, at 443.

[96] *Id.* at 441.

opinion that punishment for crimes must be in accordance with *nulla poena sine lege*.[97] Indeed, there was even broad agreement on this point.[98] It was noted that "the principle of legality (*nulla poena sine lege*) required that penalties be defined in the draft statute of the ICC *as precisely as possible*."[99] Some states also suggested that the punishment applicable to each offense, as well as the enforcement of penalties, should be set forth in the ICC's statute.[100] Moreover, states also widely expressed the view that adherence to fundamental principles, such as *nulla poena sine lege*, was essential in order to ensure predictability or equality before the law.[101] These expressions of *opinio juris* indicate that the positive justice dimension[102] of *nulla poena sine lege*, already recognized in domestic law for its valuable contribution in improving sentencing practice, is being considered in the international context. In addition, not only were there consistent expressions of *opinio juris* by the states on the importance of fundamental principles of criminal law but also, significantly, the reasons articulated for faithful adherence to them reflect those interests protected by the *lex certa, lex scripta, lex stricta* and *lex praevia* requirements[103] of *nulla poena sine lege*. Accordingly, any compromise on the quality of *nulla poena sine lege* as measured by these four requirements would directly undermine the reasons widely expressed and agreed upon by states for their opinion that punishment in international criminal law must comply with *nulla poena sine lege*.

At least one author has been puzzled over the "preoccupation" with *nulla poena*.[104] William Schabas described the positions of states, outlined above, as reflecting a narrow "concern about the issue of retroactivity."[105] He concludes that "such a concern . . . is difficult to understand given that this question was supposedly well settled at Nuremberg."[106] His argument is quite simple: if post-World War II trials permitted the death penalty, can any defendant seriously argue that he faces a heavier penalty than the one applicable at the time the offense was committed? However, the practice of post-World War II tribunals is not dispositive of the *nulla poena* inquiry today. Suppose, as is the case in many countries, that the death penalty has been abolished for all crimes for some period of time. Can it really be said that the defendant's argument that the death penalty should not be applied in his case is not an

[97] ICC Prep. Committee's 1996 Report, *supra* note 36, at 41.
[98] *Id.* at 41.
[99] *Id.* at 63, para. 304.
[100] *Id.* at 41.
[101] *Id.*
[102] *See supra* Part II.B.
[103] *See supra* Parts II.A-B.
[104] Schabas, *supra* note 74.
[105] *Id.* at 468-69.
[106] *Id.* at 469.

argument that should be taken seriously? Assume further that life imprisonment has also been abolished for some time and the maximum penalty available is 20 years imprisonment (increasable to 25 under extraordinary circumstances). A defendant, who commits a crime after the change in law abolishing the death penalty and life imprisonment, has a solid legal claim that the death penalty and life imprisonment are not applicable penalties to his crime. It matters not that his country, in the past, had allowed life imprisonment. If his crime occurred after the change in law removing life imprisonment as a legal sanction, then he cannot be punished to life imprisonment without violating *nulla poena*. In other words, arguments like Schabas's assume that the legality question is determined only once and frozen in time. It does not account for interventions by law that change the norm and the foreseeability, viability, and legality of a particular punishment.

More significantly however, Schabas's point is limited to the *lex praevia* attribute of *nulla poena* and he assumes that life imprisonment is not a more severe penalty than capital punishment.[107] Yet, it is reasonable to infer that perhaps, in expressing their support for adhering to a national penalties regime, the states were concerned with more than simply the prohibition of retroactive penalties.[108] States appear to have been also concerned about legal certainty (*lex certa*) and consistency in sentencing, concerns captured by a broader approach to *nulla poena sine lege* that gives due appreciation for its function as a principle of positive justice. As noted above, for example, the United States encouraged the adoption of sentencing guidelines. The mere presence of such a proposal strongly indicates that the concern is not so much about abusive or retroactive punishment, but more about the quality of justice and achieving equality before the law in terms of punishment of individuals brought before the court.

Likewise, one could view adherence to national penalties as a more organic means of achieving the stated goals of the ICTY as reflected in the opinion of the Netherlands which encouraged following the sentencing norms of the *locus delicti*. As Schabas acknowledges, when adopting the ICTY statute, states were aware of the complexities surrounding applicable penalties, such as the fact that Yugoslavian law limited terms of imprisonment to twenty years, had no provisions for life imprisonment or prison sentences of twenty-five, forty-five, or forty-

[107] The issue of whether life imprisonment is not a more severe penalty than capital punishment is further discussed below, *infra* text accompanying notes 196-202.

[108] AMBOS, ICL TREATISE II (2014), *supra* note 6 at 277 (concluding that inclusion of the national law provision in the statutes of the *ad hoc* tribunals "speaks in favour of a stricter understanding of *nulla poena*").

six years,[109] but allowed for the death penalty which would not have passed a veto of at least one member of the Security Council.[110] Accordingly, it may be too speculative to attribute to the states a narrow conception of *nulla poena*, limited to the *lex praevia* principle, and on that basis, proceed to diminish the relevance of *nulla poena* in international criminal justice.[111]

The drafters' concerns, extending beyond the mere issue of non-retroactivity, become even plainer when the matter is considered from another perspective. If one removes the national law provision, on the assumption that it is unnecessary because *lex praevia* is not in issue, we are left with a provision that provides no better guidance to judges than the penalty provision of the International Military Tribunal (IMT). Since the death penalty is already excluded by operation of the first sentence, what serious guidance can be gleaned from criteria of "gravity of the offense"[112] that cannot be read into the IMT criteria of "just punishment"? If, as Schabas points out, the Hans Corell commission[113] was ill at ease with the IMT sentencing precedent, then there is no reason to presume that it was limited to the issue of non-retroactivity.[114]

In sum, based on the views expressed by states above, the following observations can be made as to the quality of *nulla poena sine lege* in international law. First, almost without exception, states share the view that the principle of non-retroactivity (*lex praevia*) is a fundamental feature of any criminal justice system, including international criminal law.[115] Second, *lex scripta* and *lex certa* are likewise recognized as essential requirements of *nulla poena sine lege*.[116] It was noted that "the principle of legality (*nulla poena sine lege*) required

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[109] Such as those, respectively, visited upon *Prosecutor v. Kordić*, Case No. IT-95-14/2-T, Judgment (Feb. 26, 2001), *aff'd*, Case No. IT-95-14/2-A, Judgment (Dec. 17, 2004), *Prosecutor v. Blaškić*, Case No. IT-95-14-T-A, Judgment (July 29, 2004) (reducing the original sentence to nine years), and *Prosecutor v. Krstić*, Case No. IT-98-33-A, Judgment (Apr. 19, 2004) (reducing Krstić's sentence to thirty-five years).

[110] Schabas, *supra* note 74, at 479.

[111] For a broader approach to *nulla poena*, see BASSIOUNI & MANIKAS, *supra* note 15, at 700; Allen, *supra* note 3; Robinson, *supra* note 2.

[112] Or even the criteria of "concerning the individual circumstance of the accused."

[113] In February 1993, while acting under the auspices of the Organization for Security and Cooperation in Europe, a team of experts lead by Hans Corell, along with Helmut Turk and Gro Hillestad Thune, proposed to the United Nations the formation of an international criminal tribunal to prosecute the perpetrators of the mass atrocities unfolding in Yugoslavia.

[114] Schabas, *supra* note 74, at 471. This misattribution of meaning concerning *nulla poena* in this context perhaps reflects old differences traditionally between common law and civil law lawyers. While certain common law systems, like United States, now follow a practice of strict articulation of penalties per crime, generally speaking it has not been theoretically linked to *nulla poena sine lege*. Thus, the instinctive reaction to the principle of legality among common law lawyers still focuses narrowly on its prohibition of retroactive penalties. Civil law traditions, in which Mr. Corell once served as a criminal judge, take a broader approach to *nulla poena sine lege*, accounting also for its "positive justice" function and demonstrate a deeper tradition in doctrinally linking their practice to *nulla poena*. In the many excellent commentaries that Schabas has written on international sentencing, this broader conception of *nulla poena sine lege* is not contemplated. *See also* Schabas, *supra* note 2; William A. Schabas, *Penalties*, *in* THE ROME STATUTE OF THE INTERNATIONAL COURT: A COMMENTARY 1497-1534 (Antonio Cassese, Paola Gaeta & John Jones eds., 2002); William A. Schabas, *Perverse Effects of the* Nulla Poena *Principle: National Practice and the Ad Hoc Tribunals*, 11 EUR. J. INT'L. L. 521 (2000).

[115] *See* ICC Prep. Committee's 1996 Report, *supra* note 36, at 43.

[116] *Id.* at 41-43.

that penalties be defined in the draft statute of the Court *as precisely as possible*."[117] For example, some states expressed the view that more precise maximum penalties should be included as part of the definitions of specific crimes.[118] This proposal mirrors state practice at the domestic level where national criminal legislation typically contains a specific maximum penalty following the definition of the crime. It was further expressed that not only maximum penalties, but also "minimum penalties *for each crime* should be carefully set out in the draft statute."[119] Suggestions were also made to include even more detailed sentencing regulations addressing, for example, "cumulative penalties for multiple crimes, an exhaustive list of aggravating circumstances and a non-exhaustive list of attenuating circumstances."[120]

Thus, state practice and *opinio juris* on *nulla poena sine lege* suggest that customary international law recognizes a *nulla poena sine lege* rule which contains significant *lex certa, lex scripta, lex stricta* and *lex praevia* qualities. Moreover, in the context of criminal law and in the imposition of penal sanctions, the applicable penalties should be defined precisely, even if there is some disagreement in certain cases on what the maximum penalty should be. In this sense, it can be reasonably concluded that customary international law on *nulla poena sine lege* contains stricter requirements regarding the application of penalties than is reflected in treaty provisions of positive international law.

C. *NULLA POENA SINE LEGE* AS A GENERAL PRINCIPLE OF LAW

A third source of international law to consider in order to distill the international standard for *nulla poena sine lege* is general principles of law.[121] "General principles of law" are principles guiding a legal system or overarching legal norms which find widespread acceptance in national law of states.[122] Lord Phillimore, a key figure in the formulation of the concept, explained that by "general principles of law" he meant "maxims of law."[123] The primary function of "general principles of law"' in international adjudication is "to make the law of nations a viable system for application of judicial process."[124] "General principles of law" are

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[117] *Id.* at 63, para. 304.

[118] *See id.* at 228 n.68 [hereinafter Compilation of Proposals]. For example, as to various violations of the laws and customs of war, some suggested distinguishing specific maximum penalties.

[119] ICC Prep. Committee's 1996 Report, *supra* note 36, at 63, para. 304 (emphasis added).

[120] *Id.*

[121] Statute of the International Court of Justice, 1999 I.C.J. art. 38(1)(c). *See generally* BROWNLIE, *supra* note 76, at 15-19; BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS (1987); SHAW, *supra* note 78, at 92-99; Michael Bogdan, *General Principles of Law and the Problem of Lacunae in the Law of Nations*, 46 NORDIC J. INT'L L. 37 (1977).

[122] BROWNLIE, *supra* note 76, at 16; SHAW, *supra* note 78, at 94; Bogdan, *supra* note 121, at 42.

[123] CHENG, *supra* note 121, at 24.

[124] BROWNLIE, *supra* note 76, at 16.

particularly relevant when international tribunals must rule on substantive issues in matters not readily susceptible to international state practice. Emerging or rapidly growing areas of international law are prime examples, including international criminal prosecutions, which provide an adjudicatory forum for the direct application of criminal sanctions to individuals by international institutions.[125] Given that international justice, as a legal system, may be considered to be at a rudimentary stage,[126] "general principles of law" allow international tribunals to draw upon elements of better developed systems, resulting in the advancement of the international legal system.[127] This is particularly true for international criminal justice. As both a body of law and as an adjudicatory process, international criminal law is replete with lacunae. A lacuna, however, should not be misunderstood as a normative standard. Because international treaties generally lack details regarding penalties, international sentencing will need to draw on general principles of law to make international criminal justice as viable legal system for the application on international judicial process.

The majority of commentators consider Article 38's reference to "general principle of law" to include general principles of national legal systems.[128] This approach is also generally followed in international criminal justice and judgments of post-World War II tribunals. For example, the United States Military Tribunal at Nuremberg stated that where a principle is "accepted generally as a fundamental rule of justice by most nations in their municipal law, its declaration as a rule of International Law would seem to be fully justified."[129] Modern international criminal tribunals also turn to municipal law when formulating a "general principle of law" in order to fill lacunae.[130] While a principle must represent a common theme in the different legal traditions, most commentators agree that it is not necessary to demonstrate

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[125] ANTONIO CASSESE, INTERNATIONAL LAW 193 (2nd ed. 2005).

[126] *Id.*; SHAW, *supra* note 78, at 93.

[127] BROWNLIE, *supra* note 76, at 16.

[128] *Id.* (citing Root, Phillimore, Guggenheim, and Oppenheim); SHAW, *supra* note 78, at 93-94 ("[B]oth municipal legal concepts and those derived from existing international practice can be defined as falling within the recognised catchment area."); Bogdan, *supra* note 121, at 42. The ICTY also followed this approach in its first sentencing judgment. Prosecutor v. Erdemović, Case No. IT-96-22-T, Sentencing Judgment, para. 19 (Nov. 29, 1996). For a discussion and further references on additional conceptions of "general principles of law", for example one which contemplates "natural law", see CHENG, *supra* note 121, at 2-4. For the drafting history of the provision, see *id.* at 6-26.

[129] U.N. WAR CRIMES COMMISSION, *The Hostages Trial: Trial of Wilhelm List and Others* (Case No. 47), *in* 8 LAW REPORTS OF TRIALS OF WAR CRIMINALS 34, 49 (1949) [hereinafter *Hostages*], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-8.pdf.

[130] *Erdemović*, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah, para. 57 ("[G]eneral principles of law are to be derived from existing legal systems, in particular, national systems of law."); *see also Erdemović*, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Stephen, paras. 25, 63, 65 (Oct. 7, 1997); Prosecutor v. Delalić, Case No. IT-96-21-T, Decision on the Motion to Allow Witnesses K, L and M to Give Their Testimony by Means of Video-Link Conference, para. 8 (May 28, 1997).

that the principle is universal.[131] Nevertheless, the four attributes underlying the principle of legality are well represented in the world's diverse legal systems.[132]

In a comprehensive survey of 192 national constitutions of member states of the United Nations, Kenneth Gallant demonstrated that more than three quarters of the nations recognize *nulla poena*, especially *lex praevia*, in their constitution, including Islamic, Asian, civil law, and common law countries.[133] Several other countries adhere to *nulla poena* pursuant to domestic statutes.[134] A separate 1993 survey by Cherif Bassiouni of 139 national constitutions revealed that 96 states contain an expression of the principle of legality in their constitutions, in addition to the good many others that adhere to the principle in case law or practice.[135] Moreover, rulings of national courts indicate that the *nulla poena* norm, whether found in the constitution or in statute, is not limited to its *lex praevia* function, the prohibition of retroactive application of a heavier penalty. Challenging the presumption that only civil law countries adhere to a full *nulla poena* principle, a state court in the United States overturned a conviction for attempted murder because the offense as defined in the criminal code was not accompanied by a penalty specific to that crime.[136] In doing so, the court upheld not only the *lex certa* principle of *nulla poena sine lege*, that the penalty must be clearly defined, but also its *lex stricta* attribute, the prohibition against application of criminal penalties by analogy.[137] Likewise, in light of *nulla poena*'s widespread presence in national legal systems, international courts have implicitly relied on "general principles of law" in order to apply a *nulla poena* rule that extends beyond its *lex praevia* function.[138] This is further supported by scholarly research concluding that "comparative law recognizes – apart from the *lex praevia* attribute – the *lex certa* element of *nulla poena*.[139] Accordingly, *nulla poena sine lege* may be considered a

[131] SHAW, *supra* note 78, at 94; Bogdan, *supra* note 121, at 46; *see also Erdemović*, Case No. IT-96-22-A, Separate and Dissenting Opinion of Judge Stephen, para. 25.

[132] Bassiouni Study, *supra* note 84, at 290; *see also supra* text accompanying notes 28-42, 84-92.

[133] KENNETH S. GALLANT, THE PRINCIPLE OF LEGALITY IN INTERNATIONAL AND COMPARATIVE CRIMINAL LAW 243-46 (2009).

[134] *Id.*

[135] Bassiouni Study, *supra* note 84, at 291.

[136] Cook v. Commonwealth, 458 S.E.2d 317, 319 (Va. Ct. App. 1995) ("[A] 'crime is made up of two parts, forbidden conduct and a prescribed penalty. The former without the latter is no crime.'").

[137] *Id.* The court refused to turn to a similar crime or the method generally followed by penalties for inchoate crimes for other crimes in order to provide a penalty.

[138] *See, e.g.*, Başkaya v. Turkey, App. Nos. 23536/94 & 24408/94, 31 Eur. H.R. Rep. 10, para. 36 (1999); Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City, Advisory Opinion, 1935 P.C.I.J. (ser. A/B) No. 65 (Dec. 4) [hereafter *Danzig Decrees*], *available at* http://www.worldcourts.com/pcij/eng/decisions/1935.12.04_danzig/; J.H.W. VERZIJL, THE JURISPRUDENCE OF THE WORLD COURT: A CASE BY CASE COMMENTARY (1965).

[139] AMBOS, ICL TREATISE II (2014), *supra* note 6 at 274.

"general principle of law" within the meaning of Article 38(1)(c) of the Statute of the International Court of Justice.[140]

D. International Precedent: The Permanent Court of International Justice

In 1935, the Permanent Court of International Justice (PCIJ) was offered the opportunity to address the principle of legality in the *Advisory Opinion on the Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*.[141] In August of 1935, the city of Danzig, following the example of Nazi law, amended its criminal code to permit punishment in the absence of a legal provision. The amendment decreed that an act is punishable:

> (1) where it is declared by law to be punishable, and
>
> (2) where, according to the fundamental idea of a penal law and according to sound popular feeling, it deserves punishment. Where there is no particular penal law applicable to the act, it shall be punished in virtue of the law whose fundamental conception applies most nearly.[142]

Another decree accorded "[w]ider latitude . . . to judges" and permitted the "'[c]reation of law . . . by the application of penal analogy.'"[143] The PCIJ noted that the "object of these new provisions is stated to be to enable the judge to create law to fill up gaps in the penal legislation."[144] On the other hand, Article 2, paragraph 1, of the Penal Code in force in Danzig before the amendment provided: "'An act is only punishable if the penalty applicable to it was already prescribed by a law in force before the commission of the act.'"[145] The court recognized that this provision gave effect to the maxims *nullum crimen sine lege* and *nulla poena sine lege*. The consequence, according to the PCIJ, was that the "law alone determines and defines an offense" and that the "law alone decrees the penalty." In relation to *nulla poena sine lege* in particular, the court further held that the maxim carries with it the principle that "[a] penalty cannot be inflicted in a given case if it is not decreed by the law in respect of that case" and a "penalty decreed by the law for a particular case cannot be inflicted in another case."[146] Thus, the PCIJ opinion recognized the *lex stricta* principle, that is, the prohibition on

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[140] Bassiouni Study, *supra* note 84, at 291-93.
[141] *Danzig Decrees*, *supra* note 138; *see* VERZIJL, *supra* note 138 (containing a commentary).
[142] *See Danzig Decrees*, *supra* note 138.
[143] *Id.* at 11.
[144] *Id.*
[145] *Id.* at 4.
[146] *Id.* at 10.

the application of a penalty by analogy, as part and parcel of *nulla poena sine lege*. Moreover, the PCIJ also ruled that the imposition of a penalty must be in accordance with the principles of *lex scripta* and *lex certa*, although the opinion cannot be read so far as to limit satisfaction of *lex scripta* to statutory written law. The PCIJ went on to condemn the 1935 penal provision as incompatible with the principles of law in the Constitution.[147] In doing so, the PCIJ affirmed several important general principles of law and recognized an international *nulla poena sine lege* norm with strong attributes of *lex scripta, lex certa*, and *lex stricta*.[148] Only *lex praevia* was not addressed and this appears to be because the question of retroactive application of the decree did not arise. According to the research performed thus far, the principle of *nulla poena sine lege* does not appear to have been addressed by the International Court of Justice.

E. Preliminary Observations on International Standard for *Nulla Poena*

Before continuing on to the next section to examine *nulla poena sine lege* in the jurisprudence of international criminal courts and tribunals, it may be useful to provide here a brief summary of some preliminary observations arising from the analysis of this section on *nulla poena sine lege* in international law. Positive international law incorporates the *lex praevia* principle of *nulla poena* as a fundamental human right from which no derogation is permitted. In interpreting this principle under Article 7 of the ECHR, the European Court of Human Rights held that this provision also embodies the *lex stricta* principle as a fundamental attribute of *nulla poena* as an individual right. But this ruling comes as no surprise as leading commentaries on human rights conventions have long taken the view that *nulla poena* is not limited to merely prohibiting retroactivity. In fact, the status of *lex stricta* under international law was previously cemented by the PCIJ decision in the *Danzig Decrees* case, which explicitly rejected the application of penalties by analogy.[149] Although it may be tempting to argue that a few cases are not conclusive of the issue, the absence of contentious cases addressing the *lex stricta* principle does not necessarily undermine its position in international law. It may simply

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[147] *Id.*

[148] The court was mindful, nevertheless, that *nulla poena* was not the only principle relevant for consideration. It acknowledged that

> [t]he problem of the repression of crime may be approached from two different standpoints, that of the individual and that of the community. From the former standpoint, the object is to protect the individual against the State: this object finds its expression in the maxim *Nulla poena sine lege*. From the second standpoint, the object is to protect the community against the criminal, the basic principle being the notion *Nullum crimen sine poena*.

Id. at 16.

The PCIJ observed, however, that the decrees were based on the second principle where as the Constitution took the former principles as the starting point. *See id.* at 16.

[149] *See supra* Part III.C.

be the result of restricted adherence to the principle by states in the context of their own national legal systems, where the practice of articulating specific penalties per crime obviates the need to resort to analogy in order to impose a penalty. More significantly, as we shall see later, the solidification of *lex stricta* as a principle of international law in relation to the application of penalty was achieved in the Rome Statute.

In connection with *lex scripta* and *lex certa*, customary international law can contribute to a fuller appreciation of the international character of *nulla poena sine lege*. State practice, as evidenced in the national legislation of an overwhelming majority of states, coupled with state expressions of *opinio juris*, strongly indicate that the legal principles of *lex scripta* and *lex certa* may be considered as part of an international *nulla poena sine lege* norm.[150] Additionally, as discussed above, these four underlying principles of *nulla poena sine lege* may be considered as "general principles of law." Accordingly, the four legal principles underlying *nulla poena sine lege* may be considered as part of its international character.

IV. *NULLA POENA* AND PUNISHING ATROCITY CRIMES

A. POST-WORLD WAR II PERIOD: PRAGMATICS OVER PRINCIPLES

The question of legality was ardently contested in the proceedings before the International Military Tribunal (IMT) in Nuremberg. The debate focused primarily on the question of *punishability* of the conduct, *i.e.* a *nullum crimen* issue, not on *nulla poena*, *i.e.* the legality of the penalty itself. Nazi defendants before the IMT argued that the charges against them for crimes against the peace and crimes against humanity violated *nullum crimen sine lege*. The IMT rejected this argument. It reasoned that the crimes under its jurisdiction had been prohibited under international law since The Hague Regulations of 1907 and The General Treaty for the Renunciation of War of 1928 (Kellogg-Briand Pact).[151] The Hague Regulations and the Kellogg-Briand Pact themselves, however, do not characterize their breach as criminal, nor call for individual criminal responsibility, nor prescribe a penalty. Nevertheless, these notable absentees did not appear to trouble the IMT which observed that these international agreements "deal with general principles of law, and not with administrative matters of

[150] This analysis also applies to *lex praevia*, because it is likewise a fundamental feature in most domestic legal systems. Unlike the other three principles, it has, as noted above, been codified into positive international law.

[151] The General Treaty for the Renunciation of War is more generally known as the Pact of Paris or the Kellogg-Briand Pact. At the outbreak of World War II, it was binding on sixty-three nations.

procedure."[152] The judgment discusses at length the *nullum crimen* question, but offers little or no analysis of *nulla poena*.

Accordingly, while the Nuremberg precedent serves as an illustration of treatment of the principle of legality by an international court, its utility as an international source of law arising from a "judicial decision"[153] may be considered to be limited to the *nullum crimen sine lege* maxim. Same is true for the Tokyo war crimes tribunal (hereafter "IMTFE").[154] According to Neil Boister and Robert Cryer, *nulla poena sine lege* issue "does not seem to have arisen at Tokyo."[155] Therefore, caution must be exercised in drawing broad inferences from the IMT and IMTE precedents regarding the nature of the principle of legality generally because the *nulla poena* debate is not well represented. Although some references to *nulla poena* are made at the IMT, it seems that for the large part this maxim was overlooked by all parties involved at both post-World War 2 tribunals.[156] The oversight seems to flow from collapsing two separate issues into one inquiry. For example at the Nuremberg trials, rather than dealing with *nullum crimen sine lege* and *nulla poena sine lege* individually, the inquiry focused on whether the conduct proscribed in the Charter of the International Military Tribunal was reflected in general prohibitions found in international treaties. From the Nuremberg records and commentaries, it appears that it was widely presumed that if the punishability of the conduct was deemed to have satisfied the principle of legality then *ipso facto* the penalties prescribed by the Charter were appropriate.[157] In other words, once punishability (*nullum crimen*) was satisfied, the legality of the penalty (*nulla poena*) was not considered. The Charter permitted the imposition of the death penalty[158] but it would be a mistake to assume that its legality was generally accepted. Little consideration was given to the fact that, even prior to World War II,

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[152] *Judgment*, *in* 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 171, 221 (1947).

[153] Statute of the International Court of Justice, 1999 I.C.J. art. 38(1)(d).

[154] The International Military Tribunal for the Far East.

[155] NEIL BOISTER AND ROBERT CRYER, THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: A REAPPRAISAL 248 (2008).

[156] Schabas, *Penalties*, *supra* note 114, at 1498.

[157] *See* AMBOS, ICL TREATISE II (2014), *supra* note 6 at 275 (discussing how "the Nuremberg precedent completely ignored the *nulla poena* aspect of the principle" focusing all its legality analysis on the issue of punishability, i.e. *on nullum crimen sine lege*).

[158] Article 27 of the Charter authorized IMT to impose "death or such other punishment as shall be determined by it to be just" upon a convicted war criminal. *See* Charter of the International Military Tribunal (Nuremburg Charter), Aug. 8, 1945, 82 U.N.T.S. 279, art. 27, r*eprinted in* INTERNATIONAL CRIMINAL LAW: A COLLECTION OF INTERNATIONAL AND EUROPEAN INSTRUMENTS 55 (Christine Van den Wyngaert ed., 2d ed. 2000). This vague and general clause was the Nuremburg Charter's only provision addressing the subject of penalties. Article 27 was reproduced in Article 16 of the Tokyo Charter, Charter of the International Military Tribunal for the Far East (Tokyo Charter), Jan. 19, 1946, T.I.A.S. No. 1589, and Control Council Law No. 10, *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, Nuremberg Trials Final Report app. D, art. II(3) (Dec. 20, 1945), *available at* http://avalon.law.yale.edu/imt/imt10.asp.

several European countries had already moved away from the notion that the death penalty is an appropriate form of punishment.[159]

In the post-war period, the International Law Commission (ILC) also briefly reflected on the issue of penalties by its consideration of the Draft Code of Offenses Against the Peace and Security of Mankind. The 1951 proposal contained a terse article on penalties: "The penalty for any offence defined in this Code shall be determined by the tribunals exercising jurisdiction over the individual accused, taking into account the gravity of the offence."[160] Although the subsequent revised 1954 proposal removed this article, the ILC's discussion of the issue suggests that this decision does not signal a defeat of the *nulla poena* norm in international law.[161] In fact, several members supported a penalty provision more precise than the above article.[162] Several states also favored this approach as reflected in their comments on the proposed text.[163] In the end, the ILC shied away from including a more specific penalty provision for a variety of reasons unrelated to the legality principle. For example, there were concerns that the task of the Commission here was limited to defining the crimes, and not to dictating the type of penalties.[164] Several members expressly stated that penalties were not included because it was left to the states to specify the penalty according to their domestic laws, as protected by Article 2(7) of the Charter of the United Nations. However, there was a strong consensus that states themselves were obliged to provide the necessary penalties and the final

[159] Prior to the war years, a number of European countries had already abolished the death penalty. For example, in the Netherlands, the last recorded execution occurred in 1860, and by 1870, the Netherlands abolished the death penalty for all crimes except military offenses and war crimes. Likewise, Belgium, with one exception in 1918, had not executed the death penalty since 1863. Thus, by the time of World War II, there existed over half a century of abolitionist practice, vis-à-vis the execution of the death penalty, among these countries of the future Benelux region, which had fallen victim to Nazi aggression. Of course, the fact that war crimes had been exempted from these early abolitions of capital punishment bodes in favor of the IMT's resort to it. Moreover, immediately following the defeat of Nazi Germany, the Netherlands, Belgium, France, and a host of other European countries responded with a wave of executions and enforcement of death penalties against members of the Nazi party who had surrendered or were captured in various localities that had been under occupation. *See* Capital Punishment Worldwide (2009). This rapid and widespread use of the death penalty among European countries victimized by Nazi aggression, genocide, and war crimes raises legitimate skepticism of France's uncompromising refusal of the Rwandan government's proposal that the ICTR be empowered to have the option of imposing the death penalty for those senior political and military figures who masterminded the 1994 genocide in Rwanda.

[160] *Summary Records of the Third Session*, [1951] 1 Y.B. Int'l L. Comm'n 81, U.N. Doc. A/CN.4/44.

[161] *Summary Records of the Sixth Session*, [1954] 1 Y.B. Int'l L. Comm'n 139, U.N. Doc. A/CN.4/85/1954 [hereinafter ILC Records].

[162] *Id.* The strongest view along these lines was expressed by Mr. G. Scelle who considered the absence of a penalty provision as "tantamount to saying that the offences in question would go unpunished." *Id.* This reflects the view of some leading authorities on substantive criminal law. *E.g.*, 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 1.2(d) (1st ed. 1986) ("A crime is made up of two parts, forbidden conduct and a prescribed penalty. The former without the latter is no crime.").

[163] For example, Belgium proposed that a scale of penalties be laid down. *See* ILC Records, *supra* note 161, at 139.

[164] *Id.* at 124, 139.

report included a comment to that effect.[165] Thus, it is clear that the absence of a penalty provision was not a reflection on the applicability of *nulla poena sine lege* to the punishment of international crimes. It certainly was not intended to suggest that international criminal justice enjoys *carte blanche* when it came to penalties, as best captured by the comments of one expert, Carlos Salamanca Figueroa, who at the time was a member of the International Law Commission:

> If the offenses in question were to be tried by a national court, that court would necessarily have to apply penalties laid down in the particular State's criminal law. If an international court were to be set up, it would be unwise to give it the very wide power to determine the penalty to be applied to each crime. No doubt that problem would be dealt with when such a court came to be set up.[166]

Figueroa's warning was not heed when modern international criminal courts where established and international judges were given very wide powers to determine penalties.

B. *NULLA POENA* IN THE AD HOC TRIBUNALS: THE PHANTOM MAXIM

When the *ad hoc* international criminal tribunals for Rwanda and Yugoslavia were called upon to interpret and apply their sentencing provisions, the IMT judgments and norms arising from other sources of international law[167] presented divergent approaches to the task of sentencing in accordance with *nulla poena sine lege*. The tribunals were technically not bound by either and yet each could be argued in support of a particular approach. In light of the comments of the United Nations Secretary-General and the representatives of other countries,[168] a firm approach to *nulla poena sine lege* would have probably raised little objection. Regarding the determination of a penalty, the statutes of the ad hoc tribunals contained a reference back to national practice. Article 24 of the International Criminal Tribunal for the former Yugoslavia (ICTY) statute and Article 23 of the International Criminal Tribunal for Rwanda (ICTR) statute provides: "The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial

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[165] *Id.* at 139.
[166] *Id.*
[167] *See* discussion *supra* sections III.A-D.
[168] *See* Letter from the Permanent Representative of Italy, *supra* note 94; *see also Summary Records of the 17th Meeting*, *supra* note 89.

Chambers shall have recourse to the general practice regarding prison sentences in the courts of [the former Yugoslavia or Rwanda]."[169]

Although several commentators observed that the national law provision was included out of concern for respecting *nulla poena sine lege*,[170] two characteristics of the construction of this article open a window to debate the binding force of the national law provision on the discretion of judges when determining a sentence. The first provision of this article provides a clear limitation on the authority of judges regarding the form of punishment that may be imposed. Penalties "shall be limited" to imprisonment.[171] Thus, by implication, the ICTY and ICTR are not authorized to impose the death penalty. In contrast, the second provision is drafted rather awkwardly. Like the first provision, it employs the directive "shall," instead of "may," suggesting that the judges do not have discretion to ignore the directive contained within this provision. Unfortunately, it follows this imperative ("shall") with a less then forceful instruction ("have recourse to"). The force of the national law provision as a binding instruction on the judges is further compromised by the fact that it follows a provision that unambiguously sets a clear limit. The inevitable comparison between the two provisions ("shall *be limited to*" versus "shall *have recourse to*") further opens the window to argue that it is not a binding limitation on the sentencing discretion of judges.

Dražen Erdemović's decision to plead guilty unexpectedly provided the ICTY's first opportunity to interpret the national law provision of Article 24.[172] Given that sentencing matters arise, if at all, at the end stages of the criminal justice process, it was unforeseen that one of the ICTY's earliest decisions would call upon the judges to interpret its sentencing provisions. Academics, legal officers, and judicial law clerks had been focusing on questions of jurisdiction, applicability of treaties regulating international armed conflicts, and substantive elements of crimes. Little analysis had been done on the articles of the ICTY statute and rules of procedure and evidence pertaining to sentencing.[173]

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[169] ICTY Statute, *supra* note 12, art. 24(1); Statute of the International Tribunal for Rwanda, S.C. Res. 955, art. 23(1), U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute]. The second sentence of this paragraph will hereinafter be referred to as the "national law provision."

[170] *See, e.g.*, KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW VOLUME II: CRIMES AND SENTENCING 277 (2014); BASSIOUNI & MANIKAS, *supra* note 15, at 692, 700; MORRIS & SCHARF, *supra* note 91, at 94; Schabas, *Perverse Effects*, *supra* note 114, at 524-28; Damien Scalia, *Long-term Sentences in International Criminal Law: Do They Meet the Standards Set Out by the European Court of Human Rights?* 9 J. INT'L CRIM. L. 669, 681-684 (2011).

[171] ICTY Statute, *supra* note 12, art. 24(1).

[172] *Croat Pleads Guilty to War Crimes in Bosnia*, CNN.COM, May 31, 1996, *available at* http://www.cnn.com/WORLD/Bosnia/updates/9605/index.html (last visited Oct. 12, 2009); *see also* Prosecutor v. Erdemović, Case No. IT-96-22-T, Sentencing Judgment (Nov. 29, 1996).

[173] S*ee* Virginia Morris & Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis* (1995) (providing an early commentary on the Statute of the ICTY).

While the *Erdemović* case provided the ICTY with its first opportunity to render an interpretation of Article 24 in a sentencing judgment, it seems that the question of the applicability of the national law provision as a limitation on its sentencing authority had already been predetermined by the judges.[174] The Rules of Procedure and Evidence (RPE), promulgated and adopted by the judges themselves prior to the *Erdemović* sentencing judgment, seem to have already determined the issue. Rule 101 of the RPE, as initially adopted on February 11, 1994, provides that "[a] convicted person may be sentenced to imprisonment for a term up to and including the remainder of his life."[175] As the penal code of the Socialist Federal Republic of Yugoslavia (the former Yugoslavia) in force at the time of the commission of the offences did not permit the imposition of a life sentence, Rule 101 foreshadowed the judges' approach towards the national law provision.

The *Erdemović* case involved a low level soldier in the Bosnian Serb Army who participated in the killing of groups of Muslim civilians, namely men between the ages of seventeen and sixty from Srebrenica, collected at a farm site near Pilica, northwest of Zvornik.[176] By his own admissions, Erdemović murdered approximately seventy individuals.[177] He admitted his involvement in these crimes, but insisted that he was forced to do so under threat of death to himself and his family.[178] Formally, he was pleading guilty to the charges while asserting a defense or excuse for his actions. Thus, before the Trial Chamber could proceed to a determination of the sentence, it had to deal with a more fundamental issue—the validity of his guilty plea.[179] Having satisfied itself that the plea was valid,[180] notwithstanding Erdemović's claim that he acted under duress, the Trial Chamber proceeded to the sentencing phase.

Regarding national laws and sentencing practice, Articles 141 to 156 of Chapter XVI of the criminal code of the Socialist Federal Republic of Yugoslavia dealt with, *inter alia*, genocide and war crimes committed against the civilian population. The penalty provided under Yugoslav law was a minimum of five years and a maximum of fifteen years or a death

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[174] Schabas, *supra* note 74, at 480.

[175] Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia, R. 101(A), U.N. Doc. IT/32/Rev.32 (Feb. 11, 1994) [hereinafter ICTY RPE], *reprinted in* INTERNATIONAL CRIMINAL LAW: A COLLECTION OF INTERNATIONAL AND EUROPEAN INSTRUMENTS *supra* note 12, at 63, 68.

[176] *See* Prosecutor v. Erdemović, Case No. IT-96-22-T, Sentencing Judgment, para. 2 (Nov. 29, 1996).

[177] Prosecutor v. Erdemović, Case No. IT-96-22-T*bis*, Sentencing Judgment, para. 15 (Mar. 5, 1998). The Prosecution placed the number closer to one hundred individuals.

[178] Erdemović had a wife and an infant child. *Id.* para. 14.

[179] *Erdemović*, Case No. IT-96-22-T, paras. 10-21.

[180] This ruling was overruled by the Appeals Chamber. *See* Prosecutor v. Erdemović, Case No. IT-96-22-A, Judgment (Oct. 7, 1997) (holding that, in order to be valid, a plea of guilty must be voluntary, informed, and unequivocal).

sentence.[181] Pursuant to these same provisions, a twenty-year prison term could be imposed instead of the death penalty. The Trial Chamber reasoned that full consideration of the national law provision in the ICTY Statute also requires taking into account the case law of the courts of the former Yugoslavia. In this regard, there have been two significant trials for genocide in Yugoslavia. The first took place in 1946 following World War II against Mikhailovic and others.[182] The majority of defendants were sentenced to death and executed.[183] The second trial took place forty years later in which Artuković was also sentenced to death, but died in prison of natural causes.[184] Thus, the practice of the courts of the former Yugoslavia on what the judges considered to be "analogous" crimes was limited and the Trial Chamber concluded that it "cannot draw significant conclusions as to the sentencing practices for crimes against humanity in the former Yugoslavia."[185] However, recognizing a principle of statutory interpretation, the Trial Chamber acknowledged that it must interpret the national law provision in a manner that gives it practical and logical effect.[186] Beginning with what appears to be an implicit acknowledgement of the view of commentators, the Trial Chamber reasoned:

> It might be argued that the reference to the general practice regarding prison sentences is required by the principle *nullum crimen nulla poena sine lege.* Justifying the reference to this practice by that principle, however, would mean not recognising the criminal nature universally attached to crimes against humanity or, at best, would render such a reference superfluous. The Trial Chamber has, in fact, demonstrated that crimes against humanity are a well established part of the international legal order and have incurred the severest penalties. It would therefore be a mistake to interpret this reference by the principle of legality codified *inter alia* in paragraph 1 of Article 15 of the International Covenant on Civil and Political Rights, according to which "no one shall be held guilty of any criminal offence on account of any act or omissions which did not constitute a criminal offence, under national or international law, at the time when it was committed (. . .)." Moreover, paragraph 2 of that same article states that "nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was

[181] CRIM. CODE SOCIALIST FED. REP. YUGOSLAVIA, ch. 16, arts. 141-156 (1976) [FORMER YUGOSLAVIA CRIM. CODE], *available at* http://www.eulex-kosovo.eu/training/justice/docs/Criminal_Code_of_SFRY_1976.pdf

[182] *See* Dylan Cors & Siobhán K. Fisher, *National Law in International Criminal Punishment: Yugoslavia's Maximum Prison Sentences and the United Nations War Crimes Tribunal*, 3 PARKER SCH. J.E. EUR. L. 637 (1996).

[183] *Id.*

[184] *Id.*

[185] Prosecutor v. Erdemović, Case No. IT-96-22-T, Sentencing Judgment, para. 37 (Nov. 29, 1996).

[186] *Id.* para. 38.

committed, was criminal according to the general principles of law recognised by the community of nations."[187]

The Trial Chamber's analysis here appears to be misplaced. It improperly framed the issue as an inquiry into the *punishability* of the conduct rather than the determination of the applicability penalty. In other words, the Trial Chamber's arguments focus on justifying why this conduct must be punished (a *nullum crimen* issue), but that does not necessarily inform us about the appropriate lawful punishment. The error in reasoning stems from its argument that interpreting and applying the national law provision in light of the *nulla poena* principle would result in "not recognizing the criminal nature" of the crimes committed by the accused. This is simply incorrect. Applying the national law provision in accordance with *nulla poena sine lege* does not mean that the defendant goes unpunished. It simply means that the sentence would have to be in accordance with Yugoslavia's penalty provisions. The Trial Chamber's misframing of the issue is further demonstrated by its discussion of the principle of legality under Article 15 of the ICCPR. Although it is dealing with the question of applicable penalties under Article 24 of its Statute and Yugoslavia's laws and sentencing practice, the Trial Chamber turns to an analysis of the *nullum crimen sine lege* provision in Article 15 of the ICCPR. Thus, the Trial Chamber oddly attempts to reject a *nulla poena* argument on the grounds that *nullum crimen* has been satisfied.

Whether by stratagem or unwittingly, the Trial Chamber collapsed the analysis of the two principles *nulla poena sine lege* and *nullum crimen sine lege*. It conflated the two maxims and referred to the "requirements" of "*nullum crimen nulla poena sine lege*," and then concluded that adherence to this conflated principle would prevent recognition of the accused's acts as criminal. Moreover, its preoccupation with Erdemović's acts going unpunished as the consequence of the *nullum crimen* principle, which is essentially a *punishability* issue, was extraneous to its inquiry on the appropriate sentence since, by this stage in the proceedings, the legality of punishing the act had already been satisfied. Indeed, it appears that the accused did not even raise the *nullum crimen* question, rendering the Trial Chamber's focus on it even more puzzling. Furthermore, at his initial appearance before the Trial Chamber, Erdemović pled guilty to crimes against humanity as charged in count one of the indictment.[188] The Trial Chamber noted that crimes against humanity, as defined in Article 5, are not "strictly speaking"

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[187] *Id.*

[188] *See* Prosecutor v. Erdemović, Case No. IT-96-22, Indictment (May 22, 1996); *Erdemović*, Case No. IT-96-22-T, Sentencing Judgment, para. 3. The plea was subsequently changed to a guilty plea to count 2 of Indictment for violations of the laws or customs of war.

provided for in the criminal code of the former Yugoslavia.[189] The Code did however cover genocide and war crimes against civilians.[190] Analogizing that the former Code penalized crimes "which are of a similar nature to crimes against humanity,"[191] the *Erdemović* Trial Chamber satisfied itself with regards to *nullum crimen sine lege*. This further highlights the oddity of the Trial Chamber's return to the *nullum crimen* principle at the sentencing stage when interpreting the national law provision of Article 24.

The legal stratagem used by the *Erdemović* Trial Chamber to free itself from any potential limitation arising from Article 24(1) is not immediately apparent. As noted above, the use of analogy in application of penalties is not unprecedented.[192] However, the use of analogy generally follows the approach of analogizing between similar crimes in order to identify an appropriate penalty. But the *Erdemović* Trial Chamber went beyond analogizing between similar crimes to analogizing between different legal systems. It employed analogy at two levels. First, it drew an analogy between genocide and war crimes committed against civilian populations under the former Yugoslavia's criminal code on the one hand, and offenses under Article 5 (crimes against humanity) of its Statute, on the other hand. Having identified the "analogous" crimes, however, the Trial Chamber did not content itself with the penalties provided by law establishing the relevant "analogous" crimes. Instead, it continued with a second level of analogizing between the penalty attached to the identified "analogous" crimes under the laws of the legal system of the *locus delicti* to the penalty attached under a different legal system, that of the *locus fori* and the ICTY legal regime. This method of expansive interpretation is beyond the typical scope of the practice even in countries that allow resort to analogy in determining penalties.[193]

The Trial Chamber justified this methodology by claiming that the Criminal Code of the former Yugoslavia "reserves *its* most severe penalties for crimes, including genocide, which are of a similar nature to crimes against humanity."[194] The observation is correct, but it does not explain why the Trial Chamber did not limit itself to the penalties provided by the Code. Rather than selecting a severe *Yugoslav* penalty, which marks the logical conclusion of its reasoning, the Trial Chamber chose to select the most severe *international law* penalty. This

[189] *Erdemović*, Case No. IT-96-22-T, Sentencing Judgment, para. 35.
[190] FORMER YUGOSLAVIA CRIM. CODE, *supra* note 181.
[191] *Erdemović*, Case No. IT-96-22-T, Sentencing Judgment, para. 35.
[192] *See also* BASSIOUNI, *supra* note 1, at 124.
[193] *Id.*
[194] *Erdemović*, Case No. IT-96-22-T, Sentencing Judgment, para. 35 (emphasis added).

latter step is not covered by its justification.[195] It would be a different matter if the ICTY Statute authorized such a maneuver — that is, substituting international law's most severe penalty in place of Yugoslavia's. But it does not, and in fact the Statute does just the opposite: it instructs trial chambers to turn to Yugoslavia's sentencing laws and practice.

Furthermore, the Trial Chamber's analysis rests heavily on a troubling assumption that reasonable minds might disagree with, namely that life imprisonment is not a more severe penalty than capital punishment. The assumption here cannot be said to have gained sufficient universal acceptance so as to justify its blanket endorsement by an international institution. Yugoslavia was not alone or the first nation to hold the view that life imprisonment is crueler and more severe than capital punishment.[196] Considered a "slow death' and a fait "worse than death", the French Constitution Assembly abolished it in 1789.[197] A number of European states have abolished life imprisonment, including Portugal, Spain, Norway, and Cyrus.[198] Tellingly, during the preparatory work for the ICC statute, some members of the committee on Article 77 "highlighted that life imprisonment was incompatible with current human rights norms and especially human dignity."[199] Concerns about life imprisonment were also raised directly by states, including Andorra, Chile, Cuba, Israel, Mexico, Portugal, Spain, Sweden, and Venezuela.[200]

The former Yugoslavia, while permitting capital punishment, had abolished the penalty of life imprisonment.[201] It is entirely reasonable, depending on a society's presumptions about the metaphysical and the purpose of incarceration, to permit capital punishment but abolish life imprisonment. The error in reasoning and methodology here stems from the Trial Chamber's reliance on a subjective assessment as to what constitutes a "heavier penalty." So long as the comparison is between penalties of the same type, the determination of whether the imposed penalty is heavier than the one applicable at the time the offense occurred is straight-forward and objective.[202] However, where the comparison is between different types of penalties, the

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[195] Damien Scalia, *Long-term Sentences in International Criminal Law: Do They Meet the Standards Set Out by the European Court of Human Rights?* 9 J. Int'l Crim. L. 669, 684 (2011) (arguing that ICTY interpretation "fails to fulfil the foreseeability criteria established by the [European Court of Human Rights]").

[196] *Id.* (Scalia claims that Qatar and Saudi Arabia also reject life imprisonment). *See also,* Stuart Beresford, *Unshackling the Paper Tiger—The Sentencing Practice of the Ad Hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 1 INT'L CRIM. L. REV. 33, 48 (2001); Schabas, *supra* note 74, at 479-80.

[197] Scalia, *Long-term Sentences in ICL, supra* note 195 at 684-685.

[198] *Id.*

[199] *Id.* citing Schabas, *Penalties, supra* note 114 at 1508.

[200] *Id.*

[201] *See* Sanja Kutnjak Ivković, *Justice by the International Criminal Tribunal for the Former Yugoslavia*, 37 STAN. J. INT'L L. 255 (2001).

[202] NOWAK, *supra* note 47, at 364.

assessment becomes more subjective and less objective. Consequently, it is more difficult to objectively conclude that the prohibition against the imposition of a "heavier penalty" has not been breached when substituting in life imprisonment.

As noted above, a latent tension exists between the IMT legacy and the principles arising from human rights treaties when it comes to sentencing in accordance with *nulla poena sine lege*.[203] In this regard, the *Erdemović* Trial Chamber's reliance on the treatment of *nulla poena* by IMT and other judgments in the immediate wake of World War II[204] can be criticized for failing to take sufficient account of the development of international human rights law on this point since World War II.[205] Since then, as illustrated above, major international human rights treaties, widely supported by states, have recognized the principle of *nulla poena sine lege* as a norm of international law and a fundamental right of an accused.[206] There has also been a corresponding development of criminal law principles in domestic law systems.[207]

Yet, the *Erdemović* Trial Chamber overlooks these developments and turns instead to a single decision from 1949 of a Netherlands special court for guidance on what *nulla poena* requires fifty years later.[208] In addition to failing to appreciate the normative development of *nulla poena* over the past five decades, the *Erdemović* Trial Chamber's reliance on the Dutch case is misplaced for yet another reason. The argument of the accused before the Dutch special court was that he *could not* be punished *at all* because of *a lack* of legal sanctions previously prescribed by law.[209] The laws of the former Yugoslavia, however, did provide for legal sanctions previously prescribed;[210] thus, the ICTY in *Erdemović* was facing a different issue than the Dutch court. The issue before the ICTY was not that Erdemović could not be punished, but rather *what* that punishment should be, and more generally how should the ICTY go about determining the period of incarceration and the relevance of national sentencing laws. Again,

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[203] *See also*, KENNETH S. GALLANT, THE PRINCIPLE OF LEGALITY IN INTERNATIONAL AND COMPARATIVE CRIMINAL LAW 405 (2009).

[204] *Erdemović*, Case No. IT-96-22-T, Sentencing Judgment, paras. 29, 38.

[205] *See* Mary Margaret Penrose, Comment, *Lest We Fail: The Importance of Enforcement in International Criminal Law*, 15 AM. U. INT'L L. REV. 321, 372 (2000).

[206] *See also* Schabas, *supra* note 74, at 464.

[207] For example, as noted above, the movement towards codification of criminal law in the 1950s in the United States that lead to the drafting of the Model Penal Code. Today, all states of the union have codes setting forth both the definitions of the crimes and the applicable penalties. *See supra* Part III.B and accompanying text.

[208] *In re* Rauter, Spec. Crim. Ct., The Hague (May 4, 1948), *reprinted in* H. LAUTERPACHT, *supra* note 17, at 526, 542-43 (1949).

[209] *Id.*

[210] Erdemović ultimately ended up pleading guilty to war crimes. Prosecutor v. Erdemović, Case No. IT-96-22-T, Sentencing Judgment, para. 8 (Nov. 29, 1996).

we see that the error stems from the Trial Chamber's failure to distinguish between *nullum crimen* and *nulla poena*.[211]

Taking the position that the national law provision in its statute was not binding upon the ICTY, the Trial Chamber attempted to bolster its view by emphasizing a single isolated comment contained in a UN report attached to a proposed draft of the ICTY statute.[212] The Trial Chamber drew specific attention to the permissive tone of the Secretary-General's comments: "[I]n determining the term of imprisonment, the Trial Chambers *should have recourse* to the general practice of prison sentences applicable in the courts of the former Yugoslavia."[213] It isolated this phrase and relied on it to the judges of any limitation on sentencing arising from the general practice of the former Yugoslavia.

There are at least two problems with the Trial Chamber's reasoning and methodology here. First, the Trial Chamber fails to appreciate the context of the Secretary-General's report and the relationship between the Secretary-General and the Security Council. The Trial Chamber characterizes the Secretary-General's comment as an "interpretation" of the Statute. The comment, however, is not intended as an "interpretation" of the Statute, but rather as a rationalization for the inclusion or exclusion of matters from the scope of the Statute.[214] These comments are made as an introduction to the proposed text of the Statute that follows. The permissive tone is intended to defer to the authority of the Security Council to ultimately decide upon the final text of the Statute. It recognizes that the decision of whether to use "shall" or "should" is a policy choice to be made by the Security Council in its role as the legislative body of the ICTY Statute. In the end, the Security Council chose "shall." For the judges to go back and engage in a debate on whether the national law provision is binding or permissive is to go beyond their judicial function and legislate from the bench, effectively redrafting their own statute.

In Resolution 808, the Security Council requested the Secretary-General's office to produce a draft statute for an international tribunal for the Council's consideration. This institutional context and the role of the Secretary-General in responding to Resolution 808 explains the permissive tone of the Secretary-General's comment. It was not intended to

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[211] *See supra* text accompanying notes 185-187.

[212] Pursuant to the request of the Security Council, the Secretary-General of the United Nations prepared a background report that accompanied the proposed draft statute of the ICTY. *See* The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), U.N. Doc. S/25704 (May 3, 1993) [hereinafter Secretary-General's Report].

[213] *Erdemović*, Case No. IT-96-22-T, Sentencing Judgment, para. 39 (quoting the Secretary-General's Report, *supra* note 212, para. 111).

[214] Much the same way that acts of national legislative bodies, which pass new laws, may include rationalization for the new legislation. In this sense, they may form part of the legislative history of the Statute.

modify the actual text of the Statute from "shall have" to "should have." If the Secretary-General in fact intended "should have," as the Trial Chamber believes, then he presumably would have used that language in the actual text of the proposed Statute. If the Secretary-General intended "should," and not "shall," then his proposed text would have stated "should."

The Trial Chamber's erroneous reasoning is accentuated if we attempt to apply it to the very next comment in the Secretary-General's report. We see another situation of "should" in the report and "shall" in the actual statute. The reported states "[t]he International Tribunal *should* not be empowered to impose the death penalty."[215] The text of the Statute corresponding to this comment reads: "The penalty imposed by the Trial Chamber *shall* be limited to imprisonment."[216] Applying the Trial Chamber's reasoning would lead to the conclusion that this provision is likewise not binding on trial chambers, and consequently the ICTY could also apply the death penalty. Clearly, this result is not intended by the Secretary-General's use of the permissive language ("should") in his report, and the Trial Chamber's contorted conclusions defies the rules of statutory interpretation.

Second, the Trial Chamber may be reasonably criticized for not taking full account of statements by Italy, Russia, the Netherlands, and other states on this issue.[217] Given that the Security Council approved the report of the Secretary-General in Resolution 827 establishing the ICTY, the contents of the report may be considered as part of the "legislative history" of the ICTY Statute. However, it is only one among several possible sources that may be considered as part of the "legislative history" of the Statute, including comments from members of the Security Council at that time. The Trial Chamber's presumption of exclusivity, or at the very least of priority, towards the comments of the Secretary-General is questionable in this regard. Moreover, even if the statements of the Secretary-General are to be given greater weight than the views of a state, the use of legislative history in the interpretation of a statute has limitations, and cannot have the effect of contravening the plain and ordinary meaning of the text.

In the end, the *Erdemović* Trial Chamber concluded that the laws and practice of the courts of the former Yugoslavia can be turned to for guidance, but they are not binding on the trial chambers:

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[215] Secretary-General's Report, *supra* note 212, para. 112 (emphasis added).
[216] *Id.* para. 115 (emphasis added).
[217] *See supra* Part III.B.

> Whenever possible, the International Tribunal will review the relevant legal practices of the former Yugoslavia but will not be bound in any way by those practices in the penalties it establishes and the sentences it imposes for the crimes falling within its jurisdiction.[218]

Despite the *Erdemović* Trial Chamber's declaration that it would not be bound by Yugoslavia's sentencing practice, the penalty it imposed on Erdemović was in fact within the penalties provided for under Yugoslavia's law. The *Erdemović* holding, that the national law provision in Article 24(1) is not binding on the ICTY, has been reiterated by other trial chambers[219] and consistently affirmed by the Appeals Chamber.[220] The holding is now a well-established principle in the sentencing jurisprudence of the ICTY and was followed by judges at the ICTR and the East Timor Special Panels for Serious Crimes.[221] This "guidance but not binding" approach has proved illusory and, in practice, has amounted to little more than a perfunctory reference to Yugoslavia's sentencing laws.[222] In subsequent judgments, some effort was made to give the national law provision a small measure of relevance by requiring trial chambers to give reasons for departing from it.[223] In such instances, the Appeals Chamber held, the trial judges "must go beyond merely reciting the relevant code provisions,"[224] a ruling which not only pointed the way forward but also implicitly confirmed that the existing practice of reciting the national law provision was indeed merely perfunctory.

While earlier commentators on the ICTY Statute conceded that the ambiguous language of the provision permitted such an interpretation, they held strong reservations about ICTY judges exercising unlimited discretion in sentencing. Bassiouni, for example, argued that "the Tribunal should follow the law of the former Yugoslavia" when determining penalties.[225] And while Morris and Scharf take the position that the ICTY is not bound by the sentencing practice

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[218] *See Erdemović*, Case No. IT-96-22-T, Sentencing Judgment, para. 40. This position, taken from the outset in the ICTY's seminal sentencing judgment, has been confirmed and followed without deviation, entrenching it deep in the Tribunal's jurisprudence. *See, e.g.*, Prosecutor v. Kunarac, Case Nos. IT-96-23 & IT-96-23/1-A, Judgment, para. 349 (June 12, 2002); Prosecutor v. Kupreškić, Case No. IT-95-16-A, Appeal Judgment, para. 418 (Oct. 23, 2001); Prosecutor v. Tadić, Case Nos. IT-94-1-A & IT-94-1-A*bis*, Judgment in Sentencing Appeals, para. 21 (Jan. 26, 2000). This seminal sentencing judgment at the rebirth of international criminal law also set the tone for other international tribunals, such as the ICTR and East Timor Special Panels for Serious Crimes, which both followed the ICTY position. *See, e.g.*, Prosecutor v. Nahimana, Case No. ICTR-99-52-A, Judgment, para. 1038 (Nov. 28, 2007); Prosecutor v. Leite, Special Panel for Serious Crimes within the District Court of Dili and Court of Appeal of East Timor Case No. 04b/2001, Judgment, para. 68 (Dec. 7, 2002); Prosecutor v. Kayishema & Ruzindana, Case No. ICTR-95-1-T, Judgment, Sentencing Order, para. 3 (May 21, 1999).

[219] *E.g.*, *Tadić*, Case Nos. IT-94-1-A & IT-94-1-A*bis*, Judgment in Sentencing Appeals, para. 21.

[220] Prosecutor v. Krajišnik, Case No. IT-00-39-A, Judgment, paras. 749-50 (Mar. 17, 2009); Prosecutor v. Hadžihasanović & Kubura, Case No. IT-01-47-A, Judgment, para. 335 (Apr. 22, 2008); *Kunarac,* Case Nos. IT-96-23 & IT-96-23/1-A, Judgment, para. 349; *Kupreškic,* Case No. IT-95-16-A, Judgment, para. 418.

[221] *See supra* note 218.

[222] *Hadžihasanović & Kubura*, Case No. IT-01-47-A, Judgment, para. 335; Schabas, s*upra* note 59.

