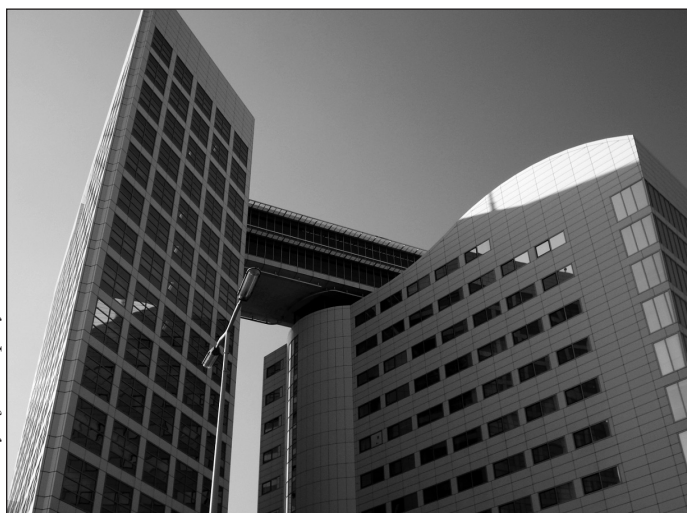

Defending International Sentencing: Past Criticism to the Promise of the ICC

by Marisa R. Bassett*

Courtesy of Michplay



The International Criminal Court building in The Hague, The Netherlands.

Over the past 15 years, the world has experienced a rebirth of international criminal law. The first international courts since the close of the Second World War, the International Criminal Tribunals for Rwanda and the former Yugoslavia (ICTR and ICTY) paved the way for hybrid courts. The 2002 establishment of a permanent International Criminal Court (ICC) demonstrates that international criminal law will be a feature of the international legal landscape indefinitely.

The work of the ICTY and ICTR has given rise to much scholarship. This article examines one branch of this scholarship—criticism of international sentencing. The article lays out critiques, which are not without merit, but responds that these critiques are overstated and misplaced as they undervalue the importance of aggravating and mitigating factors and rely on a flawed analogy between domestic and international criminal law. The article then turns to the ICC with these criticisms in mind, and concludes that the ICC’s guidance on penalties could lead that Court to take a more precise approach, improving international sentencing practice.

INTERNATIONAL SENTENCING

Punishing human rights violations with penalties proportionate to the gravity of their crimes has become a norm of international law.¹ The penalties provisions of the agreements creating the ICTY, ICTR and the ICC reflect this norm.² The ICTY and

ICTR, however, operate with scant additional formal guidance, causing sentencing practice at these two most established international courts to appear unsupported, confused, and cluttered.

PENALTIES THAT REFLECT GRAVITY

The appropriate punishment for serious human rights violations, including international crimes, is a term of imprisonment commensurate with the gravity of the crime. International criminal law began reflecting this proportionality following World War II and continues to do so. The statutes creating the ICTY, ICTR, and ICC call on each court to consider the “gravity” of the crime in determining an appropriate penalty.³

International law provides little further guidance on proper sentencing for international crimes. This relative lack of guidance springs from the fact that international crimes have gone largely unprosecuted and unpunished. Also, most human rights crimes that are prosecuted are heard by national courts; thus, domestic systems handle sentencing, employing their own criteria. Finally, fostering agreement between states on why and how to punish is extremely difficult.

SENTENCING AT THE ICTY AND ICTR

The formal sentencing guidance of the ICTY and ICTR is nearly identical. The tribunals must issue prison sentences. To determine appropriate sentences, tribunals should impose penalties that reflect the gravity of the crime, while considering “the individual circumstances of the convicted person.” They may also look to “practice regarding prison sentences” in the state where the crimes were committed.⁴ The tribunals’ Rules of Evidence and Procedure contain additional provisions, but again guidance is scant. The Rules allow consideration of aggravating and mitigating “circumstances” but do not offer definitions other than to characterize “substantial cooperation with the Prosecutor” as mitigating.⁵

Sentencing appears to vary greatly as a result of these brief provisions. Decisions typically account for a crime’s gravity, many even explicitly invoke proportionality.⁶ Yet despite employing identical provisions on gravity’s role, the tribunals have approached its determination differently. The ICTR determines the gravity of a crime based on its inherent elements, invoking a partial hierarchy under which genocide is most serious.⁷ The ICTY, however, approaches the question subjectively, allowing the context of the crime and the convicted to enter the determination.⁸

Emphasis on gravity suggests that retribution is the major theoretical underpinning behind international punishment, but the tribunals also consider other theories. They often look to deterrence, particularly general deterrence.⁹ Other theories are linked to consideration of “individual circumstances.”

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Rehabilitation is sometimes a consideration.¹⁰ As in domestic systems, the impact of these theories on resulting sentences remains unclear.

