

SENTENCING: IN INTERNATIONAL CRIMINAL LAW

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INTRODUCTION

International criminal law (ICL) is a branch of public international law. That is designed both from national laws and criminal laws of different countries all over the world. ICL prohibits and punishes atrocities against humanity. That threaten the core universal Human rights. Each country's laws are a reflection of its values, and it is the theory of punishment and reformation there are large differences between the national laws of different countries, both concerning the nature of the crimes themselves and the penalties considered appropriate. The term international criminal law refers variously to at least three distinct areas: cooperation between different national legal systems through extradition assistance; the prohibition and punishment of certain behaviour by several countries or by the international community; and the operation of autonomous international legal systems, including courts and other mechanisms of enforcement.

International criminal law can be distinguished from domestic criminal law in that the former penalizes crimes that are particularly flagrant and capable of producing widescale harm (such as crimes against humanity or genocide) and those crimes that can be thought of as 'international' in that they involve actions carried out by States or their agents (war crimes, acts of aggression) or are of a transnational, or multijurisdictional, nature (terrorism, drug trafficking, piracy, slave trade).

ICL conventions and texts rely on the criminal responsibility of individuals and not states. Because states enjoy the Sovereignty principle. Which is the ultimate power, authority, and/or jurisdiction over people and territory. No other person or state can tell a sovereign entity what to do with its land and/or people. A sovereign entity can decide and administer its laws, can determine the use of its land, and can do pretty much as it pleases, free of external influence (within the limitations of international law).

While international criminal law conventions govern the criminal responsibility of individuals, they also impose obligations on States, which accept the duty to prosecute or extradite individuals accused of international crimes and, when applicable, to cooperate with international criminal tribunals (ICTY,1993).

Through back to the history of the birth of ICL, there is the Rome statute, the first treaty that established the International Criminal Court (ICC) also called the International Criminal Court Statute, which was created in July 1998 and entered into force on 1 July 2002. The Rome statute is an agreement that led to the formation of the International Criminal Court (ICC). Rome statute regulates and declares the urgent to create a judicial international body for international criminal law. Especially in terms of sentencing and punishment. Also, in 1991 the International

Criminal Tribunal for the former Yugoslavia was created. The ICTY is a body of the United Nations created under the 827 UN resolution. It was established to prosecute serious crimes committed during the Yugoslav Wars. The tribunal is an ad hoc court which is located in The Hague, Netherlands. Another criminal tribunal is the International Criminal Tribunal of Rwanda which was created in 1194 under the 955 Resolution of the United Nations Security Council. This last lasted for one year to judge the people responsible for Rwanda, genocide. The necessity of international criminal laws is based on the idea of sentencing and punishment under the umbrella of Human rights and justice (ICTY,2002). However, International sentencing is not regulated by the exact norms. There is no established body of international principles regarding the determination of sentences. Therefore, several judges debated the purposes of punishment and the principle of proportionality. The principle of proportionality is a general principle in international human rights. “The punishments imposed upon conviction following a fair trial must be proportionate to the gravity of the crime and the circumstances of the offender.” This principle indicated two important elements: first, the principle would impose restraints to excessive or arbitrary penalties); second, the principle would ensure that the final sentence takes into account the seriousness of the offense and the gravity of the crime. When dealing with? How should we punish? What are the limits of punishment? One should also ask what are the purposes of international sentencing.

The general aims of international sentencing could be summarised in the five following areas: deterrence, retribution, rehabilitation, social defense, restoration, and maintenance of peace. The issue at stake is what relevance each purpose should exercise in the sentencing process, and which objectives should be considered the most appropriate for international justice. Reflecting on the necessity of sentencing and how it is regulated in international criminal laws. We will depict the two ad hoc tribunal courts of Yugoslavia and Rwanda to tackle how sentencing was introduced. And what determines the limits of punishment.

Mostly, what are the factors that identify the level of seriousness of sentences in both Yugoslavia and Rwanda's international criminal law cases? We will answer this question by tackling two principal factors, the gravity of the offense. Second, the individual circumstances of the accused.