[223] Prosecutor v. Karadžić, *Judgment*, Case No. IT-95-5/18, 24 March 2016, para. 6038.

[224] *Id.*

[225] BASSIOUNI & MANIKAS, *supra* note 15, at 700.

of the former Yugoslavia, they seem to do so with the assumption that the ICTY will "establish its own uniform sentencing guidelines."[226] The optimism of these observers that a flexible "directive but not binding" approach would "achieve consistency in sentencing" never materialized in practice.[227]

The *Erdemović* judgment does not provide much analysis of the *nulla poena* maxim itself. Thus, it provides little guidance on the content and character of the norm in international criminal proceedings. In fact, to date, no judgment or decision of the ICTY or ICTR has elucidated the international standard for *nulla poena sine lege*. In his separate opinion in the *Tadić* case,[228] Judge Antonio Cassese briefly discussed the relevance of *nulla poena sine lege* in international criminal justice. Although he does not address the substantive content of *nulla poena*, Judge Cassese makes general observations about its objectives.

> This principle is clearly intended to achieve three main objectives:
>
> (i) to spell out the varying degree of disapproval or condemnation of certain instances of misbehaviour by the social order. Clearly, the more reprehensible a course of conduct is considered, the heavier the penalty imposed on persons engaging in that conduct. Thus, if a national legal system provides for a penalty of 25 years' imprisonment for murder whereas it envisages 10 years for theft, this signifies that this legal system attaches greater importance to human life than to private property.
>
> (ii) to ensure legal certainty by reducing the discretionary power of courts (*arbitrium judicis*).
>
> (iii) to bring about some relative uniformity and harmonisation in the application of penalties. [229]

Consistent with the arguments developed in this chapter, the main objectives of *nulla poena*, as identified by Judge Cassese, relate to its positive justice function.[230] Cassese reinforces this chapter's key normative claim that that *nulla poena sine lege* is more than just a negative rights principle. Cassese further acknowledges that *nulla poena* is upheld in most

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[226] MORRIS & SCHARF, *supra* note 91, at 276.

[227] Schabas, *supra* note 74, at 481. Consistency in international sentencing remains elusive whether considered from a perspective internally to each Tribunal or externally comparing the two ad hoc Tribunals.

[228] Prosecutor v. Tadić, Case Nos. IT-94-1-A & IT-94-1-A*bis,* Judgment in Sentencing Appeals (Jan. 26, 2000).

[229] *Tadić*, Case Nos. IT-94-1-A & IT-94-1-A*bis*, Judgment in Sentencing Appeals, Separate Opinion of Judge Cassese (Jan. 26, 2000) para. 4.

[230] *Supra* Part II.A.

national legal systems. Notwithstanding the fact that his list of *nulla poena* objectives apply with equal force to international prosecutions, Cassese inexplicably concludes that the principle "is still inapplicable in international criminal law."[231] This latter conclusion is not developed or justified, and his opinion would have benefited from further reasoning. Significantly, this conclusion appears in a separate opinion and does not represent the views of the court. The other appeals judges were not prepared to join Cassese in ruling out *nulla poena's* application to international criminal justice. More importantly, the objectives Cassese identified strongly suggest an alternative conclusion as does a teleological understanding of *nulla poena* and its acknowledged adherence in national practice.

Cassese likely reached this conclusion by drawing on the fact that international conventions on criminal matters do not specify penalties. However, as already noted, this cannot be read to mean that *nulla poena* is inapplicable to international criminal justice. As Bassiouni argues, the absence of penalties provisions in these conventions should be understood in light of the fact that international criminal law regimes were generally indirect enforcement systems, requiring states to prosecute the relevant crime domestically, and if need be, enact appropriate legislation which provided the applicable penalty.[232] Since the international community did not directly enforce the crimes within these treaties, there was no need to lay out specific penalties in the international instrument. Thus, Cassese correctly observes the absence of specific penalty provisions in treaties that rely on indirect enforcement through national law, but this does not *per se* nullify the force of *nulla poena sine lege* in cases of direct enforcement by the international community, a distinction made clear by the International Law Commission.[233] A lacuna does not establish an alternative international standard for *nulla poena*, nor make the principle inapplicable to international prosecutions. As Cassese's own treatise on international law states, the very function of "general principles of law" as derived from municipal systems is to fill such a lacuna.[234] In addition, Cassese's sweeping conclusion that *nulla poena* is inapplicable in international criminal law is *obiter dictum* to his arguments in favor of a hierarchy between war crimes and crimes against humanity.

In the early practice of the ICTY, it could be argued that despite their strong rhetoric that they were not bound by the penalty scheme of the former Yugoslavia, trial chambers, with a

[231] *Tadić* Appeals Sentencing Judgment, Separate Opinion of Judge Cassese, para. 4.
[232] BASSIOUNI, *supra* note 1, at 125-26; BASSIOUNI & MANIKAS, *supra* note 11, at 689.
[233] *See supra* text accompanying notes 160-166.
[234] CASSESE, *supra* note 125, at 193.

few exceptions, generally sentenced within the range of penalties acceptable under Yugoslavia law.[235] The exceptions were limited to cases of notoriously sadistic perpetrators,[236] high-ranking officers,[237] and persons convicted of genocide.[238] Indeed, in order to persuade the Appeals Chamber to reduce his sentence, at least one accused argued that the practice of the ICTY up to that point had been to stay within the sentencing range provided by Article 38 of the former Yugoslavia's criminal code.[239] In that case, the Trial Chamber predictably rejected the defendant's argument that imposing a term of imprisonment of more than fifteen years would violate the principle of legality.[240] As a matter of practice before the ICTY, defense counsel would profit from noting that the Appeals Chamber's ostensible position is that comparing one accused to another for the purposes of determining a penalty "is often of limited assistance" and that "often the differences are more significant than the similarities."[241]

Since the untimely death of Slobodan Milošević in his prison cell, the number of accused sentenced to more than twenty years in prison has increased. However, an interesting development took place in the *Kunarac* case.[242] The Appeals Chamber held that family circumstances constitute a mitigating factor and that the *Kunarac* Trial Chamber should have considered it when determining a sentence.[243] It is worth taking note that the Appeals Chamber made this ruling relying on the "existing case-law of the Tribunal" and by "having recourse to the practice of the courts of the former Yugoslavia."[244] The Appeals Chamber further noted that:

> Family concerns should in principle be a mitigating factor. Article 41(1) of the 1977 Penal Code required the courts of the former Yugoslavia to consider circumstances including

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[235] Beresford, *supra* note 196.

[236] *E.g.*, Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment (Dec. 14, 1999) (sentencing Jelisić to forty years imprisonment), *aff'd*, Prosecutor v. Jelisić, Case No. IT-95-10-A, Judgment (July 5, 2001).

[237] For example, the Trial Chamber sentenced General Blaškić to forty-five years imprisonment, which was reduced to nine years on appeal. *See* Prosecutor v. Blaškić, Case No. IT-95-14-T-A, Judgment (July 29, 2004).

[238] *E.g.*, Prosecutor v. Krstic, Case No. IT-98-33-T, Judgment (Aug. 2, 2001) (sentencing Krstić to forty-six years of imprisonment), *modified*, Prosecutor v. Krstic, Case No. IT-98-33-A, Judgment (Apr. 19, 2004) (reducing Krstic's sentence to thirty-five years on appeal).

[239] Prosecutor v. Delalić ("*Čelebići Case*"), Case No. IT-96-21-A, Judgment, para. 811 (Feb. 20, 2001). The defendant urged the Trial Chamber to reduce his sentence on the grounds that Trial Chambers had "scrupulously avoided assessing penalties greater than that imposed under SFRY law." This ground of appeal predictably failed not only because of the standing jurisprudence that ICTY is not bound by national sentencing practice but also because his sentence of twenty years was within the sentencing range for serious crimes under Yugoslav law. Although the general range for sentences of imprisonment was between five and fifteen years, Yugoslav law allowed an increase to twenty years for "criminal acts . . . which were perpetrated under particularly aggravating circumstances or caused especially grave consequences." *Id.*

[240] *Id.* para. 814. For the relevant passage of the trial judgment, *see Prosecutor v. Delalić*, Case No. IT-96-21-T, Judgment, para. 402 (Nov. 16, 1998).

[241] *Čelebići Case*, Case No. IT-96-21-A, Judgment, at para. 719.

[242] Prosecutor v. Kunarac, Case Nos. IT-96-23 & IT-96-23/1-A, Judgment (June 12, 2002).

[243] *Id.* para. 362.

[244] *Id.*

> the "personal situation" of the convicted person. The Appeals Chamber holds that this should have been considered as a mitigating factor.[245]

Perhaps the Appeals Chamber's specific reference to and reliance on the practice of the courts of the former Yugoslavia should serve as a signal to the trial chambers, and now the United Nations Mechanism for International Criminal Tribunals (UN-MICT), to give greater weight and consideration to the provisions of national law and the practice of the courts of the former Yugoslavia when it comes to mitigating factors. Given the established principle in the jurisprudence of the ICTY that national practice is not binding, this is the most the Appeals Chamber could do to strengthen the role of sentencing provisions in laws of Yugoslavia in the determination of a sentence by ICTY trial chambers without overruling a well-entrenched principle and throwing the integrity of its past sentences into jeopardy.

In the *Čelebići* trial judgment, the legality of the penalty was aberrantly analyzed under the *nullum crimen sine lege* principle rather than *nulla poena sine lege*.[246] It is unclear whether this mishap spawned from the defendant's brief and was simply responded to in kind by the Trial Chamber[247] (in which case it would have been preferable for the Trial Chamber to make note of the error) or whether the *Čelebići* Trial Chamber itself, like the *Erdemović* Trial Chamber, failed to adequately distinguish between the two maxims.[248]

The *Čelebići* Trial Chamber acknowledged the existence of some "controversy" regarding its sentencing policy of substituting the Yugoslavia maximum penalty (capital punishment) with the ICTY's maximum of life imprisonment, in light of the fact that the former Yugoslavia had abolished the latter sanction, which it viewed as cruel and inhuman.[249] It defended this policy by summarily concluding that it is "consistent with the practice of States which have abolished the death penalty"[250] and by reference to the views of one member of the Security Council.[251] Even if it is assumed that life imprisonment is a suitable substitute for the death penalty, a proposition which as noted above has not gone unchallenged,[252] the Trial Chamber's analysis is incomplete from another important perspective. Under Yugoslav law, an accused

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[245] *Id.*

[246] Prosecutor v. Delalić, Case No. IT-96-21-T, Judgment, paras. 1209-12 (Nov. 16, 1998).

[247] *Id.* para. 1197. However, on appeal the Appeals Chamber referred to the defendant's submissions as challenging the sentence on the grounds that "the Trial Chamber erred in violating the principle of *nulla poena sine lege*." *Čelebići Case*, Case No. IT-96-23-A, Judgment, para. 809.

[248] *Delalić*, Case No. IT-96-21-T, Judgment, para. 1210.

[249] *Id.* para. 1208.

[250] *Id.* Although this is an assumption that is commonly repeated, it is unfortunate that the Trial Chamber does not provide a single example, much less illustrate a "consistent" practice, to bolster its reasoning.

[251] *Id.*

[252] Objections arise from both a legal and normative perspective. *See, e.g.*, BASSIOUNI & MANIKAS, *supra* note 15, at 702.

could be sentenced to a term of imprisonment of up to fifteen years or sentenced to capital punishment, which could be mitigated to a sentence of twenty years. However, a term of imprisonment beyond twenty years was not permissible. It was either twenty years or the death penalty. Thus, even if the ICTY policy of substituting the death penalty with life imprisonment is correct, this does not automatically justify terms of imprisonment that exceed twenty years. A sentencing policy that would be faithful to the Statute's directive of having "recourse to the sentencing practice of the former Yugoslavia" would be one that set a maximum term of imprisonment at twenty years while permitting life imprisonment.[253] In other words, the ICTY judges had the option of adopting a sentencing framework similar to the ICC where terms of imprisonment would be limited to 20 years or, where justified by the extreme gravity of the crime, life imprisonment, and refrain from imposing terms of sentences in between such as 45 years, 40 years, or 30 years. This approach is supported by eminent scholars, such as Cherif Bassiouni, that have aptly concluded that imprisonment in excess of twenty years allowed under "the applicable national codes" would violate the principle of legality.[254]

The *Čelebići* Trial Chamber took explicit note of Bassiouni's position and rejected it, characterizing his opinion as "an erroneous and overly restrictive view of the concept."[255] The *Čelebići* judges held that "the governing consideration for the operation of the *nullum crimen sine lege* principle is the existence of a punishment with respect to the offence. . . . The fact that the new punishment of the offence is greater than the former punishment does not offend the principle."[256] This ruling clearly violates the *lex praevia* principle of *nulla poena*. According to the Trial Chamber, once *a penalty*—any penalty—is provided for, then the accused are put on notice generally that their conduct can subject them to criminal jurisdiction, and thus the principle of legality is not violated, even if the court now substitutes its own higher penalty for the original penalty.[257] Once again, international judges misconstrue the principle of legality as encompassing only the *nullum crimen* principle, and fail to consider *nulla poena*

[253] Similar in structure to the sentencing provisions that were finally adopted in ICC Statute, *supra* note 13.

[254] BASSIOUNI & MANIKAS, *supra* note 15, at 702. *See also*, Scalia, *Long-term Sentences in ICL, supra* note 195 at 684 (concluding that the principle of legality of sentences is not complied with by international criminal courts and tribunals).

[255] *Delalić*, Case No. IT-96-21-T, Judgment, paras. 1209-10.

[256] *Id.* para. 1212. In another passage, the Trial Chamber also held that "[*nullum crimen sine lege*] is founded on the existence of an applicable law. The fact that the new maximum punishment exceeds the erstwhile maximum does not bring the new law within the principle." *Id.* para. 1210.

[257] *Id.* para. 1212 (quoting Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995) ("Nationals of the former Yugoslavia . . . were therefore aware, or should have been aware, that they were amendable to the jurisdiction of national criminal courts . . . ."); *see also id.* para. 1210 (holding that "[t]his concept is founded on the existence of an applicable law. The fact that the new maximum punishment exceeds the erstwhile maximum does not bring the new law within the principle.").

separately.[258] While the existence of a law making certain conduct a punishable offense satisfies *nullum crimen*, the substitution and enforcement of a higher penalty after the commission of the conduct violates *nulla poena*, specifically the *lex praevia* which is well-established in treaty law, customary international law, and general principles of law. The *Čelebići* Trial Chamber's application of the principle of legality here grants the benefits of legality on the innocent but withholds it from the guilty.

The Trial Chamber's analysis leads to two serious implications: the first is an explicit departure from the long-standing prohibition against imposing a greater penalty than the one applicable at the time the crime was committed, and the second is a rejection of the prohibition against the use of analogy on the discretion of international criminal adjudicators.[259] While it may be argued, in turn, that this weakens the *lex praevia* and *lex stricta* attributes of *nulla poena sine lege* under international law, the better inference to be drawn is that the Trial Chamber's analysis of the principle should not be given serious weight as international precedent for determining the international standard for *nulla poena sine lege*. First, although it is addressing the question of penalties, the Trial Chamber's discussion is in terms of *nullum crimen sine lege*. The Trial Chamber's failure to adequately distinguish between the two maxims weakens its authority as precedent on the *nulla poena sine lege* inquiry. Second, the Trial Chamber's dismissal of the *lex stricta* principle can be criticized for failing to consider, even nominally, the international precedent arising from the *Advisory Opinion on the Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City*.[260] It may be said that to some extent this criticism can be deflected by the fact that traditionally resorting to analogy was permitted on a limited basis, but this counter-argument has less force in light of modern practice of criminal law. With the exception of one or two isolated states, national criminal justice systems prohibit the expansion of criminal sanctions by analogy. Yet, even if breach of the *lex scripta* principle was to be deemed acceptable in international criminal justice, the Trial Chamber's analysis is liable to an even more serious criticism. Contrary to the well-established principle of *lex praevia* in international and national law, the Trial Chamber concluded that a "*new* punishment" which is "greater than the former punishment does not offend" the principle of legality.[261]

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[258] KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW VOLUME II: CRIMES AND SENTENCING 276 (2014) (noting that "this Chamber remained silent on the content of the *nulla poena* principle—it even seemed to conflate it with *nullum crimen*").

[259] It may be countered that these proffered implications constitute a "worse case" critique of the Trial Chamber's analysis; nevertheless, it is the logical conclusion of the Trial Chamber's holdings.

[260] *Danzig Decrees*, *supra* note 138.

[261] *Delalić*, Case No. IT-96-21-T, Judgment, para. 1212 (emphasis added).

In light of the sentences imposed, it seems quite unnecessary for the Trial Chamber to reach such controversial conclusions. In this case, the judges acquitted one defendant on all charges, and imposed imprisonment sentences of seven, fifteen, and twenty years on the other three. Hazim Delic, who received the harshest penalty of twenty years imprisonment, argued that, based on the principle of legality, the Trial Chamber could not impose a sentence greater than fifteen years.[262] Indeed, the standard maximum under the former Yugoslavia's penal code was fifteen years.[263] However, as already mentioned, under certain circumstances national courts could increase the penalty to twenty years. These include cases where the death penalty was applicable but for some reason, such as mitigating circumstances, the court chose to not impose it and cases where "criminal acts . . . were perpetrated under particularly aggravating circumstances or caused especially grave consequences."[264] Accordingly, the Trial Chamber did not need to go so far as to engage in a controversial analysis which could call into question its judgment or damage the credibility of international judges, or even cast a shadow on the endeavor to fight impunity through international criminal justice. It could simply have reasoned that Delic's crimes were of such gravity as to fall within the provisions of the former Yugoslavia's penal code, which permitted an increase in penalty from fifteen years to twenty years.

The *Čelebići* Appeals Chamber appropriately reframed the analysis in terms of *nulla poena sine lege*.[265] More significantly, it also focused the issue towards whether *nulla poena sine lege* required an international criminal tribunal to be bound by the penalties available under national law.[266] The Appeals Chamber steered clear of any overreaching declarations such as those made by the Trial Chamber that "[t]he fact that the new punishment of the offence is greater than the former punishment does not offend the principle."[267] This could arguably be considered as an implicit disavowal of the Trial Chamber's ruling on this point. After limiting the inquiry to whether *nulla poena sine lege* required strict adherence to national law, the Appeals Chamber concluded that the penalty of life imprisonment authorized by the ICTY Statute and RPE did not violate the *nulla poena* principle because it reasoned that "the accused must have been aware" that their crimes were "punishable by the most severe penalties."[268]

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[262] *Id.* para. 1211.
[263] *See supra* note 181.
[264] *Čelebići Case*, Case No. IT-96-21-A, Judgment, para. 810 n.1383 (Feb. 20, 2001) (referring to Article 38 of the SFRY Penal Code).
[265] *Id.* para. 814.
[266] *Id.*
[267] *Delalić*, Case No. IT-96-21-T, Judgment, para. 1212.
[268] *Čelebići Case*, Case No. IT-96-21-A, Judgment, para. 817.

Thus, the Appeals Chamber limited its holding, and consequently the rulings of the Trial Chamber, by the principle of foreseeability. Citing decisions of the European Court of Human Rights, the Appeals Chamber reasoned that so "long as the punishment is accessible and foreseeable, then the principle cannot be breached."[269]

The difficulties in applying the foreseeability test in this context have been addressed above already.[270] It is fair to say that it was foreseeable that serious violations of international humanitarian law would be subject to the "most severe penalties," as the Appeals Chamber pointed out.[271] However, in a country that had abolished life imprisonment as a cruel form of punishment, can it fairly be said that such a sanction was foreseeable?[272] In a country that did not permit terms of imprisonment beyond twenty years on the fundamental belief that such imprisonment was cruel and inhumane, it would be fair to argue that sentences of twenty years,[273] forty years,[274] forty-five years,[275] or forty-six years[276] were not foreseeable.

C. *NULLA POENA SINE LEGE* IN THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT

1. ICC Statute Framework for the Legality of Sanctions

Within Part III of the ICC Statute on General Principles of Criminal Law lies Article 23, the keystone to understanding the legality of the ICC's power to impose a particular punishment.[277] Entitled "*Nulla poena sine lege*," Article 23 states: "A person convicted by the Court may be punished only in accordance with this Statute."[278] Although at first glance this

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[269] *Id.* para. 817 n.1400 (citation omitted). The Appeals Chamber here relied on two cases from the European Court of Human Rights: *C.R. v. United Kingdom*, App. No. 20190/92, 335 Eur. Ct. H.R. at 68-69 (1996), and *S.W. v. United Kingdom*, App. No. 20166/92, 335 Eur. Ct. H.R. at 41-42 (1996). However, in both of these cases, the central issue was the "punishability" of the conduct, not the determination of the appropriate penalty. In other words, the threshold question before the ECHR in both cases was the application and interpretation of *nullum crimen sine lege*, not *nulla poena sine lege*. The foreseeability test was applied to determine whether *nullum crimen sine lege* had been breached.

[270] *See supra* text accompanying notes 6562-72.

[271] *Čelebići Case*, Case No. IT-96-21-A, Judgment, para. 817.

[272] Scalia, *Long-term Sentences in ICL, supra* note 195 at 684 (taking the position that it was not foreseeable under the criteria established by the European Court of Human Rights).

[273] *See*, *e.g.*, Prosecutor v. Kordić, Case No. IT-95-14/2-T, Judgment (Feb. 26, 2001), *aff'd*, Case No. IT-95-14/2-A, Judgment (Dec. 17, 2004).

[274] Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment (Dec. 14, 1999).

[275] Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment (Mar. 3, 2000). For a critique of methodology and reasoning of the *Blaškić* sentence in light of the general sentencing jurisprudence of the ICTY, see Shahram Dana, *Revisiting the Blaškić Sentence: Some Reflections on the Sentencing Jurisprudence of the ICTY*, 4 INT'L CRIM. L.R. 321 (2004). General Blaškić's sentence was reduced to nine years on appeal. *See* Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgment (July 29, 2004).

[276] *See* Prosecutor v. Krstic, Case No. IT-98-33-T, Judgment (Aug. 2, 2001). Krstic's sentence was *reduced to* thirty-five years on appeal. Prosecutor v. Krstić, Case No. IT-98-33-A, Judgment (Apr. 19, 2004).

[277] For a general commentary on this Article, see Lamb, *supra* note 2, at 762-65; Schabas, *supra* note 2, at 463-66.

[278] ICC Statute, *supra* note 13, art. 23.

single succinct sentence seems rather stingy for content, underlying its brevity are important requirements for the legality of any selected sanction within the ICC framework. First, the list of sanctions provided by the Statute is exhaustive. If a particular punishment is not provided for by the Statute, then the ICC has no power to impose it. Second, the language "only in accordance with this Statute" obliges the ICC to comply with any conditions, qualifications, or other requirements attached to any sanction, whether in regard to its determination, imposition, or enforcement. From this perspective, it may be said that the Statute reaffirms the *lex scripta* principle underlying *nulla poena sine lege*.

While the inclusion of *nulla poena sine lege* via an individualized article within the ICC Statute may be considered a positive contribution to the development of the norm under international law, it must be admitted that Article 23 contains a peculiar expression of its namesake.[279] Kai Ambos criticizes the ICC statute's articulation of *nulla poena* for failing to go "beyond a mere reference to [a] statutory framework."[280] Ambos concludes that "it is highly questionable" whether Article 23 and the ICC sentencing regime complies "with a reasonably understood *nulla poena* principle."[281] Under the ICC legal framework, *nulla poena* is made dependent on the quality of provisions found in other articles of the Statute, and in some cases even dependent on the ICC Rules of Procedure and Evidence (ICC RPE). This reverse dependency is an awkward and unfamiliar position for a fundamental principle of criminal law, which is normally independent of subsequent rules and demands that other rules within the system comply with it. Put differently, fundamental principles of the system, such as *nulla poena sine lege,* contain norms and values that subsequent rules within the system must satisfy. The dependency of the ICC's *nulla poena sine lege* provision on other articles of the Statute may limit its effectiveness in achieving the goals associated with the maxim, particularly those that pertain to its "positive justice" function.

While Article 23 limits the form and severity of the punishment to those penalties enumerated in the Statute, it cannot be said that it likewise limits the factors, especially aggravating circumstances, that judges may rely on to increase the severity of a sentence. Its effectiveness to limit judicial discretion to the factors enumerated in the Rome Statute or the ICC RPE is weakened by open-ended language in other articles and rules. This highlights the

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[279] At least one international judge has made a similar observation. *See* Prosecutor v. Tadić, Case Nos. IT-94-1-A & IT-94-1-A*bis*, Judgment, Separate Opinion of Judge Cassese, para. 5 (Jan. 26, 2000) (observing that "Article 23 lays down the *nulla poena* principle, but only in a particular form").

[280] KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW VOLUME II: CRIMES AND SENTENCING 271 (2014).

[281] *Id. See further* KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW VOLUME I: FOUNDATIONS AND GENERAL PART 93 (2013).

reverse dependency problem. For example, Article 78 instructs judges to "take into account *such factors as* the gravity of the crime and the individual circumstances of the convicted person."[282] The language suggests that the enumeration of factors here is not exhaustive. Article 78 further states that the determination of the sentence should also be in accordance with the ICC RPE. Rule 145, however, contains a non-exhaustive list of aggravating factors.[283] Thus, in determining a sentence, judges may take into account "other circumstances" not found in the Statute or ICC RPE.[284] This opening in the Statute has been criticized as being contrary to *nulla poena*.[285]

Prior to the adoption of Rule 145, the potential scope of Article 23 was a matter of interpretation for the judges. The threshold issue would have been whether the language "in accordance with this Statute" requires that the factors impacting the sentence be enumerated in the Statute or the RPE, or whether it is permissible for the Statute or ICC RPE to allow consideration of factors not enumerated. Rule 145(2)(b)(vi) seems to lay this issue to bed. However, can it be argued that the court has the authority, or even the obligation, to ensure that rules adopted by the Assembly of State Parties (APS), as part of the ICC RPE, do not conflict with the fundamental principles laid down in the Statute? In other words, does the ICC have the power of judicial review of provisions adopted in the ICC RPE? There is room to argue that this particular provision of Rule 145 is contrary to the requirements of the Statute pursuant to Article 23. The ICC judges arguably have the inherent power to interpret the scope of the ICC statute and could determine Rule 145(2)(b)(vi) is incompatible with the Statute.

Another factor contributing to the peculiar nature of the formulation of *nulla poena sine lege* in Article 23 is the absence of language expressly incorporating the *lex praevia* principle, which is codified in numerous international and regional human rights instruments. By contrast, the ICC's *nulla poena* provision in Article 23 does not explicitly address what happens when a punishment is authorized by the statute but was not applicable to the actor at the time of the commission of act. From the perspective of normative development of *nulla poena sine lege* in international law, it would have been preferable to explicitly incorporate the *lex praevia* principle in the ICC's *nulla poena* article, especially in light of some potentially

[282] ICC Statute, *supra* note 13, art. 78(1) (emphasis added).
[283] International Criminal Court Rules of Procedure and Evidence, ICC-ASP/1/3, Rule 145(2)(b)(vi).
[284] *Id.* (granting that these "other circumstances" must "by virtue of their nature be similar" to the enumerated aggravating factors).
[285] SALVATORE ZAPPALÁ, HUMAN RIGHTS IN INTERNATIONAL CRIMINAL PROCEEDINGS 201 (2003). For similar criticism of the ICTY Statute, see BASSIOUNI & MANIKAS, *supra* note 15, at 702.

adverse statements from the jurisprudence of the ICTY.[286] However, from a practical standpoint, its absence in Article 23 is not fatal to the operation of the *lex praevia* principle within the general framework of the Statute, provided that the Statute is interpreted consistent with Article 15(1) of the ICCPR. Moreover, it may be argued that the drafters of the Statute did not consider this to be a serious omission given that the Statute contains a clear provision on the non-retroactive application of the Statute to conduct occurring prior to its entry into force.[287]

Given that the ICC's *nulla poena sine lege* article does not explicitly contain the *lex praevia* principle, namely that a heavier penalty shall not be imposed than the one that was applicable at the time the offense was committed,[288] the court may have to turn outside its own statute for authority to incorporate this principle.[289] ICC judges have authority to do so under Article 21 – Applicable Law. There are a number of sources that the court can rely upon to incorporate the *lex praevia* principle into its legal framework, including "applicable treaties"[290] and "general principles of law" derived from national laws of legal systems of the world.[291] Although it is hard to imagine that ICC judges would not incorporate *lex praevia* into the *nulla poena* provision of the Statute, it would nevertheless have been preferable to have included an explicit provision to that effect.

An earlier proposal by Mexico, which was not included in the final text of Article 23, offered the following language: "No penalty shall be imposed on a person convicted of a crime within the jurisdiction of the Court, unless such penalty is expressly provided for in the Statute and is applicable to the crime in question."[292] However, without explicit reference to determining the penalty in accordance with the law applicable "at the time the conduct was committed," the proposal does not address the *lex praevia* principle, although it does provide for a stronger *lex certa* character which could have possibly required that maximum penalties or penalty ranges be specified per crime. It is not clear why the Working Group on Penalties

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[286] *E.g.*, Prosecutor v. Delalić, Case No. IT-96-21-T, Judgement, para. 1210 (Nov. 16, 1998) ("The fact that the new maximum punishment exceeds the erstwhile maximum does not bring the new law within the principle."); *id.* para. 1212 ("The fact that the new punishment of the offence is greater than the former punishment does not offend the principle."); *see supra* Part IV.B.

[287] ICC Statute, *supra* note 13, art. 24(1). The ICC Statute entered into force on July 1, 2002. *Id.* art. 126.

[288] *See supra* Parts II.B & III.A. *See generally* UDHR, *supra* note 38, art. 11, para. 2; ICCPR, *supra* note 38, art. 15(1); ECHR, *supra* note 38, art. 7(1); ACHR, *supra* note 38, art. 9.

[289] *See* ICC Statute, *supra* note 13, art. 21.

[290] *See id.* art. 21(1)(b). These may include for example international human rights treaties as well as international humanitarian law conventions. With regard to the latter, Article 75(4)(c) of Additional Protocol I to the Geneva Conventions of August 12, 1949 provides that "nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed."

[291] *See* ICC Statute, *supra* note 13, art. 21(1)(c).

[292] UN Doc A/CONF.183/C.1/WGP/L.4 (1 July 1998). *See further* Schabas, *supra* note 2, at 465.

reformulated the proposal into the present language.[293] Perhaps it was because the Working Group did not have sufficient time to achieve a more comprehensive and integrated sentencing framework. Whether this decision will weaken the *nulla poena* norm within the ICC framework remains uncertain.

To strengthen the *lex praevia* character of *nulla poena* within the ICC framework, one could argue that the principle of non-retroactive application of a heavier penalty appears in all major human rights treaties.[294] This argument, however, is only successful to the extent it is accepted that the court is bound by these treaties. Another approach would be to turn to general principles of law or customary international law, as the majority of nations prohibit *ex post facto* application of criminal law.[295] A third approach could be to rely on related articles of the Statute such as Article 22 and Article 24, although such reliance will also depend upon the interpretation of these provisions in accordance with international human rights standards.[296]

Article 22 *Nullum crimen sine lege* makes clear that the applicable law is that which was in place at the time the conduct occurred.[297] Given the nexus between *nullum crimen sine lege* and *nulla poena sine lege*,[298] the ICC may reasonably rely on Article 22 to incorporate the *lex praevia* principle into Article 23. Article 24 also has potential to strengthen *lex praevia* within the Statute, depending on the interpretation given to the phrase "the law applicable." Article 24 provides that "[i]n the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply."[299] Strictly speaking, this provision incorporates the *lex mitior* principle, but it can be interpreted so as to include the *lex praevia* principle of *nulla poena sine lege*. The threshold question to be resolved is what is meant by "the law applicable to a given case." The Statute itself does not make explicit if "applicable law" refers to the law in force at the time the conduct was committed or the law in force at the time the ICC seized jurisdiction of the case.

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[293] *Id.*

[294] *E.g.*, ICCPR, *supra* note 38, art. 15(1) ("Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed."); s*ee supra* Part III.A; *see also* ECHR, *supra* note 38, art. 7(1); ACHR, *supra* note 38, art. 9; UDHR, *supra* note 38, art. 11, para. 2.

[295] *See* BASSIOUNI, *supra* note 1, at 123.

[296] Article 22 deals with *nullum crimen sine lege* and therefore speaks to *punishability* of an act and not the punishment itself. Article 24(1) prohibits imposition of "criminal responsibility" in relation to the temporal jurisdiction of the court.

[297] ICC Statute, *supra* note 13, art. 22(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.").

[298] *See* Robinson, *supra* note 2, at 396-97 ("The rationales that support precise written rules governing assignment of liability and its degree apply as well to criminal sentencing.").

[299] ICC Statute, *supra* note 13, art. 24(2).

The *Čelebići* Appeals Chamber stated that "any sentence imposed must always be . . . 'founded on the existence of applicable law.'"[300] However, the Appeals Chamber did not further elaborate on how the "applicable law" should be identified and determined. Moreover, it made no negative judgment against the Trial Chamber's approach which seemed to suggest that when the determination of "applicable law," for the purposes of determining a penalty, is framed in terms of a jurisdictional question, it is permissible to exceed the penalty applicable at the time the crime was committed. In certain instances, this could result in an *ex post facto* increase of the penalty. On the other hand, an alternative reading of the combined rulings of the Trial Chamber and the Appeals Chamber in *Čelebići* would be that the ICTY has not endorsed *ex post facto* increase of a penalty as such, but rather is saying that *nulla poena sine lege* does not require an international criminal tribunal to be bound by the penalty provisions arising from national law so long as the international tribunal is acting in accordance with its own statutory provisions, even if those provisions result in an increase in the penalty that otherwise would have been applicable were the individual to be tried in the forum of the *locus delicti*.[301] It is one thing to say that *nulla poena sine lege* does not require an international criminal court to be strictly limited to penalties arising from national penal codes; it is an entirely different matter to suggest that *nulla poena sine lege* under international law does not encompass the *lex praevia* principle prohibiting retroactive application of penalties. Put simply, regardless of what interpretation the ICTY chooses to give to its national law provision, it cannot result in a sweeping ruling that *nulla poena sine lege* in international law does not include the principle of non-retroactivity. Such a holding would be manifestly against international human rights treaties.

Accordingly, to the extent that the *Čelebići* Trial Chamber's ruling suggested this latter consequence, it should be rejected as incompatible with international human rights standards and fundamental principles of criminal law. On the other hand, the former proposition arising from the combined rulings of the Appeals Chamber and Trial Chamber in *Čelebići* has significance for future cases before the ICC, and maybe also for the interpretation of its *nulla poena sine lege* article. The upshot of the *Čelebići* case on the *nulla poena sine lege* question is to preempt any success that the defendant may have in arguing that, where the penalty provisions of the ICC are greater than the penalties allowed under national law, the imposition of the former would violate the principle of legality. The ICC can bolster its rejection of such

[300] *Čelebići Case*, Case No. IT-96-21-A, Judgment, para. 817 (Feb. 20, 2001).

[301] This would be subject to the limitation that the penalties in the forum of adjudication were foreseeable. *Id.* at 293 n.1400.

an argument by, in addition to references to the relevant articles of its own Statute, recalling this analysis of the *Čelebići* case.[302]

A third peculiar aspect of the drafting of Article 23 pertains to its legal construction which places "may" and "only" in close proximity: "may be punished only in accordance with this Statute." It may seem too obvious to argue that the textual and teleological interpretation of this language would be that the court may, but is not obligated to (as opposed to "shall"), punish a convicted person; however, if it chooses to punish, it can only do so in accordance with the Statute. However as pointed out above, we have witnessed the ICTY reject what leading scholars considered to be the appropriate textual and teleological interpretation of its Article 24.[303] Moreover, like the national law provisions of the ad hoc tribunals,[304] which followed on the heels of a more strongly worded provision regarding applicable penalties,[305] Article 23 of the ICC Statute also follows the more strongly worded Article 22, which states, *inter alia*: "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."[306] The "shall not . . . unless" formulation is a stronger legal construction than the language of Article 23. Additionally, as noted already, Article 22 also explicitly includes the *lex praevia* principle. It is worth recalling that the national law provision of the ICTY statute also contained unorthodox drafting.[307] ICTY Article 24 uses "shall" alongside "have recourse to," creating ambiguity as to its character as a strict legal limitation on judicial discretion or as a lesser guiding, but not

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[302] The ICC Statute does not contain a national law provision like the one found in the statutes of the ad hoc Tribunals. This makes sense in light of the differences in their geographic reach. Because the ICTR and ICTY's jurisdiction is limited to crimes occurring on the territory of a single (former) state, reference to national laws is defendable. In the context of a permanent international criminal court, with the potential for global territorial reach, a national law provision would result in a fragmentation of international sentence. Some have expressed optimism that this will "build on the principle of equality of justice through uniform penalties regime for all persons convicted by the Court." *See* Rolf Einar Fife, *Applicable Penalties*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVER'S NOTES, ARTICLE BY ARTICLE 985, 986 (Otto Triffterer ed., 1999).

[303] *Compare* Prosecutor v. Kunarac, Case Nos. IT-96-23 & IT-96-23/1-A, Judgment, para. 349(June 12, 2002); Prosecutor v. Kupreškić, Case No. IT-95-16-A, Judgment, para. 418 (Oct. 23, 2001); Prosecutor v. Tadić, Case Nos. IT-94-1-A & IT-94-1-A*bis*, Judgment, para. 21 (Jan. 26, 2000); *with* BASSIOUNI & MANIKAS, *supra* note 15, at 692, 700; Schabas, *Perverse Effects*, *supra* note 114, at 524-28.

[304] A comparison between ICC Statute, *supra* note 13, art. 23, and the second sentence of ICTY Statute, *supra* note 12, art. 24(1) (and ICTR Statute, *supra* note 169, art. 23(1)) seems appropriate as it has been argued that the latter was included out of concern for respecting *nulla poena sine lege*. *See* BASSIOUNI AND MANIKAS, *supra* note 15, at 692, 700; Schabas, *Perverse Effects*, *supra* note 114, at 524-28. Except for the reference to the applicable state, the provisions of ICTY Statute, *supra* note 12, art. 24(1) and ICTR Statute, *supra* note 169, art. 23(1) are identical: "The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of [the former Yugoslavia or Rwanda]."

[305] Compare the first sentence and the second sentence of ICTY Statute, *supra* note 12, art. 24(1) ("shall be limited to" versus "shall have recourse to").

[306] ICC Statute *supra* note 13, art. 22(1). For a general commentary on this article, see Bruce Broomhall, Nullum Crimen Sine Lege, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 302, at 447, 452-53.

[307] *See supra* Part IV.B.

binding, provision.[308] ICTY judges concluded that the sentencing laws and practice of the former Yugoslavia are not binding on them.[309] Although it has been argued that this provision was included out of concern for respecting the *nulla poena sine lege*,[310] the interpretations of the judges have effectively read out this limitation on their discretion.[311]

In sum, some improvement has been made in comparison to the statutes of the ad hoc tribunals. Although sparse and not providing satisfactory elucidation of the *nulla poena* principle, Article 23 infuses the ICC sentencing regime with a significant *lex scripta* quality, which may have in turn inspired the state representatives at the drafting table to produce what has been characterized as the most progressive international sentencing code. Moreover, the fact that *nulla poena sine lege* is recognized in its own right under Article 23, separate and independent of *nullum crimen sine lege* (Article 22), should serve to give the norm additional weight and embed its position in international criminal law.[312]

2. Analysis of Imprisonment Sanctions

The penalty provision proposed by the International Law Commission in its draft statute for an international criminal court was nearly identical to the penalty provisions of the ad hoc tribunals (ICTY Article 24 and ICTR Article 23) and relied upon the same general criteria as found in the sentencing provisions of the ICC Statute.[313] In the view of many delegations, this ILC draft provision

> gave rise to a serious problem with regard to its conformity with the principle *nulla poena sine lege*. It was generally held that there was a need for maximum penalties applicable

[308] *See also* BASSIOUNI & MANIKAS, *supra* note 15, at 700.

[309] This position was taken from the outset in the ICTY's first sentencing judgment. *See* Prosecutor v. Erdemović, Case No. IT-96-22-T, Judgement, para. 39 (Nov. 29, 1996). It has been confirmed and followed without deviation, entrenching it deep in the Tribunal's jurisprudence. *See, e.g.*, Prosecutor v. Kunarac, Case Nos. IT-96-23 & IT-96-23/1-A, Judgment, para. 349 (June 12, 2002); Prosecutor v. Kupreškić, Case No. IT-95-16-A, Judgment, para. 418 (Oct. 23, 2001); Prosecutor v. Tadić, Case Nos. IT-94-1-A & IT-94-1-A*bis*, Judgment, para. 21 (Jan. 26, 2000).

[310] *See* BASSIOUNI & MANIKAS, *supra* note 15, at 702; Schabas, *Perverse Effects*, *supra* note 114, at 525; Schabas, *supra* note 2, at 464.

[311] *See supra* note 218.

[312] And, hopefully, encourage more scholarship on this subject.

[313] *See Report of the International Law Commission to the General Assembly on the Work of Its Forty-Sixth Session*, U.N. GAOR Supp. (No. 10) at 60, U.N. Doc. A/49/10 (1994), *reprinted in* [1994] 2 Y.B. Int'l L. Comm'n 287, U.N. Doc. A/CN.4/SER.A/1994/Add.1 (providing that "[i]n imposing sentence, the Trial Chamber should take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.").

to various types of crimes to be spelled out. The view was also expressed that minimum penalties should also be made explicit in view of the seriousness of the crimes.[314]

With regard to imprisonment sanctions, Articles 23 and 77 work in tandem. Article 77 sets out the ICC's powers regarding the sanction of imprisonment. It gives the court two alternatives: judges must make a choice between imprisonment of not more than thirty years[315] or life imprisonment. This structure resulted from the insistence of states for clarity as to the maximum sentence,[316] a recognition of the *lex scripta* and *lex certa* attributes of *nulla poena*.[317] The idea to include a maximum term for a sentence of determinate years originated with France and other civil law countries in order to, in the view of one participant,[318] "increase legal certainty with regard to the range of imprisonment."[319] Consequently, a degree of specificity was introduced into international criminal justice that did not exist in the statutes of previous international criminal tribunals.[320] Under the statutes of the IMT, IMTFE, ICTR and ICTY, a person could be sentenced to forty years or fifty years or any other period of time.[321] The ICC Statute, however, does not provide precise penalties for specific crimes, despite the wide range of offenses and modes of participation that the court is called upon to judge. Thus, the sentencing scheme in Article 77 applies to all crimes within the ICC jurisdiction.

When determining a sentence within this structure, judges must take into account two factors: "gravity of the crime" and "the individual circumstances of the convicted person."[322] In the practice of the ICTY, the "gravity of the crime" emerged as the key factor in

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[314] *Report of the Ad Hoc Committee to the General Assembly on the Establishment of an International Criminal Court*, 50 U.N. GAOR Supp. (No. 22) at 36, para. 187, U.N. Doc. A/50/22 (1995) [hereinafter 1995 Ad Hoc Committee Report].

[315] Proposals on the maximum years for a specific term of imprisonment ranged from twenty to forty. *See* Fife, *supra* note 302, at 990 n.24.

[316] *Id*. at 1424; *see also* Rolf Einar Fife, *Penalties*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, AND RESULTS 319, 319 (Roy S. Lee ed., 1999)

[317] Further indicia of this recognition can be found in the support of some countries for the inclusion of minimums as well as maximums. *See* ICC Prep. Committee's 1996 Report, *supra* note 36, at 63; *see also* Compilation of Proposals, *supra* note 118, at 227-34; Preparatory Committee on the Establishment of an International Criminal Court, *Decisions Taken by the Preparatory Committee at its Session Held from 1 to 12 December 1997*, U.N. Doc. A/AC.249/1997/L.9/Rev.1 (1997); United Nations Diplomatic Conference on the Plenipotentiaries on the Establishment of an International Criminal Court, June 15-17, 1998, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, arts. 75-79, U.N. Doc. A/CONF.183/2/Add.1 (April 14, 1998).

[318] Rolf Einar Fife (Norway), Chairman of the Working Group on Penalties.

[319] Fife, *supra* note 302, at 990.

[320] *Compare* ICC Statute, *supra* note 13, art. 77, *with* ICTY Statute, *supra* note 12, art. 24, *and* ICTR Statute, *supra* note 169, art. 23.

[321] *E.g.*, General Radislav Krstić was sentenced to forty-six years of imprisonment. *See* Prosecutor v. Krstić, Case No. IT-98-33-T, Trial Judgment, para. 726 (Aug. 2, 2001). On appeal, his sentence was reduced to thirty-five years. *See* Prosecutor v. Krstić, Case No. IT-98-33-A, Appeal Judgment, 87 (Apr. 19, 2004).

[322] ICC Statute, *supra* note 9, art. 78(1).

sentencing,[323] and the ICC's reliance on it to produce a just sentencing practice should not be underestimated. "Gravity of the crime" appears as the key criterion in two places in the Statute. Under Article 77(1)(b), "gravity of the crime" is relied on to determine the appropriateness of life imprisonment. At minimum, the "gravity of the crime" must be "extreme" in order to justify life imprisonment. It appears again in Article 78(1) as a general factor in determining the appropriate length of any sentence.

3. Life Imprisonment

Article 77(1)(b) provides two general qualifications intended to limit the application of life imprisonment. Life imprisonment should only be imposed "when justified by the extreme gravity of the crime and the individual circumstances of the convicted person." Both criteria must be met before an individual can be sentenced to life imprisonment. There are no crimes for which the Statute categorically excludes the applicability of a life sentence. Consequently, even with the intended limitation in Article 77(1)(b), life imprisonment is theoretically applicable to all the crimes within the Statute.

A life imprisonment sentence is, to state the obvious, a severe sanction.[324] The drafting and negotiation process revealed a notable divide between some states on its propriety. Several European and Latin American countries opposed, in principle, the inclusion of life imprisonment within the ICC's statute, and at minimum, its imposition without the possibility of parole.[325] Some states viewed life imprisonment as cruel, inhuman, and degrading punishment.[326] As such, in their view, it violated provisions of international human rights treaties.[327] Other states disagreed, stressing the importance of including severe penalties within the ICC's power because the penalties under consideration were to be applied to the most serious crimes of international concern.[328] Accordingly, they supported the inclusion of life imprisonment and, in the case of some states, the death penalty, "as a prerequisite for the credibility of the International Court and its deterrent functions."[329] Thus, on the question of which penalties should be placed under the ICC's authority, the views among the states ranged

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[323] *See, e.g.*, Prosecutor v. Delalić, Case No. IT-96-21-A, Appeal Judgment, para.731 (Feb. 20, 2001); Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Appeal Judgment, para.182 (Mar. 24, 2000).

[324] For further reading on life imprisonment, see DIRK VAN ZYL SMIT, TAKING LIFE IMPRISONMENT SERIOUSLY IN NATIONAL AND INTERNATIONAL LAW (2002).

[325] *See* SCHABAS, *supra* note 82, at 141; Fife, *supra* note 302, at 990.

[326] SCHABAS, *supra* note 82, at 141.

[327] The view that life imprisonment is unacceptable from a human rights perspective remains contentious. The majority of states allow for it. For further reading, see Schabas, *supra* note 74, at 461.

[328] Fife, *supra* note 302, at 986-87.

[329] *Id.*

from those who supported the inclusion of death penalty to those who argued against life imprisonment.

Given this diversity in views, it is perhaps surprising that further efforts were not made in the Working Group on Penalties to make appropriate distinctions among the range of crimes within the ICC's jurisdiction as to the applicable penalty for each, or at the very least, to identify those crimes for which a life sentence would be excluded. Instead, a compromise was made excluding the death penalty, but allowing for the sanction of life imprisonment which would be generally applicable to all crimes and levels of culpability, albeit with the qualification found in Article 77(1)(b). While this clause arguably places a formal limitation on the imposition of life imprisonment, its undefined quality has the potential to betray the aim of consistent application.

4. Statutory Provisions Advancing the Nulla Poena *Norm*

The Statute contains several articles which serve to strengthen its compliance with *nulla poena sine lege*. As illustrations, three of them will be discussed here. The first is a mandatory review procedure; the second pertains to specific rules regarding sentencing in the case of multiple convictions; and finally, the third covers sanctions for offenses against the administration of justice.

i. Mandatory Review of Sentences

The inclusion of a mandatory review mechanism was inspired by concerns regarding the ICC's authority to impose the sanction of life imprisonment without the possibility of parole.[330] In the final text of the ICC Statute, however, it was made widely applicable to all imprisonment sentences. The procedure is laid out in Article 110, which places upon the court a legal obligation to review the sentence after a specified period of time.[331] It provides the convicted person with legal certainty that his or her sentence will be reviewed for possible reduction. Thus, the Statute gives rise to a right of the accused to a review of his sentence during the execution phase. Significantly, these provisions represent an effort to improve the *lex scripta* and *lex certa* qualities of international sentencing by extending legal certainty into the enforcement stage. Thus, the ICC Statute extends the reach of the *nulla poena sine lege* maxim to execution of penalties. In the context of the ICTY, early commentators on the statute

[330] *Id.* at 988.

[331] For a general commentary on this article, see Gerhard A.M. Strijards, *Review by the Court Concerning Reduction of Sentence*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 302, at 1197, 1197.

concluded that *nulla poena sine lege* applies to the execution of sentences, although they did not elaborate on how they reached this conclusion.[332]

Indeed, a modern approach to *nulla poena sine lege*, which appreciates that it functions more than simply as a principle prohibiting the imposition of a penalty heavier than the one applicable at the time the offense was committed, supports the position of these authors. In its first sentencing judgment, the ICTY held that "[t]he principle of *nulla poena sine lege* must permit every accused to be cognisant not only of the possible consequences of conviction for an international crime and the penalty but also the conditions under which the penalty is to be executed."[333] Interestingly, the Trial Chamber's rationale for its holding appears to not be premised so much on *nulla poena*'s protectionist function but rather its "quality of justice" function: "[T]he Trial Chamber is concerned about reducing the disparities which may result from the execution of sentences."[334] On the other hand, where the analysis of *nulla poena* is limited to its *lex praevia* principle, some commentators have argued that it "applies only to the nominal penalty imposed, not to the manner of its enforcement. Hence, it does not prevent any retroactive alteration in the law or practice concerning the parole or conditional release of a prisoner."[335] In light of such varying opinions among human rights scholars, it is regrettable that the formulation of *nulla poena sine lege* within the ICC framework did not explicitly codify *lex praevia* into Article 23.[336]

Regarding execution of the sentence, a question for future research that is particularly pertinent to ICL punishment would be whether *nulla poena sine lege* extends to where imprisonment will be served. International war criminals face the very real prospect that they will serve their sentence in a foreign country. This can increase the harshness of the punishment. The convicting person may be unfamiliar with the local language and culture or may have zero or little possibility of visits from family and friends, increasing the harshness of isolation. These conditions increase the severity of the punishment in a very real sense. Likewise, drastically disparate prison conditions among the different countries that execute the sentences of ICL tribunals also has a bearing on the severity of the punishment. As explained in Chapter One, matters concerning the enforcement of ICL sentences fall outside the scope of this study; nevertheless, theses issues deserve further exploration in future studies.

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[332] *E.g.*, BASSIOUNI & MANIKAS, *supra* note 15, at 692.
[333] Prosecutor v. Erdemović, Case No. IT-96-22-T, Sentencing Judgment, para. 70 (Nov. 29, 1996).
[334] *Id.*
[335] *E.g.*, D.J. HARRIS, M. O'BOYLE & C. WARBRICK, LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 281 (1995); *cf. Erdemović*, Case No. IT-96-22-T, Sentencing Judgment, para. 70.
[336] *See supra* Part IV.C(1).

ii. Specific Rules for Multiple Convictions

Particular rules regarding sentencing in cases of multiple convictions are provided for in Article 78(3),[337] thereby strengthening the *lex certa* characteristic of the Statute's sentencing provisions. It contains two mandatory features that are important to compliance with *nulla poena*. The first pertains to the obligations of the ICC when imposing a sentence for multiple convictions. "When a person has been convicted of more than one crime," Article 78(3) requires the court to first "pronounce a sentence for each crime" individually. The court "shall" then also pronounce a joint sentence "specifying the total period of imprisonment." This requirement marks an improvement on a fainéant practice that had developed in some trial chambers of the ICTY and ICTR to simply provide only a single overall sentence without enumerating specific sentences for each conviction. It has been widely assumed that the RPE of the ad hoc tribunals authorized the practice of rendering a single sentence[338] at the time it was introduced in the *Blaškić* case.[339] Although General Blaškić was convicted of multiple crimes, the Trial Chamber did not render multiple sentences, opting instead for the less distinctive approach of rendering a single sentence for all crimes.[340] To justify its departure from the then existing practice of other ICTY trial chambers, the *Blaškić* Trial Chamber curiously turned to Rule 101 and observed that it "does not preclude it from passing a single sentence for several crimes."[341] At the time, however, Rule 87(C) *did* preclude the Trial Chamber from passing a single sentence for multiple crimes and it is quite egregious that the Trial Chamber did not even mention this Rule.[342] Rule 87(C) required the Trial Chamber to impose a sentence with respect to *each* finding of guilt: "If the Trial Chamber finds the accused guilty on one or more of the charges contained in the indictment, it shall at the same time determine the penalty to be imposed in respect of each finding of guilt."[343] Thus, when the *Blaškić* Trial Chamber introduced the practice of single sentencing, it did so in contravention

[337] *See* Mark Jennings, *Determination of the Sentence*, *in* COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 302, at 999, 999-1004.

[338] This is sometimes referred to as a "global" sentence.

[339] Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment, paras. 805-07 (Mar. 3, 2000) (noting that "until now the ICTY Trial Chambers have rendered Judgements imposing multiple sentences"). For a commentary on the sentencing analysis of the *Blaškić* Trial Chamber, see Dana, *supra* note 275. *See* United Nations, www.un.org/icty (last visited Mar. 3, 2008) (containing a full text of all ICTY judgments cited herein); 4 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS 477-667 (André Klip & Göran Sluiter eds., 2002) (containing a full text of the *Blaškić* judgment, along with notes and commentary).

[340] *Blaškić*, Case No. IT-95-14-T, Judgment, para. 807.

[341] *Id.* at para. 805.

[342] *See* ICTY RPE, *supra* note 175, R. 87(C).

[343] *Id.*

of the ICTY RPE.[344] Subsequently, following two revisions of the ICTY RPE, the Rules caught up to reflect the practice of single sentencing, and Rule 87(C) was amended to allow the imposition of single sentences for multiple crimes.[345]

The lack of transparency resulting from a single sentence approach undermines the criminal justice process. For example, it leaves the Appeals Chamber without any indication of how each conviction influenced the overall sentence in the event that one conviction is overturned. Likewise, both the accused and the prosecution are placed at a disadvantage when seeking to challenge a sentence on appeal. This is particularly concerning for the accused, whose right to an effective appeal is thereby undermined. Accordingly, this first feature of Article 78(3), obliging the court to render a sentence for each crime in addition to an overall sentence reflecting the total period of imprisonment, strengthens the *lex certa* principle of *nulla poena* in connection with sentencing before the ICC.

The second feature places mandatory limitations on the outer ranges of the imprisonment period. Article 78(3) mandates that the total period of imprisonment "shall not exceed 30 years," or, alternatively, life imprisonment, provided that the requirements of Article 77(1)(b) are satisfied. At the other end of the spectrum, the total period cannot be less than the highest individual sentence imposed.[346]

Thus, Article 78(3) strengthens the Statute's compliance with the *nulla poena sine lege* principle in at least two ways. First, by providing a sentencing provision dealing directly with multiple convictions, state parties to the Rome Treaty have signaled recognition in principle that such matters should be addressed in the constitutional framework of an international penal court as required by *lex scripta*, the codification requirement of *nulla poena*. By incorporating this rule within the Statute itself, the drafters have further protected the value of legal certainty by preventing a trial chamber from departing from the rules that an accused can reasonably expect to rely on, and subsequently burying its breach under layers of revisions to the rules of procedure and evidence. Here, a clear improvement is evidenced in the ICC Statute over the statutes of its predecessor tribunals, which were silent on the issue. Next, it sets statutorily

[344] Not only has the *Blaškić* Trial Chamber relied on the wrong rule, it has also relied on case law that is not on point. After acknowledging that the practice of ICTY trial chambers has been to render multiple sentences, it relied on two ICTR cases to justify its decision to violate the ICTY Rules of Procedure and Evidence and deviate from ICTY practice. The two ICTR cases relied on were not even factually or procedurally similar to qualify them as relevant authority since both resulted from guilty pleas by the defendant, which may provide more justification for a single sentence. In any event, a factually and procedurally irrelevant case from another tribunal can hardly serve as sufficient grounds for the *Blaškić* Trial Chamber to ignore its own rules of procedure as well as depart from existing practice at the ICTY.

[345] *See* Rules of Procedure and Evidence of the International Tribunal for the Former Yugoslavia, R. 87(C), U.N. Doc. IT/32/Rev.19 (Dec. 13, 2000).

[346] ICC Statute, *supra* note 13, art. 78(3).

codified limits on the terms of imprisonment in the event of multiple convictions, thereby moving towards better fulfillment of *lex certa*. To the degree possible given Article 77's own shortcomings on *lex certa*, Article 78 provides a measure of clarity and predictability in sentencing situations involving multiple convictions.

iii. Legal Authority for Sanctions Relating to Contempt of Court

The sanctions set forth in Article 77 are applicable only to a "person convicted of a crime referred to in article 5 of this Statute."[347] Therefore, it does not empower the court to impose sanctions for contempt of court, misconduct, or offenses against the administration of justice, which must likewise satisfy *nulla poena sine lege* pursuant to Article 23. The ICC's authority and the limitations regarding these sanctions are provided for in Articles 70 and 71. Article 70 sets out a range of offenses relating to the obstruction of justice[348] and provides a specific penalty provision authorizing the ICC to impose a maximum of five years imprisonment.[349]

Interestingly, the ICC's authority to impose sanctions for what can be generally considered contempt of court could have easily been left to the judges to develop under the doctrine of inherent judicial powers.[350] The inclusion of these specific provisions indicates a strict approach, by the drafters of the Statue, to *nulla poena sine lege* in the Article 23. The judges ought to rely on this teleological perspective when determining the general nature of the *nulla poena* norm while developing the ICC sentencing practice.

5. Shortcomings on Compliance with Nulla Poena Sine Lege

There can be little doubt that the ICC Statute represents a marked improvement over the statutes of its predecessor courts when it comes to provisions on sentencing. A certain degree of respect for the principle of legality, *nulla poena sine lege*, must be acknowledged within the ICC structure. But does it go far enough? If criticism were to be entertained, or put differently, if areas for improvement through possible future amendments are to be considered, the Statute's primary weakness lies in its satisfaction of the *lex certa* requirement of *nulla poena*, namely that penalties should be specific and precise, thereby providing a sufficient degree of legal certainty. This shortcoming is typified in two compromising characteristics of the

[347] *Id.* art. 77(1).
[348] *Id.* art. 70(1)(a)-(f).
[349] *Id.* art. 70(3) (providing that the court may also impose a fine).
[350] The ICTY and ICTR statutes did not contain provisions dealing directly with contempt of court and its corresponding sanctions. For a commentary on select decisions of the ad hoc Tribunals on contempt of court, see Shahram Dana, *The Law of Contempt Before the UN ICTR*, *in* 10 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS 278 (André Klip & Göran Sluiter eds., 2006); Taru Spronken, *Commentary*, *in* 7 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS, *supra*, at 225, 225.