In practice, ICTY and ICTR sentencing relies heavily on evaluating aggravating and mitigating circumstances. With little guidance on these factors, the jurisprudence defines which circumstances to consider and what these circumstances are. Aggravating circumstances include the position of the convicted; his or her degree of involvement in the crime; premeditation; the nature of the act; and the victims' status and vulnerability. Mitigating circumstances include entering a guilty plea; displaying remorse; acting under duress; surrendering voluntarily; and the convicted's age and personal circumstances.¹¹

Although the Rules guide both tribunals to consider domestic sentencing regimes of the respective states,¹² the tribunals have made little use of this provision. Jurisprudence makes clear that domestic practice does not bind tribunal judges. This determination removes the difficulty of interpreting how to incorporate Rwanda's and former Yugoslav republics' use of capital punishment into modern international criminal law, which prohibits the practice.¹³

CRITICISM OF INTERNATIONAL SENTENCING

Against this background, observers have written much about international sentencing's deficiencies. Most criticism starts from the premise that international sentencing criteria are limited and underdeveloped. At the root of the criticism is concern that international penalties do not adequately reflect the gravity of the crimes, either because international courts inconsistently punish similar crimes¹⁴ or because they are *per se* lenient.¹⁵ The extreme gravity of international crimes only heightens this concern.

International sentencing's critics are comprised of practitioners and academics of varying nationalities. Their criticism falls into two categories. First, observers criticize the ICTY and ICTR for lacking a coherent theory of punishment.¹⁶ Although consideration of gravity suggests a retributive theory, the Statutes—particularly their reference to “individual circumstances”—raise alternate theories. The tribunals' jurisprudence has fueled criticism by seemingly relying on every potential theory of punishment at different points.

Second, observers criticize the tribunals for not developing or inconsistently applying a hierarchy of crimes.¹⁷ The absence of a hierarchy complicates the ability to penalize in a manner commensurate with gravity. This critique questions the use of

“individual circumstances.” Some judges interpret “individual circumstances of the convicted” as an element contributing to a crime's gravity—the circumstances of the crime and the criminal can heighten or lessen the gravity of the crime itself. Others interpret this wording to mean that crimes have inherent gravity, independent of subjective circumstances. This split mirrors the difference between the ICTY's and ICTR's approaches to determining gravity.

Both of these critiques lead scholars to the same conclusions: the ICTY and ICTR issue inconsistent, and often, unduly lenient sentences. Purported leniency, however, appears to resonate particularly strongly.¹⁸ For this reason, no case draws greater criticism than *Prosecutor v. Erdemović*.

Drazen Erdemović, a young, low-level soldier charged with war crimes and crimes against humanity for participating in a massacre, estimated that he shot 70 men.¹⁹ Erdemović initially pled guilty to the higher of his charges, causing some judges to conclude that he was ill-informed, prompting rehearing.²⁰ He then pled to the lower charge and received a five-year sentence.²¹

Reconciling this outcome is difficult for some observers. Critics, however, misunderstand *Erdemović*. Numerous mitigating factors, including duress and cooperation with the Prosecutor, are the major reason behind his brief sentence.²² The outcome is also an anomaly. Erdemović's sentence remains the ICTY's second shortest.

Furthermore, the circumstances surrounding *Erdemović* clearly influenced his sentence. His initial trial produced the ICTY's first sentencing judgment. Judges were struggling with new, vague sentencing criteria, striving to issue an appropriate sentence with uncertainty in the future docket. Facing the prospect of trying high-level leaders accused of orchestrating larger-scale massacres, judges may not have wanted to heavily penalize Erdemović. Doing so would have reduced the tribunal's ability to maneuver on sentencing in later cases. If consistency is measured by relative sentence length, a high sentence would set a benchmark, committing the tribunal to long sentences in all cases.²³ Judges were also likely concerned with perceived fairness. Issuing its inaugural sentence against a defendant who appeared ill-informed would subject defense structures to criticism, upsetting a major underpinning of human rights and justice and calling the tribunal's fairness into question.

Criticism of *Erdemović* aside, observers correctly argue that lack of uniformity and seeming leniency of sentencing are inconsistent with the norm of issuing penalties commensurate

with gravity. Dissimilar sentences in like cases and lenient penalties for serious violations also raise questions of court bias and risk international justice's credibility. These concerns cause some critics to declare that the ICTY and ICTR have contributed little to sentencing that might guide the ICC.²⁴

RESPONDING TO CRITICS

Although critics are correct that the tribunals lack a uniform theory of punishment and have split on the question of inherent gravity, these attributes are not the root cause of sentence variation or short sentences. Furthermore, inconsistency and leniency are not the fatal flaws that critics purport. In practice, the tribunals' sentences are more consistent, more punitive, and more in accordance with gravity than critics suggest.²⁵ The leniency criticism is rooted in an imprecise, impractical analogy between international and domestic criminal law. In fact, case law shows that sentences generally fall within specific ranges, dictated by the crimes, and that these ranges vary appropriately with the presence of aggravating and mitigating circumstances. The aspects of sentencing that critics find problematic are simply a reflection of individualized sentencing, achieved through the application of these circumstances.