Gravity of the Offense

Perpetration: Both article 24 (2) of ICTY” Article 24 and Article 23 (2) of ICTR on Penalties; “In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offense and the individual circumstances of the convicted person.” Both articles declare that tribunals should seriously take into account the gravity of the offense (Article 23 (2) of ICTR,2007). Which is a very crucial factor in the determination of sentences? It is constituted by both the way the crime was perpetrated and the effects of the crime on the victims (Article 24, 2009). Therefore, by reflection on the statutes of ICTY and ICTR, there is no distinction in the seriousness of the underlying offenses of genocide, the war against humanity,

and war crimes. In consequence, there is no guidance if certain acts need to be punished more severely than others. So, what is perpetration, and how it was depicted in the ICTY AND ICTR under the sentencing system? Perpetration is the act of committing a crime or a violent or harmful act toward a group of people or individuals. In international criminal law, the way of perpetrating crimes is of relevant influence on sentencing. This factor is logically more related to perpetrators than offenders. Therefore, when evaluating how a crime was perpetrated the judge takes into account the level of brutality, cruelty, and sadism used by the offenders in carrying out the crimes. Both sadism and cruelty were presented as significant factors in both ICTY and ICTR.

For example, in the Jelusic case of ICTY, the trial chamber declared the violent and sadistic nature of Goran Jelusic's behaviour (Goran Jelusic,1998). Also, in the Delalic Case was highlighted that “the beatings and other forms of mistreatment which Mr. Landžo meted out to the prisoners detained in Hangar 6 and elsewhere in the prison camp were inflicted randomly and without any apparent provocation, in a manner exhibiting some imaginative cruelty as well as substantial ferocity.

This later imposes the principle of individual criminal responsibility in the statute of ICTY article 7 “A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime”. The ad hoc Tribunals observed that there is no distinction in gravity between direct perpetration, participation, ordering, aiding, or any kind of interference in the crime. Therefore, in the Vasiljevic case, the judge declares a form of the direct responsibility of the perpetrator (Article 7, 2002). However, both Article 7 of ICTY and Article 6 of ICTR cited “The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superiors of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof” (Article 6,1994); in other words, all participants of crimes direct or indirect are convicted and could not claim in mitigation as article 7 and 6 from ICTY and ICTR states. Therefore, the accused position of authority is considered both as an element of criminal liability and as an aggravating factor.

Victimization: Any act of violence or brutality composed of an offender and a victim. Each one plays a specific role in this cruel dynamic in international criminal law. Victimization is the process of being victimized or becoming a victim out of cruel or unjust treatment. Which is another factor related to the gravity of the offense. Mostly, the victimization level increased in terms of seriousness by the number of victims, gender, and the general situations of the victims. These are very important elements and significant indicators of the magnitude of the crimes. For example, in Rwanda, in the Kambanda case, the trial chamber stated that about 500,000 civilians were killed in 100 days. So, the factor here is the number of victims and the length of time. Other elements relating to the victims of crimes as aggravating factors are; The Atmosphere of terror,

The degree of struggle and humiliation, The vulnerability of the victims, The trauma, the age, and The infancy. So, the gravity of the offense will be taken more seriously while scaling the crime's context and elements. Not just the act. Therefore, sentencing will be indicated by the crime as the basic element and then by the specificities of the crime. On the other hand, the same elements and specificity can be taken from both angles, even as a mitigation factor to reduce the sentence as an aggravation factor to increase the punishment (Kambanda case,1998). Therefore, when the offender shows any kind of empathy and kindness towards a victim is considered a lawful factor that needs to be taken into consideration to reduce the punishment.

Individual circumstances of the accuse

It is fundamental to point out that the 'individualization' of the penalty to be imposed on the accused, imposes the principle of criminal responsibility as an individual form of responsibility at the sentencing process. Moreover, individualizing the punishment gives protection to accused individuals against punishments that do not strictly address their acts or guarantee fairness. Thus, in the following analysis, we will treat first the role of the accused depending on the leadership level (A) and as a second subparagraph the other personal circumstances (B).