Statute's sentencing provisions—generality and ambiguity: "generality" because it lacks sufficient distinctions between penalties for the variety of crimes within its jurisdiction, and "ambiguity" because it relies on vague sentencing criteria.

i. The Problem of Generality: All for One and One for All

The problem of generality appears at two levels. At the level of application, the "gravity of the crime" serves as a determinative criterion both in the specific application of life imprisonment[351] and also in the general determination of any term of imprisonment.[352] At the framework level, the ICC Statute contains a single sentencing scheme, with alternative maximums, applicable to any and all offenses under its jurisdiction. In other words, either maximum can be applied to all crimes, including inchoate crimes, and all modes of participation. The ICTY and ICTR statutes, which likewise did not provide specific penalties for particular crimes or categories of crimes, were criticized for not satisfying *nulla poena sine lege*. The ICC Statute is likewise open to the same criticism.[353] This framework departs from the example of most national criminal codes, which establish a precise penalty range for individual offenses. Thus, measured against the practice of states, the ICC sentencing provisions lack sufficient precision and specificity.

This is particularly disconcerting in relation to life imprisonment. The general applicability of the most severe sanction to all crimes within the ICC's jurisdiction compromises the *lex certa* requirement and ultimately, it must be admitted, encroaches on the accused's right to legal certainty.[354] It is tempting to justify this failure on the grounds that further agreement among states on specific penalties could not be reached. While it is true that states are sharply divided on issues surrounding the death penalty, and even to some extent, the propriety of life imprisonment, this explanation is not entirely satisfying.

First, given the range of crimes within the ICC's jurisdiction and forms of individual participation,[355] some degree of separation can be made as to the severity of the sanction applicable. At a most basic level, for example, offenses against property and offenses against life can be distinguished. There is a hierarchy of interests protected by international crimes

[351] ICC Statute, *supra* note 13, art. 77(1)(b).
[352] *Id.* art. 78(1).
[353] *See* BASSIOUNI & MANIKAS, *supra* note 15, at 689.
[354] For example, in the event that an accused pleads guilty to a crime, he has no certainty about the upper limits of penalty he will face, and his lawyer cannot provide sufficient legal advice on the matter.
[355] For the purposes of *punishability* of conduct, the Statute recognizes both completed crimes and inchoate crimes. It further recognizes that individual participation in crimes can take on different forms. *See* ICC Statute, *supra* note 13, arts. 25, 28.

including the interest of the international community in the existence of groups of people, the interest in freedom from terror and persecutory acts, the interest in individual life, the interest in bodily integrity, the interest in cultural property, and so on.[356] The interests protected are distinguishable, as is the mode of participation, the criminal intent, and the harm committed. Therefore, appropriate distinctions must likewise be made in applicable penalties. Second, the difference between states on specific philosophical concerns, such as the propriety of the death penalty, has been unnaturally stretched into a perceived general disagreement on foundational principles and methodologies useful for distinguishing penalties. All states make general distinctions between offenses against property and offenses against a person, between commission and attempt, and between different mental states. Third, reports from the preparatory meetings reveal a lot of political jockeying, which was the root of much disagreement.[357] Many delegates took the position that they could not discuss other sentencing matters until the issues surrounding the death penalty were resolved. This tactic was motivated by concerns pertaining to national interests and a firm intent to protect a state's sovereignty in applying particular penalties domestically without prejudice arising from the provisions of the ICC. It had marginal relevance to reaching agreement on distinguishing between various offenses in terms of severity and, unfortunately consumed precious time in which issues such as hierarchy of crimes, criminal intent, mode of participation, and resulting harm could have been discussed in relation to applicable penalties. In addition to these hindrances, there appears to be some cavalier, if not misplaced, confidence that, since we are dealing with the most horrible crimes, the most severe penalties will be applied. The reasoning is attractive; yet, the actual practice betrays that presumption. The practice of the ICTY in particular is littered with instances of lenient penalties.[358] Thus, the implicit presumption (that we give the harshest penalties anyway) behind the indifference towards the need for an advanced sentencing regime

[356] The scope of this comment does not permit further elaboration on the question of hierarchy of crimes in international law. Various proposals have been made based on different methodologies for creating a hierarchy. For further reading, see Pickard, *supra* note 21 (advancing a comparative analysis of the same or comparable crime in the domestic law of twelve states); Andrea Carcano, *Sentencing and the Gravity of the Offense in International Criminal Law*, 51 INT'L & COMP. L.Q. 583 (2002) (proposing a ranking scheme based on combining both gravity *in abstracto* and gravity *in concerto*); Allison Marston Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, 87 VA. L. REV. 415 (2001) (proposing a hierarchy of crimes based on an abstract assessment of harm combining the substantive elements of the crime with its jurisdictional elements in the *chapeau*).

[357] Schabas, *Penalties*, *supra* note 114, at 1533.

[358] *E.g.*, Prosecutor v. Plavsic, Case No. IT-00-39 & 40/1-S, Sentencing Judgment, para. 134 (Feb. 27, 2003) (imposing only eleven years imprisonment on a high-ranking leader indicted for genocide and convicted of crimes against humanity). For a critical analysis of undue leniency in sentencing by the ICTY, see Shahram Dana, *A Turning Point in International Criminal Justice*, *in* 11 ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS 962, 962 (André Klip & Göran Sluiter eds., 2007); *see also* Milanka Saponja-Hadzic, *Hague Deals Reduce Impact*, INST. FOR WAR & PEACE REPORTING, July 24, 2003, http://www.iwpr.net/?p=tri&s=f&o=164725&apc_state=henitri2003 (noting local reactions).

is simply unsustainable and can no longer be accepted as a tacit reason for not advancing international sentencing law.

ii. The Problem of Ambiguous Criteria

The ICC Statute contains two dangerously ambiguous criteria for determining a sentence: "gravity of the crime" and "extreme." They strongly resemble the language of general guidelines or "benchmarks" in standard setting international treaties; yet they are not functionally intended as such. They carry a much weightier role within the ICC sentencing framework. The Statute has elevated these benchmark provisos to the level of legal criteria. The question thus arises whether "gravity of the crime" and "extreme" qualify as legal criteria and whether they can adequately satisfy *nulla poena sine lege*.[359]

Reliance on the phrase "gravity of the crime" to generate a fair and consistent sentencing practice is beset with many difficulties.[360] First, the Statute does not rank the gravity of crimes within its jurisdiction and contains no gradation among the crimes. Second, the phrase is not defined anywhere in the Statute. Third, the phrase is open to varying interpretations, each being legally tenable but leading to different outcomes, and thus resulting in inconsistent sentences. The ICC forum is particularly vulnerable to this danger because its judges are drawn from diverse legal, political, philosophical, and cultural backgrounds. From case to case, accused to accused, the composition of judges will change dramatically and randomly. Fourth, despite hopes to the contrary,[361] the sentencing jurisprudence of the ICTY and ICTR is not sufficiently developed or coherent to provide meaningful, consistent guidance on interpretation and

[359] Curiously, these criteria were challenged as being contrary to *nulla poena sine lege* more than fifty years ago, when a 1951 proposal of the International Law Commission for the Draft Code of Offenses against the Peace and Security of Mankind employed similar criteria ("gravity of the offense") for the determination of penalties. *See* Schabas, *Perverse Effects*, *supra* note 114, at 523-24.

[360] *See* Margaret M. DeGuzman, *Harsh Justice for International Crimes*, 39 YALE J. INT'L L. 1, 17-24 (2014).

[361] *See* Jennings, *supra* note 337, at 1436 (asserting that "[t]he sentencing jurisprudence of the ICTY and the ICTR will provide the Court with useful guidance on the *comparative* gravity of the crimes" (emphasis added)). Regrettably, his reliance on a brief quote from one ICTR case (*Kambanda*) is insufficient for such a grand assertion. In broad strokes, the *Kambanda* case merely states that crimes listed under the category of war crimes are not as serious as those under the heading of genocide and crimes against humanity. Even judges at the ICTR consider this inadequate to provide meaningful guidance. *See* Prosecutor v. Ntagerura, Case No. ICTR-99-46-T, Judgment & Sentence, para. 812 (Feb. 25, 2004) (expressing concern "that the practice of awarding a single sentence for the totality of an accused's conduct makes it difficult to determine the range of sentences for each specific crime"). Moreover, his analysis does not consider case law from the ICTY to support his assertion. In fact, ICTY jurisprudence rejects the hierarchy set out in *Kambanda*, and thus, far from providing any such "useful guidance," there exists some inconsistency between the ICTY and ICTR rulings. Other commentators on this issue have strong reservations as to whether the case law of the ad hoc tribunals will provide any substantial utility on sentencing matters for the ICC. *See* Danner, *supra* note 356, at 501; Pickard, *supra* note 21, at 137; *see, e.g.*, Dirk van Zyl Smit, *International Imprisonment*, 54 INT'L & COMP. L.Q. 357, 367 (2005).

application of this concept.[362] A major culprit here is the "single" or "global sentencing" practice of the ad hoc tribunals in case of multiple convictions which has inhibited the maturation of sentencing norms in international criminal justice.[363]

The problem of ambiguity also arises in the method of distinguishing between the application of life imprisonment sentences and sentences for a fixed period of time not to exceed thirty years. The inclusion of this separation may be viewed as an improvement upon the statutes of the ad hoc tribunals which contained no limitation on sentences for a term of years. However, what was gained in terms of legal certainty by the inclusion of a maximum for non-life sentences was largely taken away by the statutory criteria for making the distinction. The Statute informs us that the difference between life imprisonment and thirty years lies somewhere between "extreme gravity of the crime" and "gravity of the crime." The notion of "extreme" is an insufficient criterion; it is vague and general at best, and superfluous at worst, given that the ICC is intended to deal with the "most serious" crimes in the first place.[364] Paradoxically, with its optional approach to maximum penalties combined with ambiguous criteria for selection, the ICC sentencing structure arguably results in less legal certainty. Furthermore, an accused, who is contemplating pleading guilty to a charge, has no legal certainty as to which of the alternative maximum penalties will be applied. Additionally, the challenge of applying these criteria to make necessary distinctions at sentencing is further aggravated by the constant rhetoric that the ICC was created to deal with only the most serious and gravest of crimes. This over-inflation comes at the cost of meaningful analysis. While the ICC is intended to deal with only serious crimes committed in grave contexts, all crimes within its jurisdiction are not of equal gravity.

V. CONCLUSION

One of the most fundamental rights of an individual is the right to liberty. Therefore, any institution vested with power to deprive persons of their liberty must exercise that power in accordance with basic human rights and fundamental principles of criminal law. *Nulla poena sine lege* is among the chief guardians of this right.

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[362] *See generally* Jens David Ohlin, *Towards a Unique Theory of International Criminal Sentencing*, in INTERNATIONAL CRIMINAL PROCEDURE: TOWARDS A COHERENT BODY OF LAW 373 – 404 (Göran Sluiter & Sergey Vasiliev eds. 2009).

[363] *Ntagerura*, Case No. ICTR-99-46-T, Judgment & Sentence, para. 812 (expressing concern "that the practice of awarding a single sentence for the totality of an accused's conduct makes it difficult to determine the range of sentences for each specific crime").

[364] *See* ICC Statute, *supra* note 13, pmbl. At least one commentator points out that "[t]he curious reference to 'extreme gravity of the crime' may seem out of place, since the Court is designed to try nothing but crimes of extreme gravity." SCHABAS, *supra* note 82, at 141.

The penalty provisions of the IMT, IMTFE, ICTY, and ICTR attracted criticism in legal commentaries for not meeting the requirements of *nulla poena sine lege*.[365] While the sentencing practice of modern international tribunals can hardly be characterized as an "abuse of power," the absence of a more complete approach to *nulla poena*, by both judges and drafters of statutes, has harmed the quality of justice rendered by them.[366] The sentencing practice gives the appearance of an inconsistent body of law, or at least a jurisprudence that provides little guidance to the ICC. Too often, sentences imposed from case to case appear irreconcilable.

Examining *nulla poena sine lege* through its underlying legal principles aids our understanding of its role and potential contribution to international justice. The general picture that emerges after examining treaties, custom, and general principles of law is that *lex scripta*, *lex certa*, *lex stricta*, and *lex praevia* are part of the international standard for *nulla poena sine lege*. While *lex praevia* has been explicitly codified in numerous international and regional human rights treaties, international courts have held that these provisions represent a *nulla poena sine lege* standard that embodies more than a prohibition of retroactive application of a heavier penalty, but also includes the prohibition of analogy in selecting a penalty, the requirements of legal certainty, and the obligation to clearly define penalties.[367] Furthermore, all four legal principles underlying *nulla poena sine lege* constitute general principles of law recognized in the vast majority of world's legal traditions.[368] State practice, in the context of their domestic legal systems, evidences strong adherence to these principles. Moreover, the views expressed by states in international forums indicate that these principles also apply to international criminal justice.

Adherence to *nulla poena sine lege* can serve to achieve the aim of consistency in sentencing. It can also remove, or significantly limit, the influence of arbitrary factors in the determination of a penalty. While the administration of criminal justice has made great advances over the past half century, the problem of emotive influences on punishment remains even today, both domestically and internationally.[369]

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[365] *See* BASSIOUNI & MANIKAS, *supra* note 15, at 689 (claiming that the imprecision of the penalty provisions of the statutes of the ad hoc tribunals violates *nulla poena sine lege*); Fife, *supra* note 302, at 987-88; Scalia, *Long-term Sentences in ICL, supra* note 170; *cf.* Schabas, *supra* note 74, at 469.

[366] Mark B. Harmon & Fergal Gaynor, *Ordinary Sentences for Extraordinary Crimes*, 5 J. INT'L CRIM. JUST. 683 (2007) (expressing concern regarding low sentences by the ICTY and the systematic inconsistency and discrepancy when compared to the length of sentences at the ICTR).

[367] *See supra* Parts III.A and III.C-D; *see also Danzig Decrees*, *supra* note 138; Başkaya v. Turkey, App. Nos. 23536/94 & 24408/94, Judgment, 31 Eur. H.R. Rep. 10, para. 36 (1999).

[368] GALLANT, *supra* note 53, at 243-46; Bassiouni Study, *supra* note 84.

[369] The abusive practices that appear to be on the rise in the name of "fighting against terrorism" remind us of the dangers of unchecked powers. In the context of international criminal prosecutions, emotive influences may be suspected in the sentencing of Duško Tadić. *See* Prosecutor v. Tadić, Case No. IT-94-1-T, Sentencing Judgment (July 14, 1997). Although a relatively minor figure according to the Trial Chamber's own assessment,

The time is ripe for international justice to grow out of its adolescence and develop into a mature legal system.[370] There are positive signs of movement in this direction. For example, the ICC Statute requires the court to first pronounce a sentence for each crime individually before rendering an overall sentence in the case of multiple conventions. This hopefully puts a stop to the practice of single sentencing which has inhibited the maturation of international sentencing norms. Likewise, despite the fact that the ICTY and ICTR freely employed the use of analogy in their sentencing practice, *lex stricta* still received positive recognition in international law through the Rome Treaty of the ICC. Additionally, early jurisprudence of the ICC indicates greater appreciation for the positive justice role of *nulla poena*. Notably, the ICC recognized that *nulla poena* in ICL includes the *lex certa* requirement.[371] Furthermore, the ICC's brief mention of the role of *nulla poena* in atrocity sentencing appear to prioritize the principle of legality over the principle of proportionality.[372] That is, even if the principle of proportionality demands a severe punishment, such a sentence cannot be imposed if it violates *nulla poena*. This is a notably different tone and attitude towards *nulla poena* then typically shown by ICL judges.

Thus, there are general signs of increasing appreciation that *nulla poena sine lege* is not only a principle associated with negative rights but can also contribute greatly to positive justice in punishing atrocities. These developments further bolster the view that the *ad hoc* tribunals' approach on these matters was not in keeping with the international standard for *nulla poena sine lege*.[373] Too often, ICL judges prioritized the way the Nuremberg Tribunal did things as a precedent and guide for their rulings, an approach that often ignored or marginalized substantial developments in both criminal law and human rights law since the Nuremberg trials. As Gallant's research demonstrates, the Nuremberg position on legality, even if good law then, is no longer the law now.[374]

Tadić had the misfortune of being the first defendant to arrive at the ICTY. While not suggesting that his twenty-year sentence was unjust per se, it was harsher treatment than that imposed on others with similar criminal culpability who came later and perhaps even more severe than the sentences imposed on other war criminals with more blood on their hands.

[370] To achieve this would naturally require progress on other fronts besides international sentencing, for example, on matters pertaining to enforcement and police powers. In the context of international prosecutions, it would mean loosening its dependence on state authorities for the execution of basic police powers such as investigations, arrests of suspects, and seizure of evidence and assets.

[371] *Prosecutor v. Germain Katanga*, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/04-01/07 (23 May 2014) para. 39.

[372] *Id*.

[373] *See also*, Silvia D'Ascole, *Sentencing in International Criminal Law: The Approach of the Two UN ad hoc Tribunals and Future Perspectives for the International Criminal Court*, Ph.D. dissertation, European University Institute, p. 361 (finding that the law of the ICTY, ICTR, and ICC falls short on respecting *nulla poena sine lege*).

[374] GALLANT, *supra* note 53, at 404-406.

Although the ICC sentencing provisions mark an improvement over their counterparts in the statutes of the *ad hoc* tribunals to the extent that the ICC Statute contains a clear ceiling on sentences for a term of years, the ICC provisions nevertheless continue to carry the fundamental weaknesses of the earlier statutes—generality and ambiguity—into the most recent code for international criminal justice. They do not provide penalty ranges or maximums for particular crimes or categories of crimes. This framework falls short of the standard present in the laws of most nations that there be a penalty range or clear maximum penalty attached to each crime.

Another weakness of the ICC sentencing provisions is that they rely on ambiguous criteria. Sentencing frameworks that rely almost entirely on such criteria without providing penalty ranges for separate crimes must be seen as relics of a nascent period in international war crimes prosecutions. Reliance on ambiguous and elastic criteria coupled with a lack of penalty ranges for individual crimes is an invitation to sentencing chaos and the appearance of injustice. In the ICC sentencing provisions, particular concern surrounds the consistent application of life imprisonment. The qualification of "extreme gravity of the crime" is too elastic to satisfy the *lex certa* requirement of *nulla poena*, especially given the severity of the sanction.

The enforcement of penalties has been briefly touched upon but, for reasons set out in Chapter One (Introduction), a detailed discussion of it is beyond the scope of this study. Given that the ICC and other international criminal tribunals lack their own permanent penitentiary systems, an issue worthy of further exploration is the role and relevance of *nulla poena sine lege* to the execution of penalties issued by international criminal courts. Here again, the nature of the discussion will differ depending on whether the analysis is focused only on the negative rights dimension of *nulla poena sine lege* or whether its positive justice role is also considered.[375]

It is in light of its positive justice role that *nulla poena sine lege* has much to contribute to legitimacy and justice in punishing atrocity perpetrators. What little consideration commentators have given to *nulla poena* has focused on its traditional role, namely its negative rights dimension, and in particular on the issue of retroactivity. If the discussion is to continue to be limited to this perspective, then indeed all the fuss over *nulla poena* is "difficult to

[375] For ICC provisions governing enforcement of sentences, see ICC Statute, *supra* note 13, arts. 103-10. In light of the fact that diverse states will carry out the execution of the sentences and that the conditions of imprisonment shall be governed by the law of the enforcing state, the ICC and the judges will need to exercise oversight to ensure equal treatment of convicted persons when it comes to conditions of detention, parole, or pardon.

understand" as William Schabas puts it.[376] On the other hand, if we broaden our understanding of *nulla poena* to embrace its positive justice function, such as ensuring equality before the law, consistency in sentencing, and justice in the distribution of punishment for mass atrocities, then we might realize it still has much to offer to international criminal justice. Reimagining the role of *nulla poena* in punishing atrocities opens one of the potential pathways to improving ICL sentencing practice. Another pathway to improving atrocity sentencing lies in reflection on ideologies and rationales that in practice have impacting the quantum of punishment. These reflections are picked up in the next chapter.

[376] *See* Schabas, *supra* note 74.

CHAPTER THREE
IDEOLOGIES & SENTENCING RATIONALES FOR ATROCITY CRIMES

"Men are unable to forgive what they cannot punish."
- Hannah Arendt, The Human Condition (1958)

I. INTRODUCTION

What justifies international criminal justice mechanisms? How should those justifications influence sentencing for atrocity crimes? These are questions that judges at international criminal courts and tribunals never really settled. Over time, international judges advanced an impressive array of functions of international criminal justice. ICL sentencing jurisprudence itself does not robustly distinguish between a *justification* for punishment versus the *aims* of punishment. Canvassing the discourse surrounding international criminal courts, the following ambitions are often associated with international criminal justice: retribution, deterrence, reconciliation, rehabilitation, incapacitation, reparations to victims, general affirmative prevention, expressive and/or didactic functions, historical recording building and preventing revisionism, denouncing racism, religious persecution, and other discriminatory ideologies, restoration, crystallizing international norms, public stigmatization by the international community, establishing peace, preventing war, disarming urges for revenge, establishing a narrative the culpability is individual not collective, vindicating international law prohibitions, setting standards for fair trials, and ending impunity.[1]

[1] *See e.g.* Mark Drumbl, *Punishment and Sentencing* in: THE CAMBRIDGE COMPANION TO INTERNATIONAL CRIMINAL LAW 93-95 (William Schabas ed., 2016); Margaret M. DeGuzman, *Harsh Justice for International Crimes*, 39 YALE J. INT'L L. 1 (2014); KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW, VOL. I: FOUNDATIONS AND GENERAL PART 67-73 (2013). WILLIAM SCHABAS, UNIMAGINABLE ATROCITIES: JUSTICE, POLITICS, AND RIGHTS AT THE WAR CRIMES TRIBUNALS 96 (2012); MARK A. DRUMBL, REIMAGINING CHILD SOLDIERS IN INTERNATIONAL LAW AND POLICY 151 (2012); Ruti Teitel, *Symposium: Milošević & Hussein on Trial: Perspective on Transnational Justice: Collective Memory, Command Responsibility, and the Political Psychology of Leadership: The Law and Politics of Contemporary Transitional Justice*, 38 CORNELL INT'L L.J. 837, 857 (2005); Jan Nemitz, *The Law of Sentencing in International Criminal Law: The Purposes of Sentencing and the Applicable Method for the Determination of the Sentence*, 4 Y.B. OF INT'L HUMANITARIAN L. 87 (2001); GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS 284 (2000); Mark B. Harmon & Fergal Gaynor, *Ordinary Sentences for Extraordinary Crimes*, 5 J. INT'L CRIM. JUST. 683, 694-96 (2007); Jonathan A. Bush, *Nuremberg: The Modern Law of War and Its Limitations*, 93 COLUM. L. REV. 2070 (1993) (reviewing TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR (1992)); Turner, *Legal Ethics*, *supra* note 18; Minna Schrag, *Lessons Learned from the ICTY Experience*, 2 J. INT'L CRIM. JUST. 427, 428 (2004); Jean Galbraith, *The Pace of International Criminal Justice*, 31 MICH. J. INT'L

Some of these functions mirror justifications and aims of punishment found in domestic systems, such as retribution, deterrence, incapacitation, and rehabilitation.[2] Others are proffered as "special" or "unique" to international law, and reflect a mixture of diplomatic, political, and policy goals, such as building international law, reconciliation, and developing a historical record.[3] Many of these goals have been explicitly accepted by international judges as part of the mandate of international criminal tribunals.[4] Ironically such ambitions, although usually well intended, have actually contributed to the politicization of the international judicial process.[5] Additionally, a question arises as to whether goals such as reconciliation are beyond the intuitional capacity of international criminal law mechanisms. Legalism has its limits. Its formality, rigidity, and obligation to protect the rights of diverse parties make it a limited agent of social change. These meta-juridical goals require a matrix of social institutions working together to rebuild the fabric of society post-atrocity. When other institutions and agents of society share this responsibility, international criminal justice can play a modest but important role.

L. 79 (2009); Ruti Teitel, *The Law and Politics of Contemporary Transitional Justice*, 38 CORNELL INT'L L. J. 837, 857 (2005); Richard A. Wilson, *Judging History: The Historical Record of the International Criminal Tribunal for the Former Yugoslavia*, 27 HUMAN RTS. Q. 908, 908 (2005); Ralph Henham, *The Philosophical Foundations of International Sentencing*, 1 J. INT'L CRIM. JUST. 64 (2004); Martti Koskenniemi, *Between Impunity and Show Trials*, 6 MAX PLANCK Y.B. UN L. 4 (2002); Robinson, *The Identity Crisis of International Criminal Law*, *supra* note 20, at 926, 994; Andrew N. Keller, *Punishment for Violations of International Criminal Law: An Analysis of Sentencing at the ICTY and ICTR*, 12 Ind. Int'l & Comp. L. Rev. 53 (2001).

[2] Prosecutor v. Rutaganira, Case No. ICTR-95-1C-T, Judgment, paras. 108-09 (Mar. 14, 2005); Prosecutor v. Kambanda, Case No. ICTR-97-23-S, Judgement and Sentence, para. 28 (Sept. 4, 1998). *See also* Pascale Chifflet & Gideon Boas, *Sentencing Coherence in International Criminal Law: The Cases of Biljana Plavšić and Miroslav Bralo*, 23 CRIM. L. F. 135 (2012) Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1313 (2000). *See* Damaska, *What is the Point*, *supra* note 40.

[3] Janine Natalya Clark, *The Limits of Retributive Justice: Findings of an Empirical Study in Bosnia and Herzegovina*, 7 J. INT'L CRIM. JUST. 463, 474-75 (2009).

[4] *See further*, Prosecutor v. Obrenovic, Case No. IT-02-60/2-S, Sentencing Judgment, para. 111 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 2003) (finding that "restoring peace," "establishing a historical record," "countering denials," and providing victims with "some form of closure" are part of the mandate of international criminal tribunals); Prosecutor v. Nikolić, Trial Sentencing Judgment, *supra* note 58, at para. 233 (Tribunal has the task to contribute to the "restoration and maintenance of peace" and to ensure that serious violations of international humanitarian law are "halted and effectively redressed").

[5] This is especially true when judges rely too much on reconciliation ideology to justify their rulings. *See* Valery Perry, *A Survey of Reconciliation Processes in Bosnia and Herzegovina: the Gap Between People and Politics*, *in* RECONCILIATION(S): TRANSITIONAL JUSTICE IN POST-CONFLICT SOCIETIES 207, 208 (Joanna R. Quinn ed., 2009) (stating that "'[r]econciliation' is a word rarely mentioned in good faith in political discourse."). *See also* Statements on the Rome Conference Before the Committee on Foreign Relations of the U.S. Senate, 105th Congress (July 23, 1998) (statements of David J. Scheffer, Ambassador at Large, War Crimes Issues, Head of U.S. Delegation to the U.N. Diplomatic Conference on the Establishment of a Permanent International Criminal Court), http://www.iccnow.org/documents/
USScheffer_Senate23July98.pdf; Silvia A. Fernandez de Gurmendi, *The Role of the International Prosecutor*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 175, 181 (Roy S. Lee ed., 1999). *See generally* Alexander K.A. Greenawalt, *Justice Without Politics? Prosecutorial Discretion and the International Criminal Court*, 39 N.Y.U. J. INT'L L. & POL. 583 (2007).

Given that ICL jurisprudence presents a mixture of sentencing rationales that include anything from traditional criminal law theories to international diplomatic objectives and policy goals, conflict among these ideologies is inevitable.[6] Critics of international criminal courts have seized upon these incurable conflicts to challenge the legitimacy of international prosecutions. They argue that from case to case the composition of judges determining a sentence changes, and given the wide discretion ICL judges enjoy in selecting which objectives to prioritize, these conflicts may be resolved in ways that are unpredictable to litigants before the court. Consequently, the severity of penalty may be impacted. Going forward, ICL judges will necessarily have to prioritize among sentencing rationales if they are to avoid criticism and conflict that plagued the *ad hoc* international criminal tribunals.

This Chapter aims to inform that decision-making process by evaluating the consequences of that choice through an examination of ICL sentencing jurisprudence and practice of international tribunals. Part 2 elucidates the sentencing objectives advanced by the *ad hoc* international criminal tribunals.[7] This section interrogates two issues: What do international judges purport to be the purpose of sentencing in international prosecutions? Can we identify trends or shifts in judicial narratives surrounding the purpose of ICL? Part 3 examines more closely the influence of deterrence and reconciliation. Do these consequentialist ideologies result in distorted outcomes in punishment? A distortion of the sentence may be observed in different ways: the legal principles applied may not be in line with ICL sentencing jurisprudence generally; the sentencing outcome may not measure up to the judicial narrative concerning the perpetrator's culpability; and/or the sentence itself may constitute an outlier when compared to sentences in other cases of similar crimes. Part 4 offers original normative arguments regarding the impact of reconciliation ideology on the punishments of perpetrators of atrocity crimes and on international criminal justice generally.

[6] Chifflet & Boas, *Sentencing Coherence in ICL* (2012), *supra* note 2 at 139 (describing the conflicting proffered rationales as "a patchwork of sentencing principles").

[7] Referring to the ICTR and the ICTY, which were established by U.N. Security Council Resolutions 955 and 827, respectively. *See* S.C. Res. 955, para. 1, 49th Year, U.N. Doc. S/RES/955 (Nov. 8, 1994); S.C. Res. 827, para. 2, 48th Year, U.N. Doc. S/RES/827 (May 25, 1993).

II. SENTENCING OBJECTIVES ADVANCED BY INTERNATIONAL CRIMINAL TRIBUNALS

A. DEVELOPING A FRAMEWORK: PAUCITY OF POSITIVE LAW

Fifty years after the International Military Tribunal for the Far East, sitting in Tokyo, punished military and political leaders of the Empire of Japan, three judges from France, Costa Rica, and Egypt gathered in The Hague to issue the first sentence by an international criminal tribunal for atrocity crimes since World War II. The guilty perpetrator was not a Prime Minister or high-ranking general, like Koki Hirota or a Hideki Tojo, or a Hermann Göring or Rudolf Hess, or a mastermind of the atrocities. Before the ICTY judges was an unassuming, ordinary foot solider, Drazen Erdemović. Deliberating on a just punishment for him, the judges found that "[n]either the Statute nor the Report of the Secretary-General nor the Rules elaborate on the objectives sought by imposing such a sentence."[8] In identifying justifications for punishment and aims of sentencing in international criminal law, international judges have drawn largely from the preamble of their constitutive Security Council resolutions and penal theories from national law.

The preamble provisions of Security Council Resolutions establishing the ICTY and ICTR are primarily intended to set forth the legal basis for Security Council action under Chapter VII pursuant to the U.N. Charter.[9] It is doubtful that they were intended as instructions for judges at the time of sentencing. Nevertheless, the methodology of the International Tribunals has been to turn to these provisions in their respective constitutive Resolutions to formulate objectives for international sentencing.[10] This methodology assumes that the conditions required to trigger the Security Council's powers under Chapter VII of the U.N. Charter would suffice for developing the

[8] Prosecutor v. Erdemović, Case No. IT-96-22-T, Sentencing Judgement, para. 57 (Nov. 29, 1996). *See also* Uwe Ewald, *"Predictably Irrational" – International Sentencing and its Discourse against the Backdrop of Preliminary Empirical Findings on ICTY Sentencing Practices*, 10 INT'L CRIM. L. REV. 365, 379 (2010) ("The rather thin normative framework provided by the sentencing provisions of the Statute and Rules of Procedure and Evidence of the ICTY does not offer a consistent philosophical approach to international sentencing.").

[9] While there is a natural overlap between the justification for international prosecutions and the object and purpose of international sentencing, they cannot be assumed to be identical. *See* H. L. A. HART, *Prolegomenon to the Principles of Punishment*, *in* PUNISHMENT AND RESPONSIBILITY 1 (2d ed. 2008). *See also* Margaret M. DeGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT'L L. 265, 288-89 (2012) (making a distinction between justifications for the establishment of the International Criminal Court and rationales to guide case selection).

[10] *E.g.* Prosecutor v. Kamuhanda, Judgment and Sentence, *supra* note 38, at paras. 753-54; Prosecutor v. Muhimana, Case No. ICTR-95-1B-T, Judgment and Sentence, para. 588 (28 April 2005),

justification and purpose of punishment of atrocity crimes.[11] It also assumes that the reasons supporting the creation of international criminal justice mechanisms are one and the same as the rationales to guide its sentencing practice. In connection with establishing the ICTY, Security Council Resolution 808 states:

> *Determined* to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them,
> *Convinced* that in the particular circumstances of the former Yugoslavia the establishment of an international tribunal would enable this aim to be achieved and would contribute to the restoration and maintenance of peace.[12]

Likewise, Security Council Resolution 955, establishing the ICTR, states:

> *Determined* to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them,
> *Convinced* that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would enable this aim to be achieved and would contribute to the process of national reconciliation and to the restoration and maintenance of peace.[13]

Both Resolutions speak to the Security Council's determination "to put an end to" international crimes, such as genocide, crimes against humanity, and war crimes, and "to bring to justice" the perpetrators. Furthermore, the Resolutions proclaim the Security Council's conviction that international prosecutions "would enable this aim to be achieved." Presumably, "this aim" refers to what was mentioned in the previous paragraph: "to put an end to such crimes" and "to bring to justice the persons" responsible. Thus, in the opinion of the Security Council, international prosecutions would "put an end to" international crimes and "bring to justice" the perpetrators. ICL judges have regularly invoked this language to situate retribution and deterrence as the primary purposes of sentencing.[14]

In addition to retribution and deterrence, some Tribunal judges argued that the goals of reconciliation could also be squared with the text of their constitutive resolutions. The Security Council resolutions contained standard language used to

[11] Prosecutor v. Kamuhanda, Judgment and Sentence, *supra* note 38, at paras. 753-54.
[12] S.C. Res. 808, 48th Year, S/RES/808 (Feb. 22, 1993). *See also* S.C. Res. 827, *supra* note 34.
[13] S.C. Res. 955, *supra* note 34, at paras. 1-2.
[14] *See, e.g.*, Prosecutor v. Tadić, Sentencing Judgment, at paras. 7-9 (stating that "retribution and deterrence serving as the primary purposes of sentence"); Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment and Sentence, para. 455 (Dec. 6, 1999).

trigger its powers under Chapter VII to enforce the resolution, in this case the creation of a court. The resolutions state that the establishment of an international tribunal "would contribute to the restoration and maintenance of peace."[15] While some ICTY judges have relied on this particular phrase to claim that the court's purpose is to promote national reconciliation,[16] it is doubtful that this was the intent behind the language. This language is boilerplate and appears in every resolution that invokes the Security Council's enforcement powers under Chapter VII. It is required language to set up the legal basis of the Council's use of Chapter VII and appears in all such resolutions, not just the ones that created the *ad hoc* tribunals.

There exists, however, an important difference between Resolution 827 establishing the ICTY and Resolution 955 establishing the ICTR. The former is silent regarding reconciliation, while the latter explicitly mentions "national reconciliation" as part of the ICTR's mandate.[17] This distinction never gained traction in the judges' analysis, even though the resolutions are consistently invoked the sentencing judgments to formulate ICL sentencing rationales. To the contrary, there is some evidence that ICTY and ICTR judges may not have even picked up on this distinction between the founding resolutions. For example, Judge Inés Monica Weinberg de Roca refers to the "identical formulation" of resolutions establishing the *ad hoc* Tribunals.[18]

Regarding the Special Court for Sierra Loene, the preamble of Security Council Resolution 1315 also explicitly mentions "national reconciliation" and provides important context. It "recogniz[es] that . . . a credible system of justice and accountability . . . would contribute to the process of national reconciliation."[19] Thus, if preamble provisions are to be our guide, the argument for incorporating reconciliation goals as a sentencing rationale has textual support in the context of the ICTR and the SCSL, but not so for the ICTY. This may be explained by considering that Rwanda and Sierra Leone remained territorially intact and whole after the civil war, but Yugoslavia fractured into multiple independent states. Even within Bosnia and Herzegovina (arguably the most ethnically diverse among the entities of the former Yugoslavia), the country is divided

[15] S.C. Res. 827, *supra* note 34.

[16] *See, e.g.*, Prosecutor v. Erdemović, Sentencing Judgment, *supra* note 43, at para. 58; Prosecutor v. Plavšić, Sentencing Judgement, *supra* note 36, at para. 79.

[17] S.C. Res. 955, *supra* note 34, at paras. 1-2.

[18] *See* Inés Monica Weinberg de Roca & Christopher M. Rassi, *Sentencing and Incarceration in the Ad Hoc Tribunals*, 44 STAN. J. INT'L L. 1, 2 (2008).

[19] Security Council, S/RES/1315 (2000), 14 August 2000; *Prosecutor v. Taylor,* Case No. SCSL-03-01-T, Sentencing Judgment para. 12 (30 May 2012).

between two distinct constitutional and legal entities: the Federation of Bosnia and Herzegovina and Republika Srpska, the latter consisting almost entirely of Serbs.

A notable departure from conceiving penological rationales and ideologies in preambular provisions is the ICC's first sentencing judgment.[20] The *Lubanga* Trial Chamber made no reference or mention of retribution, deterrence or reconciliation.[21] The judges recalled similar preamble provisions, but declined to box the goals of international sentencing into the taxonomy of national criminal law penology. In the ICC's second sentencing judgment, a different panel of three judges conceived the Preamble provisions as advancing the goal of deterrence.[22] The *Katanga* Trial Chamber also stated that "the role of the sentence is two-fold: … *punishment* … and … *deterrence*."[23] While there is no explicit reference to retribution, the judges discuss the role of "punishment" in the same language that other ICC judges conceive retribution: as "the expression of society's condemnation of the criminal act and of the person who committed it."[24]

A third and fourth panel of ICC judges, in the *Bemba* and *Al-Mahdi* cases, interpreted the Preamble provisions as establishing retribution and deterrence as the primary objectives.[25] These four Trial Chambers were considering the same Preamble provisions of the ICC Statute, specifically that "the most serious crimes of concern to the international community as a whole must not go unpunished" and that in establishing the ICC, the States Parties were "[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes".[26]

Thus, twelve ICC judges examining the same Preamble text reached varying understandings of the role of punishment for international crimes. Trial Chamber I made

[20] Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-2901, Decision on Sentence pursuant to Article 76 of the Statute, paras. 92-99 (July 10, 2012). For an analysis of the trial *see* Kai Ambos, *The First Judgment of the International Criminal court (Prosecutor v. Lubanga): A Comprehensive Analysis of the Legal Issues*, 12 Int'l Cr. L. Rev. 115, 138-39 (2012); Diane Marie Amann, *Prosecutor v. Lubanga*, 106 Am. J. Int'l L. 809, 812 (2012).

[21] Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-2901, Decision on Sentence pursuant to Article 76 of the Statute (July 10, 2012).

[22] Prosecutor v. Katanga, Decision on Sentence pursuant to article 76 of the Statute, ICC-01/04-01/07, (23 May 2014) at para. 37 [hereafter Katanga Trial Sentence].

[23] Id. at para. 38 (emphasis added).

[24] Id.

[25] Prosecutor v. Jean-Pierre Bemba Gombo, Decision on Sentence pursuant to article 76 of the Statute, ICC-01/05-01/08, (21 June 2016) para. 10; Prosecutor v. Al Mahdi, Judgment and Sentence, ICC-01/12-01/15 (27 September 2016), para 67.

[26] Preamble, ICC Statute.

no mention of retribution, deterrence, or any other ideological rationale;[27] Trial Chamber II identified deterrence applying a textual interpretation of the Preamble, but also employed a teleological interpretive methodology to incorporate expressivism into the ICC's sentencing goals;[28] finally, Trial Chambers III and VIII conceived retribution and deterrence as the primary objectives arising from the Preamble.[29] Additionally, beyond punitive functions, Trial Chambers II and VIII interpreted the Preamble to also include the goal of reconciliation as part of the ICC mandate and a factor that must be considered when deciding the fair and appropriate quantum of punishment.[30] These judgments suggest that ICC judges follow divergent schools of thought when it comes to considering what ideologies should appropriately influence the sentence, even though they are reaching their positions by examining the same text.

The Special Court for Sierra Leone (SCLS) primarily turns to sentencing rationales from domestic law, rather than international policy goals, to identify appropriate sentencing goals.[31] SCSL consistently identified retribution and deterrence as the primary goals of ICL punishment.[32] The SCSL judges also recognized that judges at other international criminal tribunals (ICTs) have accepted other objectives, such as reconciliation, historical recording building, stigmatization, and international norm building, but they did not hold those objectives as relevant considerations for determining the quantum of punishment appropriate for atrocity crimes.[33]

In sum, when the international community resuscitated international prosecutions in the wake of mass atrocity in the 1990s, international judges were working on a blank canvass with wide discretion to formulate the ideology behind international punishment and its justifications, purposes, aims, and objectives. They would frequently invoke the preamble of their constitutive legal instrument to justify advancing particular penological or ideological goals. They embraced punitive criminal

[27] Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-2901, Decision on Sentence pursuant to Article 76 of the Statute (July 10, 2012).

[28] Katanga Trial Sentence at para. 38.

[29] Prosecutor v. Jean-Pierre Bemba Gombo, Decision on Sentence pursuant to article 76 of the Statute, ICC-01/05-01/08, (21 June 2016) para. 10; Prosecutor v. Al Mahdi, Judgment and Sentence, ICC-01/12-01/15 (27 September 2016), para 67.

[30] Prosecutor v. Katanga, Decision on Sentence pursuant to article 76 of the Statute, ICC-01/04-01/07, (23 May 2014); Prosecutor v. Al Mahdi, Judgment and Sentence, ICC-01/12-01/15 (27 September 2016).

[31] Prosecutor v. Sesay, Kallon and Gbao, Sentencing Judgment para. 12 (April 8, 2009).

[32] *E.g.*, CDF Appeal Judgment para. 532; Prosecutor v. Taylor, Case No. SCSL-03-01-T, Sentencing Judgment para. 13 (30 May 2012); RUF Trial Sentencing para. 13; CDF Trial Sentencing para. 26; AFRC Trial Sentencing para. 15.

[33] *E.g.* Prosecutor v. Sesay, Kallon and Gbao, Sentencing Judgment para. 14 (April 8, 2009).

law orientations, such as retribution, deterrence, and incapacitation as well as restorative policy objectives, such as reintegration, rehabilitation, and reconciliation.

B. EXTRAORDINARY CRIMES, ORDINARY OBJECTIVES: RETRIBUTION AND DETERRENCE

The sentencing judgments of the ICC, ICTR, ICTY and SCSL generally advanced two primary purposes of punishment for atrocity crimes: retribution and deterrence.[34] But given the absence of sentencing rationales in statutes of international criminal courts, ICL judges did not consider themselves limited to these rationales. They exercised wide discretion to reach beyond these two primary purposes to justify their sentencing outcomes. For example, the *Blaškić* Trial Chamber added rehabilitation and protection of society to the primary purposes of ICL sentencing, but it did so without explanation or analysis.[35] These "four parameters" – retribution, deterrence, rehabilitation, and protection of society – mirror sentencing rationales found at the national level.[36] However, scholars contest the applicability and relevance of these rationales to international criminal justice.[37] Some observers criticize ICL's focus on retribution and deterrence, hallmarks of a national approaches to ordinary crimes, as contextually inept theories[38] or as an unimaginative response to atrocity crimes.[39] Modesty, however, may be a safeguard for a nascent international justice system. Broad and ambitious social engineering in the wake of mass atrocities is wisely left to other social processes and institutions. As the sentencing jurisprudence developed among the country specific

[34] *See* Prosecutor v. Tadić, Sentencing Judgment, *supra* note 35, at paras. 7-9 (stating that "retribution and deterrence serving as the primary purposes of sentence"); Prosecutor v. Furundžija, *supra* note 38, at para. 288; Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment and Sentence, para. 455 (Dec. 6, 1999); and Prosecutor v. Serushago, Case No. ICTR-98-39-S, Sentence, para. 20 (Feb. 5, 1999).

[35] *See* Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment, para. 761 (Mar. 3, 2000).

[36] *Id*.

[37] *See, e.g.* David Luban, *Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law*, *in* THE PHILOSOPHY OF INTERNATIONAL LAW 569, 575-77 (Samantha Besson & John Tasioulas eds., 2010); DeGuzman *Choosing to Prosecute* (2012) *supra* note 9, at 301-12; Damaska, *What is the Point*, *supra* note 40, at 339-40; MARK A. DRUMBL, ATROCITY, PUNISHMENT AND INTERNATIONAL LAW 149 (2007); Robert Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law,* 43 Stanford J. Int'l L. 39, 50-51 (2007); Diane Marie Amann, *Group Mentality, Expressivism, and Genocide*, 2 INT'L CRIM. L. REV. 93, 116 (2002); Nemitz, *The Law of Sentencing in International Criminal Law*, *supra* note 25.

[38] *See e.g.* Andrew Woods, *Moral Judgments & International Crimes: The Disutility of Desert*, 52 VA. J. INT'L L. 633, 654-656 (2012).

[39] *See, e.g.*, Drumbl, *Collective Violence*, *supra* note 29, at 610.

international tribunals, the law of atrocity sentencing settled on retribution and deterrence as the primary rationales of ICL punishment.[40]

However, as analyzed in detail above, the ICC's initial sentencing judgments were less unequivocal about the role of retribution and deterrence in ICL sentencing. In a curious development, the first ICC sentencing judgment did not mention either retribution or deterrence, departing from the established practice of earlier tribunals.[41] In the ICC's second sentencing judgment, judges mentioned deterrence, but not retribution, as the goal of atrocity sentencing.[42] The two subsequent ICC trial sentencing judgments considered both retribution and deterrence as appropriate purposes of punishment for atrocity trials, returning to the approach of the approach of earlier tribunals.[43]

Overall, ICL sentencing jurisprudence is remarkably enthusiastic about the deterrent capacity of international criminal courts.[44] So too is the ICC, with all but one of

[40] *See* Prosecutor v. Karadžić, Judgment, IT-95-5/18 (24 March 2016) at para. 6025; Prosecutor v. Taylor, Case No. SCSL-03-01-T, Sentencing Judgment para. 13 (30 May 2012); CDF Appeal Judgment para. 532; RUF Trial Sentencing para. 13; Kambanda Trial Judgement, para. 28; Rutaganda Trial Judgement, para. 456; Prosecutor v. Popović, Case No. IT-05-88-T, Trial Judgment, para. 2128 (June 10, 2010); Prosecutor v. Marques *et al*., 09/2000, East Timor Serious Crimes Special Panel (11 December 2001), at para. 979; ECCC, *Kaing* Appeal Judgment, para. 380; Prosecutor v. Lukić, Case No. IT-05-87 Trial Judgment, para. 1049 (July 20, 2009); Prosecutor v. Milutinović, Case No. IT-05-87-T, Trial Judgement, para. 1144 (Feb. 26, 2009); Prosecutor v. Milutinović, Case No. IT-05-87-T, Trial Judgment Vol. 3, paras. 1144-45 (Feb. 26, 2009); Prosecutor v Delić, Case No 1T-04-83-T, Trial Judgment, para. 559 (Sept. 15, 2008); Prosecutor v. Milošević, Case No IT-98-29/1-T, Trial Judgment, para. 987 (Dec. 12, 2007); Prosecutor v. Martić, Case No. 95-11-T, Trial Judgment, para. 484 (June 12, 2007); Prosecutor v Zelenović, Case No IT-96-23/2-S, Sentencing Judgment, para. 31 (Apr. 4, 2007); Prosecutor v. Krajišnik, Case No IT-00-39&40-T, Trial Judgment, para. 1134 (Sept. 27, 2006); Prosecutor v. Orić, Case No 1T-03-68-T, Trial Judgment, para. 718 (June 30, 2006); Prosecutor v. Limaj, Case No 1T-03-66-T, Trial Judgment, para. 723 (Nov. 30, 2005); Prosecutor v. Strugar, Case No IT-01-42-T, Trial Judgment, para. 458 (Jan. 31, 2005); Prosecutor v Blagojević, Case No IT-02-60-T, Trial Judgment, para. 817 (Jan. 17, 2005); Prosecutor v. Stakić, Case No. IT-97-24-T, Trial Judgment, paras. 900-02 (July 31, 2003); Prosecutor v. Kunarac, Case No. IT-96-23-T Trial Judgment, para. 838 (Feb. 22, 2001); Prosecutor v. Blaškić, Case No IT-95-14-T, Trial Judgment, para. 762 (Mar. 3, 2000); Prosecutor v. Tadić, Case No IT-94-1-T*bis*-R117, Sentencing Judgment, paras. 7-9 (Nov. 11, 1999); Prosecutor v. Stakić, Case No. IT-97-24-A, Appeals Judgment, para**.** 402 (Mar. 22, 2006); Prosecutor v. Delalić, Case No. IT-96-21-A, Appeals Judgement, para. 806 (Feb. 20, 2001); Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Appeal Judgment, para**.** 185 (Mar. 24, 2000).

[41] Prosecutor v. Thomas Lubanga Dyilo, Decision on Sentence pursuant to Article 76 of the Statute, Case No. ICC-01/04-01/06-2901, (July 10, 2012). For an excellent analysis of this trial *see* Kai Ambos, *The First Judgment of the International Criminal court (Prosecutor v. Lubanga): A Comprehensive Analysis of the Legal Issues*, 12 INT'L CR. L. REV. 115, 138-39 (2012); Diane Marie Amann, *Prosecutor v. Lubanga*, 106 AM. J. INT'L L. 809, 812 (2012).

[42] Katanga Trial Sentence at para. 38.

[43] Prosecutor v. Al Mahdi, Judgment and Sentence, ICC-01/12-01/15 (27 September 2016), para 67; Prosecutor v. Jean-Pierre Bemba Gombo, Decision on Sentence pursuant to article 76 of the Statute, ICC-01/05-01/08, (21 June 2016) para. 10.

[44] Prosecutor v. Jean-Pierre Bemba Gombo, Decision on Sentence pursuant to article 76 of the Statute, ICC-01/05-01/08, (21 June 2016) para. 10; Prosecutor v. Karadzic, Judgment, IT-95-5/18 (24 March 2016) at para. 6025; Prosecutor v. Marques *et al*., 09/2000, East Timor Serious Crimes Special Panel (11 December 2001), at para. 979.

its trial sentencing judgments explicitly embracing deterrence ideology. Moreover, international judges consistently affirm that the goal of deterrence is an appropriate influence on the quantum of the sentence, revealing a consequentialist orientation to punishing atrocities.[45] ICL judges claim to give weight to the goal of deterrence in determining the severity of a sentence. In international criminal justice, both general and specific deterrence are, in principle, accepted as relevant sentencing considerations. Trial Chambers recognize that both specific and general deterrence have "an important function in principle" and serve "an important goal of sentencing."[46] However, the Appeals Chamber of the ICTY and ICTR has also cautioned: "this factor must not be accorded undue prominence in the overall assessment of the sentences to be imposed on persons convicted by the International Tribunal."[47]

General deterrence is understood to mean that the punishment should be severe enough "to ensure that those who would consider committing similar crimes will be dissuaded from doing so."[48] Specific deterrence, on the other hand, "refers to the specific effect of the sentence upon the accused" sitting in judgment before the court.[49] The "sentence should be adequate to discourage an accused from recidivism."[50] In other words, the punishment should discourage an accused from re-offending after the sentence has been served and the accused has been released.[51] Some ICL judges have opined that "general deterrence . . . serves to strengthen the legal order in which the type of conduct involved is defined as criminal, and to reassure society of the effectiveness of

[45] *See, e.g.,* Prosecutor v. Deronjić, Case No. IT-02-61-S, Sentencing Judgment, para. 142 (Int'l Crim. Trib. for the Former Yugoslavia Mar 30, 2004) (concluding that the "[f]undamental principles taken into consideration when imposing a sentence are deterrence and retribution"); Prosecutor v. Tadić, Case No. IT-94-1-A & IT-94-1-A *bis*, Appeal Sentencing Judgment, para. 48 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 26, 2000), http://www.icty.org/x/cases/tadic/acjug/en/tad-asj000126e.pdf; Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Appeals Judgment, para. 185 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000), http://www.icty.org/x/cases/aleksovski/acjug/en/ale-asj000324e.pdf; Prosecutor v. Nikolić, Appeals Sentencing Judgment, *supra* note 60, at paras. 45-46.

[46] Prosecutor v. Nikolić, Trial Sentencing Judgment, *supra* note 58, at para. 134.

[47] Prosecutor v. Tadić, Appeal Sentencing Judgment, *supra* note 62, at para. 48.

[48] Prosecutor v. Jean-Pierre Bemba Gombo, Decision on Sentence pursuant to article 76 of the Statute, ICC-01/05-01/08, (21 June 2016) para. 10; Prosecutor v. Nikolić, Case No. IT-94-2-S, Trial Sentencing Judgment, (18 December 2003) para. 136 ("The sentence imposed must also be sufficient in order to dissuade others from committing the same crime); Prosecutor v. Karadzic, Judgment, IT-95-5/18 (24 March 2016) at para. 6026; Prosecutor v. Todorović, Case No. IT 95-9/1-S, Sentencing Judgment, para. 30 (Int'l Crim. Trib. for the Former Yugoslavia July 31, 2001).

[49] Prosecutor v. Nikolić, Trial Sentencing Judgment, *supra* note 48, at para. 135.

[50] Prosecutor v. Nikolić, Case No. IT-94-2A, Appeals Sentencing Judgment, para. 45 (4 Feburary 2005); Prosecutor v. Karadzic, Judgment, IT-95-5/18 (24 March 2016) at para. 6026.

[51] Prosecutor v. Nikolić, Trial Sentencing Judgment, *supra* note 48, at para. 134.

its penal provisions."[52] The high water mark for general deterrence was established by Judge Wolfgang Schomburg when he stated that general deterrence may act as an aggravating factor: "I also fully accept … the special emphasis on general deterrence as an aggravating factor in finding the appropriate sentence, in particular when it is to prevent commanders in similar circumstances from committing similar crimes in the future."[53] Under this view, it is justifiable and appropriate to use deterrence ideology to aggravate the severity of a sentence of a commander, "within the margin determined by the [his or her] individual guilt."[54]

Regarding specific deterrence, some trial chambers have applied the term "individual" deterrence when embracing this penological goal.[55] Other trial chambers rejected the applicability of specific deterrence in international criminal justice. For example, although the Trial Chamber in the *Dragan Nikolić* case recognized that specific deterrence "has an important function in principle and serves as an important goal of sentencing,"[56] it nevertheless found that specific deterrence had no relevance in the case before it.[57] The court did not elaborate on why it concluded that specific deterrence has no relevance to the punishment of Dragon Nikolić. The judges perhaps concluded that the aim of specifically deterring Nikolić from committing crimes against humanity is moot, assuming the circumstances that provided an opportunity for these crimes to be committed, namely war, will not be present when the accused is released.

As for the retributive theory of punishment, while there are variant schools of thought, generally speaking retribution asserts that one who freely chose to victimize another deserves to be punished accordingly.[58] The moral desert of an offender is both a necessary and sufficient reason to punish him or her.[59] Punishment is an imperative, but must also be legally sanctioned so as to distinguish retribution from revenge. The retributive theory prohibits punishment of the innocent and limits punishment of the

[52] *Babić* Trial Judgement, para. 45.
[53] Prosecutor v. Blaksić, Separate Opinion of Judge Schomburg, Appeals Judgment, IT-95-14-A (29 July 2004).
[54] *Id*.
[55] Prosecutor v. Nikolić, Trial Sentencing Judgment, at paras. 134-35.
[56] *Id.* at para. 134.
[57] *Id.* at para. 135.
[58] *See generally* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 234-235 (Oxford 1968).
[59] Michael S. Moore, *The Moral Worth of Retribution*, in: RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 179 (Ferdinand Schoeman ed., 1987).

guilty to what is proportionately deserved – no more, no less.[60] Retribution abides by the proportionality principles and is limited by human rights law.

ICL jurisprudence conceives retribution "as an expression of the outrage of the international community at the crimes committed."[61] The judges, however, are quick to point out that retribution "is not to be interpreted as desire for revenge or vengeance."[62] As the *Karadzic* Trial Chamber explained, "retribution, unlike vengeance, requires the imposition of a just and appropriate punishment, and nothing more."[63] At the ICC, the first two trial sentencing judgments do not explicitly mention retribution; the next two sentencing judgments do. As noted above, international judges in the *Katanga* case explicitly adopted "punishment" as the role of sentencing at the ICC. Their word selection here is curious. They identify the role of sentencing as "punishment" rather than "retribution". The Trial Chamber stated that "the role of the sentence is two-fold: … *punishment* … and … *deterrence*."[64] The judges did not explicitly reference retribution. It is unclear if this is a deliberate avoidance of retributive ideology or a lost-in-translation moment given that the original judgment was written in French. The judges said that "the role of sentencing" at the ICC is "punishment" and they define "punishment" as "the expression of society's condemnation of the criminal act and of the person who committed it, which is also a way of acknowledging the harm and suffering caused to the victims."[65] Thus, the judges in the *Katanga* case conceptualized the role of "punishment" in the same way other ICC judges defined "retribution".

In sum, generally ICL judges consider retribution and deterrence as the central purposes of punishment for atrocity crimes. They claim that these penological goals are influential factors in their sentencing decisions. Moreover, international judges conceive retribution with a distinctive expressivist outlook in the context of atrocity trials, and they generally orientate deterrence ideology towards general deterrence. The

[60] IMMANUEL KANT, THE METAPHYSICS OF MORALS 105 (Mary Gregor trans., Cambridge 1996).

[61] *See, e.g.,* Prosecutor v. Karadzic, Judgment, IT-95-5/18 (24 March 2016) at para. 6026; Prosecutor v. Jean-Pierre Bemba Gombo, Decision on Sentence pursuant to article 76 of the Statute, ICC-01/05-01/08, (21 June 2016) para. 10 ("Retribution is not to be understood as fulfilling a desire for revenge, but as an expression of the international community's condemnation of the crimes.")

[62] Prosecutor v. Karadzic, Judgment, IT-95-5/18 (24 March 2016) at para. 6026.

[63] *Id.*

[64] Katanga Trial Sentence at para. 38 (emphasis added).

[65] Katanga Trial Sentence at para. 38.

scholarship, however, is divided on the deterrent capacity of international criminal law[66] and on the appropriateness of retribution.[67]

C. The Lip Service to Rehabilitation

One sentencing purpose proffered by international criminal tribunals that appears to have no impact on sentencing allocations is rehabilitation. International human rights treaties encourage rehabilitation considerations in national penology.[68] While the focus of these treaties appears to be on the administration of prisons and the manner of enforcement of a sentence,[69] the ICL judges purported to consider such provisions when determining the length of the sentence itself.[70]

In the early sentencing jurisprudence of international tribunals, some trial chambers stated that rehabilitation was among the principles guiding its sentencing allocations and limited the parameters of international sentencing.[71] However, it is fair to say that rehabilitation was never highly significant[72] in the determination of a sentence and did not act as a meaningful "parameter" to limit the sentence. This was made apparent in the Trial Chamber's judgment of General Blaškić.[73] Despite acknowledging rehabilitation as one of the "parameters" guiding its determination of General Blaškić's sentence, and despite its own factual finding supporting a strong prognosis for his rehabilitation, the Trial Chamber nevertheless decided to not give these factors any weight, and certainly its forty-five-year sentence leaves little trace of rehabilitation as the court's objective, especially since Blaškić was forty years old when he was sentenced.[74]

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[66] Discussed in detail in Section IV-A below.