VARIETY RESULTS FROM AGGRAVATING AND MITIGATING CIRCUMSTANCES

ICTY and ICTR sentencing criteria inevitably lead to some inconsistency. This result is due more to extensive employment of aggravating and mitigating circumstances, than to elements on which critics focus. The consideration of aggravating and mitigating circumstances is important to preserving individualized sentences and should not be eliminated. Modern criminal law, both internationally and in general, favors individualization.²⁶

Adding a clearly articulated, overarching theory of punishment to the tribunals' vague sentencing guidelines will not lead to consistent results.²⁷ The effect that theories have on sentences length remains unclear, both in international and domestic contexts. Moreover, getting international judges to agree on one or even several theories will be difficult.²⁸ The most that a coherent theory of punishment can do is reiterate the importance of gravity in sentencing or, alternately, emphasize another purpose of punishment.

Furthermore, multiple theories of punishment working simultaneously do not inevitably lead to inconsistent results. One gauges consistency by the sentences, not how judges reach their conclusions: judges weigh factors differently, but ultimately, it is the sentence itself that matters.²⁹ A single theory might guide judges, but it alone cannot achieve consistency.

Similarly, a hierarchy of crimes alone cannot make sentencing consistent. Courts would need to agree that gravity comes from the crime itself, comprised solely of its elements. Although such an inter-court agreement might be achievable and could encourage consistency, tribunals still act under a framework in which aggravating and mitigating circumstances shape sentences. The ICTR employs a partial inherent gravity approach, but its sentences still vary, even when issued for the same crime.³⁰ Conversely, if courts chose to employ a contextual determination of gravity, ranking it will remain as difficult and have as little effect as in current ICTY practice.

Dismissing these two hypothesized causes of international sentencing's problems leaves another possible source—the use of aggravating and mitigating factors. Critics have been less willing to point a finger at this aspect of the sentencing scheme, possibly because it is a common and valued feature of many domestic systems. Aggravating and particularly mitigating circumstances, however, have strong influence on the ultimate sentencing determinations of the tribunals.

INCONSISTENCY IN SENTENCING IS MYTH

International sentences are not as divergent as some critics suggest. Although the tribunals' sentences vary, case law demonstrates they typically fall within certain ranges. As one ICTR judgment notes, although “awarding a single sentence” for multiple crimes complicates the ability to determine the range of sentences issued for specific crimes, one can “ascertain general ranges” useful to consider in future cases. The ICTR went on to discuss typical penalties at the ICTY and ICTR. “[P]erpetrators convicted of . . . genocide or extermination as a crime against humanity” typically receive sentences “ranging from fifteen years’ . . . to life imprisonment.” As crimes against humanity, rape generally results in 12- to 15-year sentences; torture, five to 12 years; and murder, 12 to 20 years.³¹

These ranges are not particularly varied. In fact, they vary less than sentences in many domestic systems. In some cases, international penalties are *lighter* than domestic sentences. Perceived leniency aside, however, viewing ICTY and ICTR sentencing decisions collectively as an independent body of jurisprudence, the sentences associated with each crime fall into rather narrow ranges that vary, as in most systems, with the presence of aggravating or mitigating circumstances.

THE LENIENCY CRITIQUE IS FLAWED

The more impassioned critique of international sentencing is that sentences are unduly lenient. Objectively, however, ICTY and ICTR jurisprudence is not as lenient as critics suggest. Rather, the tribunals routinely hand down long prison sentences. A 2002 study showed that the majority of those convicted by the ICTR were serving life sentences, and that the mean sentence at the ICTY was 16 years.³² Furthermore, the ICTY has handed down a significant number of sentences exceeding 16 years.³³ The ICTR's non-life sentences are also lengthy, with a number exceeding 20 years.³⁴

Conversely, application of mitigating circumstances often reduces sentence lengths. This is the intended and appropriate role of these circumstances, however, in international *and* domestic law. The tribunals, especially the ICTY, have issued a number of sentences in the seven to twelve year range, even for relatively serious offenses, largely because of these circumstances.³⁵

Underlying the leniency criticism is a misplaced comparison between domestic and international sentencing. More properly stated, the critique is not that international sentencing is lenient, but that it is lenient relative to domestic practice. There is some truth to this argument: international sentences are shorter than sentences in *some* national systems, but this is not true universally.³⁶

The leniency criticism is also flawed more fundamentally. Comparing international and domestic sentencing is inappropriate.

ate. The international criminal system is not a national system operating supra-nationally. International criminal law is distinct from its domestic counterpart. Murder as a crime against humanity differs from murder; rape as a war crime includes different elements from those in domestic definitions.³⁷ For proper perspective, international sentences must be examined relative to one another rather than relative to domestic sentences. In this light, international sentences are typically stringent, even in cases with numerous mitigating circumstances.³⁸ When the tribunals have issued short sentences, extenuating circumstances were at work.

Selectively looking to ICTY and ICTR practice could help the ICC answer these open questions, while avoiding past pitfalls and working to strengthen sentencing practice.