The role of the accused in defining the level of leadership: The degree of responsibility of the accused is considered an important element that needs to be taken under consideration while evaluating the sentence. The trial chambers of the ICTY and ICTR had always given an acceptable opinion about accused positions in military hierarchy or civilians. In other words, tribunals had held that accused people with superior positions deserved a harsher penalty in the Stakic affair "as with white collar crimes, the perpetrator behind the direct perpetrator—the perpetrator in white gloves —might deserve a higher penalty than the one who physically participated depending on the particular circumstances of the case". In other cases, as article 7(6) ICTR statute states the difference between superior responsibility and other modes of individual liability is the person who plans, instigates, orders, commits its planning, preparation, and execution. In the ICTY case law, the fact that an accused held a superior position within a military or civilian structure was considered as a serious aggravating circumstance, which means, if there's any aggravating circumstance the sentence will be imposed by increasing it to onethird. Moreover, the prosecution must establish aggravating circumstances using rational doubt. Referencing the ICTR, judgments of the Rwanda Tribunal are also particularly important, given the high level of authority held by some of the accused. Abuse of authority is another aggravating circumstance consistently upheld by Chambers of the ICTY and ICTR. For example, the reasoning was when the Todorovic Trial Chamber observed: "Instead, in his position as chief of an institution that is responsible for upholding the law, Stevan Todorovic actively and directly took part in offenses that he should have been working to prevent or punish his abuse of his position of authority and people's trust in the institution constitutes an aggravating factor." Certainly, for the case in which the accused was a subordinate but also a willing participant in the criminal conduct, there will be no mitigation to his/her sentence. in some other cases, forced

participation in a crime can be considered a mitigating circumstance., we can say that the role of the accused plays a big role in identifying the level of responsibility and there for the degree of seriousness of the crime; however, we can say that it is not the only individual factor we are talking about there's also another number of personal factors that are also fundamental on deducing the level of seriousness of international crimes (Todorovic case,2001).

Other personal circumstances: The other personal circumstances are all various and different; however, we cannot analyze all so we'll start first, with the "Good character" evidence and it concludes the evaluation of aspects such as reputation, credibility, personality, and social conduct of the accused. Moreover, this evidence aims to provide the judge with much more complete information concerning the accused life: background and characteristics. In other words, all information is about the accused personality. This factor is controversial because it had a different practice from ad hoc tribunals. For example, both ICTR and ICTY have always considered supporting elements of a good character with a balanced personality or evidence of a strong and high educational or professional background had always been taken as factors in mitigation of the sentence or sometimes as factor an aggravation of the punishment. In the Tadic case the good character of the accused was considered an aggravating factor, the Trial Chamber sorted out that the accused was a lawabiding citizen, an intelligent, responsible, and mature adult, and concluded that: "however this, if anything, aggravates more than it mitigates: for such a man to have committed these crimes requires an even greater evil will on his part than that for lesser men.". furthermore, there's also the "Lack of prior criminal convictions" which is the evidence that concerns an offender who does not present previous criminal convictions, mostly this evidence is considered as a mitigation factor if we consider that an accused person who never committed crimes before has a better response on the whole trial process which can lead to decreasing the sentencing of the suspect and it can be considered as "a good character prior" to the offense these circumstances were often considered in conjunction's (Tadic Case,2000). Overall, we can say that it is accepted that the accused prior criminal record can be sort of under the influence in meeting out the sentence and that an offender with a clean criminal record is entitled to a certain degree of mitigation and sentencing however when we talk about international criminal sentencing it is not clear which aspect of the accused criminal record should be regarded as relevant. On another hand, it is important also to take into consideration the "personal and familial situation" of the accused especially if married and with children. This circumstance was also taken at different times as a mitigating factor for both ICTR and ICTY especially when having young children or too many children it can be considered as mitigation for example in the Blaskic case, the family status of the accused was mentioned, but it is not clear whether any relevance was given to that element in sentencing. Among all the listed above circumstances "expression of remorse" represents a really meaningful factor in mitigation; the remorse shown by the accused for crimes committed especially when it comes in a sorrowful expression or shows sincere regret can offer a degree of mitigation in sentencing. However, to be accepted the remorse needs to satisfy the trial chamber which can be tricky (Blaskic case,2004).

In some cases, the remorse of the accused can be associated with an early guilty plea or cooperation with the office of the Prosecutor. Besides that, age is considered a personal circumstance as well and we can say that it is a traditional one; the youth of the accused can also be taken as a mitigation circumstance for both ICTR and ICTY it gives the accused chances to resocialise. However, to evaluate well the chambers considered not only the age at the time of the crime but also the age in the judgment time. Both Rwanda & and Yugoslavia own two different approaches to “young” age; the ICTY young age is between 19 to 23 for ICTR young mitigation age is considered between 31 to 37 years old even though a lot of ICL specialists consider that this can be criticisable. In the end, regarding “the state of health of the accused” this evidence is specifically concerned with posttraumatic stress (PTS) and personality disorders due to the afterwar experience lived through the war. The PTS was considered as a mitigating factor in the affair “Delalic et al”. However, the judges must be concerned about the health condition of the accused if it impacts them negatively.

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