[67] For an excellent discussion of the scholarship on retribution in the context of punishing atrocity crimes *see* DeGuzman *Harsh Justice* (2014), *supra* note 1, at 10-15.

[68] *See, e.g.*, International Covenant on Civil and Political Rights art. 10(3), Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171. ("The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation"); U.N. GAOR, 47th Sess., cmt., U.N. Doc. CCPR/C/21/Rev.1/Add.3 (1992); American Convention on Human Rights, art. 5(6), Nov. 21, 1969, 1144 U.N.T.S. 143.

[69] *See, e.g.*, Manfred Nowak, U.N. Covenant on Civil and Political Rights, 241-54 (Kehl am Rheine ed., 2d rev. ed. 2005).

[70] Prosecutor v. Delalić, Case No. IT-96-21-T, Appeals Judgment, paras. 805-06 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001), http://www.icty.org/x/cases/mucic/acjug/en/cel-aj010220.pdf.

[71] Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment paras. 761 and 765 (Mar. 3, 2000) (discussing rehabilitation).

[72] Prosecutor v. Erdemović, Case No. IT 96-22-T*bis*, Sentencing Judgment, para. 66 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 5, 1998).

[73] Prosecutor v. Blaškić, Judgment, *supra* note 71, at para. 762.

[74] Prosecutor v. Blaškić, Judgment, *supra* note 71, at para. 762. See Shahram Dana, *Revisiting the Blaškić Sentence: Some Reflections on the Sentencing Jurisprudence of the ICTY*, 4 Int'l Cr. L. Rev. 321 (2004), for a critique of the Trial Chamber's sentencing analysis in the *Blaškić* case.

Such a sentence suggests that the Tribunal was eager to send a strong signal of deterrence, and that this ideology predominated its sentencing considerations, even to the extent, some would argue, of trial chambers distributing exemplary sentences or exemplary justice and placing that foremost in their considerations. Taking caution that this practice did not go too far, the Appeals Chamber stated that deterrence "must not be accorded undue prominence in the overall assessment of the sentences."[75] The Appeals Chamber subsequently issued the same caution against rehabilitation.[76] It held that "although rehabilitation (in accordance with international human rights standards) should be considered as a relevant factor, it is not one which should be given undue weight."[77]

The Special Court for Sierra Leone (SCSL) went one step further. It completely rejected rehabilitation as a relevant factor in atrocity sentencing. [78] The SCSL in its maiden sentencing judgment acknowledged that the past jurisprudence of the ICTR and ICTY regularly identified rehabilitation as a factor.[79] However, the SCSL immediately moved away from this position, holding that rehabilitation is more appropriate as a goal in relation to ordinary criminality in the domestic context and less relevant as a sentencing factor in international criminal trials.[80] Subsequent judgments followed the same general approach toward rehabilitation,[81] although one SCSL trial chamber presented a confused treatment of it in the *Civil Defense Forces* (CDF) case.

The CDF trial involved three defendants who had fought for the side that ultimately won the war.[82] Their leader was the Samuel Hinga Norman, an enormously popular Sierra Leonean war hero, who after the war was appointed to a top government position.[83] The other two defendants were senior CDF leaders: Moinina Fofana and Allieu Kondewa.[84] The CDF defendants contended throughout the trial that they were simply

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[75] Prosecutor v. Tadić, Appeal Sentencing Judgment, *supra* note 62, at para. 48.

[76] *See* Prosecutor v. Delalic, Case No. IT-96-21-A, Judgment, para. 806 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001).

[77] Prosecutor v. Delalic, Case No. IT-96-21-A, Judgment, para. 806 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001).

[78] *E.g.*, RUF Sentencing Judgmentparas.14–16.

[79] AFRC Sentencing Judgment para. 14.

[80] *Id.* para. 17.

[81] *See* RUF Sentencing Judgment para. 16.

[82] The Civil Defence Forces (CDF) fought against the Revolutionary United Front (RUF) and the Armed Forces Revolutionary Council (AFRC) during the conflict in Sierra Leone. The CDF defendants contended throughout the trial that they were simply attempting to restore democracy and power to the democratically elected President Kabbah, whose government was overthrown by the AFRC in 1997. *See* CDF Trial Judgment, paras 2 & 11.

[83] *Id.* para. 1.

[84] *Id.*

attempting to restore democracy and power to the democratically elected President Kabbah.[85] Norman died before sentencing; the other two defendants were sentenced to six and eight years of imprisonment.[86]

In seeking to rationalize these low sentences, the CDF trial judges started by elevating the role of rehabilitation atrocity sentencing to the same level as retribution and deterrence. They repositioned rehabilitation as one of the main purposes of international criminal justice.[87] Oddly, two paragraphs later in the judgment, the judges provided the *pro forma* SCSL view on rehabilitation: namely that it "is of greater importance in domestic jurisdictions than in International Criminal Tribunals."[88] Thus, the CDF judges appear to be inarticulately repeating generic statements about rehabilitation found in ICL judgments without meaningfully contemplating or integrating the concepts into their sentencing analysis and allocations.[89] Ultimately, notwithstanding SCSL jurisprudence, they were more committed to their initial position that the goal of rehabilitation is on par with retribution and deterrence as a primary purpose of ICL punishment.

This focus on rehabilitation indicates that the CDF Trial Chamber's sentences were influenced by restorative considerations more so than punitive considerations. This is not surprising given the popular social narratives in Sierra Leone society eulogizing the CDF defendants as national heroes. Moreover, the CDF Trial Chamber's restorative orientation limited the influence of the gravity of the crime in its sentencing allocations. Although the judges are not explicit about this, it is reasonable to deduce that their restorative philosophy shaped their views on aggravating and mitigating factors, for example, the unprecedented and ultimately erroneous adoption of "legitimate cause" as a mitigating factor. Thus, the CDF case reveals the influence of restorative ideology, not only on the quantum of the actual punishment, but more significantly on the trial judge's reasoning and justification. Ultimately, restorative ideology exerted an enormous downward force on the final sentence: the CDF defendants were sentenced to six and eight years while the average sentence for opponents of the government is forty-six years.[90] However, the SCSL Appeals Chamber firmly disavowed this attempt to place

[85] *Id.* para. 11.
[86] *See* Tables 1–4, *supra* at
[87] CDF Sentencing Judgment para. 26 (treating rehabilitation as a "primary" consideration in sentencing along with retribution and deterrence).
[88] *Id.* para. 28.
[89] *Id.paras.*26–31.
[90] *See* Tables 1–4, *supra* at

rehabilitation on par with retribution and deterrence.[91] The judges on appeal increased the defendant's sentences to fifteen and twenty years' imprisonment.[92]

At the ICC, no sentencing judgments adopt rehabilitation as a goal of atrocity trials. At most, one ICC judgment briefly mentions "reintegration" as a possible outcome when the sentence reflects individual culpability. Thus, reintegration appears to be positioned as a satellite result of retributive punishment.[93] In sum, ICL sentencing jurisprudence places the goal of rehabilitation somewhere between a relevant sentencing factor in determining the quantum of punishment, but one which should not receive undue weight, to a factor that is not relevant at all to atrocity trials.

D. The Rise of Judicial Idealism: Enter Reconciliation & Social Engineering

The U.N. Security Council resolution establishing the ICTY does not mention "reconciliation" as such. Neither does the ICTY Statute or its Rules of Procedure and Evidence (RPE). Furthermore, reconciliation ideology is virtually absent in the early practice of the *ad hoc* Tribunals.[94] Even in the first cases involving guilty pleas and plea bargains, international judges did not justify sentencing discounts in terms of promoting reconciliation.[95] The practice of justifying plea deals in terms of reconciliation gained traction in judicial narratives only much later.

Their refrainment, however, should not be confused with unawareness. From the start, the judges were aware of the potential contribution that atrocity trials and just punishments could make towards reconciliation in a post-conflict society.[96] In the Tribunal's first annual report to the United Nations Security Council, Judge Antonio Cassese, the first President of the ICTY and ICTR, noted that international criminal justice mechanisms can promote reconciliation and restore "true peace."[97] Thus, from the start,

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[91] CDF Appeal Judgment para. 489.

[92] *See* CDF Appeal Judgment.

[93] Prosecutor v. Al Mahdi, Judgment and Sentence, ICC-01/12-01/15 (27 Sept. 2016), para 67.

[94] *See, e.g.*, Prosecutor v. Kambanda, Judgment and Sentence, *supra* note 41; Prosecutor v. Erdemović, Sentencing Judgment, *supra* note 43; Prosecutor v. Tadić, Sentencing Judgment, *supra* note 35; Prosecutor v. Sikirica, Case No. IT-95-8-S, Sentencing Judgment (Int'l Crim. Trib. for the Former Yugoslavia Nov. 13, 2001).

[95] *See, e.g.*, Prosecutor v. Erdemović, Sentencing Judgment, *supra* note 43; Prosecutor v. Kambanda, Judgment and Sentence, *supra* note 41; Prosecutor v. Sikirica, Sententing Judgment, *supra* note 84.

[96] *See* President of the Int'l Crim. Trib. for the Former Yugoslavia (ICTY), *1st Ann. Rep. of the Int'l Crim. Trib. for the Former Yugoslavia in Accordance with Article 34 of Security Council Resolution 25704 annex (1993), transmitted by Note of the Secretary-General, paras.* 14-18, U.N. Doc. S/1994/1007 (Aug. 29, 1994) [hereinafter *Note of Secretary-General: Rep. of ICTY*]; *See also* Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age, supra* note 23 (discussing reconciliation through judicial adjudication).

[97] *Id.*

judges at the *ad hoc* Tribunals were mindful of the reconciliatory potential of their work, but did not consider it as a differential principle for the purpose of allocating punishment.[98]

This is most likely because reconciliation is largely unmeasured, slow building, and aspirational.[99] Successful reconciliation requires the mobilization of diverse elements of social and legal order. Justice through criminal prosecution of violators of community norms is merely one step towards that goal. Although reconciliation is an important goal,[100] the first generation of international criminal law judges understood it could not be captured by legalism or transformed into an operational rule or principle.[101] The very nature of mass atrocities problematizes achieving grand ambitions like reconciliation because the widespread participation in atrocity crimes creates deep complicity that is not easily overcome through the narrow lens of judicially constructed narratives via international criminal justice mechanisms. Legalism has its limits. The hesitation of some ICL judges to entangle directly with reconciliation ideology was arguably out of respect for those limits. The formality, rigidity, and obligation to protect the rights of parties make atrocity trials a limited agent of reconciliation in a society post-conflict.

Despite these limitations, several years later, Judge Cassese returned to the Security Council and confidently stated that the Tribunals were establishing an unassailable "historical record . . . thereby preventing historical revisionism."[102] Among the institutions' "Future Priorities", he lauded building a historical record as "a most important function of the Tribunal."[103] Regarding the ICTY in particular, Cassese added that in their judicial proceedings international judges endeavored "to establish as judicial

[98] Prosecutor v. Erdemović, Sentencing Judgment, *supra* note 43, at paras. 57-66 (discussing factors influencing sentence allocation but not treating reconciliation as a sentencing factor). *See also* Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age, supra* note 23, at 117.

[99] *See* Perry, *A Survey of Reconciliation, supra* note 26, at 207, 208 (Joanna R. Quinn ed., 2009).

[100] *See Note of Secretary-General: Rep. of ICTY*, *supra* note 86, at para. 16.

[101] *See* Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age, supra* note 23, at 117 (concluding that "'adjudication' by ICTY of who started, prolonged, or ended the war and why in the context of criminal proceedings without the states themselves having input is basically unfair, or at least does not contribute to future reconciliation"). *See also* Prosecutor v. Erdemović, Sentencing Judgment, *supra* note 43; Prosecutor v. Kambanda, Judgment and Sentence, *supra* note 41; Prosecutor v. Sikirica, Sentencing Judgment, *supra* note 84.

[102] ICTY President's Fifth Annual Report, supra note 20, para. 296.

[103] ICTY President's Fifth Annual Report, supra note 20, para. 296. However, the factual accuracy of the historical record established by international tribunals has been challenged. *See* NANCY COMBS, FACT-FINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS (2010).

fact the *full details* of the madness that transpired in the former Yugoslavia."[104] However, many of Judge Cassese's colleagues on the bench did not share his optimism. According to ICTY Judge Patricia Wald, "the findings of judges may not produce the best approximations of history."[105] The institutional capacity of international criminal justice mechanisms to build a historical record is limited by discretionary selection of situations to prosecute and the rules of evidence that block from the record evidence that is factually probative but legally excluded for other reasons. Thus, understandably, many international judges, like Judge Wald, were hesitant to act as arbiters of history or to develop official narratives of the historical context leading to the conflict that could in turn serve as a platform for reconciliation.[106] These judges recognized that this objective should not dominate the proceedings, and should not be considered as first and foremost among the objectives of international criminal prosecution. This cautious approach towards viewing international trials as agents of history and reconciliation acknowledges that the criminal justice process is not ideally suited for these goals.[107] Indeed, a ground-breaking study by Nancy Combs challenges the factual accuracy of the historical record established by international tribunals, especially at the ICTR.[108] Achieving meta-juridical goals, including reconciliation and building a full truthful account of what happened, require a matrix of social and spiritual institutions working together to rebuild the fabric of society post-atrocity. When other institutions and agents of society share this responsibility, international criminal justice can play a modest but important role.

Reconciliation subsequently gained traction in the ICL jurisprudence when an increasing number of convictions were secured by plea bargains. However, with plea bargains, the historical narrative of "what happened" was no longer constructed in open and public courts by documentation and witnesses to the atrocities, as was done at

[104] ICTY President's Fifth Annual Report, *supra* note 20, at para. 296 (emphasis added).

[105] *See*, Patricia Wald, *The International Criminal Tribunal for the Former Yugoslavia Comes of Age: Some Observations on the Day-to-Day Dilemmas of an International Court*, 5 WASH. U. J. LAW & POL'Y 87, 116-17 (2001).

[106] *See, e.g.*, Prosecutor v. Delalić, Case No. IT-96-21-T, Trial Judgment, para. 88 (Nov. 16, 1998) (stating that the "Trial Chamber does not consider it necessary to enter into a lengthy discussion of the political and historical background to these events, nor a general analysis of the conflict").

[107] Prosecutor v. Deronjić, Sentencing Judgment, *supra* note 52, at para. 135 (noting that the "Tribunal is not the final arbiter of historical facts. That is for historians.").

[108] NANCY COMBS, FACT-FINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS (2010).

Nuremburg,[109] but behind closed doors in negotiations between perpetrators and international lawyers.[110] It is a negotiated partial record, not a full historical record that Cassese imaged. In sentencing judgments following a guilty plea or plea bargain, reconciliation became a useful ideology to legitimize plea deals and justify sentencing discounts.[111] While some actors within the system view sentencing reductions as a normal outcome of plea bargains,[112] local populations, especially where plea bargaining is foreign to the domestic legal culture, view the sentencing reduction as political favoritism to a particular ethnic group, unwillingness of elites to hold other elites accountable, failure to acknowledge the suffering and injustice inflicted on victim communities, or secretive deal-making.[113] Thus, reconciliation ideology in ICL jurisprudence is largely a reactionary effort to legitimize the practice of plea bargaining in the face of mounting criticism.

Crucially, for this push back to be successful, the goal of reconciliation needed to be firmly anchored in the Tribunal's mandate. The problem facing the judges, however, was that Security Council Resolution 827, establishing the ICTY, did not position reconciliation as a teleological imperative.[114] In fact, the resolution does not even mention the word "reconciliation," thus calling into question whether reconciliation ideology should be considered as part of the ICTY's mandate.[115] Nevertheless, some ICTY judges took it upon themselves to inject the goal of reconciliation into the court's mandate through a flawed interpretation of Resolution 827 that, even if well intended, was beyond the Tribunal's mandate and institutional capacity. They attempted to situate the Tribunal's role in promoting reconciliation within Resolution 827's reference to

[109] Notwithstanding the fact that the "role of criminal tribunals as arbiters of historical truth has been contested since the first serious efforts of international justice, at Nuremberg and Tokyo." *See* SCHABAS, UNIMAGINABLE ATROCITIES, *supra* note 17, at 157.

[110] For concerns that plea-bargaining distorts the historical record, see COMBS, GUILTY PLEAS, *supra* note 37, at 67, 207.

[111] *See* Prosecutor v. Plavšić, Sentencing Judgement, *supra* note 36; Prosecutor v. Bralo, Case No. IT-95-17-A, Judgment on Sentencing Appeal (Apr. 2, 2007); Prosecutor v. Nikolic, Case No. IT-94-2-S, Sentencing Judgment (Dec. 18, 2003); Prosecutor v. Bralo, Case No. IT-95-17-S, Sentencing Judgment (Dec. 7, 2005).

[112] Tribunal lawyers from civil law countries were initially concerned about the practice of plea-bargaining. *See* Nancy A. Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. PA. L. REV. 1, 139-41, 53 (2002) (reporting that judges and lawyers from civil law countries were uncomfortable with plea bargaining at international tribunals).

[113] *Cf.* Stephanos Bibas & William W. Burke-White, *International Idealism Meets Domestic-Criminal-Procedure Realism*, 59 DUKE L.J. 637, 658–60 (2010).

[114] *See* S.C. Res. 827, *supra* note 34.

[115] *See* Clark, *The Limits of Retributive Justice*, *supra* note 3, at 465 (challenging the merits of reconciliation and historical record building as goals of international criminal justice mechanisms).

"contribute to the restoration and maintenance of peace."[116] Unfortunately, this methodology suffers from over dependence on the unlikely assumption that, by such preambular statements, the Security Council intended to articulate a philosophy to guide atrocity sentencing and insufficient weight given to the more obvious and immediate purpose of such statements, namely to trigger the Security Council's coercive powers under Chapter VII.

Even if we accept the assumptions necessary for this interpretation, this language fails to justify the emphasis given to reconciliation in ICL sentencing practice, resulting frequently in lenient sentences. Arguably, restoration and maintenance of peace, in the context of a criminal justice mechanism, require justice through accountability for crimes and fair punishment for wrongdoing. Thus, even assuming that reconciliation is part of the ICTY's mandate, a difficult question follows: what impact, if any, should the aim of reconciliation have in the determination of a sentence for international crimes? This question is explored below.

The complexities and difficulties of advancing reconciliation ideology as part of the core mandate of the Tribunal were not fully appreciated when it gained traction as a justification for the increasing practice of plea-bargaining. Nevertheless, the notion of reconciliation now appears frequently, but largely perfunctory, in sentencing judgments.[117] While the Tribunals have clarified how concepts such as "retribution" and "deterrence" are to be understood in the context of international criminal justice, the notion of "reconciliation" has remained undefined. Moreover, Tribunal judges have struggled to coherently develop and integrate this goal in their decision-making and sentencing judgments.[118] The lack of clarity on what "reconciliation" means for international criminal justice, however, has not inhibited trial chambers from relying on it when allocating a sentence.

Despite its absence from the court's constitutive documents, the extant practice among ICTY judges is to cursorily identify "promoting reconciliation" as part of the Tribunal's mandate. Consequently, romanticism about international tribunals

[116] S.C. Res. 827, *supra* note 34, at 1.

[117] Prosecutor v. Babic, Case No. IT-03-72-S, Sentencing Judgment (June 29, 2004); Prosecutor v. Banovic, Case No. IT-02-65/1-S, Sentencing Judgment (Oct. 28, 2003); Prosecutor v. Mrda, Case No. IT-02-59-S (Mar. 31, 2004).

[118] See Kamatali, *The Challenge of Linking International Criminal Justice*, *supra* note 40, at 121-24, for arguments on how the ICTR's approach to jurisprudential issues regarding genocide can undermine Rwandan reconciliation.

"promoting reconciliation" persists, even though it remains elusive conceptually and pragmatically.[119] As discussed in detail below, the ICTY's method of realizing reconciliation appears to contradict the aim of combating impunity, which is explicitly part of the Tribunal's mandate.

As for the ICC, it is too early to determine what influence reconciliation ideology will have on its sentencing practice. The Preamble and Statute of the ICC are silent on reconciliation as a goal of international criminal justice. They avoid incorporating or making any reference to reconciliation. Likewise, the first ICC sentencing judgment did not consider contribution to reconciliation as a relevant sentencing factor for atrocity trials.[120] However, subsequent ICC judgments accept contribution to reconciliation as a possible sentencing consideration,[121] but not one that should overshadow punitive goals.[122]

E. Expressivism, General Affirmative Prevention, and the Didactic Function

An important step in the evolution of the global legal order is the crystallization of norms underpinning international law as more than mere soft law provisions, but more as binding law backed by punishment for violations, especially norms embedded in human rights treaties, international humanitarian law conventions, and the Genocide Convention. International criminal justice mechanisms contribute to building norms, values, and interests protected by international law and embedding them in the consciousness and culture of national and international actors.[123] In the context of atrocity trials, this translates into building awareness of the distinction between legal and criminal conduct during war or armed conflict, whether international or non-international in character.[124]

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[119] *See* Clark, *The Limits of Retributive Justice*, *supra* note 3, at 465 (challenging the merits of reconciliation and historical record building as goals of international criminal justice mechanisms).

[120] Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06-2901, Decision on Sentence pursuant to Article 76 of the Statute (July 10, 2012).

[121] Prosecutor v. Katanga, Decision on Sentence pursuant to article 76 of the Statute, ICC-01/04-01/07, (23 May 2014); Prosecutor v. Al Mahdi, Judgment and Sentence, ICC-01/12-01/15 (27 September 2016).

[122] Katanga Trial Sentence para. 38.

[123] *See, e.g.*, Prosecutor v. Nikolić, Trial Sentencing Judgment, *supra* note 58, at para. 139; Amann, *Group Mentality, Expressivism, and Genocide*, *supra* note 55, at 95, 118-19, 127, 132.

[124] Damaska, *What is the Point*, *supra* note 40, at 347. Related to didactic function is the expressive function. *See* Mark A. Drumbl, Atrocity, *supra* note 55, at 173-76; Luban, *Fairness to Rightness, supra* note 55, at 569, 576-77; Amann, *Group Mentality, Expressivism, and Genocide*, *supra* note 55, at 95; deGuzman *Choosing to Prosecute* (2012) *supra* note 9; Sloane, *The Expressive Capacity of International Punishment*, *supra* note 37, at 70-71.

These goals are shared by supporters of the expressive, didactic, or general affirmative prevention function of punishment for atrocity crimes.[125] These rationales have gained traction among defenders of international atrocity trials.[126] They find common ground in that the purpose of punishment is to influence legal awareness of a variety of stakeholders and assure them that the law is being enforced, as opposed to punishing simply to deter or because it is deserved. Under these approaches, punishment serves to reinvigorate public confidence in the rule of law and facilitate a process of norm internalization, ultimately contributing to general affirmative prevention. With minor variations, scholars from various disciplines refer to this function as "general affirmative prevention", the "didactic" function, or the "expressive" function of ICL punishment.[127] For some, it is the preferred sentencing rationale for punishing atrocities.[128]

At first blush, this aim may appear rather simplistic. After all, the line between legal and criminal conduct is rather obvious when considering murder, rape, torture, and other such crimes that occur in the context of armed conflict. However, crimes committed in these situations are often precipitated by direct and implicit indoctrination that dehumanizes the victim. Coupled with the awareness that war crimes historically go unpunished, these forces converge to disease belligerents with a "culture of inverse morality"[129] where killing, raping, and terrorizing civilians becomes an accepted part of the warfare itself. An individual's inner sense of morality and repulsion towards such brutality is overridden by peer pressure from immediate comrades and superiors, and reinforced by inflammatory rhetoric of national leaders.[130] The perversity can reach a point where, far from being considered wrongful, violence against "the other" is considered a righteous deed.[131] Thus, an educational or didactic function as an objective

[125] Amann, *Group Mentality, Expressivism, and Genocide*, *supra* note 55, at 95, 118-19, 127, 132; Robert Sloane, *Sentencing for the "Crime of Crimes": The Evolving 'Common Law' of Sentencing of the International Criminal Tribunal for Rwanda,* 5 J. INT'L CRIM. JUST. 713, 733-34 (2007); Nemitz, *The Law of Sentencing in International Criminal Law*, *supra* note 25.

[126] LARRY MAY & SHANNON FYFE, INTERNATIONAL CRIMINAL TRIBUNALS: A NORMATIVE DEFENSE, p. 61 (2017).

[127] Akhavan, *Beyond Impunity, supra* note 68, at 7; Damaska, *What is the Point*, *supra* note 40, at 334-35, 339, 345; Nemitz, *The Law of Sentencing in International Criminal Law*, *supra* note 25; Sloane, *The Expressive Capacity of International Punishment*, *supra* note 37, at 70-71.

[128] *See*, MAY & FYFE, A NORMATIVE DEFENSE (2017), *supra* note 126, p. 61; Sloane, *The Expressive Capacity of International Punishment*, *supra* note 37.

[129] *See* Akhavan, *Beyond Impunity, supra* note 68, at 7, 10, 12.

[130] For a comprehensive study of the relationship between inflammatory/hate speech and atrocity crimes *see*, Gregory S. Gordon, ATROCITY SPEECH LAW: FOUNDATION, FRAGMENTATION, FRUITION (2017).

[131] *See generally*, Akhavan, *Beyond Impunity, supra* note 68.

of sentencing is particularly significant in punishing atrocities.[132] It approaches the notion of deterrence from a positive perspective of crime prevention.[133] In addition to building awareness of international law, atrocity sentencing may also help reinforce specific values that the international community seeks to advance such as tolerance, elimination of prejudice, and freedom from persecution on the basis of race, religion, ethnicity or nationality.

But expressive accounts of punishing atrocities are also problematic. Larry May claims that for "expressivism to succeed there must be an audience that takes seriously what is expressed by a particular source."[134] He doubts whether atrocity trials can influence the moral assessment of actors who believe their acts of violence are morally correct or necessary.[135] This invites contemplation of the challenges of sustaining morality in war, and how that bears upon the goal of expressivism. The evils that inhere in war problematize achieving a didactic function through legalism via the extant framework. International law outlaws aggressive war, but even in situations where that norm is violated, international law accepts that killing of a combatant by a combatant is lawful. It is a position that is morally problematic, a legal construction that struggles to survive the realities of war.[136] Mark Drumbl argues that the questionable and limited quality of historical narratives created by international trials weaken their expressive capacity. Historical records based on atrocity trials are restricted and often incomplete due to evidentiary rules and prosecutorial discretion in case and charge selection.

The concept of general affirmative prevention in ICL derives from the Germany theory of positive general prevention.[137] Thus, it comes as no surprise that the ideology of general affirmative prevention gained traction in ICL jurisprudence with the arrival of German Judge Wolfgang Schomburg, an influential personality in shaping atrocity sentencing. In both trial and appeals chambers, when the panel of judges included Schomburg (often as presiding judge), the sentencing judgments include discussions of

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[132] *See* Tom J. Farer, *Restraining the Barbarians: Can International Criminal Law Help?*, 22 HUM. RTS. Q. 90, 91-92 (2000); Jelena Pejic, *Creating a Permanent International Criminal Court: The Obstacles to Independence and Effectiveness*, 29 COLUM. HUM. RTS. L. REV. 291, 292 (1998).

[133] *See*, MAY & FYFE, A NORMATIVE DEFENSE (2017), *supra* note 126, p. 61-62.

[134] *Id.* at 63.

[135] *Id.*

[136] For an outstanding discussion on how *jus in bello* provides moral guidance to combatants even if they are fighting for an unjust cause or on the side that has unlawfully used force *see* ADIL AHMAD HAQUE, LAW AND MORALITY AT WAR 43-49, 78-83, and 193-195 (2017).

[137] David Luban, Julie R. O'Sullivan & David P. Stewart, International and Transnational Criminal Law.

general affirmative prevention as one of the purposes of sentencing for atrocity crimes.[138] International judges at other tribunals have also advanced the didactic, expressive, or general affirmative prevention function.[139] These judges opined that punishment by an international criminal court "is intended to convey the message that globally accepted laws and rules have to be obeyed by everybody," and furthermore that "this fundamental rule fosters the internalisation of these laws and rules in the minds of legislators and the general public."[140] They describe this function of ICL punishment as "general affirmative prevention" and explain that it is "aimed at influencing the legal awareness of the accused, the victims, their relatives, the witnesses and the general public in order to reassure them that the legal system is implemented and enforced."[141] Among some ICL judges, general affirmative prevention even gained traction as one of the *main* purposes of ICL sentence.[142] For example, when sentencing former Liberian President Charles Taylor, the SCSL opined that general affirmative prevention is one of the main purposes of punishing atrocities, adding that "[s]entencing is intended to convey the message that globally accepted laws and rules have to be obeyed by everybody.[143] Likewise, scholars from various disciplines have embraced the "general affirmative prevention" function of international criminal prosecutions.[144]

Moreover, anecdotal illustrations of expressivism and the didactic function at work can be drawn from the experience of international criminal justice. As a study of ten post-atrocity situations observed, "when the [ICC] Pre-Trial Chamber authorized the Prosecutor to open investigations into the Kenya situation, the government of Kenya publicly committed itself to undertaking extensive constitutional and institutional

[138] *See*, Prosecutor v. Blaškić, Judgment, IT-95-14-A (29 July 2004), para. 678; Prosecutor v. Nikolić, Trial Sentencing Judgment, *supra* note 58, paras. 139-40; Prosecutor v. Stakić, Case No. IT-97-24-T, Trial Judgment, para. 901-902, (Int'l Crim. Trib. for the Former Yugoslavia July 31, 2003); Prosecutor v. Deronjić, Sentencing Judgment, *supra* note 52, at para. 149.

[139] CDF Trial Sentencing*paras.*28 and 30; AFRC Trial Sentencing Judgment para. 16; Taylor Trial Sentencing para. 16; AFRC Trial Sentencing para. 16; RUF Trial Sentencing para. 15.

[140] Prosecutor v. Nikolić, Trial Sentencing Judgment, *supra* note 58, at para. 139. Other trial chambers have also followed this approach. *See, e.g.*, Prosecutor v. Deronjić, Sentencing Judgment, *supra* note 52, at para. 149.

[141] Prosecutor v. Blaškić, Judgment, IT-95-14-A (29 July 2004), para. 678; CDF Trial Sentencing para. 28; AFRC Trial Sentencing Judgment para. 16; Taylor Trial Sentencing para. 16.

[142] Taylor Trial Sentencing para. 16; Prosecutor v. Nikolić, Trial Sentencing Judgment, *supra* note 58, at para. 139

[143] Taylor Trial Sentencing para. 16.

[144] Akhavan, *Beyond Impunity, supra* note 68, at 7; Damaska, *What is the Point*, *supra* note 40, at 334-35, 339, 345; Nemitz, *The Law of Sentencing in International Criminal Law*, *supra* note 25; Sloane, *The Expressive Capacity of International Punishment*, *supra* note 37, at 70-71.

reforms, including attempts to create a special division within the High Court with jurisdiction over international crimes."[145]

While international criminal prosecutions can contribute to this educational or didactic aim, it is unclear how this rationale can serve as a differential principle to guide sentencing allocations. Consistent prosecution and *some* punishment can readily achieve the didactic goal. Ascribing to it, as a sentencing factor, does not inform ICL judges about *how much* punishment is appropriate. Some international judges who embrace didactic aims accept this limitation of the didactic function.[146] The ICTY's leading proponent of the expressive potential of international criminal prosecutions, Judge Schomburg, prioritized retributivism over expressivism for the purposes of sentencing.[147] Yet, other judges at the ICTY, ICTR, and SCSL discussed the didactic aim as an *actual* sentencing factor but they do not explain how it informed the quantum of punishment.[148] Even if "influencing legal awareness" is accepted as a "main" function of sentencing, it is not clear how it guides the exercise of sentencing discretion or how it informs the appropriate quantum of punishment. It does not tell us whether the perpetrator ought to get 50 years or 25 years. Thus, the language of sentencing judgments should avoid conflating the possible functions of international criminal justice mechanisms with principles that can in fact guide sentencing. Likewise, in the sentencing discourse itself, the justification for punishment and the aims of punishment should be kept distinct.

Expressivism operates under the umbrella of retributivism.[149] In fact, absent a firm grounding in retributive justification, the expressive function loses its meaning and moral force. Thus, expressivism, the didactic aim, and general affirmative prevention are all best understood as potential optimistic outcomes of punishing atrocities, but not as factors that inform the appropriate quantum of punishment. The "culture of inverse

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[145] Evelyne Asaala, *The Deterrent Effect of the International Criminal Court: A Kenyan Perspective*, in: TWO STEPS FORWARD, ONE STEP BACK: THE DETERRENT EFFECT OF INTERNATIONAL CRIMINAL TRIBUNALS, Jennifer Schense & Linda Carter (eds.), p. 252 (2016).

[146] Prosecutor v. Nikolić, Trial Sentencing Judgment, *supra* note 58, at para. 123 (ruling that "the individual guilt of an accused limits the range of the sentence").

[147] *Id.*

[148] CDF Trial Sentencing*paras.*28 and 30; AFRC Trial Sentencing Judgment para. 16; Taylor Trial Sentencing para. 16; RUF Trial Sentencing para. 15; CDF Appeals Judgment para. 532; *Prosecutor v. Dragan Nikolić*, Case No. IT-94-2-S, Sentencing Judgment para. 40 (18 December 2003); *Prosecutor v. Mitar Vasiljević*, Case No. IT-98-32-A, Appeal Judgment para. 177 (25 February 2004); *Prosecutor v. Naser Orić*, Case No. IT-03-68-T, Trial Judgment para. 772 (30 June 2006).

[149] Prosecutor v. Nikolić, Trial Sentencing Judgment, *supra* note 58, at para. 123 (ruling that "the individual guilt of an accused limits the range of the sentence").

morality"[150] accompanying atrocity crimes does not take root for lack of awareness of the wrongfulness of the conduct. Rather, the absence of accountability and punishment for atrocity crimes sufficiently weakens the individual's moral resistance against calls to criminality in the face of orders from their leaders or pressures from their fellow soldiers.

III. BETWEEN PUNITIVE AND RESTORATIVE APPROACHES

As reconciliation ideology gained traction in the jurisprudence, it challenged the tribunal's rhetoric that retribution and deterrence are the primary goals of atrocity sentencing.[151] Consequently, inconsistency, indeterminacy, and confusion persisted from case to case when attributing priority and thus the influence of these rationales in sentencing allocations.[152] Does the weight given to reconciliation ideology undermine the purported primacy of retribution and deterrence in setting the appropriate severity of punishment? The uncertainty here results not only in the appearance of unfair sentences but also in arbitrary advancement of sentencing rationales.

Several scholars, like Mark Drumbl, Jan Nemitz, and Mirjan Damaska, have observed that under-theorization and lack of clarity regarding the purpose of international criminal prosecutions has undermined the court's integrity and credibility.[153] Nemitz criticizes international judges for engaging in "*ex post facto* justification" designed to legitimize a pre-determined end.[154] His "*ex post facto*" criticism merits further consideration, especially regarding the advancement of reconciliation as both grounds for justifying the practice of plea-bargaining[155] and as a mitigating factor.[156] Likewise, Drumbl theorized that the *ad hoc* tribunals "vacillate" between retribution and deterrence, that is, between deontological and consequentialist approaches to

[150] Akhavan, *Beyond Impunity*, *supra* note 68, at 10.

[151] Prosecutor v. Stakić, Case No. IT-97-24-A, Appeal Judgment, para. 402 (Mar. 22, 2006); Prosecutor v. Delalić, Case No. IT-96-21-A, Appeals Judgment, para. 806 (Feb. 20, 2001); Prosecutor v. Aleksovski, Case No. IT-94-14/1-A, Appellate Judgment, para. 185 (Mar. 24, 2000); Prosecutor v. Milutinović, Case No. IT-05-87-T, Trial Judgment Vol. 3, paras. 1144-45 (Feb. 26, 2009).

[152] ANDREW ASHWORTH & ANDREW VON HIRSCH, PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY 167 (Andrew Ashworth et al. eds., 3d ed. 2009) (arguing that identifying a priority among sentencing rationales is essential to achieving consistency and justice).

[153] *See* Damaska, *What is the Point*, *supra* note 40, at 330 (arguing that "current views on the objectives international criminal courts are in disarray"); Drumbl, *Collective Violence*, *supra* note 29, at 593; Nemitz, *The Law of Sentencing in International Criminal Law*, *supra* note 25.

[154] Nemitz, *The Law of Sentencing in International Criminal Law*, *supra* note 25.

[155] *See supra* Section II-D.

[156] *See infra* Section IV-B.

punishment.[157] He constructs this argument by creating three markers on a continuum: (1) judgments that cite retribution as the "primary objective", (2) judgments that treat retribution and general deterrence equally, and (3) judgments that considers "deterrence as probably the most important."[158]

Closer examination of the sentencing jurisprudence, however, challenges the theory that the tribunals vacillate between retribution and deterrence. The main difficulty with this explanation is that these markers do not carry the same weight or significance. The overwhelming majority of cases fall into group two. Only a few cases fall in groups one or three. Drumbl's own research confirms this.[159] For example, only one sentencing judgment can be found to hold the space of the third marker (that deterrence alone is the most important consideration), making it in my opinion more of an exception rather than a true vacillation. Additionally, that trial chamber did not even fully commit itself to that position: it states "deterrence *probably* is the most important factor."[160] Moreover, the Appeal Chamber distanced itself from this notion by explicitly ruling that deterrence should not be given undue prominence in the determination of a sentence and suggesting that retribution and deterrence are equal considerations.[161] Thus, any value that the trial judgment potentially offered for the retribution-deterrence vacillation argument has been overruled by the Appeals Chamber.

International judges do not meaningfully vacillate between retribution and deterrence ideologies. If they do, it is relatively minor. Across the general sentencing jurisprudence, international criminal tribunals generally position deterrence and retribution on equal footing.[162] Accordingly, I augment Drumbl's vacillation thesis by

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[157] Drumbl, *Collective Violence*, *supra* note 29, at 560-61.

[158] Drumbl, *Collective Violence*, *supra* note 29, at 560-62.

[159] Drumbl, *Collective Violence*, *supra* note 29, at 560 *et seq*.

[160] Prosecutor v. Delalić, Appeals Judgment, *supra* note 118, at para. 799 (emphasis added).

[161] Prosecutor v. Delalić, Appeals Judgment, *supra* note 118, at para. 801 (citing Prosecutor v. Tadić, Appeal Sentencing Judgment, *supra* note 62, at para. 48 (holding that deterrence "must not be accorded undue prominence in the overall assessment of the sentences to be imposed on persons convicted by the International Tribunal"). *See also* Prosecutor v. Alekovski, Case No. IT-95-14/1-A, Appeals Judgment, para. 185. (Mar. 24, 2000); Prosecutor v. Nikolić, Case No. IT-02-60/1-S, Sentencing Judgment, para. 90 (Dec. 2, 2003).

[162] *See* Prosecutor v. Popović, Case No. IT-05-88-T, Trial Judgment, para. 2128 (Jun. 10, 2010); Prosecutor v. Lukić, Case No. IT-05-87, Trial Judgment Vol. 3, paras. 1141, 1145-46 (July 20, 2009); Prosecutor v. Milutinović, Case No. IT-05-87-T, Trial Judgment Vol.3, para. 1144 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2009); Prosecutor v. Delić, Case No. IT-04-83-T, Trial Judgment, para. 559 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 15, 2008); Prosecutor v. Milošević, Case No. IT-98-29/1-T, Trial Judgment, para. 987 (Int'l Crim. Trib. for the Former Yugoslavia Dec.12, 2007); Prosecutor v. Martić, Case No. IT-95-11-T, Trial Judgment, para. 484 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2007); Prosecutor v. Zelenović, Case No. IT-96-23/2-S, Sentencing Judgment, para. 31 (Int'l Crim. Trib. for the Former Yugoslavia Apr. 4, 2007); Prosecutor v. Krajišnik, Case No. IT-00-39-T, Trial Judgment, para. 1134 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 27, 2006); Prosecutor v. Orić, Case No. IT-03-68-T, Trial Judgment, para. 718 (June 30, 2006);

reorientating its pivot. I theorize that ICL judges vacillate between *restorative* and *punitive* approaches. In other words, the tension is between retribution and deterrence (punitive approach) together on the one hand, and reconciliation (restorative approach) on the other. A number of factors have led me to prefer this explanation. First, most ICL sentencing judgments do not prioritize between retribution and deterrence.[163] Instead, they treat them as "equally important."[164] Thus, to argue that international judges vacillate between retribution and deterrence requires us to focus on one or two outlier judgments and ignore the bulk of the jurisprudence.

Accordingly, my theory redirects Drumbl's argument on vacillation between restorative goals (typified by reconciliation) on the one hand, and the two punitive goals of retribution and deterrence, on the other hand. This vacillation is more problematic for ICL because it exerts a more substantial, yet unpredictable, influence on the sentence. Both being punitive in orientation, retribution and deterrence leverage the severity of punishment in a similar direction; reconciliation, however, being restorative in orientation, will frequently exert a conflicting influence on the sentence when compared to punitive approaches.

These opposite orientations further highlight the serious and real tension between traditional criminal law functions and broader aspirations such as reconciliation and building a historical record. The vacillation argument takes new life when we unpack the impact of reconciliation ideology on the determination of a sentence. In fact, making more transparent the role of reconciliation in atrocity sentencing may help identify factors that contribute to seemingly incoherent sentences in international criminal law. Granted, establishing this link is immensely more challenging as reconciliation ideology

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Prosecutor v. Limaj, Case No. IT-03-66-T, Trial Judgment, para. 723 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005); Prosecutor v. Strugar, Case Trial Judgment, *supra* note 104, at para. 458; Prosecutor v. Blagojević, Case No. IT-02-60-T, Trial Judgment, para. 817 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005); Prosecutor v. Deronjić, Sentencing Judgment, *supra* note 52, at paras. 142-50; Prosecutor v. Stakić, Case No. IT-97-24-T, Trial Judgment, paras. 900-02 (Int'l Crim. Trib. for the Former Yugoslavia July 31, 2003); Prosecutor v. Kunarac, Case No. IT-96-23 & IT 96-23/1-A, Trial Judgment, para. 838 (Feb. 22, 2001); Prosecutor v. Delalić, Case No. IT-96-21-A, Appellate Judgment, para. 806 (Feb. 20, 2001); Prosecutor v. Aleksovski, Appellate Judgment, *supra* note 118, at para. 185; Prosecutor v. Blaškić, Case No. IT-95-14-T, Trial Judgment, para. 762 (Mar. 3, 2000); Prosecutor v. Kupreškić, Case No. IT-95-16-T, Trial Judgment, para. 848 (Jan. 14, 2000); Prosecutor v. Erdemović, Sentencing Judgment, *supra* note 43, at paras. 58, 64; Prosecutor v. Tadić, Sentencing Judgment, *supra* note 35, at paras. 7-9.

[163] Prosecutor v. Simić, Case No. IT-95-9/2-S, Sentencing Judgment para. 33 (Oct. 17, 2002) (stating that "The Trial Chamber is cognisant of the jurisprudence of the Tribunal, which supports deterrence and retribution as the main general sentencing factors."). *See also supra* note 40.

[164] Prosecutor v. Delić, Case No. IT-04-83-T, Trial Judgment, para. 559 (Sep. 15, 2008); Prosecutor v. Delalić, Appeals Judgment, *supra* note 118, at para. 806. Prosecutor v. Ntabakuze, Case No. ICTR-98-41A-A, Appeals Judgment (May 8, 2012).

is more influential in sentencing judgments following plea bargains, thus introducing a whole set of additional variables that complicate the sentencing matrix. Nevertheless, as elaborated above, the introduction of reconciliation ideology into the determination of a sentence has considerably increased indeterminacy and confusion in international penology.

The Special Court for Sierra Leone (SCSL) avoids this overreach and temptation to play a role in diplomatic and political restorative objectives, such as reconciliation, historical recording building, etc.[165] While the ICTY vacillated between a traditional punitive criminal law orientation and restorative objectives, the SCSL re-orientates ICL punishment towards a decisively punitive model. Four observations support this claim. First, the SCSL consistently prioritizes punitive justifications for sentencing by repeatedly identifying retribution and deterrence as the primary purpose of sentencing for atrocity crimes.[166] Second, the SCSL judges deliberately distance themselves from restorative ideologies such as rehabilitation and reconciliation.[167] Likewise, they saw little justification in getting entangled with objectives purportedly unique to ICL, such as historical record building, the didactic and expressive functions, and reconciliation ideology when determining sentencing allocations.[168] For example, they acknowledge rehabilitation as a factor in domestic criminal justice, but the SCSL judges consistently articulate why it is inapplicable to international criminal law. Third, the SCSL has rejected a number of mitigating factors that do not fit within a punitive framework for ICL punishment, including family circumstance, age, and others. Finally, the actual sentences reveal a firmly punitive approach to ICL punishment, especially in comparison to the ICTY. The SCSL's prioritization of a punitive approach over restorative approaches may explain its practice of imposing more severe sentences than other international tribunals. The average SCSL sentence is thirty-eight years, more than double the average at ICTY.[169]

[165] *See generally* Shahram Dana, *The Sentencing Legacy of the Special Court for Sierra Leone*, 42 GEORGIA J. INT'L & COMP. L. 615 (2014).

[166] CDF Appeal Judgment para. 532; RUF Sentencing Judgment para. 13; Taylor Sentencing Judgment para. 13; *see also supra* Part IV.*A.1*.

[167] CDF Appeal Judgment para. 532; RUF Sentencing Judgment para.13; Taylor Sentencing Judgment para. 13; *see also supra* Part IV.*A.1*.

[168] *See* Shahram Dana, *The Sentencing Legacy of the Special Court for Sierra Leone*, 42 GEORGIA J. INT'L & COMP. L. 615 (2014).

[169] The nine convicted defendants were sentenced to terms of imprisonment as follows: Fofana received 15 years; Kondewa 20; Gbao 25; Kallon 40; Kamara 45; Brima, Kanu and Taylor got 50 years each; Sesay received 52 years. *See supra* Tables 1–4.

The SCSL's redirection of ICL sentencing towards a more punitive orientation is a positive development for atrocity sentencing because the punitive/restorative vacillation exerted an uneven and unpredictable influence on the quantum of punishment.[170] Higher penalties, and prioritizing the punitive approach over a restorative model toward transitional justice, may help explain why the SCSL enjoys greater social legitimacy than other international criminal tribunals.[171] Although ICTY judgments begin by gesturing towards retribution and deterrence as the primary objectives influencing the quantum of punishment, sentencing narratives would invariably delve into discussion of diplomatic and policy goals of international trials, diminishing the influence of punitive rationales for punishment of atrocity crimes.[172] The ambivalence toward punitive justice is reflected in the ICTY's average sentence: between sixteen and seventeen years imprisonment for perpetrators of genocide, crimes against humanity, and war crimes.

IV. PROBLEMATIC ENTANGLEMENT WITH DETERRENCE AND RECONCILIATION

The opening of this chapter acknowledged that many objectives have been proffered as goals of international prosecutions, and even as goals of atrocity sentencing.[173] This overburdening of ICL has complicated the task of international judges. It is beyond the scope of this Chapter to address all of these aspirations, especially considering that many of them are better understood as broader objectives of international atrocity trials or proceedings rather than principles that can meaningfully guide sentencing determinations. Therefore, the following sections address deterrence and reconciliation because, among the consequentialist aspirations, they appear frequently in the sentencing judgments.

A common criticism of ICL sentencing is that the proffered rationales for punishment are ill suited to atrocity crimes and that they do not in fact guide sentencing

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[170] *See generally* Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U.L. REV. 539, 560–61 (2005); MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW (2007).

[171] MARY KALDOR & JAMES VINCENT, EVALUATION OF UNDP ASSISTANCE TO CONFLICT-AFFECTED COUNTRIES. CASE STUDY SIERRA LEONE (2006).

[172] *Id.* at 93.

[173] *See, supra* Section I. Introduction. *See also* Zoe Pearson, *Non-governmental Organizations and the International Criminal Court: Changing Landscapes of International Law*, 39 CORNELL INT'L L.J. 243, 271-81 (2006). *See generally* Vojin Dimitrijevic & Marko Milanovic, *Human Rights before International Criminal Courts, in* HUMAN RIGHTS LAW: FROM DISSEMINATION TO APPLICATION (Jonas Grimheden & Rolf Ring eds., 2006).

allocations at international criminal courts. International criminal law judges, who come from diverse countries, cultures, and legal systems, enjoy wide discretion in sentencing.[174] This is also true for the International Criminal Court.[175] Compared to its predecessors, the ICC statute is more detailed, more rigid, and more exacting in nearly every aspect of the court's functioning, except sentencing.[176] The wide discretion in sentencing matters afforded to ICL judges has thus far failed to produce a unified articulated vision on punishment in the context of international criminal justice. The ICC might well draw important lessons in this regard. There is an impression that ICTY and ICTR judges have been sticking the arrow in the wall and then painting the target around it.[177] In other words, international judges have a predetermined penalty in mind and simply mine among the rationales available to them under their wide discretion until they find one most convenient to their intended end. Although this may occur in some cases, it does not fully explain the sentencing practice. In the following sections discussing the impact of deterrence and reconciliation ideologies, I will seek to offer a more comprehensive explanation.

A. DETERRENCE

The effectiveness of deterrence through punishment has been well debated at the national level. Many are skeptical of this function of punishment in the domestic context and have repeated their skepticism in the context of international criminal justice.[178] However, Tom Farer reminds us that a "widely accepted dictum of domestic law enforcement is that a high probability of punishment generally deters more effectively than a very severe sanction rarely applied."[179] More precisely, the rational choice model

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[174] Prosecutor v. Nyiramasuhuko *et al*., *Judgment and Sentence*, ICTR-98-42-T (24 June 2011), para. 6188.

[175] Rome Statute of the International Criminal Court art. 77 (b)(1), July 17, 1998, 2187 U.N.T.S. 38544.

[176] Philippe Kirsch, *The International Criminal Court: From Rome to Kampala*, 43 J. MARSHALL L. Rev. 515, 519 (2010); Shahram Dana, *Law, Justice & Politics: A Reckoning of the International Criminal Court*, 43 J. MARSHALL L. REV. xxiii, xxvi-xxvii (2010). *See further* Chapter 2: *Reimagining Nulla Poena Sine Lege*, Section IV(C).

[177] Jan Nemitz, *The Law of Sentencing in International Criminal Law: The Purposes of Sentencing and the Applicable Method for the Determination of the Sentence*, 4 Y.B. OF INT'L HUMANITARIAN L. 87 (2001).

[178] *See*, *e.g.*, Jan Klabbers, *Just Revenge? The Deterrence Argument in International Criminal Law*, 12 FIN. Y.B. INT'L L., 249-67 (2001) (disagreeing that human rights violators can be deterred); Drumbl, *Collective Violence*, *supra* note 29, at 609-10 (2005) (claiming that there is little or no evidence that punishment deters perpetrators of mass atrocities); Farer, *Restraining the Barbarians*, *supra* note 109, at 92 (questioning a straight-forward extrapolation of experience with enforcement via criminal sanctions at the national level to enforcement at the international level).

[179] *Id.; See also*, Mark Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U. L. REV. 1221, 1255 (2000).

focuses not only on "the intensity of certainty, celerity, and proportionality of punishment but rather the individual's perception of these elements."[180] Given the long history of impunity for atrocity crimes, perhaps it is too early to judge whether international criminal justice can have an effective deterrent quality.[181] Jennifer Schense argued that the Nuremberg trials "had their greatest impact several generations after their conclusion."[182]

The establishment of a permanent international criminal court can contribute to increasing the probability that those bearing the greatest responsibility for mass atrocities will be punished. International criminal law has long lacked the necessary enforcement mechanisms to offer relative certainty of punishment for violations of human rights and international humanitarian law.[183] Moreover, with the current international criminal justice system remaining dreadfully dependent on voluntary cooperation of states, questions still remain whether the international system, in its present form, can sustain a credible threat of certain punishment so as to deter potential violators.

This section critiques the application of deterrence ideology in international judicial determinations of punishment for atrocity crimes. I do not attempt to settle the question of whether prosecutions for atrocity crimes actually deter the commission of gross violations of human rights.[184] The goal of this research is not to prove or disprove that proposition, although I will synthesize the arguments of ICL scholars on this question. My focus is on a different set of questions. First, do ICL judges consider deterrence as an appropriate objective of international punishment for atrocity crimes? Second, does deterrence ideology actually influence their sentencing allocations? And if so, how? What weight do judges give the goal of deterrence in sentencing? And does that weight change or shift depending on whether the perpetrator is a high-ranking figure or

[180] Dawn Rothe, *Commentary* in: Andre Klip & Göran Sluiter, 20 Annotated Leading Cases of International Criminal Tribunals 497, 501 (2010).

[181] Jennifer Schense & Linda Carter (eds.), TWO STEPS FORWARD, ONE STEP BACK: THE DETERRENT EFFECT OF INTERNATIONAL CRIMINAL TRIBUNALS 1 (2016) ("the impact of international tribunals has yet to be fully felt."); Drumbl, *Collective Violence*, *supra* note 29, at 608 (noting that international criminal law "is still relatively young" and "in a nascent stage").

[182] Jennifer Schense & Linda Carter (eds.), TWO STEPS FORWARD, ONE STEP BACK: THE DETERRENT EFFECT OF INTERNATIONAL CRIMINAL TRIBUNALS 1 (2016)

[183] *See* William W. Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 MICH. J. INT'L L. 1, 3 (2002).

[184] For a study of the deterrent impact of international trials *see*, Jennifer Schense & Linda Carter (eds.), TWO STEPS FORWARD, ONE STEP BACK: THE DETERRENT EFFECT OF INTERNATIONAL CRIMINAL TRIBUNALS (2016).

a low-level individual? In other words, do ICL judges consider the level of the perpetrator for the purpose of determining whether deterrence is an appropriate objective to pursue in the sentencing of the individual?

1. Theories on the Deterrent Capacity of International Prosecutions

Farer claims that "[b]elief about the potential efficacy of penal sanctions as vehicles for enforcing international law is a fairly straightforward extrapolation from the collective appreciation of law enforcement at the national level."[185] Speaking to this observation, Dawn Rothe notes that "the belief in effective deterrence can be carried over to assume that those actors most likely to be involved in state crimes[186] would seem to be those who are most susceptible to legal sanctions given 'what they have to lose' – social position,"[187] provided that, in my opinion, this control takes root before the actor resigns to a "no way out" mentality. Both are cautious, however, to not overstate the deterrent capacity of ICL. Farer cautions that "[c]onfidence in this extrapolation is not universally shared"[188] and Rothe notes that "for the most egregious of crimes, such controls have historically done little to deter."

A vocal proponent of the deterrent capacity of international criminal justice, Payam Akhavan, argues that mass atrocities are the product of "elite-induced" violence aimed at the acquisition or preservation of power.[189] Leaders are making calculated choices and trade-offs and engaging in an immoral cost-benefit analysis. Akhavan makes a compelling case that political power gained through fomenting ethnic hatred resulting in mass violence can be discouraged. Threat of punishment and international stigmatization "can increase the costs of a policy that is criminal under international law."[190] According to Akhavan, this can in turn impact the calculations of leaders contemplating engagement in criminal policies such as ethnic cleansing, genocide, or

[185] Farer, *Restraining the Barbarians*, *supra* note 109, at 92.

[186] I define "state crimes" as any action that violates international criminal law, and/or a states' own domestic law when these actions are committed by individual actors with de jure authority within state institutions, agencies, and/or militaries or with de facto authority over the same in the case of unrecognized states, even when such acts are motivated by their own personal economic, political, and ideological interests. This definition borrows heavily from the definition of state crimes offered by Professors Roth and Mullins. *See*, D. Rothe & C. Mullins, SYMBOLIC GESTURES AND THE GENERATION OF GLOBAL SOCIAL CONTROL: THE INTERNATIONAL CRIMINAL COURT (2006).

[187] Dawn Rothe, *Commentary*, *supra* note 203, at 501.

[188] *Id.*

[189] Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?* 95 AM. J. INT'L L. 7, 12 (2001).

[190] *Id.*

crimes against humanity as a viable policy for sustaining power.[191] A research study by Kathryn Sikkink and Hunjoon Kim concluded that criminal prosecutions can deter human rights violations.[192] Most supporters of deterrence in ICL acknowledge that some individuals may not easily be dissuaded from committing crimes when surrounded by routine cruelty. However, they maintain that punishment can be an effective deterrent in preventing such deviant contexts prior to their occurrence.[193]

Others are much more skeptical about the deterrent capacity of international prosecutions, raising both theoretical and pragmatic challenges.[194] Some critics focus on arguments challenging the applicability of theories of rational choice to collective violence or extremely powerful individuals.[195] Jan Klabbers, for example, takes the position that ICL will not play a significant deterrent role because human rights violators cannot be deterred.[196] He argues that the cost-benefit analysis underlying the deterrence argument advanced by Akhavan and others cannot be applied to human rights violators because they act mainly for political reasons. Because they willfully engage in mass murder for political motives, Klabbers considers them undeterrable. This argument, however, has attracted criticism for assuming that political motivations are necessarily beyond deterrence. As Isaac Ehrlich observes, "willful engagement in even the most reprehensible violations of legal and moral codes does not preclude an ability to make self-serving choices."[197] Missing from this debate is a contextual consideration of deterrence that distinguishes between high ranking political and military figures and low-level foot soldiers. I will develop this nuance below.

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[191] *Id*.

[192] Kathryn Sikkink and Hunjoon Kim, *Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries*, 54 INT'L STUDIES QUARTERLY 939 (2010).

[193] *See generally*, Akhavan, *Beyond Impunity*, *supra* note 189; Rolf Einar Fife, *Penalties*, *in* THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, 211-36 (Roy S. Lee ed.,1999); Dominic McGoldrick, *The Permanent International Criminal Court: An End to the Culture of Impunity?,* CRIM. L. REV.,Aug. 1999, at 627; M. Cherif Bassioiuni, *Searching for Peace and Achieving Justice: the Need for Accountability*, 59 L. & CONTEMP. PROBS. 9 (1996), for support of deterrence in ICL.

[194] Jan Klabbers, *Just Revenge? The Deterrence Argument in International Criminal Law*, 7 FIN. Y.B. INT'L L. 249 (2001) (disagreeing that human rights violators can be deterred); Drumbl, *Collective Violence*, *supra* note 29, at 610 (claiming that there is little or no evidence that punishment deters perpetrators of mass atrocities).

[195] *See e.g.* David S. Keller, *The Faith of the International Criminal Lawyer*, 40 N.Y.U. J. INT'L & POLICY 1019, 1027-1031 (2008) (discussing criticisms of ICL's deterrent capacity); *See generally* David Mendeloff, *Truth-seeking, Truth-telling, and Postconflict Peacebuilding: Curb the Enthusiasm?* 6 INT'L STUDIES REV. 355 (2004).

[196] Klabbers, *Just Revenge?, supra* note 72, at 253; Charles Villa-Vicencio, *Why Perpetrators Should Not Always Be Prosecuted: Where the International Court and Truth Commissions Meet*, 49 EMORY L.J. 205, 210 (2000).

[197] Isaac Ehrlich, *Crime, Punishment, and the Market for Offenses,* 10 J. ECON. PERSP. 43, 43 (1996).