Furthermore, from a practical standpoint, international courts cannot account for domestic law in sentencing. With so many states involved, it is extremely difficult to reach agreement. If ICC judges were concerned about sentences seeming lenient relative to domestic law, they would either have to examine domestic law in each case or resort to the strictest penal law of all member states. The Rome Statute appears to prohibit the first scenario.³⁹ Its application would sacrifice sentencing consistency, causing the ICC to fail to create a uniform penalties regime.⁴⁰ The second scenario creates distressing results: the harshest (even disfavored) penal systems would set the international standard.

LOOKING FORWARD: THE PROMISE OF THE ICC

The ICC's formal guidance on sentencing is more extensive than that of the ICTY or ICTR, but it remains untested. The Rome Statute's penalties provisions resemble those in the ICTY and ICTR Statutes. The "gravity of the crime" and the "individual circumstances of the convicted person" are the two main considerations.⁴¹ Due to the ICC's worldwide jurisdiction, the Rome Statute does not provide recourse to national practice.⁴² In an effort to increase certainty in penalization, the Rome Statute elaborates on sentence length. It caps imprisonment at 30 years but permits life imprisonment "when justified by the extreme gravity of the crime and the individual circumstances of the convicted person."⁴³

Unlike the ICTY and ICTR, the ICC's Rules of Evidence and Procedure offer significant additional guidance on sentencing. Rule 145 instructs judges to consider 12 enumerated "factors," and then "balance all the relevant factors" to develop a sentence that, in "totality[,] . . . reflect[s] . . . culpability. . . ." The Rule also contains lists of mitigating and aggravating "circumstances." The lists of "factors" and "circumstances" include information relevant both to the facts of the crime and the convicted, although neither list is exhaustive. Finally, Rule 145 elaborates that the "existence of one or more aggravating circumstances" may be sufficient to impose life imprisonment.⁴⁴

CAN THE ICC IMPROVE INTERNATIONAL SENTENCING?

The ICC's sentencing guidance remains relatively unexplored in scholarship. Addressing this gap is important, but it makes analyzing the guidance challenging, and makes considering potential approaches to sentencing speculative. The ICC's more detailed guidance is an achievement. Because the Rome Statute strives to create a uniform, universal system of penalization, drafting these provisions required compromise. Those involved manifested their interest in improving the precision of international sentencing. The improved guidance suggests that sentencing decisions will be more understandable and grounded than those of previous courts. If ICC judges follow the drafters' lead, they will also attempt greater precision.

Without case law to test this prediction, one must turn to a hypothetical. *Erdemović* provides an apt example. If the ICC were to hear *Erdemović*, it would begin from an advantaged perspective. For example, Rule 145 establishes duress as a mitigating circumstance, whereas ICTY judges made this determination. Additionally, the ICC Rules suggest that remorse, a mitigating circumstance that the ICTY recognizes, is an appropriate mitigating circumstance. In short, the ICC's guidance suggests that ICC and ICTY judges would agree on *Erdemović*'s major mitigating circumstances. ICC judges could also more easily recognize certain aggravating factors in *Erdemović*, such as the large number and vulnerability of victims, and discriminatory motive. Interestingly, because aggravating factors exist, the ICC Rules would allow the Court to consider life imprisonment, indicating that judges might consider a longer sentence.

Although the ICC's additional guidance could simplify judges' work, it still endows judges with significant discretion over sentencing, thus failing to address inconsistency critiques. Three issues present questions. First, the ICC Rules call for the Court to "balance" aggravating and mitigating circumstances with other "factors," but do not provide any guidance on relative weight of these considerations or how to conduct this balancing. Whether *Erdemović*'s duress, cooperation, and remorse would outweigh aggravating circumstances is an open question. Second, the ICC's lists of mitigating and aggravating circumstances are non-exhaustive. It remains uncertain whether mitigating circumstances that the ICTY considered, such as *Erdemović*'s age and family situation, would be relevant. Finally, the role that the "factors" play in sentencing is unclear. The listed factors relate to both the crime and the convicted. They are also not conclusively mitigating or aggravating.⁴⁵ Rather, they seem to comprise a list of umbrella considerations for judges seeking to define additional, non-enumerated aggravating and mitigating circumstances. Judges might consider these issues in striving to improve sentencing precision.

RECOMMENDATIONS: PAST PRACTICE AS GUIDANCE

Selectively looking to ICTY and ICTR practice could help the ICC answer these open questions, while avoiding past pitfalls and working to strengthen sentencing practice. Although the ICC has held that it will not simply “import” the practice of the ICTY and ICTR, its judges can learn from these predecessors.⁴⁶ Judges can choose to absorb certain practices while circumventing problematic aspects. Selectivity will help the ICC create a uniform penalties regime that represents development in international sentencing, while avoiding confusion and inconsistency that would come with endorsing all international jurisprudence.

For the ICC to develop credibility and legitimacy, well-defined criteria on what constitutes an aggravating or mitigating circumstance and how these circumstances affect sentence length are necessary. ICC judges, however, might hesitate to establish guidelines that limit judicial discretion.⁴⁷ Therefore, the following recommendations are intentionally broad.

EXAMINE SENTENCING RANGES AND EFFECT OF AGGRAVATING AND MITIGATING CIRCUMSTANCES

ICC judges should examine the range of sentences that the tribunals have issued for analogous cases. Examining single cases will rarely be helpful. Given the ICC’s “message of relative clemency,”⁴⁸ looking to ranges of ICTY sentences—which are typically lighter—may be useful. ICTR case law may also guide judges, specifically in determining when “extreme gravity” warrants life imprisonment.⁴⁹

The importance of individualized sentencing makes examining ranges essential. Sentencing ranges can elucidate how ICC judges might appropriately “balance” sentencing factors and aggravating and mitigating circumstances. Because aggravating and mitigating circumstances are the primary reason for sentence variety, they are largely responsible for the existence of ranges. By looking to these ranges, judges can observe the weight that circumstances carry and their effect on sentences. Given the ICC Rules’ instruction that judges consider “circumstances . . . of the convicted . . . and of the crime” and additional “factors,” the ICTY’s contextual case law might be particularly helpful.

PRECISELY DEFINE AGGRAVATING AND MITIGATING CIRCUMSTANCES AND CLARIFY EFFECTS ON SENTENCES

ICC judges should strive to define aggravating and mitigating circumstances precisely, and better articulate their application. Given the numerous, diverse states involved with the ICC, the likelihood that members or judges will agree upon a theory of punishment is low. Clarifying the definition and significance of aggravating and mitigating circumstances, however, is a major and achievable step toward improving international sentencing’s flaws. Clearer jurisprudence on these topics will allow the ICC to develop international sentencing coherently, while preserving judicial discretion.

Despite the advantages of clearer formal guidance and the ability to examine past practice, the Rome Statute and the ICC Rules leave open significant questions about the role and relevance of aggravating and mitigating circumstances, and of the additional sentencing “factors.” The named factors might help judges define additional aggravating and mitigating circumstances, and articulate them with greater precision. ICC judges may wish to consider certain aggravating and mitigating circumstances that are well-established in ICTY and ICTR jurisprudence and suggested by the ICC Rules. These include leadership role or high position, humiliating nature of the crime, and remorse.

The tribunals’ jurisprudence also offers guidelines on the weight that these circumstances carry. For example, case law often describes which mitigating circumstances warrant substantial reductions in sentence versus those that have little impact.⁵⁰ ICC judges should make similar determinations.

CONCLUSION

Current international sentencing practice is not without flaws. Given the early stage of development of the field, flaws are understandable, but are also less severe than scholarship suggests. The ICC has the potential to improve international sentencing practice, and will undertake its early sentencing judgments with more precise guidance than its predecessors did, benefitting from the experience of the ICTY and ICTR. The ICC judges would be wise not to approach sentencing from within the vacuum of the Rome Statute and the ICC Rules, but instead to draw on past experience. This approach will help develop international sentencing and improve international criminal law as whole.

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ENDNOTES: Defending International Sentencing

¹ See, e.g., Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 4(2), Dec. 10, 1984, S. Treaty Doc. No 100-20, 1465 U.N.T.S. 85; Convention on the Prevention and Punishment of the Crime of Genocide art. 5, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277; see also *Report of the International Law Commission to the General Assembly*, [1951] 2 Y.B. Int’l L. Comm’n 137, U.N. Doc. A/18581; *Report of the International Law Commission to the General Assembly*, [1996] 2 Y.B. Int’l L. Comm’n 22, U.N. Doc A/51/10; Robert D. Sloane, *The Expressive Capacity of International Punishment: The Limits*

of the National Law Analogy and the Potential of International Criminal Law, 43 STAN. J. INT’L L. 39, 66 (2007).

² See Statute of the International Tribunal for the Prosecution of Persons Responsible for Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 art. 24(2) U.N. Doc. S/RES/827 (1993) [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda art. 23(2), U.N. Doc S/RES/955 (1994) [hereinafter ICTR Statute]; Rome Statute of the International Criminal Court arts. 78(1), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

³ See ICTY Statute, *supra* note 2, art. 24(2); ICTR Statute *supra* note 2, art. 23(2); Rome Statute, *supra* note 2, art. 78(1).

⁴ ICTY Statute, *supra* note 2, arts. 23(1), 24(2); ICTR Statute, *supra* note 2, arts. 22(1), 23(2).

⁵ See ICTY Rules of Procedure and Evidence Rs. 101(B)(i), 101(B)(ii), U.N. Doc IT/32/Rev.38 (2006), available at <http://www.un.org/icty/legaldoc-e/basic/rpe/IT032Rev38e.pdf> [hereinafter ICTY Rules]; ICTR Rules of Procedure and Evidence Rs. 101(B)(i), 101(B)(ii) (2006), available at <http://69.94.11.53/ENGLISH/rules/101106/rop101106.pdf> [hereinafter ICTR Rules].