As a preliminary matter, anecdotal accounts illustrate that the ICC does have some deterrent impact. For example, Joseph Kony demanded that the ICC drop its indictment as a condition of a peace agreement. Even ICC investigations absent successful prosecution can impact behavior of would be human right violators. In March 2010, the ICC Prosecutor opened a criminal investigation of alleged crimes against humanity into election related violence in Kenya in 2007 and 2008, eventually charging six persons including current Kenya President Uhuru Kenyatta. While the ICC investigations were on-going, Kenya held its 2013 presidential election which was reported to be a largely peaceful election, unlike prior experiences.[198] This happened despite the collapse of the case against Kenyatta and others. The ICC investigations into past election related violence correlated temporally with generally peaceful elections in 2013. Dr. Alex Vines, who served in various capacities with the United Nations and other organizations on human rights and international security matters in Africa, attributes Kenya's peaceful elections in 2013 to the "ICC act[ing] as a deterrent for further abuses."[199] Likewise, a study under the aegis of the International Nuremberg Academcy considered the absence of any *coup d'etat* in Sierra Leone since the operation of the SCSL as an indicator of the deterrent effect of international trials.[200]

Of course, these examples do not establish an empirically verifiable cause and effect between ICC investigations and peaceful elections. Limited or lack of empirical data and inconclusive findings on the deterrence effective of international trials render elusive quantitative claims. There is insufficient data to conclude empirically that international prosecutions deter atrocities. There is also insufficient data to conclude that it does not. Settling the question of whether international criminal prosecutions deter atrocity crimes is not the endeavor of this chapter. The focus is on a narrower question: to what extent does the objective of deterrence *actually* influence sentencing considerations of international judges? The aim here is not simply to consider the rhetoric employed by international judges in their discussion of the sentence, but to go beyond the rhetoric and examine the practice itself. The goal is to observe, analyze, and synthesize the impact of

[198] CNN, "Vote counting begins after largely peaceful election in Kenya" by Faith Karimi & Nema Elbagir, 4 March 2013.

[199] Dr. Alex Vines, "Does the international criminal court help to end conflict or exacerbate it?" The Guardian (22 February 2016). Others are less positive about the ICC's impact in Kenya. *See*, Mahmood Mamdani, Kenya 2013: The ICC election, Al-Jazeera, 15 March 2013.

[200] Jennifer Schense & Linda Carter (eds.), TWO STEPS FORWARD, ONE STEP BACK: THE DETERRENT EFFECT OF INTERNATIONAL CRIMINAL TRIBUNALS 161 (2016).

deterrence ideology on the sentencing decisions of ICL judges. Before doing so, a preliminary observation is offered from a pragmatic perspective. As noted above, effectively deterring future leaders from committing atrocities comprises a primary mandate of international tribunals. In the early days of the ICTY, for example, the main challenge to realizing this mandate was that those in custody were not the top leaders bearing the greatest responsibility for atrocity crimes. They were low-level soldiers like Dražan Erdemović[201] and Duško Tadić. High-ranking political and military leaders like Slobodan Milošević, Radovan Karadžić, Rakto Mladić, and Biljana Plavšić who bear the greatest responsibility for the atrocities, were at that time beyond the reach of the ICTY.[202] Nor was there any prospect that these individuals would ever see trial and punishment at the ICTY. The most senior ranking accused in the custody of the ICTY in the early days was Tihomir Blaškić, who had just been made a colonel at the time of the war. Although Blaškić was by no means a mastermind of the policies that lead to the atrocities, nor even among the high-ranking decision makers within the Bosnia Croat or Croatian power structures, he was nevertheless the highest-ranking person before the ICTY. If the ICTY wanted to send a message of deterrence through severe punishment of senior political and military officials, then the Tribunal would need to impose a severe sentence on Blaškić. It did so without hesitation. As Dawn Rothe observed, "a key goal of these proceeding was general deterrence, focused on reducing the probability of deviance in the general population."[203]

2. Divergent Impact of Deterrence Ideology in ICL Sentencing

ICL jurisprudence consistently holds that deterrence is one of the primary objectives in international sentencing.[204] Early sentencing judgments even considered

[201] *Croat is First to be Convicted by Balkan War Crimes Panel*, N.Y TIMES, June 1, 1996, http://www.nytimes.com/1996/06/01/world/croat-is-first-to-be-convicted-by-balkan-war-crimes-panel.html.

[202] Milošević was surrendered to the Tribunal on June 28, 2001 *see*, SLOBODAN MILOŠEVIĆ CASE INFORMATION SHEET, INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA; Karadzic was surrendered on July 30, 2008 *see*, RADOVAN KARADZIC CASE INFORMATION SHEET, INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA; Mladic was surrendered on May 31, 2011 *see*, RAKTO MLADIC CASE INFORMATION SHEET, INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA; Biljana Plavšić voluntarily surrendered to the ICTY on January 10, 2001 *see*, BILJANA PLAVŠIĆ CASE INFORMATION SHEET, INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA.

[203] Dawn Rothe, *Commentary* in: Andre Klip & Göran Sluiter, 20 Annotated Leading Cases of International Criminal Tribunals 497, 501 (2010).

[204] For rulings by the ICTY Appeals Chamber see, for example, Prosecutor v. Delalić, Appeals Judgment, *supra* note 118, at para. 806 ("[T]he Appeals Chamber (and Trial Chambers of both the Tribunal and the ICTR) have consistently pointed out that two of the main purposes of sentencing for these crimes are deterrence and retribution." (internal citations omitted)). For ICTY trial chambers, see, for example, Prosecutor v. Deronjić, Sentencing Judgment, *supra* note 52, at para. 142 (concluding that the "[f]undamental principles taken into

deterrence to be "the most important factor" in determining a sentence for international crimes.[205] Sending a strong message that the international community will not tolerate the perpetration of international crimes by political leaders and senior military officials has been considered as part of the mandate of international criminal justice from the very start. Particular importance is attached to effectively deterring the so-called architects of atrocity crimes, that is, those bearing the greatest responsibility for enabling genocidal policies, crimes against humanity, and war crimes.

Thus, ICL judges view the objective of deterrence as an appropriate and important influence on their determination of the severity of a sentence.[206] Whether the goal of deterrence meaningfully influences ICL sentences in practice can be challenged; nevertheless, the sentencing judgments ostensibly claim sentencing allocations to be deterrence orientated. For example, in the *Dragan Nikolić* case, the Trial Chamber held that deterrence was among the "[f]undamental principles *taken into consideration when* imposing a sentence".[207] Thus, the objective of deterrence was a factor that influenced the length of Dragan Nikolić's sentence. The deterrence orientation of these judges follows the approach of earlier cases.[208] For example, both the *Blaškić* case and the *Todorović* case express the view that the goal of deterrence may legitimately influence the sentence. The *Todorović* Trial Chamber understood this to mean that the goal of deterrence is relevant to determining whether an individual's punishment should be in the high or low end of the penalty range.[209] Punishment "imposed by the International Tribunal must, in general, have sufficient deterrent value to ensure that those who would consider committing similar crimes will be dissuaded from doing so.[210] The *Blaškić* Trial Chamber likewise adopts an objectives-orientated approach, namely general deterrence, to sentencing.

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consideration when imposing a sentence are deterrence and retribution"). For cases from the ICTR, see Prosecutor v. Rutaganda, Case No. ICTR-96-3-T, Judgment and Sentence (Dec. 6, 1999); Prosecutor v. Serushago, Case No. ICTR-98-39-S, Sentence (Feb. 5, 1999).

[205] *See, e.g.*, Prosecutor v. Delalić, Case No. IT-96-21-T, Trial Judgment, para. 1234 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998), http://icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf (stating that "[d]eterrence is probably the most important factor in the assessment of appropriate sentences for violations of international humanitarian law."); Prosecutor v. Blaškić, Case No. IT-95-14-T, Judgment, para. 761 (Int'l Crim. Trib. for Former Yugoslavia Mar. 3, 2000).

[206] *See further*, Prosecutor v. Todorović, Sentencing Judgment, *supra* note 58, at para. 30 (citing Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, Appeals Judgment, para. 185 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2000).

[207] Prosecutor v. Nikolic, Sentencing Judgment, *supra* note 94, at para. 132 (emphasis added).

[208] *See* Dana, *Revisiting the Blaškić*, *supra* note 74, at 326.

[209] Prosecutor v. Todorović, Sentencing Judgment, *supra* note 58, at para. 30.

[210] *Id.*

Notwithstanding the overt gesture towards the deterrence as a primary and influential consideration, do ICL judges in fact give significant weight to deterrence when determining the actual quantum of punishment? In other words, do ICL sentencing outcomes actually give primacy to deterrence ideology? To answer this question, this section will explore what impact, if any, did deterrence have on the sentences of General Tihomir Blaškić, Mikaeli Muhimana, and Stevan Todorović. These cases were selected for closer examination because they allow comparison between military and civilian figures at different levels of heirarchy.

Mikaeli Muhimana was a businessman and the *conseiller* of the Gishyita *secteur* during the Rwandan genocide.[211] The Trial Chamber found that he "occupied a position of influence in the community." Instead of using his position to protect the defenseless, he enabled and actively participated in the attacks against Tutsi civilians. He reportedly armed civilians, gendarmes, and communal police with the aim of exterminating Tutsi civilians.[212] Muhimana was a serial rapist who killed his rape victims in the most gruesome and brutal manner.[213] He was sentenced to life imprisonment. The Trial Chamber found a host of aggravating factors such as his position of influence,[214] the fact that the victims were seeking refuge,[215] the young age (fifteen years old) of one of the rape victims,[216] presence of others during the rapes,[217] intentionally increasing the suffering of the victim,[218] public humiliation,[219] savagery,[220] and the fact that the victim was pregnant.[221] Some of these aggravating factors could arguably be characterized as factors pertaining to the gravity of the offense.

The Trial Chamber found that the defendant's "status" in the society where he lived constituted an aggravating factor.[222] In *Muhimana* case, however, the Defense should have challenged the Prosecutor's submission that his "status" constitutes an aggravating factor.

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[211] Prosecutor v. Muhimana, Judgment and Sentence, Case No. ICTR-95-1B-T (28 April 2005). paras. 3, 4, 596, and 604.

[212] Trial International, Mikaeli Muhimana (7 June 2016) *available at* https://trialinternational.org/latest-post/mikaeli-muhimana/

[213] Prosecutor v. Muhimana, Case No. ICTR-95-1B-T, Judgment and Sentence, paras. 606-15 (Apr. 28, 2005). In one incident, Muhimana "used a machete to cut the pregnant woman Pascasie Mukaremera from her breasts down to her genitals and remove her baby, who cried for some time before dying. After disembowelling the woman, the assailants accompanying Muhimana then cut off her arms and stuck sharpened sticks into them."

[214] Prosecutor v. Muhimana, Judgment and Sentence, *supra* note 211, at para. 604.

[215] *Id.* at para. 605.

[216] *Id.* at para. 607.

[217] *Id.* at para. 609.

[218] *Id.* at para. 610.

[219] *Id.* at para. 611.

[220] *Id.* at para. 612.

[221] *Id.* at para. 612.

[222] *Id.* at paras. 595-96.

Neither the Trial Chamber nor the Prosecutor explain how Muhimana's "status" aggravates his criminality. The Prosecution only submits that "his close associations with senior civil servants and prominent business people, and his popularity . . . further enhanced his 'status'."[223] The Trial Chamber accepted this argument and aggravated his sentence because of his "status."[224] However, while his associations and popularity may have enhanced his "status," the Trial Chamber does not explain how it enhances his culpability in relation to his crimes. The *Muhimana* Trial Chamber found no mitigating circumstances,[225] and the Defense surprisingly made no submissions on this point.[226]

Generally speaking, persons in positions of public authority who abuse their positions and the powers entrusted to them to commit or enable mass atrocities merit greater punishment because such perpetrations are more dangerous in that they cast a wider net of harm and destruction. While ICL jurisprudence recognizes these principles by holding "superior position" or "abuse of authority" as aggravating factors, it would be incorrect to interpret this as increasing punishment based on "status" alone. It is not mere "status" that warrants greater punishment; it is about using the power and authority that flows from that status or senior position to enable groups to perpetrate atrocities. When a senior government official uses his or her superior position and power to enable the commission of atrocities, an increase in punishment is deserved. Aggravating the punishment in these circumstances can be also justified because the senior public official breached a sacred trust by abusing their position and resources at their disposal to victimize those to whom they owed a duty to protect. These factors have a direct impact on their criminality.

Thus, the ICTR Trial Chamber's discussion (and the Prosecutor's argumentation) of this issue in terms of "status" is unfortunate, but its intuition is correct. The ICTR Trial Chamber viewed Muhimana as an influential person and middle to high-level public official who used his influence and authority to enable groups of actors to commit crimes against humanity. Enabling atrocities deserves severe punishment and the Trial Chamber sentenced accordingly.[227] Muhimana was sentenced to life imprisonment.[228]

Around the same time that Muhimana was taken into custody by the ICTR, Stevan Todorović was busy negotiating a plea deal with the ICTY. Todorović's crimes include

[223] *Id.* at para. 596.
[224] *Id.* at para. 604.
[225] *Id.* at para. 616.
[226] *Id.* at para. 602.
[227] *Id.* at para. 618.
[228] The life sentence was affirmed on appeal. Prosecutor v. Muhimana, Judgment, Case No. ICTR-95-1B-A (21 May 2007).

murder, sexual assaults, beatings, ordering and participating in the unlawful detention and cruel and inhumane treatment of non-Serb civilians, ordering subordinates to torture a person, ordering and participating in deportation and forcible transfers, ordering and issuing directives violating the rights of non-Serb civilians to equal treatment under the law, and infringing on their basic rights.[229] He also participated in the forcible takeover of the non-Serb towns and villages in the municipality of Bosanski Samac.[230] He was convicted of persecution as a crime against humanity. Todorović was the Chief of Police in Bosanski Samac and also a member of the Serb Crisis Staff.[231] The *Todorović* Trial Chamber considered "his abuse of such a superior position" and the "particular cruelty" and "duration" of the beatings as an aggravating factor.[232] As mitigating factors, the Trial Chamber held that Todorović's guilty plea, expression of remorse, and substantial cooperation with the Prosecution merited reduction in the penalty.[233] For his crimes, the Prosecution recommended a sentence of five to twelve years; the Trial Chamber sentenced him to ten years imprisonment.

In comparison with penalties at the national level as well as penalties imposed by international criminal courts, Todorović's punishment is notably lenient: ten years for a murder, multiple lengthy and brutal beatings, and sexual assaults, crimes committed with discriminatory intent amounting to persecution as a crime against humanity.[234] While recalling the Appeals Chamber's rulings that deterrence is an important and significant consideration when fixing a penalty, Todorović's actual sentence reveals that deterrence objectives had little or no impact on the penalty, according to the Trial Chamber's own explanation and in comparison to the average length of ICTY sentence (approximately seventeen years). The *Todorović* trial judges ruled that "while the Chamber recognises the importance of deterrence as a general consideration in sentencing, it will not treat deterrence as a distinct factor in determining sentence in this case."[235] In essence, the *Todorović* Trial Chamber took the position that it was free to ignore deterrence as a consideration when fixing its penalty, despite the pronouncements of the Appeals Chamber. Moreover, it gives no explanation for why it chooses to not factor deterrence

[229] *Id*. at para. 9
[230] *Id*. at paras. 12, 35.
[231] *Id.* at para. 60.
[232] *Id.* at paras. 59-62.
[233] *Id.* at paras. 67-95.
[234] *See generally*, Ulrich Sieber (ed.), THE PUNISHMENT OF SERIOUS CRIMES: A COMPARATIVE ANALYSIS OF SENTENCING LAW AND PRACTICE VOL. 2 (2004) (analyzing punishment reports from various countries).
[235] Prosecutor v. Todorović, Sentencing Judgment, *supra* note 58, at para. 30.

rationale into its sentence in this case, as all other trial chambers had done. The Trial Chamber may have a good reason for not giving much weight to deterrence, but this reason is not made transparent. The lack of transparency, in turn, can lead to criticism that the Tribunal's sentencing practice is unjust and arbitrary. Such criticism calls into question the legitimacy of international sentencing and undermines its expressive capacity. Subsequent sections of this chapter will explain why the judges were instinctively correct to discount deterrence ideology when determining how severely they should punish Todorović.[236] Before exploring that discussion, let us first consider General Blaškić's sentence in the context of the impact of deterrence.

If the *Todorović* case serves as an example of a trial chamber paying lip service to the objective of deterrence but not following that ideology in its actual sentencing, what example does the *Blaškić* case provide? General Blaškić was the first high-ranking figure to appear before the ICTY.[237] At the start of his trial, the Tribunal had a meager eight alleged war criminals in its custody. War criminals to prosecute were hard to come by and the dockets were empty despite the fact that the Office of the Prosecutor (OTP) had publically issued indictments for seventy-five individuals.[238] Among those in custody, Blaškić was not only the highest-ranking defendant, but also the only one of any significance.[239] The Trial Chamber found him guilty of persecution as a crime against humanity for ordering attacks on towns and villages, murder, destruction of property and institutions dedicated to religion or education, inhumane treatment, and forcible transfer of civilians.[240] He was also convicted of war crimes, but the underlying acts overlapped almost entirely with the crimes against humanity charges.[241] In other words, due to the different jurisdictional elements of crimes against humanity and war crimes, the alleged

[236] Arguably, the circumstances of Todorović's case necessitated powerful pragmatic considerations, leading to a plea agreement between the accused and the Prosecutor. However, the low sentence is not fully explained by them. After all, the Trial Chamber could have given a higher sentence (that of 12 years) and still satisfied the terms of the plea agreement.

[237] GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE 4 (2000).

[238] *Id.*

[239] *Id*.

[240] Prosecutor v. Blaškić, Trial Judgment, *supra* note 151, at para. 267. The trial lasted more than two years. The Prosecution opened the trial on 24 June 1997 and completed its case-in-chief on July 29, 1998. Presentation of evidence by the Defense commenced on September 7, 1998. Following a period of recess after the Defense rested, the Trial Chamber heard closing arguments from July 26 to 30, 1999.

[241] *See* ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS, VOLUME IV: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 1999-2000, 659-66. (André Klip & Göran Sluiter eds., 2002), for further analysis of General Blaškić's criminal responsibility.

criminal acts were charged as both.[242] I have elsewhere criticized the *Blaškić* Trial Chamber's analysis of modes of liability,[243] which was subsequently overturned on appeal in large part.[244]

For the judges in the *Blaškić* case,[245] the key to determining a "fair" and "just" sentence was not the gravity of the offense but the "objectives sought" by international prosecutions and punishment.[246] In their estimation, the main objective of international prosecutions is deterrence.[247] The commitment of the judges to deterrence is asserted several times, and it unequivocally increased General Blaškić's sentence: "The Tribunal's mission is to put to an end serious violations of international humanitarian law."[248] In order to achieve this objective, deterrence became "the most important factor in the assessment of appropriate sentences for violations of international humanitarian law."[249] Thus, the international judges here are clearly adopting a consequentialist approach towards General Blaškić's punishment. The result was forty-five years of imprisonment; the most senior figure in the court's custody received the highest punishment ever imposed by the ICTY at that time.[250]

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[242] *See* William Fenrick, *A First Attempt to Adjudicate Conduct of Hostilities Offenses: Comments on Aspects of the ICTY Trial Decision in the Prosecutor v. Tihomir Blaškić*, 13 LEIDEN J. INT'L L. 931 (2000), for a discussion on the Trial Chamber's findings on the charge of unlawful attacks and its relation to persecution as a crime against humanity.

[243] *See* Dana, *Revisiting the Blaškić*, *supra* note 74. *See also* Prosecutor v. Blaškić, Trial Judgment, *supra* note 151, at paras. 267-70.

[244] Prosecutor v. Blaškić, Trial Judgment, *supra* note 151, at para. 502.

[245] The Trial Chamber was composed of Judge Claude Jorda (Presiding), Judge Almiro Rodrigues, and Judge Mohamed Shahabuddeen.

[246] *Id.* at para. 761.

[247] *Id.* at para. 762.

[248] *Id.*

[249] Prosecutor v. Blaškić, Trial Judgment, *supra* note 151, at para. 761 (quoting Prosecutor v. Delalić "Čelebići", Case No. IT-96-21-T, Trial Judgment (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998)). Moreover, the *Blaškić* Trial Chamber considered both specific deterrence and general deterrence as relevant factors in allocating a punishment: "Apart from the fact that the accused should be sufficiently deterred by appropriate sentence from ever contemplating taking part in such crimes again, persons in similar situations in the future should similarly be deterred from resorting to such crimes." *Id.* (quoting the Čelebići Trial Judgment at para. 1234).

[250] Prosecutor v. Furundzija, Case No. IT-95-17/1-A, Judgment (July 21, 2000), (sentenced to 10 years); Prosecutor v. Aleksovski, Appeals Judgment, *supra* note 118, at para. 191 (sentenced to 7 years); Prosecutor v. Tadić, Appeal Sentencing Judgment, *supra* note 62, at para. 76 (3) (sentenced to 20 years); Prosecutor v. Jelisić, Case No. IT-95-10-A, Judgment, para. (7) (July 5, 2001), (sentenced to 40 years); Prosecutor v. Kupreskic, Case No. IT-95-16-A, Appeal Judgment, paras. 439, 466 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 23, 2001), http://www.icty.org/x/cases/kupreskic/acjug/en/kup-aj011023e.pdf (Josipovic and Santic were sentenced to 12 and 18 years, respectively); Prosecutor v. Kupreskic, Case No. IT-95-16-T, Judgment, paras. 1, 3 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000), http://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf (The Trial Chamber acquitted Papic. The Kupreskic brothers were sentenced to 6, 8 and 10 years, but all three were acquitted on appeal). *See* Prosecutor v. Kupreskic, Case No IT-95-16-A, Appeal Judgment (Int'l Crim. Trib. for the Former Yugoslavia Oct. 23, 2001), http://www.icty.org/x/cases/kupreskic/acjug/en/kup-aj011023e.pdf.

The influence of deterrence in increasing Blaškić's punishment is demonstrated not only by court's consequentialist reasoning and lengthy sentence, but also by its treatment of aggravating and mitigating factors, especially its marginalization of mitigating factors relevant to individualizing the sentence.[251] In the Trial Chamber's own words, in light of the deterrent "mission of the Tribunal, it is appropriate to attribute a lesser significance to the specific personal circumstances."[252] From the perspective of the Trial Chamber's deterrence ideology, this reasoning makes perfect sense. It is a logical extension of its ideology because such factors are less relevant to the goal of deterrence. The *Blaškić* Trial Chamber's treatment of "personal factors" and "rehabilitation" only serve to underscore its deterrence orientation towards punishing atrocities. The court's own findings strongly indicate that Blaškić is well suited for rehabilitation: he had no prior criminal record;[253] assisted victims;[254] was a dutiful and professional soldier,[255] and demonstrated "exemplary behaviour" throughout the entire trial.[256] After a detailed accounting and analysis, the Trial Chamber concluded that it was "evident" that Blaškić's "character is reformable."[257] Furthermore, on principle, the Trial Chamber stated that rehabilitation is a factor "to be taken into account in fixing the length of the sentence"[258] Then, completely against the grain of their explicit reasoning, judges abruptly did the opposite of the principles and finding they just laid out and declared that these factors will not be taken into account and are "non-existent" for the purposes of fixing Blaškić's sentencing.[259]

What is objectionable about the *Blaškić* judgment authored by Judge Claudia Jorda (France) is not its rejection of rehabilitation, but the oblivious disconnect between its narrative and its actual sentencing outcome. Judge Jorda states that rehabilitation is one of the parameters of ICL sentencing, presents a compelling narrative about Blaškić's rehabilitative character, but then states none of this will be considered when punishing him. Given this detailed analysis, we would have expected the judges to provide a similarly detailed explanation of why it is rejecting its own analysis. Instead, in a single line, the Trial Chamber summarily concluded

[251] In one way or another, the *Blaškić* Trial Chamber found reason to reject the following mitigating factors: voluntary surrender (Prosecutor v. Blaškić, Trial Judgment, *supra* note 151, at para. 776); remorse (*Id.* at para. 775); lack of direct participation in the crime (*Id.* at para. 768); duress (*Id.* at para. 769); material context of armed conflict, *i.e.* disorder ensuing from a state of armed conflict (*Id.* at para. 770); and co-operation with the Prosecutor (*Id.* at para. 774).

[252] Prosecutor v. Blaškić, Trial Judgment, *supra* note 151, at para. 765.

[253] *Id.* at para. 780.

[254] *Id.* at para. 781.

[255] *Id.* at paras. 765, 780.

[256] *Id.* at paras. 765, 780.

[257] Prosecutor v. Blaškić, Trial Judgment, *supra* note 151, at para. 781.

[258] *Id.* at para. 761.

[259] *Id.* at para. 782.

that factors indicative of Blaškić's reformability were "*non-existent* when determining the sentence."[260] By the time the Trial Chamber reaches the end of its analysis, it appears to experience amnesia vis-à-vis its own principles guiding the parameters of an appropriate punishment. Thus, although the Trial Chamber sets-out "four parameters",[261] it appears to be only seriously interested in deterrence. Nevertheless, despite the criticisms that may be levied against the *Blaškić Trial Judgment*,[262] it must be noted in its favor that, unlike the *Todorović* Trial Chamber, once the *Blaškić* Trial Chamber commits to deterrence, it remains faithful to its espoused ideology and reflects that ideology in its sentence. It takes the position that sentences must reflect the object of Tribunal's mandate. It identifies deterrence as the main objective, and it imposes a sentence commensurate with that objective.

In sum, both the *Todorović* and *Blaškić* trial chambers overtly state that deterrence is one of the primary goals of punishing atrocities and as such may influence the sentence. However, the sentencing outcome in the *Todorović* case reveals that the goal of deterrence did not have a meaningful impact on the punishment; whereas it had a substantial influence on Blaškić's sentence. The potential appearance of inconsistency here is further exacerbated by the *Todorović* Trial Chamber's admission, without explanation, that it opted to not consider the goal of deterrence at all when punishing Todorović. Why was Blaškić not so fortunate to benefit from a suspension of the penalty enhancing effects of deterrence ideology? I argue below in Section 3 that both trial chambers "got it right" intuitively, even if they could have done better to articulate their approaches.

3. Reflections on Deterrence & International Criminal Justice

To further examine the role and relevance of deterrence to international sentencing, it may be helpful to place perpetrators of atrocities crimes in two broad categories of offenders: low-level perpetrators and high-level perpetrators. Mass conflict is the theater for mass atrocities. Genocide, crimes against humanity, and war crimes usually occur in the context of protracted mass violence or armed conflict. Therefore, I argue that responsibility for enabling

[260] *Id.* at para. 782 (emphasis added). The Trial Chamber gave two reasons to justify its positions here: the "serious" nature of the case and the fact that "many accused share these personal factors" *Id.* at para. 782.

[261] They are retribution, protection of society, rehabilitation and deterrence. Prosecutor v. Blaškić, Trial Judgment, *supra* note 151, at para. 761.

[262] For example, it has departed in both ideology and practice from the general sentencing jurisprudence of the ICTY and ICTR that treat "gravity" of the crime as the primary factor in determining a sentence. Dana, *Revisiting the Blaškić*, *supra* note 74, at 330-32.

mass conflict must be accounted for when pursuing deterrence and determining what impact it should have on the severity of the sentence. In a holistic study of international, domestic, and foreign prosecutions, Kathryn Sikkink and Hun Joon Kim of the Griffith Asian Institute at Griffith University found that "prosecution processes and convictions of high-level state officials appear to have a stronger deterrence effect when compared with prosecutions and convictions of low-level officials."[263] Thus, in the context of atrocity crimes, deterrence is arguably better suited to punishment of high-level perpetrators.

Their findings push back against Jan Klabber's assumption that human rights violators are undeterrable and support Payam Akhavan's position that high-level political and military officials are not free of self-serving motives and that the model of the "rational calculating" actor applies to them. As noted above by Dawn Rothe, deterrence can be effectively applied to the powerful actors who enable atrocities. Thus, from a utilitarian perspective, punishment can have a deterrent effect by tipping the scales on the cost-benefit analysis[264] so that "crime does not pay." According to Akhavan, high-level leaders, responsible for instigating circumstances that lead to atrocity crimes, deliberately and calculatedly promulgated doctrine of racial and religious hatred or extreme nationalism and cynically propagated such divisive currencies to ascend to political power. Punishment of such persons can demonstrate that there is a real cost, in terms of a severe penalty, for those that seek to gain political power through tactics that endanger the stability of society. The punishment must outweigh any political gains. Conversely, contextual considerations, such as a culture of inverse morality as noted by other authors and discussed above, challenges the appropriateness and effectiveness of deterrence in relation to low-level perpetrators or those that were not enablers of the conflict.[265] Although as discussed above, the didactic function of ICL or "affirmative general prevention" can play a role in preventing such a culture from taking root.[266]

Therefore, leaders bearing the greatest responsibility for atrocity crimes or enablers of the conflict are appropriate targets of deterrence ideology punitively swelling their punishment. Criminology research shows that "social location and position strongly influence deterrence."[267] I argue that understanding the weight given (or not given) to deterrence through

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[263] Kathryn Sikkink and Hun Joon Kim, *The Justice Cascade: The Origins and Effectiveness of Prosecutions of Human Rights Violations*, 9 ANNUAL REV. LAW AND SOCIAL SCIENCE, 269, 281 (2013).

[264] *See generally*, Akhavan, *Beyond Impunity*, *supra* note 189, at 8.

[265] *See* Akhavan, *Beyond Impunity*, *supra* note 189, at 7. Kathryn Sikkink and Hun Joon Kim, *The Justice Cascade: The Origins and Effectiveness of Prosecutions of Human Rights Violations*, 9 ANNUAL REV. LAW AND SOCIAL SCIENCE, 269, 281 (2013).

[266] Nemitz, *The Law of Sentencing in International Criminal Law*, *supra* note 25, at 90, 110-11.

[267] Dawn Rothe, *Commentary*, *supra* note 203, at 501.

the lens of the enabler factor helps explain sentencing outcomes.[268] The enabler factor explains why the goal of deterrence results in a more punitive punishment for some perpetrators but not others. It can explain not only sentencing outcomes but also the choices and rulings the judges made to justify those outcomes. Enablers of atrocity crimes are more likely to be among those making calculated decisions to deliberately engage in gross violations of human rights in order to achieve their goals or ambitions. As many experts have argued, the rational choice model can be applied to these actors.[269] On the other hand, as discussed above many non-enablers, mid-level and low-level perpetrators, commit their crimes in a context where firmness of moral resistance to wrongdoing has been considerable weakened by widespread, systemic, or state-induced atrocity crimes. A person of ordinary firmness may be unable to resist the tide of systemic criminality unleased by enablers. In such contexts, where the behavior ICL seeks to deter is no longer the deviant behavior but has in reality become the widespread behavior, deterrence has little hope of gaining traction. In such situations, it may be appropriate to de-emphasize deterrence ideology in favor of rehabilitation. To be certain, it is quite possible that some non-enablers are outside this context and can be effectively deterred. This would need to be resolved by a factual interrogation of the conduct and character of the perpetrator.

Even if one disagrees with this approach, it may explain what the Tribunals are doing. As demonstrated above, some trial chambers took a consequentialist approach towards punishment of human right violators, focusing on deterrence. While the rhetoric on deterrence is bold and broad, the practice reveals a more subtle and sophisticated nuance. There is some evidence that international judges weigh the relevance of deterrence in determining the quantum of punishment for a particular perpetrator based on that person's position of authority or whether they acted as an enabler of the conflict. This is illustrated through the examples of the punishment of Blaškić and Todorović. Both trial chambers declared the objective of deterrence to be a factor in their sentencing allocations. The *Blaškić* Trial Chamber in particular appears wholly fixated on deterrence, but a closer reading reveals that its reactionary consequentialism is induced by the presence of a high-ranking perpetrator. The judges unwaveringly declared that "the Tribunal was set up to punish according to the accused's level of responsibility."[270] Thus, the judges in the *Blaškić* case approached the deterrence factor with regard to Blaškić's role and position in the overall hierarchy that was responsible for the atrocities.

[268] The enabler factor is presented and discussed in detail in Chapter Four.
[269] *See supra* note 193 for support of the deterrence capacity of atrocity trials.
[270] Prosecutor v. Blaškić, Trial Judgment, *supra* note 151, at para. 808.

Moreover, regarding the influence of general deterrence on punishment in ICL, with a few exceptions, the sentencing practice indicates that the objective of general deterrence will increase the sentence of a high-ranking perpetrator, but generally has little effect on the sentence of rank and file soldiers, unless they demonstrated notorious cruelty or exceptional brutality. This explains to some extent why Todorović received a very low sentence. Boiler plate rhetoric aside, international judges do not actually seem to be very convinced that deterrence is relevant or effective in the case of mid or low-level perpetrators. A more cynical view attributes Todorović's low punishment to the embarrassing situation the ICTY found itself in when the United Nations sanctioned peacekeeping force, S-FOR,[271] refused to comply with the Court's order to turn over documents relevant to his arrest and transfer to The Hague.[272] This perspective, however, does not entirely account for how low the Trial Chamber went with Todorović's sentence because the judges could have given a higher sentence and still remained within the scope and terms of the plea agreement.

In sum, international judges gesture towards deterrence as a universal influencer of the quantum of the sentence.[273] This rhetoric unfortunately obfuscates an actual sentencing practice that features appropriate and important granularity. The general sentencing jurisprudence reveals that the goal of deterrence has little impact on increasing the penalty of low-level war criminals. Deterrence plays a more significant role in enhancing the penalty for a high-level perpetrator or those that had significant power or influence or enabled atrocities. This nuance in the sentencing practice resonates with expert findings that rank and file common persons cannot be easily deterred when surrounded by the chaos of systematic criminality during

[271] S-FOR stands for "Stabilization Force" which was led by NATO but established by United Nations Security Council pursuant to Resolution 1088 on December 12, 1996.

[272] Combs, *Copping a Plea, supra* note 112, at 118-22; *See* discussion *infra* Section II(B)(2).

[273] *See* Prosecutor v. Galic, Case No. IT-98-29-A, Judgment, para. 441 (Nov. 30, 2006); Prosecutor v. Stakić, Case No. IT-97-24-T, Judgment, paras. 891, 900, 902 (Int'l Crim. Trib. for the Former Yugoslavia July 31, 2003); Prosecutor v. Plavšić, Sentencing Judgement, *supra* note 36, at para. 24; Prosecutor v. Krajišnik, Case No. IT-00-39-A, Judgment, paras. 775-77 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 17, 2009*)*; Prosecutor v. Blaškić, Judgment, *supra* note 151, at para. 761; Prosecutor v. Delić, Case No. 1T-04-83-T, Trial Judgment, para. 559 (Int'l Crim. Trib. for the Former Yugoslavia Sept 15, 2008); Prosecutor v. Milutinović, Case No. IT-05-87-T, Judgment, para. 1144 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2009); Prosecutor v. Lukić, Case No. IT-98-32/1-T, Trial Judgment, para. 1049 (Int'l Crim. Trib. for the Former Yugoslavia July 20, 2009); Prosecutor v. Popović, Case No. IT-05-88-T, Trial Judgment, para. 2128 (Int'l Crim. Trib. for the Former Yugoslavia June 10, 2010); Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Trial Judgment, para. 838 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001); Prosecutor v. Blagojević, Case No. IT-02-60-T, Trial Judgment, para. 817 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 17, 2005); Prosecutor v. Strugar, Trial Judgment, *supra* note 104, at para. 458; Prosecutor v. Limaj, Case No. 1T-03-66-T, Trial Judgment, para. 723 (Int'l Crim. Trib. for the Former Yugoslavia November. 30, 2005); Prosecutor v. Orić, Case No. 1T-03-68-T, Trial Judgment, para. 718 (Int'l Crim. Trib. for the Former Yugoslavia June 30, 2006); Prosecutor v. Tadić, Sentencing Judgment, *supra* note 35, at paras. 7-9; Prosecutor v Kupreški, Case No. IT-95-16-T, Trial Judgment, para. 848 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000).

war.[274] Instead, the goal of deterrence should focus ICL's punitive sting for leaders who used their power and influence to enable systemic criminality and criminal policies.

B. RECONCILIATION

One unresolved question regarding the role of international atrocity trials and punishment is to what extent the ICC and other international criminal justice mechanisms should allow reconciliation ideology to influence its decision-making. Prioritizing reconciliation (a restorative focus) over retribution and deterrence (punitive focuses) may alter decisions by the ICC Prosecutor at the front end, for example in case and situation selection, as well as decisions by judges at the back end, for example when sentencing.[275] This section examines the impact of reconciliation ideology on ICL sentencing. What influence does the goal of reconciliation have on the quantum of punishment? In examining this question, the research methodology in this study took into account the possibility that the influence of reconciliation ideology may not have been uniform over the duration of the operation of international criminal tribunals. Thus, this section also explores trends over time regarding the impact of reconciliation ideology.

Additionally, this section scrutinizes the interconnectivity between reconciliation ideology and other sentencing factors. Has infusing reconciliation ideology into ICL sentencing influenced how other sentencing factors are treated and weighed? What ought to be the relationship between the goal of reconciliation and aggravating and mitigating factors? Or, is reconciliation itself a mitigating factor? If so, is this normatively desirable? And how do we measure contribution to reconciliation? The experience of the ICTY shows that the absence of a coherent theoretical underpinning for the application of reconciliation ideology has led to some troubling results. To illustrate the problematic entanglement with reconciliation ideology and explore possible solutions, we may

[274] However, this is by no means universal. In both the Yugoslav and Rwandan atrocities, there are a number of examples of great human moral courage resisting systematic criminality. *See* Bernard Muna, *The ICTR Must Achieve Justice for Rwandans*, 13 AM. U. INT'L L. REV. 1481 (1998).

[275] *See* WILLIAM SCHABAS, UNIMAGINABLE ATROCITIES: JUSTICE, POLITICS, AND RIGHTS AT THE WAR CRIMES TRIBUNALS, 162-64 (2012) (discussing the tension between ICTY judges and the Prosecutor regarding the scope of indictments based on competing visions of the role of the Tribunal).

consider the following cases: *Erdemovic*,[276] *Jelisić*,[277] *Sikirica*,[278] *Plavšić*,[279] *Bralo*,[280] and *Nikolić*.[281]

1. Early Practice: Reconciliation Ideology Has No Influence on Sentencing.

Since 2001, the practice of plea-bargaining has significantly increased in international prosecutions.[282] At the same time, reconciliation ideology gained traction among international judges.[283] To appreciate this phenomenon, it is necessary to examine the early practice at the Tribunal in relation to both plea-bargaining and reconciliation. As a preliminary matter, it should be noted that guilty pleas at international tribunals come in two varieties: *bargained-for* guilty pleas and *non-bargained* guilty pleas. The former consists of situations where the defense engages in negotiations with the Prosecutor for the defendant's admission to the certain charges in exchange for the Prosecutor's agreement to dismiss other charges and/or allegations from the indictment (charge reduction), and/or to recommend a lenient sentence, or to refrain from seeking a particular (high) penalty (sentence reduction). It excludes situations where the accused accepts his or her criminal responsibility and enters a guilty plea without negotiating for charge or sentence reduction. In these guilty pleas, no bargaining or negotiating is needed to secure the defendant's admission.[284] In other words, not all guilty pleas are the result of plea-*bargaining*.[285]

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[276] Prosecutor v. Erdemović, Sentencing Judgment, *supra* note 43; Prosecutor v. Erdemović, Case No. IT-96-22-A, Appeals Judgment (Int'l Crim. Trib. for the Former Yugoslavia Oct. 7, 1997).

[277] Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment (Dec. 14, 1999); Prosecutor v. Jelisić, Case No. IT-95-10-A, Appeals Judgment (July 5, 2001).

[278] Prosecutor v. Sikirica, Sentencing Judgment, *supra* note 84.

[279] Prosecutor v. Plavsic, Case No. IT-00-39&40/1-S, Sentencing Judgment (Int'l Crim. Trib. for the Former Yugoslavia Feb. 27, 2003).

[280] Prosecutor v. Bralo, Sentencing Judgment, *supra* note 94; Prosecutor v. Bralo, Judgment on Sentencing Appeal, *supra* note 94.

[281] Prosecutor v. Nikolic, Sentencing Judgment, *supra* note 94; Prosecutor v. Nikolic, Case No. IT-94-2, Judgement on Sentencing Appeal, (Int'l Crim. Trib. for the Former Yugoslavia Feb. 4, 2005).

[282] *See* COMBS, GUILTY PLEAS, *supra* note 37.

[283] Prosecutor v. Obrenović, Case No. IT-02-60/2-S, Sentencing Judgment, para. 111 (Dec. 10, 2003); Prosecutor v. Nikolić, Trial Sentencing Judgment, *supra* note 58, at para. 233; Prosectuor v. Mrđa, Case No. IT-02-59-S, Sentencing Judgment, para. 78 (Mar. 31, 2004); Prosecutor v. Jokic, Case No. IT-01-42/1-S, Sentencing Judgment, para. 76 (Mar. 18, 2004); Prosecutor v. Rajic, Case No. IT-95-12-S, Sentencing Judgment, para. 146 (May 8, 2006).

[284] An illustrative example is the case of Dražan Erdemović and his immediate plea of guilt at his initial appearance. *See Erdemović, Dražen*, HAGUE J. PORTAL, http://www.haguejusticeportal.net (last visited Oct. 13, 2013). *See also* Prosecutor v. Erdemović, Sentencing Judgment, *supra* note 43.

[285] To avoid importing baggage from domestic law, the ICC Statute abandons the terminology of civil law and common law traditions for proceedings involving "admission of guilt". *See*, ICC Statute, Article 64(8)(a) and Article 65. For an interpretation of these articles on "admission of guilt" *see*, Prosecutor v. Al Mahdi, Judgment and Sentence, ICC-01/12-01/15 (27 September 2016).

In the first ten years of the ICTY's operations, only two cases were disposed of by plea bargaining: the *Todorović* case and the *Sikirica* case.[286] Each contained some element out of the ordinary. A third case – against Goran Jelisić, a camp commander – involved the accused pleading guilty to all counts but one – genocide – and the Office of the Prosecutor continued to trial on the remaining count. Thus, his plea does not appear to have been bargained for. All three cases underscore an OTP policy against plea-bargaining, especially when the accused has been charged with genocide. Reconciliation ideology is virtually non-existent as a sentencing factor in these early cases.[287]

In the *Jelisić* case, a camp commander pled guilty to thirty-one individual counts of crimes against humanity and war crimes. The only charge that Jelisić refused to accept responsibility for was a single charge of genocide.[288] Given that the OTP believed it had substantial evidence to prove genocide, it refused to drop the charge from the indictment. Much to the disappointment of the judges, the Prosecution insisted on proceeding to trial against Jelisić for the single count of genocide, even though Jelisić was already facing a very severe prison sentence resulting from his guilty plea to very serious crimes, including multiple murders committed in the most chilling and wicked manner. The tension between the ICTY judges and the Prosecutor was plainly evident during the course of the trial. The judges were frustrated at what they considered wasteful expenditure of time and resources on a trial of a relatively minor figure that had already pled guilty to crimes grave enough to merit a forty-year sentence. The OTP was equally determined to try Jelisić for genocide so that the record would reflect what it believed was the true scope of his culpability. The policy behind the OTP's uncompromising stance was the idea that the crime of genocide carries too much significance to be dropped simply because the accused has accepted responsibility for other crimes. The *Jelisić* case demonstrates the OTP's unwillingness to provide the accused with any concession by way of charge or penalty reduction for his guilty plea. As noted above, however, it would be incorrect to characterize Jelisić's guilty plea as a plea bargain. Jelisić *sua sponte*

[286] Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgment, para. 11 (Dec. 14, 1999) (pleading guilty on October 29,1998); Prosecutor v. Todorović, Sentencing Judgment, *supra* note 58, at para. 5 (pleading guilty on December 13, 2000); Prosecutor v. Sikirica, Sententing Judgment, *supra* note 84, at paras. 12-15 (pleading guilty on September 19, 2001; September 19, 2001; and September 4, 2001, respectively). As explained above, the Erdemović case is not included among these cases because Erdemović pled guilty at his initial appearance.

[287] *See also* Prosecutor v. Erdemović, Sentencing Judgment, *supra* note 43.

[288] Press Release, Int'l Crim. Trib. for the Former Yugoslavia, "Brcko" Indictment: Goran Jelisić Pleads Guilty to the Majority of the Charges in the Second Amended Indictment, JL/PIU/357-E (Oct. 29, 1998), http://www.icty.org/sid/7624.

accepted responsibility for all the charges against him except the crime of genocide.[289] No bargaining or negotiating was needed to secure his admission to the other crimes.

Stevan Todorović and Biljana Plavšić, on the other hand, represent cases of carefully crafted plea bargains. Todorović muscled a highly favorable plea deal out of the Prosecutor. His Defense team successfully obtained an order from the ICTY directing the NATO led S-FOR to cooperate with the defendant by producing documents and making senior officials available as witnesses for his hearing challenging the lawfulness of his arrest, detention, and transfer. Todorović was living comfortably in his hometown and woke up one morning to find himself hooded and handcuffed in a helicopter on his way to S-FOR's Tuzla Air Force Base.[290] One version of the events attributes his capture to four bounty hunters.[291] According to Todorović, his kidnapping was a clandestine operation orchestrated by S-FOR in which he was hooded, beaten, kidnapped, and taken to the boarder of Bosnia Herzegovina to be subsequently transferred by S-FOR to the ICTY.[292]

Claiming that his arrest was illegal and violated fundamental human rights, Todorović sought to compel S-FOR to hand over documents and witnesses to support his allegations.[293] The ICTY judges ordered the North Atlantic Council, thirty-three individual States, and S-FOR itself to disclose specific documents. In a bold move, they also ordered the Commanding General of S-FOR, Eric Shinseki of the United States, to appear as a witness in his individual capacity at the hearing. All parties promptly refused to comply with the order, citing possible security risks to an on-going military and peacekeeping operation.[294] The standoff was an embarrassment to the United Nations and the ICTY — a U.N. created peacekeeping force flatly refused to comply with an order of a U.N. judicial body. NATO's non-compliance with the ICTY order seemly contradicted the principle that *all* must obey the law. The ICTY – in fact the entire enterprise of international criminal justice – was predicated on the notion of accountability and that no one was above the law. It was a direct challenge to the authority of the court from an unexpected source.[295]

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[289] *Id*.

[290] Press Release, Int'l Crim. Trib. for the Former Yugoslavia, Decision on Todorovic's Motion For Judicial Assistance, XT/ P.I.S./ 636-e (Oct. 20, 2000), www.icty.org/sid/7811.

[291] *See*, Combs, *Copping a Plea*, *supra* note 112, at 118.

[292] Id. at 118-19. *See also* Susan Lamb*, Illegal Arrest and the Jurisdiction of the ICTY*, *in* ESSAYS ON ICTY PROCEDURE AND EVIDENCE IN HONOUR OF GABRIELLE KIRK MCDONALD 27-35 (Richard May et al. eds., 2001) (discussing the events surrounding Todorovic's arrest and transfer to the ICTY).

[293] *See* Combs*, Copping a Plea*, *supra* note 112, at 119.

[294] Id.

[295] Prosecutor v. Tadić, Case No. IT-94-1, Decision on the Defense Motion on Jurisdiction (Int'l Crim. Trib. for the Former Yugoslavia Aug. 10, 1995).

With his motion threatening the legitimacy of the ICTY if NATO were to continue to disobey the ICTY order, Todorović gained leverage in his negotiations with the Prosecutor. NATO, the U.S., and other states appealed the decision and the Appeals Chamber stayed the Trial Chamber's order pending the outcome of the appeal. Meanwhile, ICTY lawyers scrambled behind the scenes. While the appeal was pending, the OTP and the defendant filed a joint and confidential *ex parte* motion, submitting to the court a negotiated plea agreement.[296] Todorović agreed to plead guilty to the crime of persecution on political, racial, and religious grounds as a crime against humanity.[297] Tellingly, the plea agreement specifically required him to withdraw: (1) all pending motions regarding his arrest; (2) all factual allegations that his arrest was unlawful; and (3) all claims that NATO or SFOR participated in any unlawful activity in connection with his arrest.[298] To secure the deal, the OTP withdrew the remaining twenty-six counts and recommended a prison sentence of five to twelve years.[299]

The *Sikirica* case involved three defendants: Duško Sikirica, Damir Došen and Dragan Kolundžija.[300] All three were charged with crimes against humanity and violations of the laws and customs of war. Additionally, Sikirica was also charged with genocide. The defendants all entered a plea of not guilty and the case proceeded to trial.[301] After the close of the Prosecution's case-in-chief, Sikirica filed a Rule 98*bis* motion to dismiss the genocide count, which was granted. Then, to everyone's surprise, during the presentation of the defense rebuttal, one of Sikirica's co-defendants changed his plea and pled guilty to crimes against humanity. With the code of silence broken, the remaining defendants also sought the Prosecutor for a plea bargain. The plea agreement between Sikirica and the OTP made clear that the Prosecutor would not have accepted his plea

[296] *See* Prosecutor v. Simic, Simic, Tadic, Todorovic, and Zaric, Case No. IT-95-9-PT, Judicial Supplements, Decision on (1) Application by Stevan Todorovic to re-open the Decision of 27 July 1999, (2) Motion by ICRC to Re-Open Scheduling Order of 18 November 1999, and (3) Conditions for Access to Material (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2000).

[297] Count 1 of the indictment. Prosecutor v. Todorović, Sentencing Judgment, *supra* note 58, at para. 5.

[298] Prosecutor v. Todorović, Case No. IT-95-9/1, Decision on the Prosecution Motion to Withdraw Counts of the Indictment and Defence Motion to Withdraw Pending Motions, para. 1 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001); Prosecutor v. Todorović, Sentencing Judgment, *supra* note 58, at para. 5.

[299] Prosecutor v. Todorović, Decision on the Prosecution Motion to Withdraw Counts of the Indictment and Defence Motion to Withdraw Pending Motions, *supra* note 244, at para. 2; Prosecutor v. Todorović, Sentencing Judgment, *supra* note 58, at para. 4.

[300] Sikirica was the most senior ranking of the three.

[301] See William Schabas, *Commentary*, *in* ANNOTATED LEADING CASES OF INTERNATIONAL CRIMINAL TRIBUNALS, VOLUME VIII: THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 2001-2002 1078-82 (André Klip & Göran Sluite eds., 2005), for a commentary on this case.

while the charges of genocide were still pending against him.[302] This reluctance towards plea-bargaining is in line with the OTP's policy in the *Jelisić* case. The ICTY Prosecutor manifested complete aversion toward any type of bargaining or deal making that would require her to withdraw a genocide charge.

While the Prosecution refused to bargain in the *Jelisić* case, it did not have to in the *Erdemović* case – he immediately and comprehensively accepted responsibility to the entire indictment against him. The *Erdemović* case challenges the ICTY's current ideological narrative constructed around reconciliation. Extant sentencing judgments declare reconciliation as an ideology – something more than mere *ex post facto* rationalization of an expanding plea bargaining practice and lenient sentences, but as a principled justification for mitigating penalty. However, the judges do not advance such a view of reconciliation in the *Erdemović* sentencing judgment, even though the facts of the case offered plenty opportunity to establish this platform. Erdemović did not attempt to negotiate a deal behind the scenes. He plead guilty to all crimes charged at his first hearing, expressed genuine remorse, and fully cooperated with the Prosecution in bringing to light what happened. Although in subsequent cases, notably the *Plavšić* case, these factors are considered relevant to determining the accused's contribution to reconciliation and thus also a reduction in punishment, the *Erdemović* Trial Chamber did not consider contribution to reconciliation *per se* as a sentencing factor. In fact, "reconciliation" is mentioned only twice in passing in the entire judgment.[303] It is not discussed in relation to Erdemović's acceptance of guilt, nor do the international judges appear to be particularly interested in the possibility that his unreserved admission of responsibility for his share in the atrocities will foster reconciliation.

Compare this to the twenty-seven times the ICTY judges discuss reconciliation in the *Plavšić* case and their unbridled enthusiasm about how her narrowly crafted and limited admission will have a significant impact on reconciliation in the former Yugoslavia. The notion of reconciliation overwhelms the analysis of sentencing in the *Plavšić* case, but is non-existent in *Erdemović*. Yet, the latter did not bargain his plea, made no demands for charge reduction, made no effort to limit the factual basis of his admission (i.e. he did not limit the historical record), and did not insist on first obtaining the

[302] Prosecutor v. Sikirica, Sententing Judgment, *supra* note 84, at para. 24.

[303] Prosecutor v. Erdemović, Sentencing Judgment, *supra* note 43, at para. 58. In comparison, in the *Plavšić* case, the concept of reconciliation appears no less than 27 times in the sentencing judgment. Prosecutor v. Plavšić, Sentencing Judgment, *supra* note 36.

Prosecution's agreement to recommend a reduced sentence. Therefore, I argue that the rise of reconciliation as an ideology in international criminal law has less to do with the goal of reconciliation and more to do with rationalizing plea-bargaining. Reconciliation gained traction, paradoxically, in cases where the accused bargained for a less comprehensive factual record and a reduction in charges or punishment.[304] This deal making in the face of mass atrocities required a counterweight. Enter reconciliation. It is an apology for plea-bargaining atrocity crimes, an attempt to recast plea deals as an ally of truth and history rather than cutting the legs of public and accurate record building. These matters are addressed in greater detail in the next section.

To summarize the jurisprudential background to reconciliation in ICL, the ICTY's early jurisprudence and practice indicates that reconciliation was not a central issue in sentencing and that the Prosecution was unwilling to bargain away the charge of genocide. The *Plavšić* case reversed the trajectory on both matters. It was the first time the Prosecutor willingly dropped charges of genocide against an accused in return for her guilty plea. Moreover, it marked the coming of age of reconciliation, as it proved an influential force in mitigating Biljana Plavšić's sentence.

2. The Coming of Age of Reconciliation Ideology.

Generally, sentencing discounts for guilty pleas are justified on the grounds of their functional utility, namely that plea bargains can result in efficiency benefits by saving costs and Tribunal resources related to investigation, counsel fees, trial costs, etc. The *Plavšić* Trial Chamber, however, offered more than a functional justification for plea bargains that result in large sentencing reductions by arguing that they substantially contribute to the Tribunal's presumed mandate. The judges characterized Plavšić's negotiated and carefully contrived guilty plea as a genuine expression of remorse and a meaningful contribution to a historical record that significantly advanced the goal of reconciliation, rather than a self-interested maneuver that resulted in limiting her criminal liability and punishment.[305] Both scholars and ICL practitioners have criticized

[304] Janine Natalya Clark, *Plea-Bargaining at the ICTY: Guilty Pleas and Reconciliation*, 20 EUR. J. INT'L L. 415, 416 (2009) (arguing that reconciliation is "seriously undermined" by plea-bargaining and reduced prison sentences).

[305] *Id.* at para. 70.

the "overinflated significance" that the judges "attributed to her remorse and post-conflict activities."[306]

The *Plavšić* case marks a turning point in the ICTY's legacy. The rise of reconciliation ideology as a justification for the practice of plea bargaining[307] and as a mitigating factor in sentencing can trace their origins to this case. Prior to the *Plavšić Sentencing Judgment*, only three cases in the ICTY's ten-year history had been disposed of by plea-bargaining. In sharp contrast, following the *Plavšić* judgment, the first twelve months alone witnessed at least seven cases disposed of by way of plea bargaining.[308] These plea bargains occasioned "unseemly" lenient sentencing recommendations by the OTP.[309] Likewise, the practice of dismissing the charge of genocide can trace its origins to the *Plavšić* case. Plavšić was initially indicted for the crime of genocide and complicity in genocide.[310] Departing from past practice, Chief Prosecutor Carla Del Ponte subsequently made a deal with Plavšić to withdraw the genocide charges and allegations as well as all remaining crimes, except persecution as a crime against humanity. In return, Plavšić would plead guilty to one count for the crime of persecution.[311]

She was the first defendant for whom the Prosecution willingly withdrew the genocide charges from the indictment in exchange for a plea. Ironically, this first time willingness to bargain away the crime of genocide was inspired by a defendant who was

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[306] Chifflet & Boas, *Sentencing Coherence in ICL* (2012), *supra* note 2 at 149.

[307] *See* Damaska, *What is the Point*, *supra* note 40, at 341 (concluding that the only viable justification for plea bargaining is efficiency), for a critique of various justifications for plea-bargaining.

[308] Prosecutor v. Simić, Case No. IT-95-9-2-S, Sentencing Judgment, paras. 9-16 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 17 2002) (pleading guilty on May 13, 2002); Prosecutor v. Obrenović, Case No. IT-02-60/2-S, Sentencing Judgment, paras. 10, 12-21 (Int'l Crim. Trib. for the Former Yugoslavia May 21, 2003) (pleading guilty on May 21, 2003); Prosecutor v. Momir Nikolić, Case No IT-02-60/1-S, Sentencing Judgment, para. 12 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 2, 2003) (pleading guilty on May 7, 2003); Prosecutor v. Mrda, Case No. IT-02-59-S, Sentencing Judgment, para. 5 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 31, 2004) (pleading guilty on July 24, 2003); Prosecutor v. Jokić, Case No. IT-01-42/1-S, Sentencing Judgment, paras. 7-14 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 18, 2004) (pleading guilty on Aug. 27, 2003); Prosecutor v. Banović, Case No. IT-02-65-1-S, Sentencing Judgment, para. 13 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 28, 2003) (pleading guilty on June 26, 2003); Prosecutor v. Dragan Nikolić, Case No. IT-94-2-S, Sentencing Judgment, paras. 5, 14 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 18, 2003) (pleading guilty on Sept. 4, 2003); Prosecutor v. Češić, Case No. IT-95-10/1-S, Sentencing Judgment, para. 4 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 11, 2004) (pleading guilty on Oct. 8, 2003); Prosecutor v. Deronjić, Sentencing Judgment, *supra* note 52, at paras. 18-19 (pleading guilty on Sept. 30, 2003); Prosecutor v. Babić, Case No. IT-03-72-S, Sentencing Judgment, para. 10 (Int'l Crim. Trib. for the Former Yugoslavia June 29, 2004) (pleading guilty on Jan. 27, 2004); Miroslav Bralo, Case No. IT-95-17-S, Sentencing Judgment, para. 3 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 7, 2005) (pleading guilty on July 19, 2005).

[309] *See* Nancy Amoury Combs, *Procuring Guilty Pleas for International Crimes: The Limited Influence of Sentencing Discounts*, 59 VAND. L. REV. 69, 93 (2006).

[310] Prosecutor v. Plavšić, *Indictment*, Case No. IT-00-40-I (3 April 2000) para. 19. The counts were: Count 1(Genocide) and Count 2 (Complicity in Genocide).

[311] Prosecutor v. Plavšić, *Plea Agreement*, Case No. IT-00-39&40-PT (30 September 2002).

most likely among the individuals most culpable for genocidal policies.[312] Given the magnitude of the case, the leadership role and high profile of the accused, the gravity of her crimes (as originally alleged), and the fact that the Chief Prosecutor herself appeared at an accused's sentencing hearing, which she rarely did, the people of Yugoslavia and the international community rightfully expected an accounting for Del Ponte's decision to drop genocide from the indictment. However, she offered no explanation in the public forum of an international courtroom. Nor did the judges press her for one. If there was a good reason for the compromise, it did not appear in the Court's official records or sentencing judgment, and thus omitted from the judicial historical record.