⁶ Prosecutor v. Mucić *et al.* (the *Čelebići* Case), ICTY, Case No. IT-96-21, Judgment (Appeals Chamber), Feb. 20, 2001, ¶ 731; see, e.g., Prosecutor v. Dragan Nikolić, ICTY, Case No. IT-94-2, Judgment on Sentencing Appeal (Appeals Chamber), Feb. 4, 2005, ¶ 18 (“[T]he gravity of the offence may be regarded as ‘the litmus test’ in the imposition of an appropriate sentence”); Prosecutor v. Kamuhanda, ICTR, Case No. ICTR-95-54, Judgment and Sentence (Trial Chamber), Jan. 22, 2004, ¶ 760 (“[T]he more heinous the crime, the higher the sentence that should be imposed upon its perpetrator . . .”).

⁷ See, e.g., Prosecutor v. Serushago, ICTR, Case No. ICTR-98-39, Sentencing Judgment (Trial Chamber), Feb. 5, 1999, ¶¶ 13-15.

⁸ See Andrea Carcano, *Sentencing and the Gravity of the Offense in International Criminal Law*, 51 INT’L & COMP. L. Q. 583, 607 (2002).

⁹ See, e.g., Prosecutor v. Deronjić, ICTY, Case No. IT-02-61, Judgment on Sentencing Appeal (Appeals Chamber), July 20, 2005, ¶ 136 (referring to retribution and deterrence as the “main purposes of sentencing”); Prosecutor v. Rutaganda, ICTR, Case No. ICTR-96-3, Judgment and Sentence (Trial Chamber), Dec. 6, 1999, ¶ 456.

¹⁰ See, e.g., Prosecutor v. Bralo, ICTY, Case No. IT-95-17, Sentencing Judgment (Trial Chamber), Dec. 7, 2005 ¶ 22.

¹¹ See, e.g., HUMAN RIGHTS WATCH, GENOCIDE, WAR CRIMES & CRIMES AGAINST HUMANITY: A TOPICAL DIGEST OF THE CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 578, 580, 584, 590-95, 598-604, 607, 621-32, 633-39, 639-42, 644-46, 653-56, 660-61 (2006); HUMAN RIGHTS WATCH, GENOCIDE, WAR CRIMES, CRIMES AGAINST HUMANITY: TOPICAL DIGESTS OF THE CASE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA AND THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 82-84, 85-87, 88-89 (2004).

¹² See ICTY Rules, *supra* note 6, R. 101(B)(iii); ICTR Rules, *supra* note 14, R. 101(B)(iii).

¹³ See generally William A. Schabas, *War Crimes, Crimes against Humanity and the Death Penalty*, 60 ALBANY L. REV. 733 (1993).

¹⁴ See Mirko Bagaric & John Morss, *International Sentencing Law: In Search of a Justification and Coherent Framework*, *International Sentencing Law: In Search of a Justification and Coherent Framework*, 6 INT’L CRIM. L. REV. 191, 193 (2006) (calling international sentencing “marked . . . by discretion and uncertainty” with regard to appropriate penalties); Allison Marston Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, 87 VA. L. REV. 415, 501 (2001) (criticizing the “coherency” of international justice at the ICTY and ICTR).

¹⁵ See, e.g., Steven Glickman, Note, *Victim’s Justice: Legitimizing the Sentencing Regime of the International Criminal Court*, 43 COLUM. J. TRANSNAT’L L. 229, 245(2004) (expressing frustration that international sentences do not adequately “weigh” a crime’s

gravity and, thus, infrequently dispense retributive justice); Bagaric & Morss, *supra* note 15, at 253 (calling tribunal sentences “breathtakingly light”).

¹⁶ See, e.g., Danner, *supra* note 15, at 444-53; Glickman, *supra* note 16, at 230.

¹⁷ See, e.g., *id.* at 501 (criticizing incongruence resulting from the ICTR’s use of such a hierarchy); Carcano, *supra* note 9, at 591, 609.

¹⁸ See, e.g., Sloane, *supra* note 1, at 83 (“[E]motively, virtually all of the . . . crimes [under international criminal jurisdiction] seem to demand the harshest penalties”); Glickman, *supra* note 16, at 230 (“the prison sentences . . . issued by [international courts] have not adequately expressed the extreme moral outrage that the international community must convey . . .”).

¹⁹ See Prosecutor v. Erdemović, ICTY, Case No. IT-96-22, Indictment, ¶¶ 11-12, May 29, 1996, available at <http://www.un.org/icty/indictment/english/erd-ii960529e.htm>; Prosecutor v. Erdemović, ICTY, Case No. IT-96-22, Sentencing Judgment (Trial Chamber), Nov. 29, 1996, ¶ 78.

²⁰ At the time of the case, the ICTY recognized a hierarchy of crimes. Prosecutor v. Erdemović, ICTY, Case No. IT-96-22, Joint Separate Opinion of Judge MacDonald and Judge Vorah (Appeals Chamber), Oct. 7, 1997, ¶ 26.

²¹ See Prosecutor v. Erdemović, ICTY, Case No. IT-96-22, Sentencing Judgment (Trial Chamber), Mar. 5, 1998, ¶¶ 7, 11, Disposition.

²² See *id.*, ¶¶ 17, 16(iv); see also *id.*, ¶ 16(i) (citing his young age and that fact that he did not pose a danger to society as additional mitigating factors proving reformability).

²³ See Glickman, *supra* note 16, at 252, n. 85.

²⁴ See Ralph Henham, *Some Issues for Sentencing in the International Criminal Court*, 52 INT’L & COMP. L. Q. 81, 114 (2003); see also Danner, *supra* note 15, at 441 (noting inconsistency as reinforcing the concern that international justice is “fatally arbitrary”).

²⁵ See HUMAN RIGHTS WATCH, THE JUNE 29 AGREEMENT ON ACCOUNTABILITY AND RECONCILIATION AND THE NEED FOR ADEQUATE PENALTIES FOR THE MOST SERIOUS CRIMES (July 2007), available at <http://hrw.org/backgrounders/ij/uganda0707/uganda0707web.pdf>.

²⁶ See *id.*; William A. Schabas, *Sentencing by International Tribunals: A Human Rights Approach*, 7 DUKE J. COMP. & INT’L L. 461, 485 (1997) [hereinafter Schabas, *Sentencing by International Tribunals*] (noting a statement by French jurists made during the drafting of the ICTY Statute stresses “individualization” of sentence as a “fundamental principle”). See generally SENTENCING, SANCTIONS, AND CORRECTIONS 60 (Nicholas N. Kittrie, Elyce H. Zenoff & Vincent A. Eng eds. 2002).

²⁷ See Immi Tallgren, *The Sensibility and Sense of International Criminal Law*, 13 EUR. J. INT’L L. 561, 564 (2002) (“The inherent problems attending criminal law, and even more so international criminal justice, are not likely to disappear just by developing a perfect theory”); see also Henham, *supra* note 25, at 96 (noting that domestic systems also struggle with punishment theories and sentencing consistency, suggesting that the challenge is greater in international systems).

²⁸ William A. Schabas, *Penalties, in 2 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 1497, 1533 (Antonio Cassese, Paola Gaeta & John R. W. D. Jones eds., 2002) [hereinafter Schabas, *Penalties*].

²⁹ Patricia M. Wald, *Reflections on Judging: At Home and Abroad*, 7 U. PA. J. CONST. L. 219, 246 (2004) (admitting that ICTY judges' cultural backgrounds and understandings "inevitably factor into" their conceptions of what constitutes an appropriate sentence).

³⁰ Compare Prosecutor v. Kambanda, ICTR, Case No. ICTR-97-23, Judgment and Sentence (Trial Chamber), Sept 4, 1998, Verdict (handing down a life sentence for genocide, despite a guilty plea), with Prosecutor v. Serushago, ICTR, Case No. ICTR-98-39, Sentence (Trial Chamber), Feb. 5, 1999, Verdict (issuing a sentence of fifteen years' imprisonment for genocide, in part due to the convicted's guilty plea). The ICTR upheld Kambanda's sentence on appeal and dismissed Serushago's appeal, calling both sentences within the court's "discretionary framework." See Prosecutor v. Kambanda, ICTR, Case No. ICTR-97-23, Judgment (Appeals Chamber), Oct. 2000, ¶ 126; Prosecutor v. Serushago, ICTR, Case No. ICTR-98-39, Reasons for Judgment (Appeals Chamber), Apr. 6, 2000, Conclusions, Disposition.

³¹ See Prosecutor v. Semanza, ICTR, Case No. ICTR-97-20, Judgment (Trial Chamber), May 15, 2003, ¶¶ 562-64, 585-90.

³² See Mark A. Drumbl & Kenneth S. Gallant, *Sentencing Policies and Practices in the International Criminal Tribunals*, 15 FED. SENT'G REP. 140, 142 (2002).

³³ See, e.g., Prosecutor v. Jelisić, ICTY, Case No. IT-95-10, Judgment (Appeals Chamber), July 5, 2001, Disposition; Prosecutor v. Kunarac, Kovač and Vuković, ICTY, Case No. IT-95-23&23/1, Judgment (Appeals Chamber), June 12, 2002, Disposition (Kunarac); Prosecutor v. Kordić and Čerkez, ICTY, Case No. 95-14/2, Judgment (Appeals Chamber), Dec. 17, 2004, Disposition (Kordić); Prosecutor v. Furundžija, ICTY, Case No IT-95-17/1, Judgment (Appeals Chamber), July 21, 2000, Disposition.

³⁴ See, e.g., Prosecutor v. Elizaphan and Gerard Ntakirutimana, ICTR, Case Nos. ICTR-96-10 & ICTR-96-17, Judgment (Appeals Chamber), Dec. 13, 2004, Disposition (Gerard Ntakirutimana); Prosecutor v. Ruzindana, ICTR, Case Nos. ICTR-95-1 & ICTY-96-2, Judgment (Appeals Chamber), June 1, 2001, Disposition.

³⁵ See, e.g., Prosecutor v. Plavšić, ICTY, Case No. IT-00-39&40, Sentencing Judgment (Trial Chamber), Feb. 27, 2003, ¶ 134; Prosecutor v. Strugar, ICTY, IT-01-42, Judgment (Trial Chamber), Jan. 31, 2005, ¶ 478.