If the judges genuinely believe that the goal of reconciliation is central to the Tribunal's mandate, that International Tribunals have the capacity to contribute to reconciliation and that substantial sentencing reductions actually promote reconciliation, then they must account for why genocide was removed from the scope of Plavšić criminal responsibility and why a prison sentence of eleven years supports rather than undermines the goal of reconciliation. The absence of transparency regarding the circumstances resulting in a factual record narrower than the original indictment undermines reconciliation and truth finding. Rather than address difficult questions about responsibility and punishment that are crucial to the goal of reconciliation, international sentencing judgments idealize reconciliation as vague aspirations of ICL while remaining impervious to factors that undermine it. The judgments mistake acceptance of responsibility and apology (often short lived) for reconciliation. Del Ponte has even admitted that Plavšić's admissions and statements of apologies offered nothing towards reconciliation.[313] ICL's integration of reconciliation ideology, as typified by the *Plavšić* case, raises several concerns in relation to sentencing. Certain post-crime actions by the accused, such as expression of remorse, truth-telling, cooperation with the Prosecutor, and genuine and sincere acceptance of responsibility have been accepted as appropriate reasons to mitigate punishment because ICL judges believe that these factors potentially contribute, *inter alia*, to the aim of reconciliation. However, the *Plavšić* Trial

[312] In her published memoirs, Del Ponte describes Plavšić as a "close associate" of the notorious Radovan Karadzic and Momcilo Krajisnik. Del Ponte further claims that Plavšić "participated at the highest political levels in the campaign to dismember Bosnia and Herzegovina and ethnically cleanse large swaths of its territory." *See* CARLA DEL PONTE, MADAME PROSECUTOR: CONFRONTATIONS WITH HUMANITY'S WORST CRIMINALS AND THE CULTURE OF IMPUNITY 160 (2008).

[313] *See* CARLA DEL PONTE, MADAME PROSECUTOR, *supra* note 312, at 161.

Chamber appears to go beyond this and treat reconciliation itself as an independent mitigating factor.

The problem with treating reconciliation as an independent ground for sentence mitigation lies in the limitations of criminal justice legalism. Reconciliation is better understood as a slow rebuilding process, not an event. While judicial institutions are quite capable of determining whether, say, a war criminal "voluntarily surrendered," they are not particularly apt at predicting future events. Whether the accused has "contributed to reconciliation" is usually difficult to measure with legal certainty. It cannot be put sufficiently beyond the realms of speculation so as to satisfy the Tribunal's legal standards or the requirements of law.[314] Some factors relevant to assessing an atrocity perpetrator's contribution to reconciliation are admittedly less speculative, such as an accused who goes door to door apologizing to specific families that he has victimized, or volunteers for demining operations, or helps surviving victims identify locations where murdered family members have been hidden or buried. But the contribution to reconciliation of gestures, such as a general apology, on which the *Plavšić* Trial Chamber relied, is highly speculative. These apologies are often devoid of personal acceptance of responsibility. They simply recognize that suffering and harm occurred and express sympathy for the victims without acknowledging the apologist's personal role in the atrocities. Without the crucial acceptance of individual responsibility, theses apologies are no different than a new report by a journalist reporting about the crimes. Moreover, general apologies can be eviscerated in a way that concert action beyond mere words cannot be (such as those listed above). Thus, as is the case with other consequentialist aims, the court treads in dangerous territory when judges allow reconciliation to influence its sentencing allocations.

For example, Plavšić gave an interview to Banja Luka ATV on March 11th, 2005, that undermined her purported contribution to reconciliation based on her apology and public statement that the judge used to justify mitigating her penalty to eleven years' imprisonment.[315] Barely two years after her public remorse and apology in the courtroom of the ICTY, she denied all responsibility for her role in the atrocities to the

[314] While aggravating circumstance must be proved beyond a reasonable doubt, mitigating circumstance need only be proved on a balance of probabilities. *See* Prosecutor v. Milan Simić, Case No. IT-95-9/2-S, Sentencing Judgment, paras. 39-40 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 17, 2002).

[315] Interview by Banja Luka ATV with Biljana Plavšić (Mar. 11, 2005), http://www.atvbl.com/home.php?id=billjanaintervju. An unofficial translation into English by the ICTY Outreach Office in Sarajevo is available on file with the author.

viewing general public back in the former Yugoslavia. With thousands, if not tens of thousands, of persons whose lives she victimized watching, she emphatically claimed: (1) she only pled guilty because witnesses that would establish her innocence were afraid to come forward; (2) smug international judges sitting in The Hague far away from the realities of the conflict could not comprehend that a high ranking person in her position, removed from the battlefield, may not know what is going on at the ground level; (3) Western powers, creators and backers of the tribunal, refused to accept that the real culprits of the conflict where the Bosnians that wanted independence in the first place.[316] To the victims, her statements most likely came across as: (1) I am not responsible; (2) the Bosnian Serb leadership is not responsible; and (3) the victims got what they deserved. Perhaps Del Ponte and the international judges had no reason to suspect that Plavšić would so fantastically and publically unravel the foundations of her mitigated sentence. Nevertheless, the experience illustrated why the ICC should not entangle with consequentialist aspirations. At least, judges should not allow the goal of reconciliation to influence sentencing allocations. Despite these warnings and unresolved issues surrounding the application of reconciliation as a mitigating factor, some ICC judges have introduced reconciliation ideology as a relevant sentencing factor.[317] The ICC's approach to reconciliation will be analyzed in section five below.

3. Interconnectivity: Reconciliation Ideology & Sentencing Factors.

a. Failure to Link Lack of Cooperation to Sentencing Discounts based on Purported Contribution to Reconciliation.

The sentencing law of international criminal courts and tribunals recognize cooperation with the Prosecutor or Court as a mitigation factor.[318] It is the only mitigating factor explicitly provided in the Rules of Procedure and Evidence for the ICTY and ICTR.[319] Plavšić firmly refused to cooperate with the ICTY or the Office of the Prosecutor, despite several interventions by Del Ponte and her team to get Plavšić to reverse course.[320] When Del Ponte tried to include in the plea agreement a condition that Plavšić

[316] *See id*.

[317] Prosecutor v. Katanga, Decision on Sentence pursuant to article 76 of the Statute, ICC-01/04-01/07, (23 May 2014); Prosecutor v. Al Mahdi, Judgment and Sentence, ICC-01/12-01/15 (27 September 2016).

[318] INT'L CRIM CT. R. P. & EVID. 145 (2)(a)(iii) (2003); INT'L CRIM. TRIB. FOR THE FORMER YUGOSLAVIA R. P. & EVID. 101 (2009).

[319] *Id*.

[320] *See* CARLA DEL PONTE, MADAME PROSECUTOR, *supra* note 312, at 161-62.

agree to be a witness in the cases against persons who bore the greatest responsibility for the atrocities such as Radovan Karadzić, Momčilo Krajišnik, and Ratko Mladić, Plavšić flatly refused and the Chief Prosecutor backed down.[321] In fact, Plavšić appears to go out of her way to insulate her co-perpetrators and protect them from criminal responsibility for the atrocities she acknowledges took place. At her sentencing hearing, she expressly stated that responsibility for the atrocities does not "extend to other leaders", such as Karadzić, Krajišnik, and Mladić.[322] Del Ponte would later claim in her memoirs that Plavšić had deceived her into thinking that she would cooperate.[323]

Her purported "contribution to reconciliation" should have been assessed in light of her staunch refusal and failure to cooperate with the ICTY investigation of the atrocities. Her lack of cooperation and lack of commitment to uncovering the truth should have been considered when deciding the appropriate weight for her supposed "contribution to reconciliation" as a mitigating factor. To be clear, I am not suggesting that the court do what the *Blaškić* Trial Chamber did when it treated non-cooperation as an aggravating factor.[324] The international sentencing jurisprudence correctly rejects such an approach.[325] However, failure to cooperate with international justice is relevant to assessing the accused's "contribution to reconciliation." Plavšić's conduct and statements carefully avoid implicating her co-perpetrators Karadžić and Krajišnik in the atrocities and cast doubt on her commitment to reconciliation. Choosing loyalty to fellow nationalists instead of calling to account atrocity perpetrators for crimes against other ethnic groups does little to defuse ethnic tensions or contribute to reconciliation. The judges specifically highlighted one expert's testimony that "*full* disclosure in confessions is vital for the reconciliatory process."[326] As had happened previously in the *Blaškić* case, we see another example of the international judges failing to meaningfully analyze the accused's conduct and factors relevant to punishment in relation to what they identified as the purpose of sentencing. Plavšić's failure to disclose the role of other high-ranking perpetrator in atrocity crimes to the full extent of her knowledge undermines the goal of reconciliation. Local reactions confirm this disconnect. Sefko Alomerović, President of the

[321] *See id.* at 161.
[322] Prosecutor v. Plavšić, Sentencing Hearing Transcript, IT-00-39&40/1-S (17 December 2002) p. 610.
[323] CARLA DEL PONTE, MADAME PROSECUTOR, *supra* note 312, at 161.
[324] Prosecutor v. Blaškić, Judgment, *supra* note 151, at para. 774. *See* Dana, *Revisiting the Blaškić*, *supra* note 74, at 327.
[325] *See* Dana, *Revisiting the Blaškić*, *supra* note 74, at 328.
[326] Prosecutor v. Plavšić, Sentencing Judgment, *supra* note 36, at para. 77 (emphasis by Trial Chamber).

Helsinki Board in Sandzak at the time of Plavšić's sentencing, also drew attention to her failure to "bring into question the state policy that led towards the extinction of the Bosnian people, in which she played an important role."[327] The judges should have weighed the potential adverse impact this has on their purported goal of reconciliaton, especially because they used reconciliation ideology to justify a lower sentence.[328]

Although the Trial Chamber expressly disagreed with the Prosecutor's evaluation of the weight to be accorded to this factor in mitigation,[329] in light of the foregoing, the Prosecutor's assessment seems to better capture the extent of her contribution to reconciliation. The OTP recommended a prison term of fifteen to twenty-five years.[330] The Trial Chamber sentenced her to eleven years.[331] This was not the first time a trial chamber imposed a sentence lower than the Prosecutor's recommendation, but it was the first time the Prosecutor did not appeal a sentence below its recommended range.

b. Superior Position Results in Paradoxical Boost for Mitigation.

The goal of reconciliation exerts an unexpected effect on the role of "superior position" as a sentencing factor. ICL judgments have long held that the superior position of the accused is a factor that aggravates the accused's punishment. In the *Plavšić* case, however, the ICTY used her superior position to lower her sentence, as the judges enthusiastically embraced reconciliation ideology. Apparently, the Trial Chamber was guided in this direction by the Prosecutor who amplified the mitigating value of Plavšić's contribution to "reconciliation" and "expressions of remorse" based on her superior position as a high-ranking and high-profiled member of the Bosnian Serb war leadership.[332]

The Trial Chamber noted: "[t]he Prosecution states that this expression of remorse is noteworthy *since it is offered from a person who formerly held a leadership position*, and that it 'merits judicial consideration.'"[333] Thus, the *Plavšić* Trial Chamber

[327] *See* Milanka Saponja-Hadzic, *Hague Deals Reduce Impact*, INST. OF WAR & PEACE REPORTING (July 24, 2003), http://iwpr.net/report-news/hague-deals-reduce-impact.

[328] Prosecutor v. Plavšić, Sentencing Judgment, *supra* note 36, at paras. 66-81. In the Trial Chamber's own assessment, "these circumstances make a formidable body of mitigation". Prosecutor v. Plavšić, Sentencing Judgement, *supra* note 36, at para. 110.

[329] Prosecutor v. Plavšić, Sentencing Judgment, *supra* note 36, at para. 130.

[330] *Id.* at para. 128.

[331] *Id.* at para. 132.

[332] *Id.* at para. 70.

[333] Prosecutor v. Plavšić, Sentencing Judgment, *supra* note 36, at para. 70 (emphasis added).

endorsed the notion that expressions of remorse have added value for the purposes of reconciliation when offered by high-ranking defendants, and therefore are deserving of greater reduction in sentence.[334] This position, however, is at odds with basic principles of justice, general ICL sentencing law, and the ICTY's own jurisprudence. Unfortunately, the *Plavšić* precedent favoring high-ranking perpetrators when it comes to mitigation of penalty based on contribution to reconciliation is having a pernicious influence on other cases. In some cases, it appears that both the Prosecutor and the judges award less sentencing reduction for low-level defendants who contribute to reconciliation.[335] Citing the *Plavšić* ruling, some defense counsels even appear convinced that their client's potential contribution to reconciliation is only worth arguing if the client is a person of high rank.[336]

4. The Perverse Effects of Reconciliation Ideology on Sentencing Outcomes

As noted above, reconciliation was not a significant factor in sentencing in the early practice of the ICTY. However, since the *Plavšić Sentencing Judgment*, it has received frequent consideration by trial chambers when addressing sentencing. In the *Plavšić* case, it exerted a significant influence in mitigating her punishment. Many commentators consider Plavšić's eleven-year sentence to be very lenient in both absolute and symbolic terms.[337] As ICTY and ICTR Appeals Chamber has done with other ideological factors such as deterrence and rehabilitation, the ICC should likewise encourage a cautious approach towards (or avoid altogether) awarding significant reduction of the penalty on the basis of "contribution towards reconciliation." Caution here is justified on both moral and practical basis. The *Plavšić* case illustrates why.

During Plavšić's sentencing hearing, I observed, first hand, defense counsel argue to the judges that her remorse and acceptance of responsibility provided a more significant contribution to reconciliation than had the same come from a lower ranking

[334] *Id.* at para. 70.

[335] *See, e.g.*, Prosecutor v. Bralo, Sentencing Judgment, *supra* note 94. This case is discussed in detail below.

[336] Prosecutor v. Obrenović, Case No. IT-02-60/2-S, Sentencing Judgment, para. 110 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 2003).

[337] *See* Nancy A. Combs, *Procuring Guilty Pleas for International Crimes, supra* note 253, at 98; Mark B. Harmon & Fergal Gaynor, *Ordinary Sentences for Extraordinary Crimes*, 5 J. INT'L CRIM. JUST. 683, 688-9, n.21 (2007). *See also* Daria Sito-Sucic, *Muslim Victims Outraged, Say Plavšić Sentence Low*, REUTERS, Feb. 27, 2003; Amra Kebo, *Regional Report: Plavsic Sentence Divides Bosnia*, INST. OF WAR & PEACE REPORTING (Feb. 22, 2005), http://iwpr.net/report-news/regional-report-plavsic-sentence-divides-bosnia.

perpetrator. Defense counsel boldly declared: "what greater contribution do you have to your mandate than my client's – a person at the very top of the Bosnian Serb leadership – admission of responsibility."[338] Never mind that her limited acceptance of responsibility was known to the judges or that her remorse proved to be ostensible. Nonetheless, all this coming from the Defense was largely expected. The real surprise was that Chief Prosecutor Carla de Ponte, in a rare court appearance at a sentencing hearing, made the same argument but even more emphatically.[339] She argued that as a high-ranking figure and former leader, her remorse and contribution to reconciliation is particular noteworthy and merits special consideration.[340] Thus, in advancing a framework for how reconciliation should influence sentencing allocations, the Chief Prosecutor advocates for greater sentencing reductions for those in high-ranking positions, thereby turning upside down the relationship between superior position and punishment.[341] The judges agreed, finding that Plavšić's position at the very top of the Bosnian Serb Presidency gave "significant weight" to her contribution to reconciliation. Because the Trial Chamber accepted the goal of reconciliation as a relevant factor in punishing atrocities, it was able to justify substantial reduction of prison time.

Accordingly, greater contributions to reconciliation merit greater reduction in punishment. Unfortunately, ICTY judges and the Chief Prosecutor appear to weigh the value of an accused's contribution to reconciliation based largely on his or her rank. Under their approach, high-ranking offenders, who accept responsibility for their wrongdoings, deserve more sentencing reduction than low-level individuals merely because of their status. The perverse effect of this consequentialist approach towards punishment is that the leaders who are most culpable and bear the greatest responsibility for the atrocities receive greater sentencing discounts, as demonstrated by how the ICTY subsequently dealt with the punishment of low-level perpetrators.[342] Adding to a sense of injustice is the fact that their purported "contribution to reconciliation" is built on the very sufferings and atrocities that they themselves created.

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[338] *See* Prosecutor v. Plavšić, Case No. IT-00-39&40/1, Sentencing Hearing Transcript, para. 649 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 17, 2002).

[339] Prosecutor v. Plavšić, Sentencing Judgment, *supra* note 36, at para. 70.

[340] *Id.*

[341] Superior position is an aggravating factor in the ICTY jurisprudence.

[342] *See, e.g.*, Prosecutor v. Bralo, Sentencing Judgment, *supra* note 94, at para. 95; Prosecutor v. Nikolić, Case No. IT-94-2-S, Sentencing Judgment, § X (Int'l Crim. Trib. for the Former Yugoslavia Dec. 18, 2003), http://www.icty.org/x/cases/dragan_nikolic/tjug/en/nik-sj031218e.pdf.

Therefore, the logical conclusion of the reconciliation ideology adopted by the *Plavšić* Trial Chamber is that less culpable and lower ranking perpetrators will not receive the same degree of mitigation, resulting in higher penalties. If so, this would be elitism at its worst and consequentialism at its most perverse. In order to test this hypothesis, I examined the ICTY sentencing judgments to identify cases similar to Plavšić. Two cases – the prosecutions of Miroslav Bralo and Dragon Nikolić – shared several factors in common with the *Plavšić* case.[343] Both involved a plea of guilt, admission to crimes against humanity, underlying crimes that included killings and murder, and in both cases, the trial judges found reconciliation to be a mitigation factor in sentencing.

In the *Bralo* case, a Croatian defendant – a relatively minor figure in the conflict – was initially only charged with war crimes.[344] Because of his complete self-effacing cooperation with the Prosecutor, Miroslav Bralo exposed himself to further criminal liability for persecution as a crime against humanity. The Prosecution mercilessly moved to amend the indictment to include persecution as a crime against humanity, increasing Bralo's individual criminal responsibility.[345] Bralo did not oppose the motion. In fact, he did not challenge or dispute any charge or allegation in the extended indictment and pled guilty to all charges.[346] The trial judges considered his unexpurgated acceptance of criminal responsibility as an unequivocal sign of sincere remorse and willingness to be held accountable.[347]

As noted above, the process leading to an accused's admission to his or her participation in atrocity crimes and ethnic violence impacts the goal of reconciliation. Plavšić and Bralo stand in sharp contrast. The former machinated to limit and diffuse the scope and gravity of her crimes, successfully minimizing her criminal responsibility. Her plea deal included charge reduction with the removal of genocide from the record, thereby altering the narrative of the conflict and degree of victimization. Bralo, on the other hand, showed unabridged acknowledgement of his moral blameworthiness and took full responsibility for his wrongful conduct. While Plavšić bargained down her responsibility, Bralo accepted responsibility beyond the initial charges against him.

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[343] Examining these cases allows the opportunity to look at both variants of guilty pleas: an unconditional guilty plea and a bargained-for guilty plea.

[344] Press Release, Int'l Crim. Trib. for the Former Yugoslavia, Indictment against Miroslav Bralo Made Public, JL/P.I.S./902-e, (Oct. 13, 2004), http://www.icty.org/sid/8352.

[345] Prosecutor v. Bralo, Sentencing Judgment, *supra* note 94, at para. 62.

[346] *Id.* at paras. 5-6.

[347] *Id.* at para. 60.

Working from the contested premise that reconciliation is an appropriate goal of sentencing for international crimes, Bralo's contribution to reconciliation arguably merits greater mitigation.[348] The Trial Chamber found that Bralo apologized to victims in person and through personalized letters, identified previously unknown locations of mass graves allowing survivors to carry out funerals for their departed loved ones in accordance with their religion and customs, in some cases exhuming the body from the mass grave himself, and participated in de-mining operations.[349] This may be understood as *direct* reconciliatory acts. It is more tangible to individual victims than Plavšić's prescribed general apology. Although the Tribunal held that Bralo contributed to reconciliation,[350] it did not afford Bralo's acts as much weight in mitigation as was awarded to Plavšić. Has the ICTY's reconciliation ideology turned the significance of superior position or authority as an aggravating factor upside down? Plavšić's punishment was imprisonment for eleven years.[351] Bralo received a prison sentence of twenty years,[352] nearly twice as much as Plavšić, despite the fact that she was in the very highest echelons of the Bosnian Serb leadership prosecuting the war.[353] At the time of her sentencing, she was the highest-ranking figure on any side of the conflict to be punished by the ICTY.[354] Bralo was a relatively low ranking figure, a Croatian foot soldier in a notorious military unit with little or no command authority.[355] Dragon Nikolić, also a relatively low level perpetrator, was sentenced to 23 twenty-three years of imprisonment.[356]

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[348] *Id*. at para. 72.

[349] *Id.* at paras. 66-71.

[350] Prosecutor v. Bralo, Sentencing Judgment, *supra* note 94, para. 71.

[351] In the opinion of many commentators, her unacceptably lenient punishment fails to give a true impression of the gravity of her crimes. *See* Chifflet & Boas, *Sentencing Coherence in ICL* (2012), *supra* note 2 at 149 (stating that Plavšić's "11 year prison sentence belies the seriousness of the heinous crimes she helped perpetrate").

[352] *Id.* at para. 95.

[353] Prosecutor v. Plavšić, Sentencing Judgment, *supra* note 36, at para. 10. *See also* Nancy A. Combs, *International Decisions: Prosecutor v. Plavšić*, 97 AM. J. INT'L L. 929, 930 (2003) ("From 1990 through 1992, Plavšić was the Serbian representative to the Presidency of the Socialist Republic of Bosnia and Herzegovina, serving for a time as the acting co-president of the Serbian Republic of Bosnia and Herzegovina, and later as a member of the collective and expanded Presidencies of the Republika Srpska. Known as the 'Serbian Iron Lady' as a result of her hard-line nationalism and rabidly anti-Muslim views, Plavšić was a close ally of Radovan Karadžić."); CARLA DEL PONTE, MADAME PROSECUTOR, *supra* note 312, at 160-61.

[354] Prosecutor v. Plavšić, Sentencing Judgment, *supra* note 36, at para. 10; Combs, *International Decisions, supra* note 295, at 930; CARLA DEL PONTE, MADAME PROSECUTOR, *supra* note 312, at 160. When Plavšić was sentenced, the other senior figures who bore the greatest responsibility for the atrocities were either not in custody or their trials were ongoing.

[355] Prosecutor v. Bralo, Judgment on Sentencing Appeal, *supra* note 94, at para. 2.

[356] Prosecutor v. Dragan Nikolić, Appeals Sentencing Judgment, *supra* note 60, at paras. 2, 4.

Plavšić's low sentence compared to higher penalties for Bralo and Nikolić is inconsistent with the Tribunal's sentencing practice and legal rulings that superior position or authority is an aggravating factor. By this measure, Plavšić should have received a more severe punishment, all other material factors being equal — and they generally are. Similarly, the difference in the distribution of punishment does not square with ICL sentencing law that cooperation with the Prosecution is a significant mitigating factor, if not the most significant. The trial judges found that Bralo and Nikolić substantially cooperated with the Prosecutor, a mitigating factor that was absent in Plavšić's case. Still, both were punished more severely than Plavšić. Compounding the disparity, one could reasonably conclude that cooperation with the Court or the Prosecutor itself constitutes "contribution towards reconciliation." Likewise, it would have been reasonable for the trial chambers to treat intentional non-cooperation as diminishing the value of an accused's asserted potential contribution to reconciliation. In sum, where judges allow purported reconciliation to impact the quantum of punishment, these cases reveal that their treatment of the two sentencing factors — one aggravating factor (superior position/authority) and one mitigating circumstance (cooperation with the Prosecution) — is inconsistent with the general sentencing jurisprudence. Plavšić, who used her superior position to perpetrate grave crimes and offered no cooperation with the ICTY or OTP, received a much lower sentence than low level perpetrators, who cooperated with the investigations. Reconciliation ideology was so influential that it resulted in misapplication and perversion of two well entrenched sentencing principles in international criminal law.

Judging by the fact that low-level offenders were punished twice as harshly as a high- ranking perpetrator, the ICTY disproportionately awards more penalty reduction for reconciliation to the latter. Interestingly, the *Bralo* Trial Chamber stated that if there were no mitigating factors, it would have imposed a prison sentence of twenty-five years.[357] Thus, Bralo received a sentencing reduction of five years that accounts for *all* the mitigation factors found in his case. Therefore, his contribution to reconciliation represented something much less than a five-year discount, significantly lower than the discount given to Plavšić.[358]

[357] Prosecutor v. Bralo, Sentencing Judgment, *supra* note 94, at para. 95.

[358] Plavšić, Sentencing Judgement, para. 59. *See also* CARLA DEL PONTE, MADAME PROSECUTOR, *supra* note 312, at 161.

Unfortunately, the negative effects of consequentialism permeate the entire ICTY institution beyond the international judges. Consequentialism in the decision-making of the ICTY Prosecutor influenced its presentation of the case during oral arguments, its application of sentencing factors, and finally its sentencing recommendation. As noted above, the Prosecutor argued that Plavšić's contribution to reconciliation "is noteworthy since it is offered from a person who formerly held a leadership position."[359] Thus, the Prosecutor links the mitigating value of an accused's contribution to reconciliation to their superior position.

Similarly, in cases where reconciliation is a factor, the OTP exercises its discretion to recommend sentences that offer greater penalty reduction to high-ranking perpetrators. The court typically follows the OTP's recommendations in plea bargains. For example, the Chief Prosecutor Carla Del Ponte recommended a prison sentence of fifteen to twenty-five years for Plavšić. She represented to the Court that if Plavšić had not pled guilty she would have recommended life imprisonment.[360] Typically, the ICTY grants early release after the defendant has served two-thirds of the sentence.[361] Accordingly, when the OTP recommends a prison term of twenty-five years, it is effectively asking for a sentence of a little more than sixteen-and-a-half years. Thus, its low-end recommendation of fifteen years in the *Plavšić* case is effectively a recommendation for ten years. The Trial Chamber sentenced Plavšić to eleven years of imprisonment; she was out in six years and a few months.[362]

The OTP's discretion was exercised more harshly when recommending a sentence for Bralo. Although it initially asked for a prison sentence of twenty-five years, at the sentencing hearing the OTP stated that it was in fact seeking a "mandatory minimum" of twenty-five years.[363] Thus, accounting for the two-thirds approach outline above, the OTP recommendation was effectively a prison sentence of thirty-seven-and-a-half years. The OTP's policy towards reconciliation and mitigating factors indicate that it assigned less value to Bralo's contribution to reconciliation because he is a low profile perpetrator, in

[359] Prosecutor v. Plavšić, Sentencing Judgement, *supra* note 36, at para. 70 (emphasis added).

[360] *Id.* para. 59. *See also* CARLA DEL PONTE, MADAME PROSECUTOR, *supra* note 312, at 161.

[361] Ines Monica Weinberg de Roca & Christopher M. Rassi, *Sentencing and Incarceration in the Ad Hoc Tribunals*, 44 STAN. J. INT'L L. 1, 50-51 (2008) ("At the ICTY, early release is determined by the implied powers of the President, which is particularly instructive when examining the case of the eight ICTY-convicted persons granted early release, after serving approximately two-thirds of their sentence.").

[362] Plavšić was granted early release on 29 Ocotober 2009.

[363] Prosecutor v. Bralo, Sentencing Judgment, *supra* note 94, at para. 90.

other words, because of his status.[364] Its policy manifested an aggressive recommendation for a harsher penalty for the low level perpetrator *because he is a low level person*, despite his cooperation with the Prosecution. The reconciliation ideology is driving these perverse outcomes.

A final point of interest here concerns Plavšić's release from prison. She served her sentence at a women's prison called "Hinseberg" located in Frövi, Örebro County, Sweden. The inmates call it "the castle" because it is a mansion overlooking a lake.[365] The prisoners can engage in artistic activities, enjoy saunas, bake for leisure, and even ride horses.[366] In 2009, after serving two-thirds of her sentence, she applied to the ICTY for early release.[367] Although her application for early release was made *after* her repudiation of responsibility on public television, something she repeated again for a local newspaper,[368] ICTY President Judge Patrick Robinson granted her motion for release, finding that she was "rehabilitated."[369] No mention was made of her renunciation of responsibility, her slide backwards towards justifying her criminal behavior, or her complete nullification of her apology, which was the pivotal justification for mitigating her sentence.[370]

5. Future of Reconciliation Ideology in Atrocity Sentencing: The ICC a New Hope?

It is too early to draw broad conclusions about the future role of reconciliation ideology in atrocity sentencing at the ICC. There is some indication that the ICC will incorporate the notion of reconciliation into its sentencing practice, but with a new orientation. Following the lead of the Special Court for Sierra Leone, ICC judges in the *Katanga* case prioritized the "punitive aspects" of atrocity sentencing.[371] They held that

[364] *Id.* at para. 62.

[365] *Luxury prison for Bosnia's Iron Lady*, TELEGRAPH, June 7, 2013, http://www.telegraphindia.com/1030607/asp/foreign/story_2044806.asp.

[366] *Id*.

[367] *See generally* President of the Int'l Trib. Judge Patrick Robinson, IT-00-39 & 40/1-ES, Decision of the President on the Application for Pardon or Commutation of Sentence of Mrs. Biljana Plavšić (Int'l Crim. Trib. for the Former Yugoslavia Sept. 14, 2009) [hereinafter Plavšić Pardon Decision].

[368] Carrie Schimizzi, *Bosnia war crimes victims submit evidence against former Serbian officials*, JURIST (Apr. 8, 2011), http://jurist.org/paperchase/2011/04/bosnia-war-crimes-victims-submit-evidence-against-former-serbian-officials.php; Iva Martinović, *Outcry at Plavsic's Belgrade Welcome*, INST. FOR WAR & PEACE REPORTING (Nov. 4, 2009), http://iwpr.net/report-news/outcry-plavsics-belgrade-welcome.

[369] *See* Plavšić Pardon Decision, *supra* note 306, at para. 8.

[370] *See id.*

[371] Katanga Trial Sentence at para. 38.

the "role" of atrocity sentencing "is two-fold": "punishment" and "deterrence".[372] They further added that, when punishing atrocities, the ICC must "ensure that . . . the sentence reflects the degree of culpability while contributing to the restoration of peace and reconciliation."[373] Thus, ICC judges appear to be saying that, when the sentence reflects the perpetrator's culpability, punishment can contribute to peace and reconciliation in the affected communities. At the end of its sentencing judgment, the *Katanga* Trial Chamber leaves some room for efforts to promote peace and reconciliation, noting they "could potentially mitigate the sentence."[374]

This anchoring of reconciliation to just punishment was absent in the ICTY's approach. In the *Plavšić* case, even if we accept that Plavšić did her part to promote reconciliation with her public apology, the ICTY arguably failed to do its part when it imposed a relatively low sentence. The consequence in the communities concerned was to reject her apology as genuine and to perceive her admission of guilty as self-serving deal-making to avoid just punishment. Additionally, the focus is on "palpable and genuine" efforts on the part of the accused, not on speculative results. Had ICTY applied this approach, Bralo's contribution to reconciliation would have merited greater weight and Plavšić would have received less mitigation. The Trial Chamber scrutinized the evidence provided by Katanga against the standard of palpable and genuine efforts. It concluded that his efforts were not. Thus, while the Trial Chamber was prepared mitigate punishment based on an accused's efforts to promote peace and reconciliation, it carefully examined the actual record of the accused's conduct. It did, however, take into account the positive role that he played in disabling the conflict, specifically in the process of disarming and demobilizing child soldiers.

V. CONCLUSION

The prospect of a permanent mechanism to bring to justice perpetrators of gross human rights violations has captured the imagination of ordinary people, victims, human rights advocates, and even celebrities.[375] The potential latent in the International

[372] Id.
[373] Id.
[374] Katanga Trial Sentence at para. 91.
[375] Ben Child, *Kony 2012: Angelina Jolie calls for Ugandan warlord's arrest,* THE GUARDIAN, Mar. 12, 2012, http://www.guardian.co.uk/film/2012/mar/12/kony-2012-angelina-jolie; *Angelina Jolie attends ICC hearing to witness Lubanga Decision*, AFRICANEWSWIRE.NET, Mar. 14 2012,

Criminal Court has fueled high expectations. Yet, the growing list of aspirations burdening international criminal justice mechanisms has resulted in unrealistic expectations. ICL sentencing philosophy continues to lack cohesion but is crystalizing as having a more punitive orientation than a restorative one. With the contribution of the SCSL, retribution and deterrence are in full ascendency over other ideological approaches to ICL sentencing. Other international tribunals, particularly the ICTY, advanced numerous and conflicting rationales for ICL sentencing. In addition to retribution and deterrence, judges at the *ad hoc* tribunals also claimed that the purposes of ICL sentencing include reconciliation, rehabilitation, general affirmative prevention, expressivism, historical recording building, and more.[376] Moreover, when ICL sentencing judgments embrace these various ideologies, the judicial narratives do more than identifying them as achievable goals of international prosecutions; they also considered them fundamentally to be factors that appropriately influence sentence allocations.

As was the case with its predecessor institutions, the ICC will have to navigate justice through these conflicting tensions. Should it prioritize punitive aims or restorative aims? Should it prioritize criminal justice objectives (such as deterrence and retributions) or extra-juridical goals (such as reconciliation and historical record building)? ICL sentencing judgments point to retribution and deterrence, in principle, as the core function of punishment for atrocity crimes. Judicial narratives, however, reveal that ICL judges are prepared to accommodate a wider range of aspirations influencing sentencing outcomes. The sentencing phase allows ICL to inject granularity into the discourse of culpability and accountability for atrocity crimes. This powerful potential is largely underutilized. For example, as this chapter demonstrates, ICL judges state that deterrence is a primary function universally applicable to all perpetrators in atrocity trials. Yet, their actual sentencing outcomes reveal sensitivity to the view that the suitability of deterrence ideology may turn on the perpetrator's role in the conflict. These nuances do not come through in their sentencing narratives. More direct and layered

http://www.africanewswire.net/story.php?title=angelina-jolie-attends-icc-hearing-to-witness-lubanga-decision. See *Angelina Jolie in court as ICC finds Congo warlord Thomas Lubanga guilty of using child soldiers,* TELEGRAPH, Mar. 14, 2012, http://www.telegraph.co.uk/news/worldnews/africaandindianocean/democraticrepublicofcongo/9143254/Angelina-Jolie-in-court-as-ICC-finds-Congo-warlord-Thomas-Lubanga-guilty-of-using-child-soldiers.html, for a video of Ms. Jolie's statements following the verdict.

[376] *See supra* Section II(C)-(E).

engagement could aid their justification of differentiated individual punishments, which may otherwise outwardly appear inconsistent.

Although ICL sentencing judgments ostensibly claimed retribution and deterrence to be the primary rationales influencing the quantum of punishment, the actual sentence pronounced frequently undermined both, or at a minimum, are counter-intuitive to a punitive orientation. Given the recurring tensions between what ICL judges identify as the core functions of atrocity sentencing (retribution and deterrence) and other political objectives that they consider to be part of the mandate of atrocity trials, an ordering principle is in dire need. Otherwise, they risk jeopardizing the very goals they espouse to be the core function of international criminal justice. Given the high profile of atrocity trials, ICL judges come under intense pressure from powerful international actors and institutions, local politicians, special interest groups, and the media to consider and accommodate meta-judicial agendas. Admittedly, international judges themselves have at times bought into romanticized notions that ICL institutions can achieve an awesome array of social goals and policy objectives, even when some of them are in direct conflict with each other.

This overreach, even when well intended, has had a negative impact on the sentencing of perpetrators of genocide, crimes against humanity, and war crimes, resulting in confusing justifications for individual sentences. Although deterrence and retribution appear most frequently in the tribunal's sentencing judgments, international judges appealed to a much wider range of justifications, legal and political, to legitimize their sentences. This toggling at will between punitive and restorative approaches to punishment has opened the work of international criminal tribunals to criticism of bias, politicization, and victor's justice.

Regarding atrocity trials, Hannah Arendt aptly concluded: "The purpose of a trial is to render justice and nothing else; even the noblest of ulterior purposes . . . only detract from the law's main business: to weigh the charges brought against the accused, to render judgment, and to mete out due punishment."[377] In other words, idealism about atrocity trials is self-defeating. There are many learning lessons here for the ICC and pitfalls to avoid. As this chapter reveals, ambitious incorporation of goals such as reconciliation into the judicial decision-making process results in perverse outcomes in the sentencing

[377] HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 253 (1964).

phase. This chapter's findings caution against international criminal justice mechanisms becoming too entangled with idealistic aspirations, such as reconciliation or producing a historical record, at the cost of their primary function to punish perpetrators of atrocity crimes. It illustrates that international judges risk veering off course away from their primary role when attempting to achieve other well-meaning goals that are beyond the institutional capacity of international criminal courts. The desire to characterize a senior official's limited acceptance of responsibility as meaningful contribution to reconciliation invited distorted application of sentencing factors leading to a relatively light sentence. For example, prioritizing the goal of reconciliation in sentencing inverted superior responsibility from an aggravating factor into a mitigating circumstance. It also caused a blind eye to be turn to the accused's lack of cooperation.

Therefore, a possible unfortunate legacy of the ICTY's sentencing jurisprudence is that high-ranking perpetrators in leadership positions receive more reduction in the quantum of punishment than foot soldiers where both are found to have "contributed toward reconciliation."[378] Those most responsible for atrocities, in particular, have benefited the most when reconciliation was advanced as a rationale for mitigating punishment. They have received significantly reduced sentences, often lower than their subordinates, thus trivializing their culpability for the atrocities.

Moreover, in general, most utilitarian aspirations associated with international criminal prosecutions should be abandoned as sentencing rationales because they distort the individual perpetrator's culpability. In the *Plavšić* case, in addition to reconciliation, other consequentialist aspirations were said to be significant in a sentence below the Prosecutor's recommendation. For example, it was suggested that her lenient sentence was influenced by the consequentialist desire to encourage others in the leadership, who bear the greatest responsibility for the atrocities, to surrender and likewise make a public admission and acceptance of responsibility. When the ICTY announced Plavšić's sentence, Karadzić and Mladić were still at large and Krajišnik rejected any responsibility for his crimes.[379] If that consequentialist aim was the strategy, then it failed miserably. None of the remaining most wanted perpetrators followed Plavšić's suit in either voluntarily surrendering to the court or admitting responsibility. Krajišnik maintained

[378] *See generally* Prosecutor v. Plavšić, Sentencing Judgment, *supra* note 36; Prosecutor v. Bralo, Judgment on Sentencing Appeal, *supra* note 94.

[379] Prosecutor v. Krajišnik, Case No. IT-00-39-T, Trial Judgment, para. 888 (Sept. 27, 2006).

his innocence and opted for a trial.[380] Karadzić and Mladić refused to surrender.[381] Slobodan Milošević and Vojislav Šešelj defiantly denounced the ICTY as an "illegal tribunal" and the latter claimed that his court appointed defense lawyer was a "spy" for Western imperialism.[382]

This Chapter's analysis demonstrates that when international judges give undue weight to utilitarian aspirations in their sentencing judgments, they distort and diminish the culpability and just distribution of punishment among the various actors' responsibility for atrocity crimes in a situation. Moreover, the goals (such as reconciliation) they seek to achieve through their sentencing reductions are beyond the immediate capacity of criminal courts. International prosecutions should assume a more modest posture regarding its capabilities, lest it damages its core responsibility of punishing perpetrators of atrocities crimes. This is not to say that international criminal justice cannot contribute to these aspirations, but rather that it should not be given weight as a factor in sentencing. Going forward, the ICC should approach the notion of reconciliation as a mitigating sentencing factor with caution. There are hopeful signs that it may do so.[383]

This Chapter has sought to reflect on aspirations associated with international atrocity trials and analyze how they have impacted judicial determinations of the quantum of punishment. It has called for clarity and distinction between desired ideological aspirations of international prosecutions and those rationales that ought to (or ought not to) influence the sentence. While clarity on the purpose of atrocity sentencing is crucial to improving judicial narratives about punishing atrocities, it does not on its own improve sentencing outcomes. Clarity on the purpose of atrocity sentencing must be augmented by clarity surrounding sentencing criteria and factors. The next chapter takes up this task.

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[380] Id.

[381] Ed Vulliamy, *Twelve years on, a killer on the loose*, THE GUARDIAN, Dec. 1, 2007, http://www.theguardian.com/world/2007/dec/02/warcrimes.edvulliamy1.

[382] *Serb ultranationalist disrupts ware crimes trial*, REUTERS, Nov. 1, 2006, http://uk.reuters.com/article/2006/11/01/uk-warcrimes-seselj-idUKL0146563020061101; *Serb nationalist rejects UN court*, BBC, Nov. 8, 2007, http://news.bbc.co.uk/2/hi/europe/7084506.stm.

[383] *See supra* Section IV(B)(5).

CHAPTER 4
RECONCEPTUALIZING ATROCITY SENTENCING

I. INTRODUCTION

Many ICL practitioners and scholars have observed that individuals convicted of atrocity crimes of similar gravity are sentenced to punishments of vastly different severity.[1] This raises questions about whether "gravity" is indeed the primary consideration and differential factor in determining the quantum of punishment for atrocity crimes.[2] Is gravity of the offence operating as a meaningful differential principle in punishing atrocities? Is there an explanation that might reasonably justify substantially different sentences for persons convicted of crimes of similar gravity? Moreover, from a systemic perspective, has the notion of "gravity" been overplayed as a differential criterion for the purpose of punishing atrocities? And, has this come at the expense of developing sentencing criteria *sui generis* to atrocity crimes? This Chapter explores these questions and responds with an original claim and an innovative sentencing framework for international criminal justice.

In order to answer these questions, the research sought to identify individuals convicted of the same crimes. This methodology allowed the analysis to hold constant gravity of the crime as a sentencing factor while evaluating the influence of other factors on the quantum of punishment. It also allowed us to evaluate whether gravity is consistently the primary factor influencing sentencing outcomes. This approach made significant the jurisprudence of the Special Court for Sierra Leone (SCLS) due to the prosecutor's distinctive approach to charging atrocity crimes. The SCSL Prosecutor conducted a single trial for each warring party in the armed conflict and prosecuted multiple co-perpetrators of varying rank within the same armed group under a single

[1] *See* Pascale Chifflet and Gideon Boas, *Sentencing Coherence in International Criminal Law: The Cases of Biljana Plavsic and Miroslav Bralo*, 23 CRIMINAL LAW FORUM 135, 147 and 154 (2012); Jean Galbraith, *The Good Deeds of International Criminal Defendants*, 25 LEIDEN J. INT'L L. 799, 800 (2012); Ines Monica Weinberg de Roca, *Sentencing and Incarceration in the Ad Hoc Tribunals*, 44 STANFORD. J. INT'L L. 1, 6-12 (2008); MARK A. DRUMBL, ATROCITY, PUNISHMENT AND INTERNATIONAL LAW 11, 15, 56-57 (2007); Mark B. Harmon & Fergal Gaynor, *Ordinary Sentences for Extraordinary Crimes*, 5 J. INT'L CRIM. JUSTICE 683, 684, 710 (2007); Andrew Keller, *Punishment for Violations of International Criminal Law*, 12 INDIANA INTERNATIONAL & COMPARATIVE LAW REVIEW 53, 65-66 (2001).

[2] Robert Sloane, *Sentencing for the "Crime of Crimes"*, 5 J. INT'L CRIM. JUSTICE 713, 734 (2007) (rejecting the idea that gravity of the offence is a principle determinant of sentencing for atrocity crimes).

indictment with exactly the same charges and underlying facts and violations of law. In each trial, the same criminal charges were laid against all defendants, regardless of rank held within the group's hierarchy. This afforded a rare opportunity to analyze sentencing outcomes where perpetrators occupying different positions in the hierarchy of an organization are held criminally responsible for the same underlying crimes. This reason compelled the inclusion of the SCSL in this study.

Furthermore, very few studies focus on the SCSL and its sentencing jurisprudence in particular has been largely ignored in academic literature.[3] This too informed the decision to include the SCSL's sentencing jurisprudence in this study. By selecting the SCSL's jurisprudence as the subject of study, Chapter Four makes an important and new contribution to ICL literature. Furthermore, among the *ad hoc* and hybrid tribunals, the SCSL enjoys the distinction of being the only international court to sentence a former Head of State. Thus, its jurisprudence includes the rare opportunity to analyze the application of ICL sentencing law, norms, and principles to a head of state. A study on punishing atrocities cannot ignore the only international court to punish a former Head of State. Additionally, the ICC has cited the SCSL sentencing decisions giving it continuing immediate relevance to ICL.[4]

Drawing on the jurisprudence of the SCSL, this Chapter offers an original claim regarding atrocity sentencing. I theorize that judges consider an atrocity criminal's role in enabling the context, that is conflict, in which atrocity crimes erupt when allocating an appropriate punishment. I call this the "enabler factor".[5] Although ICL jurisprudence does not explicitly identify "enabling" as a specific sentencing factor, the notion is present in judicial narratives about the role of the accused in the atrocities.[6] I argue that when ICL judges view an individual as an enabler, even if not explicitly articulated as a sentencing

[3] *But see* Shahram Dana, *The Sentencing Legacy of the Special Court for Sierra Leone*, 42 GEORGIA J. INT'L & COMP. L. 615 (2014).
[4] *Prosecutor v. Thomas Lubanga Dyilo,* ICC-01/04-01/06, Decision on Sentence pursuant to Article 76 of the Statute, (10 July 2012) (hereafter *Lubanga* Sentencing Judgment).
[5] Admittedly, I went back and forth on whether I should refer to the enabler concept as a "factor" or a "theory". I settled on presenting the concept as a "factor" at this stage, believing that it is premature to present it as a theory.
[6] *See, e.g.*, Tadic Appeals Sentence, para. 55-58 (instructing trial judges to "consider the need for sentences to reflect the relative significance of the role of the Appellant in the broader context of the conflict"); *Prosecutor v. Rukundo* (ICTR-2001-70 Trial Chamber), Judgment para. 605, (27 February 2009); *See also, Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Judgment (May 18, 2012) [hereinafter Taylor Trial Judgment] paras.5834-5835, 5842, and 6913-6915 (finding that "Taylor's acts and conduct had a substantial effect on the commission of the crimes because they: (i) enabled the RUF/AFRC's Operational Strategy; (ii) supported, sustained and enhanced the RUF/AFRC's capacity to implement its Operational Strategy.")

factor, they will punish that individual more severely than others that have committed similar crimes but were not considered to be enablers. ICL judgments in cases involving very powerful war criminals sometimes discuss the accused's role in enabling atrocities or the context of armed conflict that spawned atrocities crimes. This may appear in the court's judgment on guilty rather that in the sentencing judgment.[7]

The enabler factor closes the explanatory gap in sentencing outcomes left unexplained by the gravity narrative.[8] Taking the SCSL as a case study (for the reasons stated above), I use the enabler factor to explain perceived inconsistencies in the quantum of punishment between different trials, for example between the sentence of Charles Taylor and the perpetrators in the CDF trial. It also explains the distribution of punishment among co-perpetrators within a single trial. For example, in the RUF trial, the enabler factor explains why Issa Sesay received more than double the prison sentence of his co-defendant Augustine Gbao (52 years versus 25 years) even though both were convicted of the same crimes. This Chapter also employs the enabler factor to explain the sizable differences between the punishment of individuals who fought against the government of Sierra Leone versus the comparatively light sentences of government supporters. Additionally, the enabler concept offers a pathway towards congruency between judicial narratives and actual sentencing allocations. It is also instructive to future sentencing determinations by the ICC and other international tribunals. Thus, in addition to closing the explanatory gap in sentence allocations, it also integrates sentencing outcomes with sentencing narratives and the goals of international prosecutions.

Section II launches straight into applying the enabler factor to explain the sentencing outcomes at the Special Court for Sierra Leone. The enabler factor is examined in three distinct contexts. First, it is offered to explain the sentence of an individual atrocity perpetrator at the highest level of power and authority, such as a head of state, and to push back against criticisms that Liberian President Charles Taylor's sentence was too harsh. Second, through the prism of the enabler factor, I will illuminate the sentencing of three co-perpetrators of the same crimes in a way that "gravity" alone cannot explain. Third, the enable factor closes the explanatory gap between the

[7] *Compare* Taylor Trial Judgment *with Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Sentencing Judgment (May 30, 2012) [hereinafter Taylor Sentencing Judgment].
[8] Chifflet & Boas, *Sentencing Coherence in ICL, supra* note 1, at 147, 156, and 158 (suggesting that gravity does not explain a large number of ICL sentencing outcomes).

sentences of perpetrators across the different trials and armed groups. Next, the Chapter moves to develop a communicative sentencing framework for atrocity crimes. First, in section III, the chapter synthesizes the general ICL jurisprudence, systematizing the key considerations for punishing atrocities. It critically analyzes four recurring pillars of atrocity sentencing in ICL jurisprudence: gravity, individual circumstances of the convicted person, aggravating factors, and mitigating circumstances. In addition to offering descriptive claims about each of these four pillars, this section also interrogates the application of these factors by international judges, critically reflecting on recurring conceptual and doctrinal problems. Section IV then begins to respond to these problems. I reimagine, re-conceptualize and restructure these four core elements with an eye towards optimizing their integration with the purpose of atrocity sentencing. Thus, this Chapter pulls together these key factors to effectuate their harmonized consideration when determining sentence allocations and just distribution of punishment among actors responsible for atrocity crimes. The Chapter concludes by offering a fresh legal framework for atrocity sentencing.

II. ENABLERS AND MASS ATROCITIES IN SIERRA LEONE

When heads of states or heads of armed groups enable mass conflict and criminality, an ominous environment for atrocities is created. The number of victims increases exponentially. Punishment in international criminal law must capture this extremely dangerous criminality. This can be done, for example, by linking the head of a state or head of an armed group's use of authority to create, facilitate and/or maintain conditions that sustain atrocity criminality, *i.e.* enabling atrocities. This section applies the enabler factor to atrocities committed during a brutal war that fatally consumed the people of Sierra Leone for more than a decade.[9] In order to establish sufficient context, the section begins with a brief overview of the civil war in Sierra Leone. This provides the factual context necessary for understanding the role of particular perpetrators and the

[9] For further reading on the conflict in Sierra Leone *see* IAN SMILLIE, LANSANA GBERIE, & RALPH HAZLETON, THE HEART OF THE MATTER: SIERRA LEONE, DIAMONDS & HUMAN SECURITY 8 (2001) (*discussing* the devastating nature of the conflict); Nicole Fritz & Alison Smith, *Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone*, 25 FORDHAM INT'L L.J. 391, 394 (2001) (*discussing* a campaign of terror against civilians that included abducting children, forced prostitution, and the amputation of limbs).

application of the enabler factor. It then applies the enabler factor to the trials and punishments of Charles Taylor, then sitting Head of State and President of Liberia; three members of the Revolutionary United Front (RUF); and two members of the Civil Defense Force (CDF).

In Sierra Leone's 1996 democratic elections, Alhaji Ahmad Tejan Kabbah, an ethnic Mandingo, was elected President of Sierra Leone, becoming his country's first Muslim Head of State.[10] Soon after the elections, armed conflict between the new government and the Revolutionary United Front (RUF) resumed.[11] The RUF claimed that Kabbah's government was overrun with corruption, justifying an armed rebellion by the people.[12] From neighboring Liberia, Charles Taylor long supported and enabled the RUF's war against the Sierra Leone's government of President Kabbah and past ruling regimes.[13]

In December 1996, President Kabbah and RUF leader Foday Saybana Sankoh signed a peace agreement, the Abidjan Peace Accord, bringing a temporary halt to the atrocities and granting blanket amnesty to the RUF fighters. However, peace did not last long. Within months, war consumed the country again. In March 1997, Sankoh was placed under house arrest in Nigeria for alleged weapons violations.[14] Although this gave Sierra Leone President Kabbah a small victory over the RUF, the ascendancy was short lived. A few months later, a group of senior military officers in the Sierra Leone Army (SLA) overthrew a weakened Kabbah in a *coup d'etat* and unlawfully seized power from the newly elected government with a brutal military assault on Freetown in which Liberian President Charles Taylor had "a heavy footprint" in planning, enabling, and

[10] Charles C. Jalloh, *Contributions of the Special Court for Sierra Leone on the Developments of International Law*, 15 AFR. J. INT'L & COMP. L. 165, 169 (2007) ("Jalloh *Contributions*"). *Prosecutor v. Sesay*, Trial Chamber Sentencing Judgment, para. 146 (April 8, 2009) ("RUF Trial Sentencing").
[11] Nsongurua J. Udombana, *Globalization of Justice and The Special Court of Sierra Leone's War Crimes*, 17 Emory Int'l. Rev. 55, 71 (2003) (*stating* that the atrocities were occasioned by the desire to control of the country's natural resources).
[12] *See*, Babafemi Akinrinade, *International Humanitarian Law and the Conflict in Sierra Leone*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 391, 392 (2001); Jalloh *Contributions*, *supra* note 10, at 169; RUF Trial Sentencing para. 146.
[13] Jamie O'Connell, *Here Interest Meets Humanity: How to End the War and Support Reconstruction in Liberia, and the Case for Modest American Leadership,* 17 HARVARD. HUM. RTS. J. 207, 213 (2004); Nicole Fritz & Alison Smith, *Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone*, 25 FORDHAM INT'L L.J. 391, 394 (2001) (*discussing* how after the RUF entered Sierra Leone and controlled the Eastern region of the country, it implemented Charles Taylor's a campaign of terror by abducting children, forcing prostitution, and amputating limbs).
[14] *Prosecutor v. Sesay, Kallon and Gbao,* Trial Chamber Judgment para. 19 (March 2, 2009).

overseeing.[15] Establishing themselves as the Armed Forces Revolutionary Council (AFRC), these mutinous officers installed one of their own, Johnny Paul Koroma, as Sierra Leone's new Head of State.

Although the AFRC and RUF joined forces, their union was an uneasy one. Together they fought against the Civil Defense Force (CDF), a loosely organized fighting force loyal to President Kabbah and the ousted government of Sierra Leone. The CDF was led by Samuel Hinga Norman, an enormously popular figure and war hero among Sierra Leoneans.[16] With the intervention and support of the Economic Community of West African States Monitoring Group (ECOMOG), forces loyal to Kabbah, including the CDF, managed to regain control of Freetown and reinstate Kabbah as Sierra Leone's president. The civilian population of Sierra Leone, however, saw no respite from deliberate brutalization and horrific attacks against them. All parties to the conflict, including ECOMOG and Nigerian armed forces, continued to mercilessly attack, kill, and terrorize civilians. The retreating AFRC and RUF fighters looted and pillaged villages, killed or imprisoned civilians, and otherwise terrorized the population, including widespread mutilations and amputations. The hostilities and accompanying atrocities were intense, extreme, and prolonged.[17] After two more years of fighting, another peace agreement was signed and again RUF war criminals were granted full amnesty despite the horrible atrocities they committed. The 1999 Lome Peace Agreement, signed by President Kabbah and the RUF represented by Sankoh, not only gave Sankoh amnesty for atrocity crimes and pardoned his treason, but also installed him as Sierra Leone's Vice-President, and gave him control of the country's lucrative diamond mines.[18]

Two peace agreements and two full amnesties failed to deliver lasting or even short-term peace to the country, or respite to Sierra Leoneans from the horrors and hell

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[15] *Prosecutor v. Charles Taylor,* Case No. SCSL-03-01-T, Sentencing Judgment para. 76, 77, and 98 (30 May 2012); CDF Trial Sentencing para. 44. *See also* Human Rights Watch, *Sierra Leone: Getting Away with Murder, Mutilation, and Rape*, 11 Human Rts. Watch 3(A), at 12 (July 1999); James Rupert, *Diamond Hunters Fuel Africa's Brutal Wars*. Washington Post Foreign Service. (October 16, 1999); Ian Stewart, *Rebels Set Freetown Ablaze, President Opens Talks*, Associated Press (January 7, 1999).

[16] ANTONIO CASSESE, THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 677 (2009).

[17] *See further,* IAN SMILLIE, LANSANA GBERIE, & RALPH HAZLETON, THE HEART OF THE MATTER: SIERRA LEONE, DIAMONDS & HUMAN SECURITY 8 (2001) (*discussing* the devastating nature of the conflict); Nicole Fritz & Alison Smith, *Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone*, 25 FORDHAM INT'L L. J. 391, 394 (2001) (*discussing* a campaign of terror against civilians that included abducting children, forced prostitution, and the amputation of limbs).

[18] Tony Karon, "The Resistible Rise of Foday Sankoh," Time Magazine (May 12, 2000) available at http://www.time.com/time/arts/article/0,8599,45102,00.html (last visited July 3, 2013); Obituaries, Foday Sankoh, The Telegraph (July 31, 2003) available at http://www.telegraph.co.uk/news/obituaries/1437579/Foday-Sankoh.html (last visited March 18, 2013).

they suffered. More hostilities followed and so too did graver atrocities. Throughout the war, Charles Taylor, now President of Liberia, provided material support to the RUF/AFRC armed groups that enabled them to continue the hostilities and atrocities, including supplying arms, weapons, munitions, and military personnel. After the failures of the "peace with amnesty" strategy, movement towards accountability and justice gained traction, perhaps encouraged by the international tribunal model in response to the atrocities in Rwanda and Yugoslavia. In June 2000, President Kabbah pleaded to the United Nations Security Council to establish a "special court for Sierra Leone" to prosecute RUF and AFRC leaders for planning and executing terrible atrocity crimes that brutalized and terrorized the people of Sierra Leone for more than 10 years.[19] The United Nations and Sierra Leone created a "special court" to prosecute persons bearing the "greatest responsibility" for the atrocities.[20]

The Special Court for Sierra Leone prosecuted and punished, *inter alia*, Charles Taylor, who was a sitting head of states when indicted as President of Liberia; Alex Tamba Brima, Santigie Borbor Kanu, and Brima Bazzy Kamara, senior military commanders in the Sierra Leone Army that staged a successful *coup d'etat* that ousted the Sierra Leone government and members of the AFRC Supreme Council; Issa Sesay, senior military officer and commander of the RUF and later the combined AFRC/RUF forces in their insurrection against Sierra Leone; and Samuel Hinga Norman, founder and leader of the CDF who was appointed Deputy Minister of Defence during the conflict.

In contextualizing the enabler concept to the atrocities in Sierra Leone, the first step is to lay out the quantitative picture emerging from the sentencing practice of the SCSL. It has imposed nine sentences ranging from 15 years to 52 years with an average sentence of 36 years and median of 45 years. This picture changes dramatically if we nuance our observations by examining separately the sentences in the trials of vanquished opponents of the Sierra Leone government and the trial of the victorious pro-Sierra Leone forces. The average sentence for the vanquished opponents (*i.e.* Charles Taylor, the RUF and AFRC fighters) is 46 years; whereas the average sentence for President Kabbah's supporters (*i.e.* the CDF defendants) is 17.5 years (after appeal), a mere fraction of the punishment met out to those that rebelled against the government.

[19] President of the Republic of Sierra Leone, Annex to the Letter dated Aug. 9, 2000, from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2000/786 (Aug. 10, 2000).
[20] *See,* Jalloh *Achieving Justice*, *supra* note 2, at 398-404 (discussing the creation of the court).