³⁶ The classic example is Rwanda, where until recently, offenders prosecuted for international crimes in domestic courts were subject to capital punishment, whereas higher-level offenders before the ICTR faced maximum sentences of life imprisonment. See also Schabas, *Sentencing by International Tribunals*, *supra* note 27, at 480 (explaining that many European jurisdictions prohibit life imprisonment and limit terms of imprisonment to no longer than 20 to 25 years).

³⁷ See, e.g., Wolfgang Schomburg & Ines Peterson, *Genuine Consent to Sexual Violence under International Law*, 101 AM. J. INT'L L. 121, 122-23 (2007).

³⁸ See, e.g., Prosecutor v. Akayesu, ICTR, Case No. 96-4, Judgment (Trial Chamber), Sept. 2, 1998, ¶¶ 184-187; Sentence (Trial Chamber), Oct. 2, 1998; Prosecutor v. Momir Nikolić, ICTY, Case No. IT-02-60, Sentencing Judgment (Trial Chamber), Dec. 2, 2003, ¶¶ 140-183; Judgment on Sentencing Appeal (Appeals Chamber), Mar. 8, 2006, Disposition; Prosecutor v. Dragan Nikolić, ICTY, Case No. IT-94-2, Sentencing Judgment (Trial Chamber), Dec. 18, 2003, ¶ 274, Disposition; Judgment on Sentencing Appeal

(Appeals Chamber), Feb. 4, 2005, Disposition; Prosecutor v. Obrenović, ICTY, Case No. IT-02-60, Sentencing Judgment (Trial Chamber), Dec. 10, 2003, ¶¶ 149-156.

³⁹ Compare Rome Statute, *supra* note 2, art. 78 (calling on judges only to examine the gravity of the crime and the individual circumstances of the convicted), with ICTY Statute, *supra* note 2, art. 24 and ICTR Statute, *supra* note 2, art. 23 (giving the tribunals "recourse" to domestic practice).

⁴⁰ See Henham, *supra* note 25, at 96 (worrying about the "potential for . . . dysfunction" in ICC sentencing if domestic sentencing "paradigms" enter into the picture). See generally Rolf Einar Fife, *Article 77: Applicable Penalties*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES ARTICLE BY ARTICLE 985, 986 (Otto Triffterer ed., 1999).

⁴¹ Rome Statute, *supra* note 2, art. 78(1).

⁴² See Fife, *supra* note 41, at 986 (explaining that the Rome Statute's absence of reference to state sentencing practice is due to its goal of creating a "uniform penalties regime" for international application).

⁴³ Rome Statute, *supra* note 2, art. 77.

⁴⁴ See International Criminal Court Rules of Procedure and Evidence R. 145, Doc. ICC-ASP/1/3 (2002) available at http://www.icc-cpi.int/library/about/officialjournal/Rules_of_Proc_and_Evid_070704-EN.pdf. [hereinafter ICC Rules].

⁴⁵ See, e.g., *id.* R. 145(1)(c) (listing "the nature of the unlawful behavior," "the age, education, and social and economic condition of the convicted person," "the degree of participation of the convicted person," and "the degree of intent" as factors).

⁴⁶ Situation in Uganda, ICC-02/04-01/05, Decision on the Prosecutor's Position on the Decision of the Pre-Trial Chamber II to redact factual descriptions of crimes from the warrants of arrest, motion for reconsideration, and motion for clarification, Oct. 28, 2005, ¶ 19; *cf.* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.) 2007 I.C.J. 140 (Feb. 26), ¶ 223 (concluding that ICTY case law is not binding, but its findings of fact are "highly persuasive" authority "entitled due weight").

⁴⁷ See Prosecutor v. Blaskić, ICTY, Case No. IT-95-14, Judgment (Appeals Chamber), July 29, 2004, ¶ 680 ("it is inappropriate to set down a definitive list of sentencing guidelines"); Prosecutor v. Blagojević and Jokić, ICTY, Case No. IT-02-60, Judgment (Trial Chamber), Jan. 17, 2005, ¶ 838 (emphasizing the importance of the Trial Chamber's ultimate discretion in defining and weighing aggravating and mitigating circumstances).

⁴⁸ Schabas, *Penalties*, *supra* note 29, at 1533.

⁴⁹ See Fife, *supra* note 41, at 995 (noting that drafters of the Rome Statute's penalties section discussed the ICTR providing guidance on life sentences).

⁵⁰ Compare e.g., Prosecutor v. Babić, ICTY, Case No. IT-03-72, Judgment on Sentencing Appeal (Appeals Chamber), July 18, 2005, ¶ 49 (finding that the trial chamber did not err in according "substantial weight" to cooperation with the Prosecutor), with e.g. Prosecutor v. Bralo, ICTY, Case No. IT-95-17, Sentencing Judgment (Trial Chamber), Dec. 7, 2005, ¶ 48 (ascribing "little weight" to Bralo's mitigating family circumstances).