The CDF defendants also received the lowest individual sentences. Among the opposition groups, the AFRC was punished most severely with an average sentence of 48.3 years, comprising of individual sentences of 50 years for Brima and Kanu, and 45 years for Kamara.[21] The average punishment for the RUF defendants was 39 years.[22] Sesay received a prison sentenced of 52 years, the highest individual punishment rendered by the SCSL.[23] His RUF co-defendants Morris Kallon and Augustine Gbao received 40 and 25 years respectively.[24]

A. ENABLER FACTOR AS APPLIED TO CHARLES TAYLOR

Several authors have criticized Taylor's fifty-year (50) prison sentence as excessive. Mark Drumbl, for example, argues that the judges were obsessed with Taylor's status as Head of State.[25] He concludes that this judicial obsession with accountability for a Head of State disproportionately increased Taylor's sentence.[26] Drumbl invites us to consider whether Head of State status should matter that much when it comes to a just distribution of punishment.[27] Likewise, Kevin Jon Heller argues that the mode of liability underlying Taylor's conviction, aiding and abetting, does not justify his sentence.[28] Heller's dissatisfaction stems largely from what he characterizes as poor reasoning and scant explanation for departing from basic principles that the judges themselves proffered as controlling the quantum of punishment.

Although subsequently overturned by the Appeals Chamber,[29] the trial judges took the position that aiding and abetting warrants a lesser punishment and furthermore proclaimed this to be a general principle of criminal law.[30] But then they immediately tossed this declared principle aside, and decide that they will instead consider the

[21] *See*, AFRC Appeals Judgment, Sentencing Disposition.
[22] *See*, RUF Appeals Judgment, Sentencing Disposition.
[23] *Id*.
[24] *Id*.
[25] Mark Drumbl, "The Charles Taylor Sentence and Traditional International Law", Opinio Juris Blog, 11 June 2012, available at http://opiniojuris.org/2012/06/11/charles-taylor-sentencing-the-taylor-sentence-and-traditional-international-law (last visited 14 April 2018) (hereafter "Drumbl, Punishing Heads of State (2012)").
[26] *Id*.
[27] *Id*.; *See also*, Wayne Jordash and Scott Martin, *Due Process and Fair Trial Rights at the Special Court: How the Desire for Accountability Outweighed the Demands of Justice at the Special Court for Sierra Leone*, 23 Leiden Journal of International Law 585 (2010) (claiming that the quest for accountability of perceived leaders has trumped certain fair trial rights).
[28] Kevin Jon Heller, *The Taylor Sentencing Judgment: A Critical Analysis*, 11 J. Int'l Crim. Justice 835 (2013) (hereafter "Heller, *Taylor Sentence* (2013)").
[29] Taylor Appeals Judgment paras. 666 and 670.
[30] Taylor Sentencing Judgment, para 100.

"unique circumstances" of Taylor's case when determining his punishment. The ruling comes across as an unjustified "go around" a purportedly basic principle of criminal law acknowledged by the Trial Chamber itself. Heller and others are rightly discontent. The convicted person, the victims, and the broader communities deserve a sounder justification.

There is some debate about whether the asserted rule - that aiding and abetting as a matter of law deserves less punishment – is a universally accepted general principle of criminal law.[31] Of course, factually, the actual contribution of an aider and abettor may be rather minor so as to warrant a lesser penalty. In such cases, a lesser penalty for aiding and abetting is the justifiable result of analysis and evaluation of the actual criminal conduct. It is not an automatic outcome. This is quite different from claiming at aiding and abetting as a matter of law merits a lesser penalty, regardless of the significance or decisiveness of the perpetrator's contribution. Facts must drive the analysis, especially in the context of atrocity crimes where the aiding and abetting is done by a head of state or head of an organized armed group. Yet, this critique does not resolve the problem here because, whether or not this is actually a general principle of criminal law, the Trial Chamber believed this rule to be a general principle and proceeded to sentence Taylor on that basis. So, assuming that this principle applies, is there a better explanation for the Trial Chamber's departure from it than the proffered "unique" circumstances?

One response might be that the critics are underestimating how seriously the Trial Chamber viewed Taylor's *planning* of crimes against humanity and war crimes. After all, Taylor was convicted of two modes of liability: planning as well as aiding and abetting.[32] Still, this explanation does not get us home because Taylor was convicted of "planning" only one of his crimes; for all others he was convicted as an aider and abettor. An explanation with greater legs is that the judges considered Taylor's contribution to the

[31] The SCSL Appeal Chamber decisively concludes that it is not. It holds that the Trial Chamber's position is inconsistent with the SCSL's statute, rules, and jurisprudence. *See*, Taylor Appeals Judgment paras. 666 and 670. The Appeal Chamber further holds that the Trial Chamber's ruling here is not supported by customary international law, nor a general principle of law, citing and discussing numerous jurisdictions including the Sierra Leone, the United States, Austria, Brazil, Costa Rica, Puerto Rico, France, and Italy. *See*, *Id.* para. 667. The SCSL also persuasively demonstrates the error of arguments that rely on ICTY jurisprudence to claim that aiding and abetting as a mode of liability warrants lesser punishment. *Id.* paras. 666-669.
[32] Taylor Sentencing Judgment para. 37B.

atrocity crimes to be a particularly serious form of complicity. They considered Taylor to be an enabler.[33]

A closer examination of the trial judgment reveals that the judges consider Taylor to have not merely aided and abetted in the crimes but in fact *enable* the atrocities.[34] He enabled the RUF/AFRC's operational strategy, which included the committed atrocity crimes, by supporting, sustaining and enhancing the RUF/AFRC's capacity to carry out these activities.[35] Taylor supplied arms and ammunitions to the RUF and AFRC that was "indispensable" in empowering them to launch attacks.[36] The RUF repeatedly encountered the problem of depletion of its arms and military supplies and time and again Taylor responded by directly supplying them with more weapons.[37] Without the shipment of weapon's from Charles Taylor, the RUF could not have sustained their attacks on civilians.[38] During the same time, the United Liberation Movement of Liberia for Democracy (ULIMO) was supposed to disarm and surrender its weapons to the UN. Instead, Taylor enabled them to sell or barter their weapons to the RUF, and further provided the RUF the financial means needed to purchase these arms and ammunitions from the ULIMO.[39] Taylor also directly supplied the AFRC with arms.[40] The trial judges found that "Taylor's acts and conduct had a substantial effect on the commission of the crimes because [he] enabled the RUF/AFRC."[41]

While the Trial Judgment is explicit that Taylor "was critical in enabling" the RUF and AFRC,[42] the Sentencing Judgment does not explicitly identify "enabling" as a sentencing factor. Nevertheless, I argue the enabler factor influenced and increased Taylor's sentence. Implicit in the judges' sentencing narrative is their grave concern that Taylor enabled the armed conflict and ensuing atrocities. When the Trial Chamber analyzes the "role of the accused" it considers Taylor's "sustained operational support;"

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[33] *E.g.* Taylor Trial Judgment para. 6914 (finding that Taylor "was critical in enabling" the RUF and AFRC). *See also*, Appeals Judgment para. 683.
[34] *E.g.* Taylor Trial Judgment paras. 5834, 5835, 5842, 6913-6915 (finding that "Taylor's acts and conduct had a substantial effect on the commission of the crimes because they: (i) enabled the RUF/AFRC's Operational Strategy; (ii) supported, sustained and enhanced the RUF/AFRC's capacity to implement its Operational Strategy.")
[35] Taylor Trial Judgment paras. 5834, 5835 5842, 6913-6915.
[36] *E.g.* Taylor Trial Judgment paras. 5835 and 6914.
[37] *E.g.* Taylor Trial Judgment paras. 5837 and 6914.
[38] *E.g.* Taylor Trial Judgment para. 6813. *See also*, Appeals Judgment para. 683.
[39] Taylor Trial Judgment para. 5835.
[40] Taylor Trial Judgment para. 5837.
[41] Taylor Trial Judgment paras. 5834, 5835, 5842, 6913-6915.
[42] *E.g.* Taylor Trial Judgment para. 6914.

"the steady flow of arms and ammunition;" and "the extended duration of the conflict . . . and crimes."[43] The judges further found that without Taylor's involvement "the crimes might have end earlier."[44] These finding concerning Taylor's role in the atrocities strongly indicate that the judges considered Taylor to be an enabler, and they further imply this by placing him in "a different category of offenders for the purpose of sentencing."[45] Clearly, the fact that Taylor was responsible for knowingly enabling a dire situation encouraging the commission of atrocities, some of which he planned himself and others in which he was complicit and made a decisive contribution, weighed heavily on the judges during sentencing deliberations.

The enabler factor explains Taylor's sentence by considering his role in enabling and maintaining a milieu or situation of atrocities. The judges found that Taylor enabled the commission of atrocity crimes in another state.[46] In the context of atrocity crimes and the goals of international criminal justice, a Head of State using his power and state resources to *enable*, as the SCSL describes it, atrocities and conflict in the territory of another country is the archetype criminality that ICL is most concerned with. It is arguably the quintessence of atrocity crimes. This wrongdoing must be accounted for in the punishment. The harm here goes beyond public international law concerns regarding state sovereignty. As a Head of State, Taylor's criminality decisively enabled the commission of crimes against humanity and war crimes against the civilians of another state. Thus, when such extraterritorial criminality is committed by a person in control of a foreign state's armed forces or military resources, the nature of this criminality must be linked to the quantum of punishment. The *Taylor* Trial Chamber sought to capture this harm – the extraterritorial nature and effect of his wrongdoing – as an aggravating factor. Such a conceptualization is reasonable, but arguably could have been sharpened by more direct accounting of the harm of enabling atrocities and connecting that to the resulting increase in punishment. The danger lies not simply in extraterritorial criminality, but in the enabling of atrocities in a neighboring country. The punishment is better explained by the enabler factor.

[43] Taylor Sentencing Judgment para. 76.
[44] Taylor Sentencing Judgment para. 76.
[45] Taylor Trial Sentencing Judgment para. 100.
[46] Taylor Sentencing Judgment para. 98.

B. ENABLER FACTOR AS APPLIED TO THE RUF CASE

Comparing the sentences of Sesay, Kallon and Gbao gives further traction to the influence of the enabler factor. Given that all three defendants were convicted of the same underlying crimes (acts of terrorism, mutilations and cutting off of limbs, rape, sexual slavery, murder, enslavement, pillage, forced marriage, and attacks on peacekeepers), we are able to compare crimes of the same gravity. When we compare the sentence of Sesay, the man who had the power to effectuate the disarmament of the RUF, with Gbao, also a senior military commander second only to Sesay, we learn that "gravity" does not function as a differential sentencing principle as judges claimed. For some crimes, Sesay was sentenced to three times the prison term that Gbao received, as shown in the table below.[47] For example, as noted already, both were convicted of rape as a crime against humanity under Count 6 of the indictment.[48] For this offense, Sesay was sentenced to 45 years of imprisonment, whereas Gbao received only 15 years. For sexual slavery as a crime against humanity under Count 7, Sesay was sentenced to 45 years; Gbao got 15.[49] For pillaging as a war crime under Count 14, Sesay was sentenced to 20 years; Gbao got six.[50] For other inhumane acts as a crime against humanity under Count 7, Sesay was sentenced to 40 years; Gbao got 11.[51]

CRIME	SENTENCE
Rape (CAH)	Sesay – 45 years Gbao – 15 years
Sexual Slavery (CAH)	Sesay – 45 years Gbao – 15 years
Pillaging (WC)	Sesay – 20 years Gbao – 6 years
Terrorism (WC)	Sesay – 52 years Gbao – 25 years
Attacks against Peacekeepers (WC)	Sesay – 51 years Gbao – 25 years
Other inhumane acts (CAH)	Sesay – 40 years Gbao – 11 years

[47] RUF Appeals Judgment, Sentencing Disposition.
[48] Prosecutor v. Sesay, Kallon and Gbao, Case No. SCSL – 2004-15-PT, Corrected Amended Consolidated Indictment (Aug. 2, 2006) [hereafter "RUF Indictment"].
[49] RUF Appeals Judgment, Sentencing Disposition.
[50] *Id.*
[51] *Id.*

Furthermore, comparing their punishments for other crime reveals a similar pattern. Crimes for which Sesay received 52 years (terrorism as a war crime) and 51 years (attacks against peacekeepers), Gbao received only 25 years for the same crimes,[52] which were in fact charged in the indictment under the same count against both (Counts 1 and 15).[53] Yet, Sesay received more than double the prison time that Gbao got for them. For example, for extermination as a crime against humanity under Count 3, Sesay was sentenced to 33 years; Gbao got 15. Thus, the increase in the penalty for the same crime is more than 100%.

The Trial Chamber treated Sesay as the most influential and highest-ranking battlefield commander of RUF/AFRC; in other words, Sesay was the ultimate commander of the all rebel fighting forces.[54] Sesay's power to end the conflict was amply demonstrated when under his orders the entire rebel forces demobilized. Given Sesay's crucial role in sustaining the conflict and atrocities, and his 52-year sentence (the highest at the SCSL) compared to the 25 years Gbao received, the sentencing practice here indicates that the enabler factor will enhance punishment by more than 100%.[55] Thus, gravity of the offense, if understood as the seriousness of the harm, is not as controlling of punishment allocation as the rhetoric of the SCSL and other international criminal courts suggests. In fact, gravity can hardly be considered a "litmus test" for a sentence when one defendant receives double the sentence of this co-defendant when both were convicted for the very same crime – thus same gravity – alleging the same facts under the very same count in the indictment. For the same crime, Sesay was sentenced to 25 years more than Gbao. Attributing this increase of 25 years to the aggravating factor of Sesey's "position as a superior" also does not convincingly account for the quantum of the increase. Gbao was also a senior commander.

The difference is also striking when we compare Sesay to Kallon. For the crime of acts of terrorism, Kallon got 39 years and Sesay received an additional 13 years, increasing his punishment to 52 years of imprisonment, a 33% increase in punishment.[56] Likewise, for the crime of attacking peacekeepers, Sesay's punishment was 51 years of

[52] RUF Appeals Judgment, Sentencing Disposition.
[53] Prosecutor v. Sesay, Kallon and Gbao, Case No. SCSL – 2004-15-PT, Corrected Amended Consolidated Indictment (Aug. 2, 2006).
[54] *Id.* paras. 22 and 23.
[55] RUF Appeal Judgment para. 1206 (*finding* that Sesay's highly influential role increased the gravity of the offences).
[56] RUF Appeals Judgment, Sentencing Disposition.

imprisonment whereas Kallon received 40 years.[57] Thus, Sesay received 11 more years than Kallon for the same crime, making Sesay's prison sentence more than 25% longer than Kallon.

The sentences in RUF case demonstrates that even between high level perpetrators (Sesay, Kallon and Gbao), the punishment for the enabler among them increases more than 100%. The critical role of a very high-ranking accused in enabling and creating a milieu for systemized criminality is a weighty differential factor and can reasonably account for this sharp increase in penalty. The enabling atrocity factor is very significant in sentence allocations, even though it is often not fully articulated in international sentencing judgments. So influential was the enabler factor at sentencing that, in the RUF case, it nullified the fact that Sesay's responsibility for the attacks on the peacekeepers was less than Kallon's culpability for the same crime. This suggests that the enabler factor is a more significant factor for sentencing than the accused's mode of liability. Kallon ordered the attacks on peacekeepers and he even personally attempted to kill an UNAMSIL officer. These constitute particularly grave modes of liability. Kallon bore direct criminal responsibility for direct participation, according to the Trial Chamber. Sesay's responsibility however was further removed and less culpable relatively speaking. The Trial Chamber found Sesay to be only indirectly responsible for the attack because he failed to punish individuals like Kallon who ordered and carried out the attacks. Thus, Sesay's only culpability was by omission, compared to Kallon ordering and personally participating in the crime. Nevertheless, for the same crime, Sesay was sentenced to 11 more years of imprisonment than Kallon.

Although Sesay was not a head of state, he did direct and enable all RUF activities in Sierra Leone after Sankoh was imprisoned.[58] Thus, he was the *de facto* head of an organized armed group in armed conflict against a state. I theorize that accounting for the enabler factor is implicitly what some international judges are doing in their determination of what constitutes a just and appropriate punishment, even if their sentencing judgments fail to explicitly articulate enabler as a sentencing factor and even despite their magniloquence about "gravity of the offense" as the dispositive criteria for atrocity sentencing. The enabler factor better explains the reason for the very substantial

[57] RUF Appeals Judgment, Sentencing Disposition.
[58] Prosecutor v. Sesay, Kallon and Gbao, Case No. SCSL – 2004-15-PT, Corrected Amended Consolidated Indictment para. 23 (Aug. 2, 2006)

increase in Sesay's punishment compared to his RUF co-perpetrators. Responsibility for enabling atrocities is a significant differential factor in sentencing allocations for international crimes.

C. ENABLER FACTOR AS APPLIED TO CDF CASE

The CDF defendants, Moinina Fofana and Allieu Kondewa, received the lowest sentences of any atrocity perpetrator convicted by the SCSL. The Trial Chamber sentenced Fofana to six years of imprisonment and Kondewa to eight years for very heinous crimes including murder, cruel treatment, pillage, and using children in hostilities.[59] These are similar in gravity to the crimes committed by other perpetrators convicted by the SCSL.[60] Yet, the CDF war criminals' punishment is drastically lower than the average sentence (48 years) for other trials at the SCSL. Does the gravity of the offence factor adequately explain sentences of six (6) and eight (8) years for murder, cruel treatment, pillaging, and using children in hostilities? Can the enabler factor better explain why the CDF defendants received substantially lower punishments than the defendants in the RUF and AFRC trials?

How did the judges arrive at these sentences? As all ICL sentencing judgments do, the trial judges in the CDF cases narrate their sentences in terms of "gravity".[61] And, like all other ICL sentencing analysis, the judges do not follow a doctrinal approach to gravity. Instead, they list a number of factors relevant to the gravity assessment: "scale and brutality of the offenses committed, the role played by the Accused in their commission, the degree of suffering or impact of the crime on the immediate victim, as well as its effect on relatives of the victim, and the vulnerability and number of victims."[62] If gravity is the litmus test, then punishments of six and eight years of imprisonment seem manifestly low for perpetrators convicted of murder, forcing children to kill for them, and acts of rape resulting in death.[63] If gravity demands a more severe punishment, how do the judges justify this comparatively low sentence? Part of the explanation lies in the judges'

[59] CDF Trial Sentencing Judgment at p. 34. The SCSL Appeals Chamber increased their sentences to 15 and 20 years respectively for Fofana and Kondewa. *See*, CDF Appeal Judgment at 189.
[60] For a complete discussion and analysis of all crimes and punishment of defendants before the SCSL *see* Shahram Dana, *The Sentencing Legacy of the Special Court for Sierra Leone*, 42 GEORGIA J. INT'L & COMP. L. 615 (2014).
[61] Prosecutor v. Fofana and Kondewa, Sentencing Judgment para. 33.
[62] Prosecutor v. Fofana and Kondewa, Sentencing Judgment para. 33.
[63] Prosecutor v. Fofana and Kondewa, Sentencing Judgment paras. 47 and 52.

sympathy for the reasons the CDF Kamajor fighters entered the armed conflict, namely in "defence of their communities . . . with the sole objective of ...preventing the brutal killings" of their families and to "protect their lands and properties."[64]

Another prominent narrative also influenced the sentence.[65] According to the judges, a significant justification for the low sentence was that these war criminals fought for a "legitimate cause".[66] The CDF defendants helped "re-establish the rule of law" by defeating a rebellion.[67] Fighting for a legitimate cause merited mitigation of punishment, even if the means to achieve that end included atrocity crimes.[68] The sentencing narrative exudes a distinctive tone of redemption, rather than condemnation as might be expected in a judgment on criminality. The judges moralized that fighting to restore the "legitimate" government "atones" for their "grave and very serious" crimes.[69] Justifying reduction of punishment based on fighting for the good guys is deeply problematic, and the SCSL Appeals Chamber promptly overturned this ruling. Mitigating a sentence because the war criminal fought on the right side offends a core value of international humanitarian law, that all sides conduct hostilities in accordance with basic laws of humanity. To allow otherwise, destroys the *jus in bello, jus ad bellum* distinction. This justification for mitigation is liable to criticism of "victor's justice" and politicization of international justice and runs counter to its underlying goals. The enabler factor, on the other hand, offers an explanation more congruent with the goals of international criminal prosecutions.

If gravity of the offence was indeed the primary factor influencing the trial sentence of the CDF defendants, then it would be reasonable to expect a higher sentence than six (6) and eight (8) years for murder, using children in hostilities, cruel treatment, and pillaging. Thus, the gravity factor does not explain the sentence. Could the sentence be better explained by the fact that Fofana and Kondewa were not enablers? Nowhere in the judgment of the CDF do you find the characterization of them as enablers as you do with, for example, Charles Taylor.[70] The Trial Chamber also noted "Fofana's commitment to and observance of the Lome Peace agreement", demonstrating commitment to non-

[64] CDF Trial Sentencing Judgment para. 84.
[65] CDF Trial Sentencing Judgment para. 91 and 94.
[66] Prosecutor v. Fofana and Kondewa, Sentencing Judgment paras. 82-94.
[67] Prosecutor v. Fofana and Kondewa, Sentencing Judgment para. 87.
[68] Prosecutor v. Fofana and Kondewa, Sentencing Judgment paras. 44 and 82-94.
[69] Prosecutor v. Fofana and Kondewa, Sentencing Judgment paras. 82-94.
[70] *See also,* Taylor Trial Judgment para. 5834, 5835 5842, 6913-6915.

conflict.[71] He also made substantial efforts to "ensur[e] that members of the CDF remained committed to the peace process."[72] The Trial Chamber commended Fofana's post-conflict efforts to foster the peace process.[73] These findings all indicate that the judges did not consider the CDF defendants to be enablers of the armed conflict that spawned the atrocities. The judges recognized that these factors are significant in determining an appropriate sentence. They determined that Fofana and Kondewa merited a sentence lower than what the gravity of the crime might otherwise demand. The fact that Fofana and Kondewa were not enablers better explains their sentences than the gravity of their offences.

D. Possible Critiques of the Enabler Factor

I do not present the enabler factor as an exclusive explanation that completely responds to all that vexes the goal of justly punishing atrocities. I argue that it elucidates a real determinate of ICL sentencing that is not explicitly accounted for in the sentencing narratives, and thus it brings greater clarity to punishment for atrocity crimes. It is time for the enabler factor to surface in sentencing judgments. It captures a war criminal's responsibility for enabling and creating the context of armed conflict. This element is not yet accounted for in any explicit sentencing factor. Yet, atrocities generally do not occur absent the chaos and disorder of war or armed conflict. In addition to better explaining ICL sentences, the enabler factor also enriches the sentencing analysis, leading to greater coherence between judicial narratives and sentencing outcomes.

Nevertheless, I recognize some concerns and possible arguments against the enabler claim. First, some may argue that it is too narrow in its applicability. This critique points out that the enabler factor will only apply to a small percentage of war criminals and thus have limited utility. I argue that its limited applicability is actually a strength. The reality is that only a few war criminals have the capacity to be enablers of armed conflict. Second, it may also be argued that the enabler factor unfairly backdoors responsibility for aggression, violating *nullum crimen sine lege*. This criticism misunderstands the scope of the enabler factor. It does not create an independent or

[71] CDF Trial Sentencing Judgment para. 67.
[72] CDF Trial Sentencing Judgment para. 67.
[73] CDF Trial Sentencing Judgment para. 67.

separate grounds of individual criminal responsibility for the crime of aggression, or any other atrocity crime for that matter. The accused must still first be found guilty of an existing atrocity crime, thus respecting the principle of legality. Consideration as an enabler arises only after a finding of guilt for an existing crime for the purpose of determining an appropriate sentence. Third, and related to second, is the criticism that the enabler factor appears to only capture the person or side that initiated the conflict. It is true that persons who initiate large scale armed violence are more likely to be captured by the enabler factor. I argue that such dire conduct is dangerous criminality that must and should be captured in the sentence. Moreover, nothing about the enabler factor necessarily limits it to initiators of armed conflict. It is quite possible that a non-initiator of the violence can be found to be an enabler. The analysis would be driven by the facts on the ground, not labels. In the CDF case, the Kamajor were not viewed as enablers; the judges found that they did not enable the civil war in Sierra Leone but only engaged in the fighting in "defence of their communities" to protect their families from becoming victims of atrocities.[74] Based on these findings of fact, the Kamajor would not be considered enablers of Sierra Leone's civil war. Admittedly, the determination of who are enablers, and who are not, can be politicized. However, this does not undermine the enabler factor as a helpful tool for conceptualizing the role of accused in sentencing narratives. It simply draws attention to the importance of objective application, which is true of any judicial determination. As discussed in Chapter 3, international judges are already called upon and indeed do make determinations on matters that are politicized and can impact domestic and international politics such as, for example, whether a war criminal contributed to national reconciliation.

To be clear, the fact that a war criminal is not an "enabler" does not exonerate them from their crimes. They are still criminally responsible for their hand in the atrocities. A non-enabler can still be guilty of atrocity crimes and punished accordingly. The CDF defendants were found guilty of their crimes, but as non-enablers, were punished less severely.

[74] CDF Trial Sentencing Judgment para. 84.

E. How the Enabler Factor fits into ICL Statutory Provisions

There are different options for incorporating the enabler factor into sentencing determinations. The statutory language through which it could be incorporated is found in the basic sentencing provisions of all tribunals. International judges are called upon to determine a sentence by considering "the gravity of the offence and the individual circumstances of the convicted person."[75] As discussed further below, I propose that the latter consideration take into account the convicted person's role as an enabler. The statutory criterion of "individual circumstances of the convicted person" has thus far been underutilized in ICL sentencing discourse, serving mostly as an entry point for mitigating circumstances and aggravating factors. Section IV below provides a detailed consideration of how the enabler factor can be incorporated into the statutes of international criminal courts, including the ICC, and into my proposed sentencing framework.

III. Systemic Problems & the Ad Hoc Nature of ICL Sentencing

This section critiques the *ad hoc* nature of atrocity sentencing by interrogating ICL's conceptualization and implementation of key sentencing factors. ICL judges speak of four core considerations essential to determining an appropriate punishment for atrocity crimes: (1) the gravity of the offence; (2) individual circumstances of the convicted person; (3) aggravating factors and mitigating circumstances; and (4) the law and practice of sentencing of the *locus delicti*.[76] How have ICL judges conceptualized and interpreted these concepts? What problems emerge from the extant approach to ICL sentencing? Are they isolated or systemic? Specific attention is given to the notion of gravity, which has arguably been overplayed at the expense of other considerations, representing a lost opportunity to develop ICL sentence law *sui generis* to atrocity criminality. In addition to offering descriptive claims about each category, this section also scrutinizes the application of these factors in practice, critically reflecting on recurring conceptual and doctrinal problems.

[75] SCSL Article 19(2); ICC Article 77; ICTR article 23; ICTY Article 24.
[76] Taylor Trial Sentencing para. 18; AFRC Appeal Judgment para. 308-309; CDF Trial Sentencing para. 32; CDF Appeal Judgment para. 465; RUF Trial Sentencing para. 17; AFRC Appeal Judgment para. 313; RUF Appeal Judgment paras. 1129, 1236, 1239, and 1240.

The statutory law of sentencing at international criminal courts and tribunals (ICC&Ts) is minimal and empowers international judges with broad discretion in fixing punishment.[77] The codified crimes are not individually accompanied by penalty ranges or maximums.[78] Statutes of international criminal tribunals provide only a single scant article on penalties, no identifiable maximum terms (the ICC being an exception), and do nothing more than rule out the death penalty.[79] The ICC limits terms of imprisonment to a maximum of 30 years, but allows for life imprisonment based on the "extreme" gravity of the crime.[80]

A common sentencing provision in ICC&T's statutes states that "[i]n imposing the sentences, the Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person."[81] Likewise, a common provision in their RPE states that judges should also take into consideration aggravating and mitigating factors when determining a sentence. The statutes of all courts and tribunals also direct the judges to turn the sentencing law and practice of the *locus delicti*, except for the sentencing provisions of the ICC. Additionally, the SCSL's sentencing provisions included a novel statutory requirement for its judges: an explicit reference to the sentencing practice of another international criminal court, the ICTR, as an appropriate source of sentencing law. Interestingly, it selects only the ICTR and deliberately excludes the ICTY's jurisprudence on sentencing. However, in practice, ICL judges from all tribunals make use of referencing the sentencing practice of other ICC&Ts.

Although ICL jurisprudence establishes four distinct categories for sentencing considerations, the judges do not in fact follow their own road map. They often collapse these categories in their sentencing analysis. One illustration of this is the unexplained collapsing of categories two (individual circumstances) and three (aggravating and mitigating factors).[82] ICL judges also vacillate in their treatment of particular sentencing

[77] ICTR Statute, Article 23; ICTY Statute, Article 24; SCSL Statute, Article 19; ICC Statute, Article 78.
[78] *See generally*, Chapter 2: Reimagining *Nulla Poena Sine Lege*.
[79] For a discussion on the death penalty for atrocity crimes see, Jens David Ohlin, *Applying the Death Penalty to Crimes of Genocide,* 99 AM. J. INT'L L. 747 (2005).
[80] ICC Statute, Article 78.
[81] SCSL Statute, Article 19. *See also*, ICTR Statute, Article 23; ICTY Statute, Article 23; ICC Statute, Article 79.
[82] Taylor Trial Sentencing para. 22. ("The Trial Chamber notes that 'individual circumstances of the convicted person' can be either mitigating or aggravating."); CDF Appeal Judgment para. 498. ("The Appeals Chamber considers that the level of education and training of a convicted person is part of his individual circumstances which the Trial Chamber is required to take into consideration as an aggravating or mitigating circumstance."); RUF Appeal Sentencing para. 1296; *Prosecutor v. Mladen Naletilić and Vinko Martinovi*, Case No. IT-98-34-A,

factors, placing it in one category in a particular case and changing its categorization in another case. For example, in one case, a factor may be treated as a "gravity" factor; yet in another case that same factor is treated as an "aggravating" factor.

Furthermore, ICL judges have not developed a doctrinal approach to atrocity sentencing. Thus, the collapsing of categories and roulette treatment of sentencing factors is not a surprise. It is an expected outcome of a process unmoored from legal doctrine. More significantly, as this Chapter develops, the insipid merger of categories two and three represents a missed opportunity to develop a sentencing framework *sui generis* to international criminal law. A salient feature of ICL sentencing is the wide discretion that judges have been given in sentencing. To be sure, this is a departure from other phases of the international criminal justice process, where the discretion of judges has been circumcised.[83] But this bestowal of wide discretion has not been deployed to manifest sentencing theory or doctrine specific to atrocity criminality. Arguably, enjoying wide discretion in sentencing has disincentivized ICL judges from developing doctrine in this area which could encroach on their largely unfettered discretion. Thus, ICL judges have predictably adopted a factor by factor, case by case, approach to sentencing. Under this approach, "gravity" has been proffered as the key sentencing factor – the "litmus test" of a fair punishment and "the touchstone of sentencing."[84]

The following sections focus on how ICL judges conceptualize and apply core sentencing considerations such as "gravity of the offence", "individual circumstances of the convicted person", and "the role of the accused." Has "gravity" been overplayed? Has "individual circumstances of the convicted person" been underdeveloped? Does the extant approach represent a lost opportunity to develop a sentencing principles *sui generis* to ICL? The following sections examine these questions.

Appeal Judgment para. 592 (3 May 2006), quoting *Blaškić* Appeal Judgment para. 679 ("the individual circumstances of the accused, including aggravating and mitigating circumstances").

[83] Philippe Kirsch, *The International Criminal Court: From Rome to Kampala*, 43 JOHN MARSHALL L. REV. 515, 519-520 (2010); *See also*, Shahram Dana, *Law, Justice & Politics: A Reckoning of the International Criminal Court* (*Forward*), 43 JOHN MARSHALL L. REV. xxiii, xxvi (2010).

[84] *Prosecutor v. Delalić et al.*, Judgment, Case No. IT-96-21-T (16 November 1998), para.1260 [hereafter *Delalić* Trial Judgment].

A. GRAVITY: A COLORLESS LITMUS TEST

ICL sentencing jurisprudence presents "gravity of the offence" as the primary consideration in determining an appropriate sentence.[85] Judges declare gravity to be the key differential principle – the "litmus test" and "touchstone" – of sentencing allocations.[86] Beyond declaring its importance, however, ICL judges generally did not engage in the challenge of doctrinally conceptualizing gravity in a manner that would predictably anchor its application. The current approach to the application of gravity is to catalogue a list of "gravity" factors.[87] This approach has not propelled the quality of ICL sentencing.[88] Depending on which judgment is examined, the list runs anywhere between six to eight factors including (1) the "scale" of the offenses committed; (2) their "brutality"; (3) the temporal scope of the crime; (4) the "role of the Accused" in their commission; (5) the "number of victims;" (6) the "degree of suffering" or impact of the crime on the immediate victim; (7) the crime's "effect on relatives" of the victim; and (8) the "vulnerability" of victims.[89]

Developing a doctrinal approach to gravity is not merely an academic exercise; its absence has problematized ICL sentencing practice in several ways. First, reasonable doubts have been raised about whether the concept of gravity functions as a differential principle in atrocity sentencing. ICL judges proclaim gravity to be the key determinant of atrocity sentencing.[90] Kai Ambos believes this is an "overstatement".[91] Robert Sloane calls it an outright a "fiction."[92] He questions the very "idea that 'gravity of the offence' functions as one of two principle determinants of the sentence."[93]

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[85] Prosecutor v. Karadžić, *Judgment*, IT-95-5/18, 24 March 2016, para. 6030; AFRC Trial Sentencing para. 19; CDF Trial Sentencing para. 33; RUF Trial Sentencing para. 19; Taylor Trial Sentencing para. 19; AFRC Appeal Judgment para. 308; CRF Appeal Judgment para. 465; RUF Appeal Judgment para. 1229.
[86] *Delalić* Trial Judgment para. 1260; AFRC Trial Sentencing para. 19; CDF Trial Sentencing para. 33; RUF Trial Sentencing para. 19; Taylor Trial Sentencing paras. 19-20; AFRC Appeal Judgment para. 308; CRF Appeal Judgment para. 465; RUF Appeal Judgment para. 1229.
[87] Karadžić Trial Judgment para. 6031; AFRC Trial Sentencing para. 19; CDF Trial Sentencing para. 33; RUF Trial Sentencing para. 19; Taylor Trial Sentencing paras. 19-20; CRF Appeal Judgment para. 465; RUF Appeal Judgment para. 1229.
[88] *See generally* Pascale Chifflet & Gideon Boas, *Sentencing Coherence in International Criminal Law: The Cases of Biljana Plavsic and Miroslav Bralo*, 23 CRIMINAL L. FORUM 135 (2012).
[89] AFRC Trial Sentencing para. 19; CDF Trial Sentencing para. 33; RUF Trial Sentencing para. 19; Taylor Trial Sentencing paras. 19-20.
[90] AFRC Trial Sentencing para. 19; CDF Trial Sentencing para. 33; RUF Trial Sentencing para. 19; Taylor Trial Sentencing paras. 19-20.
[91] KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW VOLUME II: CRIMES AND SENTENCING 285 (2014).
[92] Sloane *Sentencing*, *supra* note 2 at 734.
[93] *Id*. *See further* Margaret M. DeGuzman, *Harsh Justice for International Crimes*, 39 YALE J. INT'L L. 1, 17-24 (2014) (raising concerns that the gravity "rhetoric and narratives risk misleading sentencing decisionmakers").

While Sloane's damning judgment is based largely on an analysis of ICTR sentences for genocide, his criticism can be extended to sentences at other international tribunals for crimes against humanity and war crimes. An examination of ICL sentences, and the judicial reasoning underlying them, challenges the mantra that gravity is the litmus test of atrocity sentencing. A comparative analysis of Sesay's and Gbao's sentences demonstrates this gap. Sesay and Gbao were convicted of crimes of similar gravity. For instance, both were convicted of the same crime under Count 6 of the indictment for rape as a crime against humanity. Yet, for that offense, Sesay was sentenced to 45 years of imprisonment. Gbao received only 15 years, a third of Sesay's punishment. Thus, it is hard to accept that "gravity" is what determined their respective punishments given that both were convicted of rape as a crime against humanity. Of course, one could attempt to explain the difference by accounting for varying aggravating and mitigating factors, assuming there is any difference in this regard. Nevertheless, even conceding for argument's sake that there is some minor difference in their aggravating and mitigating circumstances, this explanation attempts to account for a 300% difference in the sentences. If aggravating and mitigating factors are in fact responsible for 300% increase in punishment for the same crime, it can hardly be said that gravity is the litmus test.

Additionally, the primacy of gravity as the controlling factor determining the quantum of punishment can be called into question from a different set of observations. Take for example the sentencing of Dragan Nikolic.[94] Nikolic's crimes included persecution, murder, rape, and torture as crimes against humanity.[95] The judges found his crimes to be of the highest gravity for which "no other punishment could be imposed except a sentence" of life imprisonment.[96] But the trial judges did not impose a sentence of life imprisonment. Instead, they sentenced Nikolic to twenty-three (23) years of imprisonment after consideration of mitigating factors.[97] Nikolic is now free, having been granted early release in August 2013, less than ten (10) years from when the trial chamber first sentenced him.[98] It would be reasonable to question whether gravity is in

[94] *Prosecution v. Dragan Nikolic*, Sentencing Judgment, IT-94-2-S (18 December 2003) [hereafter "Nikolic Sentencing Judgment"].
[95] Nikolic Sentencing Judgment p. 73 (Disposition).
[96] Nikolic Sentencing Judgment para. 214.
[97] Nikolic Sentencing Judgment p. 73 (Disposition). The Appeals Chamber confirmed the Trial Chamber's findings on law and fact and it application of them to Nikolic's sentence but reduced the sentence to 20 years. *Prosecution v. Dragan Nikolic*, Judgment on Sentencing Appeal, IT-94-2-A (4 February 2005).
[98] *Prosecution v. Dragan Nikolic*, Decision of the President on Early Release, IT-94-2-ES (16 January 2014).

fact the "primary" sentencing factor when gravity of the crime demanded a life sentence but final sentence was substantially reduced due to mitigating factors. Perhaps, in atrocity sentencing, gravity of the harm is but one factor alongside several other important factors. It can be observed that Nikolic was not an enabler and perhaps this better explains why Nikolic's punishment is much less that what the gravity of his crimes would otherwise demand.

Moreover, far from being the primary sentencing consideration, the punishment of certain defendants suggests that gravity of the crimes played little role in their sentencing, as for example in the CDF trial where the defendants where sentenced to six (6) and eight (8) years for crimes against humanity and war crimes.[99] To rationalize these very low sentences, the judges stated that *in their view* gravity was an "*important* factor" rather than the "primary factor" or the "litmus test."[100] This characterization of gravity contradicts the rulings of the SCSL in the RUF, AFRC, and Taylor cases.[101] It also cuts against the grain of ICL jurisprudence in general where gravity occupies a more controlling role: it is the "litmus test", the "*primary* factor" for determining a sentence, not merely an *important* one.[102]

It would be a mistake to dismiss this as a trivial or inconsequential difference in word selection. Rather, it is the law artist at work. Trained judges and lawyers understand how word choice, characterizations, and framing create conceptual space to support distinctions or signal departures. In my opinion, the judges' emphasis that this is *their view* signals that there is more going on here than mere interchangeable word selection; instead they intend to set a platform to support a substantial difference in outcome, which is exactly what happened. The subtle shift here dominoes into prodigious differences in punishment. The CDF defendants received the most lenient sentences of all atrocity perpetrators convicted by the SCSL, despite the fact that their crimes were of the utmost gravity. They deliberately and systematically killed civilians with discriminatory intent; they brutally disemboweled their victims; they terrorized and tortured men, women, and children.[103] In the face of such extremely grave harms, a sentence of a few years does not square easily with a punishment ideology where gravity is proffered as the "litmus test".

[99] *See supra* Section II(C).
[100] Prosecutor v. Fofana and Kondewa, Sentencing Judgment para.33.
[101] Prosecutor v. Fofana and Kondewa, Sentencing Judgment para. 33.
[102] *See, supra* Sections II2B and 3B.
[103] For a full account of their crimes *see supra* Section II(C).

Thus, a reorientation away from gravity and punitive ideologies became a necessity in the sentencing narrative to sustain such low penalties. The entire sentencing analysis is designed to loosen gravity's dominance in determining the appropriate quantum of punishment. But given the entrenchment of gravity as the "litmus test" for the quantum of punishment, the shift had carefully and subtly orchestrated or risk appearing blatantly contrary to the general ICL jurisprudence. And the judges delivered. Every sentencing determinant is singularly funneled towards supporting a merciful sentence, beginning with CDF Trial Chamber's restorative orientation, to its treatment of rehabilitation as a primary purpose of ICL sentencing alongside decisively punitive purposes of retribution and deterrence, and ending with its downscaling of gravity from a *primary* consideration to an *important* one. All this steering a pathway to punishments of six (6) and eight (8) years for atrocity crimes.

Another area of atrocity sentencing in which the absence of a doctrinal approach to gravity raises concerns has to do with the distinction between gravity and aggravating factors. Failure to adequately conceptualize gravity may explain why ICL judges frequently vacillate between treating a particular factor as a gravity factor in one judgment, but as an aggravating factor in another. They frequently reach opposing conclusions, blurring the line between "gravity" considerations and aggravating factors.[104] Indeed, some ICL judges have altogether abandoned the attempt to distinguish between gravity factors and aggravating factor or include separate discussions and examinations of gravity and aggravating factors in their judgment, opting for a combined discussion of both under a single conflated analysis.[105]

Although the ICL sentencing practice unfortunately permits some factors to be treated as either aggravating circumstances or gravity factors, it is uncertain if judges attribute the same or different weight to them depending on how they are grouped. Since under the case law of international tribunals, gravity and aggravating factors are not of equal weight in sentencing allocations, whether a factor is treated as the former or as the latter may have a dissimilar impact on the sentence. The jurisprudential rhetoric suggests as much: "gravity" *is* the "litmus test" of a fair sentence, not aggravating factors.[106] Of

[104] Taylor Trial Sentencing para. 102.
[105] *E.g. Prosecution v. Dragan Nikolic*, Sentencing Judgment, IT-94-2-S (18 December 2003), paras. 176 – 213.
[106] AFRC Trial Sentencing para. 19; CDF Trial Sentencing para. 33; RUF Trial Sentencing para. 19; Taylor Trial Sentencing paras. 19-20.

course, whether the sentencing practice lives up to the rhetoric is debatable. In addition to the problem of disparate weight that might be attributed to each, other difficulties also arise such as the risk of double counting.

Going forward these concerns only heighten under the ICC sentencing regime where the existence of an aggravating factor may trigger the criteria of "extreme gravity" for the application of life imprisonment. The doctrinal failure to conceptually separate the gravity consideration from aggravating factors came to head in the ICC's first sentence judgment in the *Lubanga* case.[107] Under the ICC Statute and Rules of Procedure and Evidence, the maximum prison length in terms of years is thirty.[108] Life imprisonment may be imposed "when justified by the extreme *gravity* of the crime and the individual circumstances of the convicted person."[109] This can be established by the existence of one or more of the aggravating circumstances listed in Rule 145.[110] Thus under the ICC regime, it arguably could make a significant difference whether a particular factor is treated as part of gravity matrix or as an aggravating factor.

In the current situation, marked by a lack of doctrinal distinction between gravity and aggravating factors, defense counsel will invariably beseech the judges to subsume potential aggravating factor into their consideration of gravity of the crime (as happened in the *Lubanga* case), while the ICC Prosecutor, if seeking life imprisonment, will ask the court to treat that same factor as an aggravating factor. Without a doctrinal distinction between the concept of gravity and aggravating factors, ICC judges are put in a precarious position when deciding and explaining how they treated that particular factor. One possible escape route would to hold that, for the purpose of interpreting the ICC statute and triggering the life imprisonment provision, it should not matter whether the factor is labelled as a "gravity" factor or "aggravating" factor. So long as one of the factors listed in Rule 145 is found by the court, that is sufficient to trigger the possible application of life imprisonment, regardless of how it is labeled. But the language of the statute does permit a stricter, more categorical approach.

Finally, the absence of a conceptualization of gravity suitable for atrocity sentencing has also festered legitimacy issues for international criminal justice. ICL sentencing outcomes often do not match the powerful, condemning judicial narrative

[107] *See generally, Lubanga* Sentencing Judgment.
[108] ICC Statute, Article 77(1)(a).
[109] ICC Statute, Article 77(1)(b) (emphasis added).
[110] ICC RPE, Rule 145(3).

surrounding the heinous nature of the perpetrator's crimes. This problematizes the achievement of goals associated with atrocity trials. The sentencing framework proposed in this study overcomes these problems.

B. Collapsing Distinct Categories

The problem of collapsing distinct sentencing considerations arises in multiple ways. One recurring collapse is the merger of categories two (individual circumstances) and three (aggravating and mitigating factors). Another is the treatment of certain modes of participation in criminality as a mitigating factor while that same consideration also informed the severity of punishment under the second prong of "gravity of the offence." Both will be considered in further detail now.

Across all courts and tribunals, ICL sentencing judgments, both trial and appeals, identify "individual circumstances of the convicted person" as an independent sentencing consideration, separate and distinct from aggravating and mitigating factors.[111] In practice, however, ICL judges routinely collapsed these two categories in their sentencing analysis, despite the fact that they enumerated them as *separate* considerations when laying out the applicable legal framework.[112] This analytical deficiency accents a deep automatism in ICL judicial sentencing analysis. Consequentially, "individual circumstances of the convicted person" has unimaginatively become a dumping ground for aggravating and mitigating factors. In my opinion, this collapse represents a lost opportunity to develop a meaningful *sui generis* penology for ICL that is optimal for punishing atrocity crimes. The enabler factor and the sentencing framework proposed below seize upon this lost opportunity and also infuses sentencing judgments with a voice capable of linking to broader narratives about atrocity crimes, accountability, justice, human nature, and war.

Regarding aggravating circumstances, the law of atrocity sentencing holds a number of factors as aggravating, such as superior position, abuse of power, betrayal of trust, exploitation of war for personal financial gain, excessive brutality, attacking

[111] AFRC Appeal Judgment para. 308-309; CDF Trial Sentencing para. 32; CDF Appeal Judgment para. 465; RUF Trial Sentencing para. 17; Taylor Trial Sentencing para. 18.
[112] AFRC Appeal Judgment para. 308-309; CDF Trial Sentencing para. 32; CDF Appeal Judgment para. 465; RUF Trial Sentencing para. 17; Taylor Trial Sentencing para. 18.

traditional places of sanctuary, and more.[113] However, the absence of a strong analytical sentencing framework has problematized the application of these factors, leading to criticisms of the court's sentences. Yet, some of these criticisms may be unwarranted or could be overcome had the sentencing analysis been more methodical. For example, as noted, the Trial Chamber increased Taylor's punishment based on several aggravating circumstances: his leadership role; his special status as Head of State; his betrayal of trust; the extraterritorial reach of his crimes; and his exploitation of war for personal financial gain.[114] According to Kevin Jon Heller, the judges' sentencing analysis here falls short of sufficiently distinguishing the first three aggravating factors, suggesting discernable error due to double counting.[115] For example, regarding betrayal of public trust as an aggravating factor, Taylor abused his position, authority, and power over "state machinery and public resources,"[116] including military assets, to assist in the commission of atrocity crimes. This same type of abuse of authority is germane to the judges' justification for aggravating his sentence on the account of his "leadership role" and "status as Head of State."[117] On the other hand, the judges arguably correctly appreciated that these three factors – leadership role, crimes by a Head of State, and betrayal of trust – have converged to aggregately enhance both Taylor's culpability and the harms resulting from his wrongful conduct in a way that the combined damage is more than each factor could inflict in isolation. The judges sensibly understand and recognize that this warrants a more severe punishment, but the ICL sentencing framework is insufficient to capture and logically account for this form of criminality. Consequently, observers interpret the sentencing judgment as flawed for double counting or emotively fixating on status.[118] Adding to the confusion is the judges' imprecise language, which blurs the line between "gravity" considerations and aggravating factors as noted above.[119]

Perhaps it is not surprising that absent an articulated sentencing framework, a coherent theory, and a more exacting analysis, some commentators attributed the SCSL's 50 year sentencing of Taylor as manifesting a "fetish" with Head of State status rather

[113] Taylor Trial Sentencing paras. 95-103.
[114] Taylor Trial Sentencing paras.95-103.
[115] Heller, *Taylor Sentence* (2013), *supra* note 28.
[116] Taylor Trial Sentencing Judgment para. 97.
[117] Taylor Trial Sentencing Judgment para. 97.
[118] *E.g.* Heller, *Taylor Sentence* (2013), *supra* note 28, at 47; Drumbl, Punishing Heads of State (2012), *supra* note 25.
[119] Taylor Trial Sentencing Judgment para. 102.

than sound sentencing principles.[120] But even if reasonable minds disagree on the soundness of permitting a "leadership" position to aggravate a perpetrator's punishment in more than one way, to attribute this approach to a "fetish" with Head of State status ignores the rest of court's sentencing jurisprudence. In fact, this approach by the SCSL was not unique to Taylor. For example, in the CDF case, when a Kamajor leader was found criminally responsible under Article 6(1), the Trial Chamber also considered multiple ways in which his leadership position could aggravate his sentence.[121] Thus, far from fixating the application of this principle on Charles Taylor because he was a Head of State, the SCSL applies this approach (whether correct or erroneous) to government officials, police chiefs, commanders, and significantly, also to non-official positions of prominence in the community. Thus, both *de jure* and *de facto* positions can qualify for this aggravating factor – the former viewed primarily as breach of *authority* and the latter as breach of *trust*.

Regarding mitigating factors, exercising their wide discretion, the ICL judges have held a number of factors to constitute mitigating circumstances: expression of remorse;[122] good character with no prior conviction;[123] acknowledgment of responsibility;[124] the accused's lack of education or training;[125] advanced age of the accused;[126] duress;[127] indirect participation.[128] Additionally, a few trial judges at the SCSL controversially held that "legitimate cause" constitutes a mitigating factor.[129] Some of these mitigating factors are particularly problematic conceptually and theoretically. Others are arguably conceptually sound, but the court's method of analysis and application of them raises concerns or exposes doctrinal deficiencies. For the purpose of this section, I will focus further on "indirect participation" as it bears on assessing the perpetrator's mode of liability.

[120] Drumbl, Punishing Heads of State (2012), *supra* note 25; Heller, *Taylor Sentence* (2013), *supra* note 25.
[121] CDF Trial Sentencing Judgment para. 38; *see also supra* Section II.C (discussing the punishment of CDF defendants).
[122] AFRC Trial Sentencing para. 25; CDF Trial Sentencing para. 40; CDF Appeal Judgment para. 489-490; RUF Trial Sentencing para. 29; Taylor Trial Sentencing para. 34.
[123] CDF Appeal Judgment para. 511; Taylor Trial Sentencing para. 34.
[124] AFRC Trial Sentencing para. 25; CDF Trial Sentencing para. 40; CDF Appeal Judgment para. 489-490; RUF Trial Sentencing para. 29; Taylor Trial Sentencing para. 34.
[125] CDF Appeal Judgment para. 498; RUF Trial Sentencing para. 29; Taylor Trial Sentencing para. 34.
[126] AFRC Trial Sentencing para. 25.
[127] Id.
[128] Id.
[129] CDF Trial Sentencing.

Treating "indirect participation" as a *mitigating* factor unsettles the sentencing matrix because the accused's mode of liability is often already accounted for in the assessment of *gravity* of the offense. Furthermore, conceptualizing "indirect participation" as a mitigating factor is incongruent with the position typically proffered by ICL judges that there is no hierarchy in modes of liability for sentencing purposes. In this regard, the SCSL offered important rulings on the nexus between modes of liability and sentencing. The SCSL's final judgment held that domestic and international criminal law do not support the notion that aiding and abetting *ipso jure* warrants a lesser sentence than more direct forms of participation.[130] The court refused to introduce a hierarchy of modes of liability for the purpose of sentencing, just as the judges at the *ad hoc* tribunals declined to impose a hierarchy of crimes. This is not surprising as any such ruling would curtail the wide discretion ICL judges enjoy in sentencing matters, a discretion they guard very watchfully as noted above. Previously, the *Taylor* Trial Chamber had painted itself into a corner by erroneously declaring that "aiding and abetting *as a mode of liability* generally warrants a lesser sentence,"[131] but then handed out a 50-year sentence on par with *direct* perpetrators in the RUF and AFRC trials. In a somewhat unconvincing manner, the Trial Chamber subsequently attempted to justify its departure from a supposed "general principle" because of the "unique circumstances of a case."[132] The sentencing judgment, however, would have benefitted from explaining this point more clearly. What is exactly the "unique" circumstance of the case against Charles Taylor?

The judges could have strengthened their position by noting that the argument that "aiding and abetting warrants a lesser sentence" does not apply to planning or ordering atrocity crimes (depending on the facts).[133] ICL statutory law treats these as separate and distinct modes of liability,[134] even though in a general sense they also amount to assisting in the commission of a crime. Neither "planning" nor "ordering" as a mode of liability requires, *sensu stricto*, the actual commission of the crime. Thus, a broad stroke calling for lesser punishment for aiders and abettors based on a presumed notion that such culpability is *ipso jure* less serious is misplaced in the context of ICL and atrocity

[130] Taylor Appeals Judgment
[131] Taylor Trial Sentencing Judgment para. 21 (emphasis added). Overruled on appeal.
[132] Taylor Trial Sentencing Judgment para. 21.
[133] SCSL Article 6(1); ICC Article 25; ICTR Article 6(1); ICTY Article 7(1).
[134] SCSL Article 6(1); ICC Article 25; ICTR Article 6(1); ICTY Article 7(1).

crimes. That said, drawing a distinction between planning and aiding and abetting does not cover sufficient ground to explain why Taylor's lengthy sentencing is appropriate compared to other perpetrators, especially given that the "planning" mode of liability only applied to his crimes in the capture of Freetown. For all other crimes that he was found guilty, he was convicted as an aider and abetter. This brings us back to the gap in the Trial Chamber's explanation for departing from its avowed principle because of the "unique circumstances of a case". This Chapter's primary claim is that the explanatory gap here can be explained by the enabler factor. Rather than unsatisfyingly ending their sentencing analysis dependent on the "unique circumstances of a case", the judges could have returned to the findings in their judgment where they determined that Taylor had enabled the RUF/AFRC in the conflict and the atrocities they committed.[135] A Head of State's wrongdoing that enables large scale violence and atrocities in another country is wrongdoing that must be captured in his sentence. In this way, the enabler factor closes the explanatory gap between the judge's ruling on aiding and abetting and their 50-year sentence of Charles Taylor (the second highest at the SCSL).

C. THE MANY FACES OF "THE ROLE OF THE ACCUSED"

What do international judges mean by "role of the accused?" How does it operate within their sentencing considerations? Although judges consistently identify it as a sentencing factor, ICL sentencing jurisprudence is not consistent in its conceptualization and integration of this factor. Two questions remain under-examined: How is "role of the accused" conceptualized? And where does it fit in within the sentencing process? The ICL sentencing judgments frequently reference "the role of the accused" in their general discussion of "gravity of the offense" but the decisions are not consistent in how they

[135] Taylor Trial Judgment para. 5834, 5835, 5842, 6913-6915 (finding that Taylor "enabled the RUF/AFRC's Operational Strategy" and "supported, sustained and enhanced the RUF/AFRC's capacity to implement its Operational Strategy.")

account for it.[136] The jurisprudence offers a confused and varying treatment of "the role of the accused" as a sentencing factor.[137]

Across international tribunals, judges understand and account for "the role of the accused" in three different ways. Recalling the analysis of gravity in Section A above, "gravity of the *offense*" consists of two considerations: the gravity of the *crime* and the criminal conduct of the accused. The former consists of a bunch of different "gravity factors" and the latter includes the accused's mode of liability and the nature and degree of his participation in the crime.[138] Some sentencing judgments treat "the role of the accused" as one of the many enumerated "gravity" factors, but other judgments treat it as part of the accused's mode of liability and participation in the crime.[139] Still, other judgments treat the "role of the accused" as an aggravating factor. Thus, in ICL jurisprudence, we see three different applications of "the role of the accused": (1) as a gravity factor; (2) as a factor to assess the individual's culpability based on the nature of his participation in the crime; and (3) as an aggravating factor.

Regarding the first approach, some ICL judges locate "the role of the accused" as a "gravity factor" but do not infuse it with any distinctive substance. In fact, it is frequently equated to circumstances that the jurisprudence treats as aggravating factors. The only clear understanding that emerges from these judgments is that "role of the accused" is something other than the accused's mode of liability. Thus, for judges following the first approach, "the role of the accused" is not a measure of the accused's mode of liability, such as ordering, planning, or command responsibility. But for other ICL judges, this is precisely what it entails.[140] This latter group describes the "role of the accused in the

[136] *Cf., Prosecutor v. Taylor*, Appeals Judgment, para. 19 (May 20, 2012); *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeal Judgment para. 683 (29 July 2004); *Prosecutor v. Sesay*, Trial Chamber Sentencing Judgment, para. 40 (April 8, 2009); *Prosecutor v. Fofana*, Case No. SCSL-04-14-T, Trial Sentencing Judgment, para. 33 (Oct. 9, 2007); *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Appeal Judgment para. 182 (24 March 2000); *Prosecutor v. Brma*, Case No. SCSL-04-16-T; Trail Sentencing Judgment, para. 19 (July 19, 2007); *Prosecutor v. Furundzija*, Case No. IT-95-17/1-A, Appeal Judgment para. 249 (21 July 2000); *Prosecutor v. Delalic et al.,* ("*Ćelebići Case")*, Appeal Judgment para. 731 (20 February 2001).

[137] *See* cases cited *supra*.

[138] *See e.g.*, RUF Trial Sentencing para. 20; Taylor Trial Sentencing para. 21.

[139] This ambivalent treatment of "role of the accused" traces its origins to the early jurisprudence of the ICTY. *See*, *Prosecutor v. Furundzija*, Case No. IT-95-17/1-A, Appeal Judgment para. 249 (21 July 2000); *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeal Judgment para. 683 (29 July 2004); *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Appeal Judgment para. 182 (24 March 2000); *Prosecutor v. Delalic et al.,* ("*Ćelebići Case")*, Appeal Judgment para. 731 (20 February 2001).

[140] CDF Trial Sentencing para. 34.

crime" in terms of (1) the mode of liability attributed to the perpetrator, and (2) the nature and degree of his participation in the crime.[141]

However, under this approach, a cogent conceptualization of this factor is compromised by the lack of a sentencing framework drawing a coherent pathway between: the perpetrator's criminality, as determined by his culpability and wrongdoing; the proper attribution of a mode of liability; and the appropriate punishment. It is at this point in many judgments that the sentence analysis typically becomes obfuscated. For example, in the CDF case, trial judges attempted to make the above assessment by considering whether the accused was a direct or indirect participant in the crimes.[142] However, they typically do not identify what modes of liability they consider to be direct or indirect. Sentencing judgments of international criminal courts often muddy the analysis in this regard.[143] This confusion is attributable to the absence of a theory piecing together three ingredients of a fair punishment – the perpetrator's criminal conduct, the legally attributed mode of liability, and the actual sentence. Some ICL cases don't even treat "the role of the accused" as part of gravity of the offense at all, but as an aggravating factor. Thus, there is no consensus in ICL case law about how to account for "the role of the accused."

What there is agreement on is that "role of the accused" is an important sentencing factor. But questions relevant to determining its content and influence remain unresolved, making it an important, but unpredictable factor at sentencing. This raises further questions: for judges for whom "the role of the accused" is not a measure of the accused's participation in the crime, such as ordering, planning, or command responsibility, then what is it? And for judges who insist on treating it as a "gravity factor" instead of an aggravating circumstance, why is that difference important? An important contribution of the enabler factor is that it conceptualizes "the role of the accused" as something distinct from the concepts of gravity, modes of liability, and aggravating factors. Moreover, the enabler factor also infuses the concept of "the role of the accused" with substance significant and distinctive to international criminality and mass atrocities, thereby capturing its salience to situations of systemic criminality. I argue that ICL's conceptualization of "the role of the accused" should be informed by the enabler factor

[141] Id.
[142] Id.
[143] An example of this is the ICTY *Blaškić* case. *See*, Shahram Dana, *Revisiting the Blaškić Sentence: Some Reflections on the Sentencing Jurisprudence of the ICTY*, 4 INT'L CRIM. L. REV. 321, 336-340 (2004).

and understood as the accused's responsibility for enabling the situation or milieu for mass atrocity criminality.

D. National Law Provision

According to the general ICL sentencing jurisprudence, consideration of the sentencing laws and practices of the *locus delicti* constitutes one of the four pillars of an appropriate sentence.[144] It is fair to say that this consideration never gained significant traction in ICL sentencing practice. It rarely, if at all, had any meaningful influence on the quantum of punishment, despite the fact that a provision to this effect appears in the statutes of all international criminal courts and tribunals discussed herein, except for the ICC. Some consider the marginalization of the national law provision to be an error in interpretation and application of ICL statutory law.[145] Others lament that it was overlooked from a philosophical or criminological perspective.[146]

IV. Constructing a Framework for Punishing Atrocities

International criminal law has not developed an analytical framework for sentencing. The extant practice of international judges is to enumerate many "sentencing factors" under various headings found in the statute or RPE with great laxity allowing each panel of judges to conceptualize the factors as suits their purpose so long as they are careful to not double count. There is no common approach among ICL judges regarding the categorizations. Even if we assume that this method has some semblance of a framework, it is far too weak and underdeveloped to handle the complexity of sentencing perpetrators of atrocity crimes. The weakness of the current approach is demonstrated by observing a troubling pattern in sentencing judgments of (1) articulating guiding principles that are no actually adhered to in the analysis or determination of the quantum

[144] *See*, Chapter 2: *Reimagining Nulla Poena Sine Lege*.
[145] *Id.*
[146] *Id.*

of punishment;[147] or (2) proffering differential considerations that are not doing any heavy lifting.[148]

In this section, I develop an innovative framework for ICL sentencing. As discussed in the previous sections, in practice, the extant ICL jurisprudence does not sufficiently develop the doctrinal aspects of key sentencing criteria. Thus, as a preliminary matter, it is necessary to briefly revisit the extant discourse surrounding these criteria, particularly gravity, modes of liability, and the role of the accused. My proposed framework reasserts the distinctiveness of atrocity sentencing, infusing them with considerations *sui generis* to atrocity crimes. There are two benefits to this approach. The first is to give structure to concepts such as gravity, modes of liability, and the role of the accused in order to realize their potential to atrocity sentencing. Second, the conceptualizations and claims advanced herein illuminate these concepts in a manner that can aid lawyers and judges in international trials independent of whether they find my framework persuasive.

A. RE-CONCEPTUALIZING ATROCITY SENTENCING

Some trial chambers consider factors pertinent to enabler responsibility in their assessment of the "gravity of the crime". However, consuming a war criminal's role as an enabler within the concept of gravity obfuscates the function and influence of the former. It also muddies the notion of gravity itself, diminishing the expressive power of sentencing judgments. The confusion is furthered by the fact that at times international judges treat "the role of the accused" as an aggravating circumstance rather than a factor in assessing gravity of the offense. I argue that the enabler factor should be distinguished from both concepts of gravity of the offense and aggravating circumstances. This requires a shift in the discourse currently found in sentencing judgments. When ICL sentences are understood through the prism of the enabler factor, greater congruency is achieved between judicial narratives about the atrocities and their actual sentences. This does not

[147] *See supra* Section II.A (discussing the Trial Chamber's treatment of sentencing for aiding and abetting); *see also*, Heller *Taylor Sentence* (2013) at 835-840.

[148] Taylor Trial Sentencing para. 22. ("The Trial Chamber notes that 'individual circumstances of the convicted person' can be either mitigating or aggravating."); CDF Appeal Judgment para. 498. ("The Appeals Chamber considers that the level of education and training of a convicted person is part of his individual circumstances which the Trial Chamber is required to take into consideration as an aggravating or mitigating circumstance."); RUF Appeal Sentencing para. 1296; *Prosecutor v. Mladen Naletilić and Vinko Martinovi*, Case No. IT-98-34-A, Appeal Judgment para. 592 (3 May 2006), quoting *Blaškić* Appeal Judgment para. 679 ("the individual circumstances of the accused, including aggravating and mitigating circumstances").

diminish the role of gravity but rather brings clarity and transparency to punishing atrocities. Gravity of the offense still plays an important role but does not monopolize the judicial narrative.

1. Gravity Conceptualized

As noted above, the *Charles Taylor* case contributes important analysis for the purpose of conceptualizing gravity. This section builds upon that jurisprudence to further refine the notion of gravity as it pertains to atrocity sentencing. My goal here is to offer a conceptualization of gravity that stabilizes its content, makes predictable its influence, and harmonizes sentencing narratives with sentencing allocations. Moreover, if adopted by ICC judges, it will allow them to develop robust and communicative sentencing judgments.

In the *Taylor* case, the court advanced the notion of *inherent* gravity as a *distinct* consideration for the proper assessment of gravity of the offense. The judges stated that "gravity of the offence is determined by assessing the inherent gravity of the crime and the criminal conduct of the accused."[149] As a preliminary matter, it is worth noting that the *Taylor* Trial Chamber's conceptualization of gravity suggests a distinction between gravity of the *offense* and gravity of the *crime*. It implies that the latter is narrower, limited to the elements of the crime whereas the former is broader and includes an assessment of the form and degree of participation as well as the elements of the crime. Thus, we may understand the Trial Chamber's approach to conceptualizing gravity as requiring a two-prong assessment of the perpetrator's criminality.[150] The first prong requires a determination of "the *inherent* gravity of the *crime*", and the second prong considers the "criminal conduct of the accused."[151] Determining *inherent* gravity calls for an assessment of the seriousness of harm (gravity) as determined by the elements of the crime (inherent) for which the perpetrator was found criminally responsible.[152] This assessment plays an important role in sentencing because it ties the perpetrator's criminality directly to deviations from the community's norms and values.

[149] *Prosecutor v. Charles Taylor,* Case No. SCSL-03-01-T, Sentencing Judgment para. 19 (30 May 2012) [hereafter "Taylor Trial Sentencing Judgment"].
[150] Taylor Trial Sentencing Judgment para. 19.
[151] *Id*. (emphasis added).
[152] *See further* JAN PHILIPP BOOK, APPEAL AND SENTENCE IN INTERNATIONAL CRIMINAL LAW (2011).

To positively utilize this conceptualization of gravity, however, requires an adjustment in how judges narrate their sentencing opinions. Formulistic recitations of an enumerated list of gravity factors of general applicability must be replaced with a focused gravity assessment of the specific elements of the crime. This is after all what an "inherent" examination demands. Unfortunately, although the *Taylor* Trial Chamber make this important contribution to the conceptualization of "gravity" for the purpose of sentencing, it did not actually engage in an assessment of the *inherent* gravity of the crime. Instead, it reverted back to a gravity-*in-fact* analysis by simply regenerating a list of "gravity" factors, some of which could be treated as aggravating factors.[153] This reversion back to the enumerated list of gravity factors may be out of habit or it may be due to the Trial Chamber's overly broad construction of the scope of the considerations that fall under the second prong.

The judges explained that a determination of the second prong – the criminal conduct of the accused – "requires consideration of the particular circumstances of the case and the crimes for which the person was convicted as well as the form and degree of participation of the Accused in the crime."[154] Thus, the second prong itself consists of several additional considerations. Thus, the scope of the second prong is so broad that literally any factor could be considered here, including factors from the enumerated gravity list, aggravating factors, and even mitigating factors alongside modes of liability, so long as what is being considered falls under the general umbrella of "particular circumstances of the case." Recall that the judges considered *two* aspects of the alleged criminality as integral to their conceptualization of gravity: "the *inherent* gravity of the *crime* and the criminal conduct of the accused."[155] The scope of the former has clear parameters and is well-defined. But the trial chamber has given the second prong such an overly broad construction that it marginalizes the impact of the first prong (the inherent gravity assessment). What started out as a promising analysis offering a contoured concept of gravity melted into a shapeless ameba. The concept of inherent gravity gets steamrolled and disappears under the weight of a multitude of "factors" and "particular circumstances of the case."

[153] Taylor Trial Sentencing Judgment para. 20
[154] Taylor Trial Sentencing Judgment para. 19.
[155] Taylor Trial Sentencing Judgment para. 19 (emphasis added).

It is not surprising then that the SCSL trial chambers do not actually engage in a granular assessment of the *inherent* gravity of the *crime*. Rather, they skip right over an inherent assessment, opting instead to generate a list by select reference to one or more of their enumerated gravity factors, such as vulnerability of victims or the brutal manner of perpetration. As discussed above, many of these so-called gravity factors could logically and conceptually be treated as aggravating factors.[156] The absence of a doctrinal approach to gravity explains why ICL judges have difficulty deciding if a particular factor should be treated under its gravity analysis or as an aggravating factor. But more importantly, this approach causes the notion of gravity itself to become over broad and diluted.

Additionally, the need for atrocity sentencing to reimagine the notion of "gravity" pertains not only to doctrinal issues, but also extends to the role that gravity plays in judicial narratives about punishing atrocities. ICL sentencing narratives are too dominated by gravity rhetoric. Recall the CDF trial sentencing judgment. Whatever criticisms the sentences in that case may merit, the trial judges' downscaling characterization of gravity as an "important" but not "primary" factor in punishing atrocities arguably better reflects the generally body of ICL sentencing outcomes in practice.[157] Connecting the dots to other tribunals, this conceptualization – that gravity is an important factor but a primary factor in the CDF – would be in keeping with how gravity functionally operated at the ICTY in, for example, Nikolic's punishment discussed above. These and other judgments[158] casts doubt on whether "gravity of the offense" is the controlling consideration for ICL punishments.

This trend of moving away from overstating the role of gravity is a welcomed one because it invites space for more granular considerations. Margaret DeGuzman explains that the insistent gravity rhetoric in sentencing narratives can "narrow the range of discursive space and interpretive possibility."[159] This trend also appears to find favor with the ICC. For example, in the *Katanga* sentencing judgment, the trial judges discuss gravity as a sentencing factor per the ICC statute without attaching hyperbolic qualifiers

[156] *See supra* Sections III(A) and III(B).
[157] *See also*, Chifflet & Boas, *Sentencing Coherence in ICL*, *supra* note 1, at 147 and 158 (claiming that "judges and their staff are primarily focused" on a perpetrator's *responsibility* for the atrocities, not the *gravity* of crimes).
[158] For more examples from the ICTY *see generally Id.*
[159] Margaret M. DeGuzman, *Harsh Justice for International Crimes*, 39 YALE J. INT'L L. 1, 19 (2014) *quoting* ANTHONY AMSTERDAM & JEROME BRUNER, MINDING THE LAW (2000).

such as "primary" or "litmus test".[160] Likewise, in the *Lubanga* case, the sentencing judges, like the SCSL judges in the CDF case, treated "gravity" as an important consideration without giving it lofty dominance over atrocity sentencing as the litmus test.[161]

2. Modes of Liability

Determining a just distribution of punishment among actors who perpetrate atrocity crimes requires careful consideration of various ICL modes of liability. Debate surrounding ICL modes of liability remain unresolved, especially concerning theoretical and doctrinal aspects of accomplice liability. It is beyond the scope of the research questions of this study to resolve the elemental debates surrounding ICL modes of liability.[162] For the purpose of this study on sentencing, it is sufficient to reflect on the board categorizations influencing the sentence. Because of the peculiarities of atrocity criminality, domestic concepts of "accessory liability" and understandings of "direct" versus "indirect" participation are often insufficient as differential doctrines in international criminal law, or at least require some adjustment when transposed. Consequently, international judges relying on analogy to domestic doctrines often misappropriate them in their sentencing judgments. As argued above, it may be best to avoid narrating culpability for atrocity crimes in typically domestic law language because often the concept or doctrine is teleologically ill-suited for ICL or because international judges, often lacking criminal law expertise or judicial experience, misapply them.[163]

On the other hand, if characterizations such as "direct" and "indirect" are to be retained in international criminal justice, then there exists a pressing need to establish clarity around them. For the specific purpose of sentencing, I propose that international judges adopt the following approach to conceptualizing the direct or indirect nature of criminal conduct in ICL. An individual who physically commits the crime on the ground, the commander who orders it, and the leaders that plan it are all *direct* participants in the

[160] *Prosecutor v. Germain Katanga*, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/04-01/07 (23 May 2014).
[161] *Lubanga* Sentencing Judgment para. 36;
[162] *See generally*, MILES JACKSON, COMPLICITY IN INTERNATIONAL LAW (2015); Kai Ambos, Treatise on International Criminal Law Volume 1: Foundations and General Part (2013); Miles Jackson, *The Attribution of Responsibility and Modes of Liability in International Criminal Law*, 29 LEIDEN J. INT'L L. 879 (2016); James G Stewart, *The End of 'Modes of Liability' for International Crimes*, 25 LEIDEN J. INT'L L. 165 (2012).
[163] By operation of its statute, the ICC permits appointment of diplomats and other persons without legal training or judicial experience to serve as judges.

crime. A superior or commander that fails to prevent or punish the crimes of subordinates under his or her control is an *indirect* participant in the crime. Aiding and abetting is a "wobbler" – depending on the nature of the assistance it can be so substantial so as to amount to direct participation while lesser forms of assistance might rightly be regarded as indirect participation. In terms of the ICC statute, modes of liability articulated in Article 25(3)(a), (b) and (e) are direct forms of participation whereas liability pursuant to Article 28 is indirect participation in the crime. However, it should be born in mind that the ICC statute does not establish a hierarchy among modes of liability.

Had ICL judges at the SCSL conceptualized ICL modes of liability in this manner, they could have advanced a clearer link between the role of the accused, Taylor's mode of liability, and the sentence. Instead, Taylor's sentence is vulnerable to several criticisms. For example, Kevin Jon Heller considers Taylor's punishment as too high and excessive because, in his view, Taylor was merely an "accessory."[164] But in Taylor's own words, he was not just some "thug street criminal"; he was the "president of Liberia." We should not lose sight of Taylor's real power and influence. Even Taylor was not willing to belittle his position, even if it meant placing himself in the center of responsibility for the conflict and atrocities. An insignificant accomplice distracting an unwitting victim while a street criminal snatches a purse or wallet is one thing. A Head of State welding the power of militaries and armed forces and enabling crimes against humanity and war crimes in another country is quite something else. I have argued elsewhere against decontextualized transposition of national criminal law concepts to international law.[165] The nature of domestic criminality for ordinary crimes in national law is not the same as criminality underlying atrocity crimes, even if they share certain characteristics. Describing Taylor as simply an "accessory" risks giving the misimpression that his wrongdoing and criminality was not serious or grave or central. Moreover, Heller's position doesn't distinguish between "aiding and abetting" and "planning" treating both as "accessory" liability.[166] However, I argue that these are distinctive forms of participation in atrocity crimes, and depending on the facts of the case, may often bear on gravity considerations, and the individual's culpability and criminal responsibility for the

[164] Heller, *Taylor Sentence* (2013) at 855-860.
[165] Dana *Revisiting the Blaškić Sentence*, *supra* note 143, at 330-336.
[166] Heller *Taylor Sentence* (2013) at 837.

atrocities. Jurisprudentially, international criminal law treats "aiding and abetting" and "planning" as distinct modes of liability, as does the ICC statute.[167]

Even if we accept the appropriateness of the labeling Taylor as an "accessory," it doesn't shed any light on whether his punishment is too severe. The SCSL rejected the suggestion that there is a hierarchy among modes of liability.[168] Likewise, the statutes of international criminal courts and tribunals do not support such a hierarchy. In fact, given their failures as differential concepts at sentencing, many national legal systems have abandoned legal categorization of perpetrators into "principles" and "accessories" for the purpose of punishment. For example, in Sierra Leone as well as the United States, an accessory to murder can be punished as severely the principle perpetrator.[169] Likewise, the ICTY *Krstić* trial sentence illustrates that there is nothing automatic about aiding and abetting receiving a lower penalty.[170] Accordingly, the term "accessory" is a hollow label for the purposes of ICL sentencing, especially as applied to high ranking perpetrators. Of course, if the *Taylor* Trial Chamber had actually given individualized sentences for each count instead a single global sentence, we could better appreciate the difference in practice, if any, for punishment between the different modes of liability.

B. An Original Framework for ICL Sentencing

ICL sentencing practice suffers from the absence of an analytical framework to support international judges when exercising their discretion to arrive at a just punishment. My goal in this section is to propose such a framework. Admittedly, proposing an effective sentencing framework for atrocity crimes is no easy task, and a risky one. Risky because the law of atrocity sentencing remains unsettled and the practice of global sentencing obfuscated ICL sentencing practice. Thus, in attempting such a task, the effort may possibly overlook or under-appreciate issues that impact the outcome. Difficult because a hard choice had to be made: should the proposal develop a framework that maps onto the declared sentencing methodology as stated in the judgments? Or

[167] ICC Statute, Article 25.
[168] Taylor Appeals Judgment paras. 666-670.
[169] Taylor Sentencing Judgment para. 37.
[170] *Prosecutor v. Krstić*, Judgement, IT-98-33-T, 2 August 2001 (sentencing Krstić to 46 years of imprisonment). On appeal, the ICTY sentenced him to 35 years' imprisonment. *Prosecutor v. Krstić*, Judgement, IT-98-33-A, 19 April 2004.

should the proposed sentencing framework map onto what is actually happening in practice? As analyzed above, ICL judges in practice do not actually follow their avowed structure of four distinct pillars of atrocity sentencing. For this reason, I propose a sentencing framework that maps onto the actual sentencing practice.

A synthesis of ICL sentencing practice reveals three core determinants of the quantum of punishment: (1) gravity of the crime; (2) individual circumstance of the convicted person; and (3) aggravating factors and mitigating circumstances. The national law provision, often declared as a fourth determinant of a sentence, never meaningfully influenced ICL sentencing outcomes in general.[171] Although, some ICTR judgments justified higher sentences on the grounds that Rwanda domestic law permitted the death penalty.[172] Additionally, as discussed above, in practice ICL judges collapse categories two and three. "Individual circumstances of the convicted person" has been conceptualized in terms of aggravating and mitigating factors. My proposed framework reasserts the distinctiveness of these categories. It separates consideration of aggravating and mitigating factors from the consideration of "individual circumstances of the convicted person." It infuses the latter with substance that is *sui generis* to atrocity crimes, namely the role of the convicted person as an enabler.

1. Laying Out the New Framework

I propose a sentencing framework for the International Criminal Court and ICL in general that combines the constitutive sentencing considerations, identified in ICL sentencing jurisprudence, with the *Taylor* Trial Chamber's conceptualization of gravity. The constitutive elements of atrocity sentencing are: (1) gravity of the crime; (2) individual circumstances of the convicted person; and (3) applicable aggravating and mitigating factors.[173] The *Taylor* Trial Chamber conceptualized "gravity" by weighing two facets of a perpetrator's criminality: the inherent gravity of the crime and the criminal conduct of the accused. However, unlike the extant ICL sentencing practice, I would not collapse the framework's constitutive aspects. My framework identifies considerations specific to each and begins with assessing each dependently.

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[171] *See generally* Chapter 2 *Reimagining Nulla Poena Sine Lege*.
[172] Rwanda's parliament controversially voted to abolish the death penalty in 2007, while the ICTR was in operation. *See*, Rwanda Scraps the Death Penalty, BBC News at http://news.bbc.co.uk/2/hi/africa/6735435.stm.
[173] *Taylor* Trial Sentencing Judgment para. 18 (30 May 2012); Prosecutor v. Sesay, Kallon and Gbao, Sentencing Judgment para. 17 (April 8, 2009); RUF Appeals Judgment para. 1201; AFRC Trial Sentencing Judgment para. 30B; CDF Appeals Judgment para. 20B.

More specifically, under my framework, judges initially assess *inherent* gravity independently. The concept of inherent gravity entails an objective assessment of the seriousness of the elements of the crime. As noted above, an assessment of the inherent gravity of the crime is an essential step in tying the perpetrator's wrongdoing to the community norms embedded in the prohibited conduct as reflected in elements of the crime. This link is vital to retributive justifications and expressive goals of punishment. Next, judges consider the mode of liability attributed to the accused specific to each proven crime. I gradate modes of liability into three groups.[174] The most severe for the purpose of punishment are forms of responsibility that reflect grave responsibility for the crime. This includes personally committing the crime as well as planning and ordering atrocity crimes. Some commentators view planning and ordering atrocity crimes as a form of participation similar to aiding and abetting. However, planning and ordering are not merely aiding and abetting modes of liability. They are far graver and conceptually distinct from the latter. Statutes of ICC&T identify planning and ordering as separate and distinct modes of liability from aiding and abetting.[175] The former are in fact direct forms of responsibility because the accused is held liable for the actual planning or ordering of activities or actions that constituted genocide, war crimes, and crimes against humanity. The third group consists of command or superior responsibility of the type found in the ICC Statute Article 28, ICTY Article 7(3), and Article 6(3) in the statutes of the ICTR and SCSL. All things being equal, this form of criminal responsibility is less grave than the first category because it is indirect liability based on an omission. It is still a serious form of criminal liability and can attract a substantial sentence. But failing to prevent or punish subordinates who commit crimes is ordinarily not as serious, in terms of individual capability, as ordering them to commit atrocities. Based on these two considerations – the inherent gravity of the offence and the perpetrator's mode of liability – judges arrive at the *overall* gravity of the *crime*. This accounts for the first constitutive consideration noted above.

Next, the judges would then determine the accused's enabler responsibility or role, if any, for maintaining, facilitating, and/or sustaining the context in which the atrocity crimes were committed. This consideration informs the second constitutive

[174] *See, supra* section IV-A-2.
[175] Compare ICC Statute, Article 25(3)(b) and Article 25(3)(b); ICTY Article 7(1); ICTR Article 6(1); SCSL Article 6(1).

element as a determination of the "role of the accused" which forms the "individual circumstances of the convicted person". As noted above, the approach of some ICL judges is to treat the "role of the accused" as part of their assessment of gravity of the offense.[176] My proposed framework pulls "role of the accused" out of the first constitutive element, the gravity box, and analyzes it under the second constitutive element. This injects the second constitutive sentencing consideration with criteria and content specifically pertinent to atrocity crimes as distinct from ordinary crimes. This approach gives a more purposive application to the second constitutive element, which has thus far been a dumping ground for aggravating and mitigating factors, despite the fact that ICL judges consider them to be separate and distinct considerations. Thus, my proposed framework has the advantage of also preserving the integrity of the third constitutive sentencing consideration. The "individual circumstances of the convicted person" encompasses an evaluation of "role of the accused" as determined by the enabler factor, *i.e.* the defendant's role or responsibility in enabling and/or maintaining a milieu or situation of atrocity crimes.[177] The accused's punishment would be largely the product of the *overall gravity* and his responsibility as an enabler to arrive at the totality of the accused's criminality. This sentence could be moderately adjusted up or down based on aggravating or mitigating factors.

2. Advantages of the New Framework

In a certain sense, simply having a sentencing framework contributes to advancing the ICL sentencing process and sentence allocations. But there are other advantages too. Following the above-proposed sentencing framework advances a more analytical approach to explaining and allocating sentences. It allows the judges, through the sentencing jurisprudence, to develop a more granular sentencing practice and narrative that supports a normative discourse of accountability for the atrocities. This framework optimally facilitates an important expressive function of ICL judges and trials: it allows

[176] *See, supra* section III-C.
[177] The introduction of the enabler factor can potentially raise questions as to its relationship to substantive criminal law, in particular modes of liability. However, as conceived here, the enabler factor is not presented as a new mode of liability. The accused would have to first be found guilty on an existing mode of liability. The enabler concept is offered here as a factor for the purpose of sentencing only.

judges to more readily achieve coherence between justice and punishment for atrocity crimes.[178]

Presently, the normative expressions are compromised under an exclusive reliance on hyper "gravity" imagery that far outpaces and overshadows the actual quantum of punishment. Judicial narratives tirelessly badger the reader about the gravity of the offence and how monstrous the accused's crimes are.[179] Yet, the final sentences are underwhelming in the face of such explosive rhetoric. This method of communication surrenders too much. Gravity needs to yield its monopoly as an explanatory tool for punishing atrocity crimes. The enabler factor allows the judges to speak the language of gravity to acknowledge the harms suffered by the victims and yet explain why every war criminal is not being sentenced to life imprisonment or a lengthy prison term. The enabler factor combined with my proposed sentencing framework optimizes the expressive capacity of ICL punishment by offering a clear pathway linking justice, to the offender's criminal culpability, to the purposes of international trials, and finally to the sentence.

The proposed sentencing framework also guards against confusion and double counting that currently problematizes ICL sentencing. The current sentencing methodology of ICL judges bombards the judgments with an unstructured catalogue of sentencing "factors" with no connectivity or coherence. Not only does the extant approach risk legal and factual errors; it fails to sufficiently integrate sentencing into the overall goals of international prosecutions. The proposed framework also gives scope to the gravity assessment, thereby limiting the contaminating effect of narrating everything in terms gravity. When everything is narrated in terms of gravity, international judges have difficulty rationalizing upward or downward movements in the sentence.

While in a general sense gravity, broadly conceived, may also include enabler responsibility, for the purposes of sentencing discourse it is important and beneficial to treat it and weight it separately. A nuanced, distinctive treatment of enabler responsibility in sentencing opinions, unencumbered by gravity language, will enhance the communicative and expressive functions of international criminal prosecutions. Our understanding of the gravity of ICL crimes also benefits from the separation. Gravity gets

[178] On the expressive capacity of international atrocity trials *see* Robert Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law,* 43 STANFORD J. INT'L L. 39, 50-51 (2007).
[179] Margaret M. DeGuzman, *Harsh Justice for International Crimes*, 39 YALE J. INT'L L. 1, 17-24 (2014).

form and shape, becoming leaner and stronger, rather than remaining a bloated and formless notion where all sentencing factors are rolled into some broad notion of gravity.

Moreover, gravity of the offense implies a focus on individual crimes because different crimes vary in gravity or seriousness. Take for example a commander who orders his soldiers to kill all males in a captured village but is also responsible for failing to punish his subordinates who tortured five peacekeepers. The gravity measurement for each of these offenses requires consideration of very different factors. Thus, gravity properly assessed and conceptualized is crime specific. The enabler factor, however, potentially has a nexus to all the commander's crimes. This is another reason why it warrants separate consideration outside the gravity box. Additionally, assessing the accused's responsibility for enabling a toxic environment for atrocity crimes independent of gravity of the crime advances transparency in ICL sentencing judgments. It also brings clarity to the accused's moral culpability and makes punishment more communicative. It can account for why individuals whose crimes are of comparable gravity, like Sesay, Kellon, and Gbao, received substantially different penalties. Victims can better understand why the perpetrator of crimes against them served a lesser penalty than another perpetrator, without ICL messaging to them that their suffering is not important or that the crimes against them were not of significant gravity.

Another advantage of my framework is that "the role of the accused" is given its own distinct analytical space and consideration, allowing for a more granular and complete narrative of the accused's responsibility in relation to atrocities and conflict. The advantage of this approach is to allow international criminal justice mechanisms to better build a historical record, which judges seem to be eager to do, without muddling or diminishing the gravity of the accused's crimes. An independent assessment of a convicted person's responsibility as an enabler furthers the different goals that ICL has ascribed to including retribution, deterrence, reconciliation, and expressivism as discussed in Chapter Three. Supporters of each of these theories ought to welcome a sentencing framework that properly accounts for enabling conflicts that fuel atrocities.

Likewise, conceptualizing "the role of the accused" as an enabler as a consideration within the second constitutive element ("individual circumstances of the convicted person") also helps to distinguish it from aggravating factors. This separation is also warranted because the enabler factor influences sentencing allocations to such a large degree that the concept of aggravating circumstances is insufficient to account for

the quantum of difference, as evidenced by the sentences in the RUF case, the CDF case, and the Charles Taylor case. Aggravating circumstances, properly conceived and applied, do not exert extreme influence on the sentence. When a penalty is increased by more than 25 years or more than double as happened in the RUF case,[180] it is difficult to attribute the extreme difference as merely a consequence of an aggravating factor. The notion of aggravating circumstance simply cannot cope with that magnitude of an increase. I argue that the enabler factor better accounts for this dramatic increase because it more deeply and widely captures the extent of the perpetrator's criminality in a way that is very pertinent to atrocity criminality.

V. CONCLUSION

ICL sentencing jurisprudence identifies four core considerations essential to determining an appropriate sentencing for atrocity crimes: (1) gravity of the offense; (2) individual circumstances of the convicted person; (3) applicable aggravating and mitigating factors; and (4) the sentencing law and practice of the *locus delicti*.[181] Although these four considerations are tributized in every ICL sentencing judgment, giving the semblance of a robust approach to sentencing, in practice however, ICL judges did not adhere to this structure in their sentencing analysis. These proffered considerations were either effectively sidelined, such as the national law provisions on sentencing, or they were banally lumped into an amebic consideration of gravity. The assessment of "individual circumstances of the convicted person" was unimaginatively limited to consideration of aggravating and mitigating factors,[182] overlooking its potential to capture aspects of criminality specific to atrocity crimes. As this Chapter illustrates, ICL sentencing analysis is too preoccupied with justifying its outcomes almost exclusively in

[180] Sesay and Gbao were convicted of substantially the same crimes, but the former received double the sentence of the latter. *See*, *supra* section II-B.
[181] Taylor Trial Sentencing para. 18; AFRC Appeal Judgment para. 308-309; CDF Trial Sentencing para. 32; CDF Appeal Judgment para. 465; RUF Trial Sentencing para. 17; AFRC Appeal Judgment para. 313; RUF Appeal Judgment paras. 1129, 1236, 1239, and 1240.
[182] Taylor Trial Sentencing para. 22. ("The Trial Chamber notes that 'individual circumstances of the convicted person' can be either mitigating or aggravating."); CDF Appeal Judgment para. 498. ("The Appeals Chamber considers that the level of education and training of a convicted person is part of his individual circumstances which the Trial Chamber is required to take into consideration as an aggravating or mitigating circumstance."); RUF Appeal Sentencing para. 1296; *Prosecutor v. Mladen Naletilić and Vinko Martinovi*, Case No. IT-98-34-A, Appeal Judgment para. 592 (3 May 2006), quoting *Blaškić* Appeal Judgment para. 679 ("the individual circumstances of the accused, including aggravating and mitigating circumstances").

terms of "gravity", which has arguably been overplayed. At the same time, other considerations, such as "individual circumstances of the convicted person", have been underdeveloped, representing a lost opportunity to advance sentencing considerations *sui generis* to punishing atrocities.

The Chapter argues for a departure from this approach to punishing atrocities, which has largely transposed domestic sentencing practices applied to ordinary crimes. After discussing the methodological and conceptual problems in the sentencing narratives and allocations in international criminal law, this Chapter offers several suggestions to advance the law of atrocity sentencing. First, it conceptualizes key sentencing criteria, such as gravity and individual circumstances of the accused, cohesively integrating them to a sentencing process that more robustly intertwines narratives about the accused's wrongdoing, the gravity of the atrocities, the role of international prosecutions, and the quantum of punishment. Second, the Chapter elucidates a novel account of punishment for atrocity crimes. The role of the accused in enabling the milieu or situation in which atrocity crimes spawn has thus far been under-considered at sentencing. I argue that because atrocity crimes are typically the outcome of large scale violence or armed conflict, ICL punishment must account for a convicted person's role as an enabler.

The third contribution of this Chapter is developing the scaffolding towards a sentencing framework for atrocity crimes. The methodology of the proposed framework begins with consideration of the inherent gravity of crime and the convicted person's mode of liability. The quantum of punishment can then be adjusted significantly upward where the convicted person is found to be an enabler. This sentence could then be moderately adjusted upward or downward based on aggravating or mitigating factors.

The proposed sentencing framework combined with the enabler factor offers several advantages to ICL sentencing. By departing from a sentencing discourse that narrates the analysis entirely in terms of gravity, my approach allows a space for important nuances to be communicated and expressed in the sentencing process. It also closes the gap between judicial narratives about atrocities and sentencing outcomes. Additionally, the enabler factor allows ICL judges to account for a convicted person's contribution to enabling a situation erupting in atrocity crimes. Thus far, moral culpability for this type of wrongdoing in mass atrocities is not adequately accounted for in the sentence, if at all.

ICL judges do not explicitly account for the enabler factor in their sentencing analysis. However, as analyzed above, sentencing outcomes can arguably be explained by the enabler factor and its influence on the quantum of punishment. For example, pushing back on criticisms that Charles Taylor's punishment was too harsh,[183] the enabler factor explains why a 50 year prison sentence is not excessive for the atrocities he committed while he was a sitting Head of State.[184] Likewise, the enabler factor explains why Sesay, a top RUF commander and an enabler of the conflict and atrocities, received double the punishment that his subordinates received for the same crimes, even though the subordinates directly committed the killings and Sesay's responsibility was based on an omission – his failure to prevent the subordinate from committing the crime or punishing him afterwards. For this omission, Sesay received twice the punishment that the direct perpetrators of the crime received. The enabler factor explains why his sentence is appropriate, notwithstanding the fact that his criminal liability is based on an omission. It's time for ICL judges to include the enabler factor in their sentencing analysis, in addition to the concept of gravity, to better explain their sentencing outcomes.

[183] Several observers believe his punishment is too high. *See e.g.* Heller, *Taylor Sentence* (2013) at 835-840; Drumbl, Punishing Heads of State (2012), *supra* note 25.
[184] *See, supra* section III.A.

CHAPTER FIVE
CONCLUSION

ICL sentencing judgments are a rich source of insight into how judges understand the enterprise of justice for atrocity crimes. While the tone of judicial opinions on guilt is predictably technical and elemental, consisting of legal analysis of the elements of crimes in light of the evidence produced, in sentencing judgments, ICL judges demonstrate greater willingness to be more reflective, philosophical, and loquacious. In sentencing judgments, we get deeper glimpses into their views on justice and peace, war and criminality, heroes and villains, and accountability. For this reason, among others, they merit deeper examination.

The hallmark of atrocity sentencing is the very wide discretion afforded to judges. Philippe Kirsch, the first President and former judge of ICC, remarked that even at the ICC where states negotiated a very rigid legal regime, a notable exception to the tight rein on international judges is the sentencing phase.[1] As was the case at predecessor international criminal tribunals, ICC judges have been given very little guidance on punishing those found guilty of atrocity crimes. Under these circumstance, wide judicial discretion has failed to produce granularity and coherency in atrocity sentencing.[2] This study rethinks ICL sentencing from the perspective of doctrine, philosophical rationales, and theory. It creates new spaces of discourse and debate regarding punishing atrocities.

Chapter Two reimagined the principle of legality, *nulla poena sine lege* (NPSL). ICL discourse surrounding NPSL confines the maxim to a limited role.[3] The debate has largely focused on the negative justice dimensions of NPSL, such as preventing abuse of power and retroactive punishment. In Chapter Two, this study broadened the discussion

[1] Philippe Kirsch, *The International Criminal Court: From Rome to Kampala*, 43 J. MARSHALL L. REV. 515, 519-520 (2010); Shahram Dana, *Law, Justice & Politics: A Reckoning of the International Criminal Court*, 43 J. MARSHALL L. REV. xxiii, xxvi-xxvii (2010).
[2] KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW VOLUME II: CRIMES AND SENTENCING 268 (2014); Pascale Chifflet and Gideon Boas, *Sentencing Coherence in International Criminal Law: The Cases of Biljana Plavsic and Miroslav Bralo*, 23 CRIM. L. FORUM 135, 147 and 154 (2012); MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW (2007); Mark B. Harmon & Fergal Gaynor, *Ordinary Sentences for Extraordinary Crimes*, 5 J. INT'L CRIM. JUSTICE 683 (2007); OLAOLUWA OLUSANYA, SENTENCING WAR CRIMES AND CRIMES AGAINST HUMANITY UNDER THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (2005).
[3] *See* Chapter 2 *Reimagining Nulla Poena Sine Lege*; *see further* AMBOS, ICL TREATISE II (2014), *supra* note 2 at 276-278 (outlining minimalist and maximalist positions on *null poena*).

regarding the role of NPSL in ICL to include positive justice features of NPSL, such as contributing to a just distribution of punishment and consistency in sentencing. Proponents of the limited approach to *nulla poena* argue that so long as the punishment was foreseeable, there has been no abuse of power and thus no violation of the principle of legality.[4] As applied to punishing atrocities, this argument relies on the fact that post-World War II atrocity trials imposed the death penalty on many defendants.[5] Thus, the argument concludes, whatever punishment is applied today cannot be heavier than the death penalty (in their eyes), and thus cannot possibly violate *nulla poena*. One problem, among others, with this argument is that it considers the legality issue only once and assumes that the assessment is frozen in time. It wants to ignore subsequent developments in law, penal standards, and human rights.

As applied to the ICTY, this argument is extended by analogy and generalization: it was foreseeable to all in the former Yugoslavia that these crimes attracted a severe penalty; therefore, whatever punishment the ICTY Statute allows does not violate the principle of legality. But this generalization is arguably too vague.[6] A punishment of twenty years imprisonment is severe; so too is life imprisonment and the death penalty. Yet, they are not all necessarily foreseeable, especially where domestic law prohibits one of these punishments as was the case in Yugoslavia. The drafters of the ICTY statute appeared to recognize this potential legality issue and inserted the national law provision, which "speaks in favor of a stricter understanding of *nulla poena*."[7] Unfortunately, the efforts made by the drafters to bridge the gap between the ICTY's scant penalty provision and the demands of NPSL was not supported by the rulings of the *ad hoc* tribunals.[8] Imagine this: a state's domestic law prohibits the death penalty but allows life imprisonment without parole and an international court is created with jurisdiction over atrocity crimes committed in that state. Creators of the court empower it to impose the death penalty. Would the reasoning above similarly justify imposing the death

[4] *See* sources cited *supra* in Chapter 2 *Reimagining Nulla Poena Sine Lege*.
[5] KEVIN JON HELLER, THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW (2011); NEIL BOISTER AND ROBERT CRYER, THE TOKYO INTERNATIONAL MILITARY TRIBUNAL: A REAPPRAISAL 248 (2008).
[6] Damien Scalia, *Long-Term Sentences in International Criminal Law: Do They Meet the Standards Set Out by the European Court of Human Rights?* 9 J. INT'L CRIM JUSTICE 669, 684 (2011) (arguing that this interpretation by the ICTY "fails to fulfil the foreseeability criteria established by the [European Court of Human Rights]."). Scalia concludes that the ICTY and ICTR does not comply with *nulla poena sine lege*.
[7] AMBOS, ICL TREATISE II (2014), *supra* note 2 at 277.
[8] *See* Chapter 2 *Reimagining Nulla Poena Sine Lege*, Section II(B) and III(B).

penalty? Would international judges and experts be quick to make the same argument: a severe penalty (life imprisonment without parole) was foreseeable; therefore, any severe penalty is foreseeable. I doubt many would support this argument.[9]

More importantly, these arguments overlook the positive justice role of NPSL. Thus, Chapter Two also argued for a broader approach to NPSL that looks beyond its simple caricature as a principle solely limited to preventing abuse of power to one that captures its potential contribution to positive justice, advancing consistency in punishing atrocity, and contributing to the maturation of the law of sentencing for ICL. Accordingly, this study developed an international standard for the normative content of *nulla poena* using sources of international law, including treaties, customary international law, and general principles of law.[10] While the current discourse on *nulla poena* focuses on the prohibition against retroactive punishment, this research project deconstructed *nulla poena sine lege* into four underlying attributes. They include two threshold requirements pertaining to *nulla poena's* positive justice function: *lex scripta* (punishment must be based on written law) and *lex certa* (the form and severity of punishment must be clearly defined). The other two attributes are prohibitions pertaining to *nulla poena's* negative justice function: *lex praevia* (the prohibition against retroactive application) and *lex stricta* (the prohibition against applying a penalty by analogy). Chapter Two further identified sources of international law pertaining to the normative quality of each underlying attribute specifically. These sources reveal a more robust *nulla poena* principle than is conceived of by ICL judges, drafters of tribunal statutes, and commentators.[11]

Based on these findings, section IV of Chapter Two critiqued the statutory provisions and sentencing practice of *ad hoc* tribunals and the ICC. As the latter presently represents the permanent legal regime for international criminal justice, Chapter Two elucidated the strengths and weaknesses of the ICC Statute's penalty provisions in light of *nulla poena* and its potential contribution to international criminal justice. The efforts made by the drafters of the ICC statute to satisfy *nullum crimen sine lege* was not replicated in their approach to *nulla poena*. This study concluded that, while some

[9] Scalia implies that the argument is flawed because it "fails to fulfil the foreseeability criteria." He concludes that "the principle of legality of sentences does not therefore seem to be complied with by the [ICTY and ICTR]." Scalia, *Sentencing in ICL*, *supra* note 6, at 684.
[10] *See* Chapter 2 *Reimagining Nulla Poena Sine Lege*, Section III.
[11] *See* Chapter 2 *Reimagining Nulla Poena Sine Lege*, Section III (E).

authors argue that one of the concerns underlying *nulla poena*, namely preventing retroactive punishment or abuse of power, may not raise serious concerns for international punishment of atrocity crimes, *nulla poena* still remains relevant to international criminal justice. Other rationales underlying the maxim, in particular those connected with its positive justice function, such as consistency in sentencing and justice in the distribution of punishment, continue to require a rethinking of the role of *nulla poena* in advancing international law and justice. There are positive signs in the early jurisprudence of the ICC that international judges are taking note that *nulla poena* offers more to the decision making than simply prohibiting retroactive punishment.[12] Specifically, there is recognition of its *lex certa* function in ICL and punishing atrocities.[13] Furthermore, the *Katanga* sentencing analysis indicates atrocity sentencing must first satisfy *nulla poena sine lege* even ahead of the principle of proportionality.[14] Thus, even if the principle of proportionality demands a severe punishment, such a sentence cannot be imposed if it violates *nulla poena*. This is a notably different tone and attitude towards *nulla poena* than hereto shown by ICL judges.

In addition to the principle of legality, another important stabilizer of the exercise of wide judicial discretion in punishment is ordering around sentencing rationales. ICL sentencing jurisprudence accepts a wide range of ideologies as appropriate influences on the quantum of punishment, from punitive rationales rooted in traditional domestic penology to international diplomatic and policy goals.[15] The punitive rationales consist of retribution and deterrence. Other aspirations include reconciliation, establishing a historical record of the conflict and atrocities, and building international law and jurisprudence. Beyond these, ICL judges claimed that the purposes of atrocity sentencing also include rehabilitation, general affirmative prevention, expressivism, and more.[16] Some ICL judgments went beyond identifying these various ideologies as achievable goals of atrocity trials, but also considered them to be factors that can fundamentally influence sentence allocations. Further impairing clarity is cross talk and argumentation confusing justification for international criminal justice mechanisms and rationales

[12] *Prosecutor v. Germain Katanga*, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/04-01/07 (23 May 2014) para. 39 (recognizing the *lex certa* requirement of *nulla poena* in ICL sentencing).
[13] *Id*.
[14] *Id*.
[15] *See,* Chapter 3 *Ideologies and Sentencing Rationales for Atrocity Crimes*, Section II.
[16] *Id.*

pertinent to sentencing. Not uncommonly, the punitive goals conflicts with diplomatic and policy goals. Thus, the appropriate orientation for ICL punishment remains unsettled.

Chapter Three contributed to this debate in a number of ways. Early commentaries criticized ICL sentencing jurisprudence for vacillating between retribution and deterrence rationales.[17] Chapter Three scrutinized and reframed this vacillation debate. This study argues that the vacillation is not between retributive and deterrence rationales, but rather between punitive approaches (including both retribution and deterrence) to atrocity crimes and restorative ones (restoration of peace, national reconciliation, preventing revisionism). ICL sentencing rationale for atrocity crimes continues to lack cohesion but is crystalizing as having a more punitive orientation than a restorative one. Significantly, the SCSL contributed towards directing international criminal law sentencing toward a punitive orientation, settling on retributive and deterrence rationales.[18] Early ICC sentencing judgments evince retribution and deterrence in ascendency over other ideological approaches to punishing atrocities. Chapter Three argued in favor of a punitive orientation towards punishing atrocities. This study's findings caution against international criminal justice mechanisms embarking on ambitious entanglements with consequentialist aspirations, such as deterrence or reconciliation. Chapter Three offered an original account of the impact of reconciliation ideology on punishing atrocities.[19] When implemented as a sentencing factor, it disproportionately favored those bearing the greatest responsibility for the atrocities, substantially reducing their punishment.[20] While international trials may contribute towards a wider set of diplomatic and policy goals such as reconciliation and building a historical record, these aspirations are beyond the institutional capacity of international criminal courts and can only receive partial fulfillment, if that, within this context.

For many commentators, ICL sentencing outcomes appear inconsistent when crimes of similar gravity are compared. This calls into question whether gravity is the key differential principle in ordering the quantum of punishment when comparing war criminals sentenced for the same crime. An example of this is the sentencing of the RUF

[17] *See* MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW (2007).
[18] *E.g.*, Taylor Trial Sentencing Judgment para. 79; CDF Appeals Judgment para. 100b; RUF Trial Sentencing Judgment para. 100b.
[19] *See* Chapter 3 *Ideologies and Sentencing Rationales for Atrocity Crimes*, Section IV(B) and Section II(D).
[20] *See* Chapter 3 *Ideologies and Sentencing Rationales for Atrocity Crimes*, Section IV(B)(4).

defendants by the Special Court for Sierra Leone.[21] The RUF defendants were convicted of the exact same crimes based on the same charges in the indictment. Yet, their leader Issa Sesay was punished more than twice as severely (52 years) as the lowest ranking convicted co-defendant who was sentenced to 25 years imprisonment. In some instances, Sesay was sentenced to three times the prison term that Gbao received for the exact same crime based on the same underlying facts. For example, Count Six of the indictment charged both Sesay and his co-defendant with rape as a crime against humanity for specific incidences of rape.[22] Both were found guilty. Sesay was sentenced to 45 years of imprisonment, whereas Gbao received only 15 years. These exponential differences in the quantum of punishment cannot be explained by gravity. These outcomes suggest that gravity is not doing the heavy lifting when ordering the appropriate punishment between co-defendants. If gravity does not explain the difference, then what does? We can rule out aggravating factors as an answer because, as the Trial Chamber found, there were no aggravating factors in Sesay's case.[23]

Chapter Four engaged this question by taking the inquiry beyond the gravity narrative and rhetoric. Here, the research project responded with an original claim. Chapter Four hypothesized that some ICL judges, especially at the SCSL, punish more severely those atrocity perpetrators that they consider to be enablers. This study found that the enabler factor influences the quantum of punishment, even if unarticulated as a sentencing factor. I further argue that this is normatively desirable; however, ICL judges should explicitly address an atrocity perpetrator's role as an enabler, thereby allowing their sentencing narratives to find deeper resonance with the purposes of atrocity trials. The enabler paradigm posits that a perpetrator's role in enabling the context in which atrocity crimes are committed should be considered when determining the appropriate quantum of punishment. Chapter Four penetrated deeply into the SCSL jurisprudence to uncover the enabler factor at work.[24] The enabler factor responds to critics of ICL sentencing by giving weight to a crucial ingredient of atrocity crimes. For example, many criticized Charles Taylor's punishment of 50 years imprisonment as excessive, arguing that he was largely convicted for aiding and abetting.[25] Therefore, according to this view,

[21] *See* Chapter 4 *Reconceptualizing Atrocity Sentencing*, Section II-B.
[22] *Id.*
[23] RUF Trial Sentencing para. 219.
[24] *See* Chapter 4 *Reconceptualizing Atrocity Sentencing*, Section II.
[25] *See* Chapter 4 *Reconceptualizing Atrocity Sentencing*, Section II; *see further* Mark Drumbl, "The Charles Taylor Sentence and Traditional International Law", Opinio Juris Blog, 11 June 2012, available at

Taylor's sentence should have been notably less than the persons he aided, such as Sesay who received a 52-year sentence. I argue that Taylor was an enabler and his aiding and abetting was crucial to enabling a prolonged armed conflict and mass atrocities.[26] Therefore, his criminality merited a severe punishment.

The enabler factor captures a dimension of atrocity criminality that has been largely overlooked. Furthermore, understanding atrocity sentencing through the enabler factor has additional advantages. For example, it allows the sentencing narrative to track narratives about the role of atrocity trials. International criminal justice places a premium on bringing to justice persons that bear the greatest responsibility for mass atrocities. The enabler factor brings the sentencing phase into view of the goal of achieving accountability for those that bear the greatest responsibility. Atrocity crimes do not occur in a vacuum. They are typically perpetrated in the context of an armed conflict. Those that enable armed conflicts, which spawn atrocity crimes, deserve greater punishment provided that their guilt for one of the core crimes is proven. Additionally, the enabler factor better aligns judicial narratives with actual sentencing outcomes than the current narrative focusing exclusively on gravity.

Chapter Four also proposed a sentencing framework for ICL built on a synthesis of sentencing considerations found in ICL jurisprudence.[27] International criminal justice presently lacks a sentencing framework for punishing atrocities. The current practice is to articulate, on a case by case basis, a variety of sentencing factors that influence the punishment. However, this extempore approach is ill-suited to the complexities of atrocity criminality. Consequently, one of the recurring problems in punishing atrocities is the continuous shifting conceptualizations of key sentencing criteria. Even the primary sentencing factor, gravity, is conceptualized differently by ICL judges. The ensuing lack of clarity around key ICL sentencing criteria presented an initial hurdle to developing a sentencing framework. Thus, in addition to proposing a sentencing framework, Chapter Four offered concrete conceptualizations of key sentencing criteria such as gravity, the role of the accused, and modes of liability.[28] My proposed framework reasserts the distinctiveness of ICL sentencing criteria, infusing them with considerations *sui generis*

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http://opiniojuris.org/2012/06/11/charles-taylor-sentencing-the-taylor-sentence-and-traditional-international-law (last visited 14 April 2018); Kevin Jon Heller, *The Taylor Sentencing Judgment: A Critical Analysis*, 11 J. Int'l Crim. Justice 835 (2013).

[26] *See* Chapter 4 *Reconceptualizing Atrocity Sentencing*, Section II-A.

[27] *See* Chapter 4 *Reconceptualizing Atrocity Sentencing*, Section IV.

[28] *See* Chapter 4 *Reconceptualizing Atrocity Sentencing*, Section IV-A.

to atrocity crimes. By (re)conceptualizing and structuring consideration of concepts such as gravity, modes of liability, and the role of the accused, the proposed sentencing framework capitalizes on their potential to atrocity sentencing in particular. Moreover, the framework proposed in this study facilitates a shared understanding among ICL defense lawyers, prosecutors, and judges regarding key factors that impact the sentence.

A synthesis of ICL jurisprudence reveals that judges typically articulate four considerations relevant to determining an appropriate sentence: (1) gravity of the crime; (2) individual circumstance of the convicted person; (3) aggravating factors and mitigating circumstances; and (4) the sentencing law and practice of the *locus delicti*. The latter consideration was declared to be non-binding,[29] although some ICTR judgments relied on it to justify higher sentences on the grounds that Rwanda domestic law permitted the death penalty.[30] More significantly, in practice, ICL judges collapse categories two and three. "Individual circumstances of the convicted person" has been conceptualized in limited terms of aggravating and mitigating factors.[31] My proposed framework creates independent space for consideration of aggravating and mitigating factors and consideration of "individual circumstances of the convicted person." It infuses the latter with substance that is *sui generis* to atrocity crimes, namely the role of the accused as an enabler.

Chapter Four proposed an ICL sentencing framework that calls upon judges to take into account three considerations: gravity of the crime, the individual circumstances of the convicted person (as informed by the enabler factor), and aggravating and mitigating circumstances. The first two are more influential determinants than the latter. The gravity of the crime is assessed by first considering the inherent gravity of the offence based on an objective assessment of the seriousness of the elements of the crime.[32] This injects structure into the extant practice of simply articulating a list of "gravity factors." Next, judges consider the mode of liability proven against the accused in relation to each crime. As discussed in Chapter Four, modes of liability can be categorized into three groups.[33] The first consists of modes of liability reflecting grave responsibility for atrocity

[29] *See generally* Chapter 2 *Reimagining Nulla Poena Sine Lege*.
[30] Rwanda's parliament controversially voted to abolish the death penalty in 2007, while the ICTR was in operation. *See*, Rwanda Scraps the Death Penalty, BBC News at http://news.bbc.co.uk/2/hi/africa/6735435.stm.
[31] *See* Chapter 4 *Reconceptualizing Atrocity Sentencing*, Section III.
[32] The advantages of this approach are discussed *supra* Chapter 4 *Reconceptualizing Atrocity Sentencing*, Section IV-B-2.
[33] *See* Chapter 4 *Reconceptualizing Atrocity Sentencing*, Section IV.

crimes, including but not limited to planning and ordering. These deserve the greatest punishment. The second category consists of aiding and abetting modes of liability. The third category consists of command or superior responsibility, such as ICC Statute Article 28, ICTY Article 7(3), and Article 6(3) in the statutes of the ICTR and SCSL. The proposed sentencing framework treats planning and ordering as direct forms of participation in atrocity crimes. While from a certain perspective planning and ordering can be understood as aiding in the commission of a crime, they are distinct from aiding and abetting as a mode of liability and a particularly grave form of criminal responsibility in the context of atrocities. Indeed, statutes of international criminal courts treat planning and ordering as separate and distinct modes of liability from aiding and abetting. These two aspects of the accused's criminality (the inherent gravity of his offences and the perpetrator's mode of liability) determine the *overall* gravity of the crime, the first consideration listed above. Next, the judges would then determine the accused's role as an enabler as part of the second sentencing consideration listed above, namely "individual circumstances of the convicted person." The overall gravity and the enabler factor (if present) determine the totality of the accused's criminality and parameters of an appropriate sentence. Under the third consideration, this presumptive sentence could be increased or decreased based on aggravating or mitigating factors, but only moderately, not substantially, as the parameters of the punishment have already been determined by the first two considerations.

As analyzed in Chapter Four, some ICL judges treat the "role of the accused" as part of their assessment of the gravity of the offense.[34] My proposed framework pulls "role of the accused" out of the gravity assessment and analyzes it separately under the second sentencing consideration as part of the "individual circumstances of the convicted person." This proposed methodology injects the second sentencing consideration with criteria and content specifically pertinent to atrocity crimes as distinct from ordinary crimes. This approach gives a more purposive application to the second sentencing consideration, which has thus far been limited to consideration of aggravating and mitigating factors. Thus, my proposed framework has the advantage of also preserving the integrity of the gravity narrative. By creating distinct spaces for consideration of gravity and the role of the accused as an enabler, my sentencing framework allows ICL

[34] *See* Chapter 4 *Reconceptualizing Atrocity Sentencing*, Section III.

judges to justify their sentencing outcomes without undermining their gravity narrative. It therefore also enhances the expressive and communicative capacity of sentencing narratives. The enabler factor and the proposed sentencing framework work jointly to achieve harmonious and consistent consideration of factors pertinent to punishing atrocity crimes. It thereby facilitates the exercise of judicial discretion in sentencing towards realizing the purposes of atrocity trials.

Finally, regarding adjudicative rules, a synthesis of ICL jurisprudence reveals the crystallization of some general principles of international criminal law sentencing. Many are drawn directly from general principles of law in national jurisdictions.[35] Some examples include: (1) where a factor has already been taken into consideration in assessing the gravity of the offence, it cannot be considered as an additional aggravating factor and *vice versa*;[36] (2) if a factor is an element of the underlying crime, it cannot be used as an aggravating factor;[37] (3) aggravating factors must be related to the commission of the offense;[38] (4) mitigating circumstances need only be proven by a preponderance of the evidence;[39] (5) mitigating circumstances need not to be related to the offense;[40] and (6) aggravating factors must be established beyond the reasonable doubt.[41] Over time, ICL judges went beyond mere rule articulation to further declare these principles to be general principles of international criminal law. Significantly, the ICC followed the same rules in its discussion of aggravating factors in its first sentencing judgment.[42]

Punishing atrocity crimes is complex; yet key doctrinal aspects of the law of sentencing in ICL remain underdeveloped. An ICL judge informed me that their legal officers were present during all the judges' deliberations about a case, except when the judges discussed what the sentence should be. When I asked why the legal officers were excluded from the sentencing deliberations, the judge licked his finger and held it up in the air. In a sense, the aim of this research project has been to equip judges with more than a wet finger. The goal of this research project has not been to explain ICL sentencing

[35] *See Prosecutor v. Thomas Lubanga Dyilo,* ICC-01/04-01/06, T.Ch. I, Decision on Sentence pursuant to Article 76 of the Statute, para. 15 (10 July 2012) ("*Lubanga* Sentencing Judgment").
[36] Taylor Trial Sentencing Judgment para. 25 (listing aggravating circumstances).
[37] Taylor Trial Sentencing Judgment para. 28.
[38] Taylor Trial Sentencing Judgment para. 24.
[39] Taylor Trial Sentencing Judgment para. 34 (listing mitigating circumstances).
[40] Taylor Trial Sentencing Judgment para. 31.
[41] Taylor Trial Sentencing Judgment para. 24.
[42] *Lubanga* Sentencing Judgment.

outcomes in empirical or quantitative terms, but to stimulate normative, doctrinal, and theoretical rethinking on punishing atrocities. It has offered innovative claims and opened new spaces for debate. It reimagined new roles for *nulla poena sine lege* that reassert this old maxim's relevance to international criminal justice.[43] It uncovered an identity crisis in international trials and atrocity sentencing between punitive and restorative orientations, reframing and replacing the earlier debates that situated the tension as one between retributive and deterrence ideologies. It tied the consequences of the fractured identity of international criminal justice mechanisms to the realization of justice in punishing atrocity crimes. It offered the enabler factor as an explanatory response to criticisms of atrocity sentencing and as a normatively desirable underpinning to ICL punishment. It articulated a much needed ICL sentencing framework. However, it does not present any of its normative, doctrinal, or theoretical claims as an end to the discussion. Rather, I have sought to open new spaces and debates for fundamental rethinking and reimagining of doctrines and theories that will support a sentencing regime that is *sui generis* to punishing atrocities.

[43] *See* KAI AMBOS, TREATISE ON INTERNATIONAL CRIMINAL LAW VOLUME II: CRIMES AND SENTENCING 275 (2014) (discussing how the "relevance" of *nulla poena* to atrocity trials was lost after "the Nuremberg precedent").