

Sentencing at the International Criminal Court

A Practice in Search of a Rationale

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By

Colin J Flynn

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Abstract

The Rome Statute of the International Criminal Court (ICC) and the accompanying Elements of Crimes and Rules of Procedure and Evidence set out in some detail the offence types, the elements of crimes and the procedures relating to the investigation and prosecution of the international crimes within its jurisdiction. However, with respect to the issue of sentencing, the guidance provided in the Rome Statute is limited. The Rome Statute in particular is silent with respect to the principles that should apply at the sentencing stage, and the influence such principles should have on the development of a systematic approach to sentencing.

This thesis argues that the development of a principled approach to sentencing is critical for the future of the ICC. What penalty is imposed and more importantly the reasons for its imposition are central to the sustained legitimacy of any criminal justice system, whether domestic or international. The thesis proposes that a ‘principled approach’ to sentencing at the ICC should be based on an analysis of the purpose and structure of that court, and on the perceived role sentencing should play in reflecting and enhancing that purpose. The analysis undertaken concludes that the expressive principle of sentencing complements what the framers of the Rome Statute saw as the purpose of the Rome Statute, and best reflects what the Rome Statute is intended to accomplish. This principle focuses on the symbolic significance of punishment, expressing attitudes of resentment and condemnation, and of judgments of disapproval and reprobation, informing the offender and the international community that such actions will not be tolerated. The thesis argues that with the adoption of the expressive principle of sentencing to focus the imposition of penalties at the ICC, the court can develop a detailed sentencing matrix for the punishment of those individuals found guilty of any of the offences within its jurisdiction.

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ABBREVIATIONS

ABA J	American Bar Association Journal
AJIL	American Journal of International Law
Albany L R	Albany Law Review
Am J Comp L	American Journal of Comparative Law
Am J Int'l L & Pol'y	American Journal of International Law and Policy
Am L F	Amsterdam Law Forum
Am Un Int'l L R	American University International Law Review
ARIEL	Austrian Review of International and European Law
Ariz St L J	Arizona State Law Journal
B J Crim	British Journal of Criminology
Brit Y B Int'l L	British Yearbook of International Law
Camb L J	Cambridge Law Journal
Case West R J Int'l L	Case Western Reserve Journal of International Law
Chi-Kent L Rev	Chicago Kent Law Review
Chinese J Int'l L	Chinese Journal of International Law
Chitty's L J	Chitty's Law Journal
Colum J Transnat'l L	Columbia Journal of Transnational Law
Crim App R	Criminal Appeal Reports
Crim L Forum	Criminal Law Forum
Crim L R	Criminal Law Review
CUP	Cambridge University Press
Dalhousie L J	Dalhousie Law Journal

Denver J Int'l L & Policy	Denver Journal of International Law and Policy
Duke J Comp & Int'l L	Duke Journal of Comparative and International Law
ECHR	European Court of Human Rights
EJIL	European Journal of International Law
Fordham Int'l L J	Fordham International Law Journal
Fordham Int'l L Rev	Fordham International Law Review
Geo J Int'l and Comp L	Georgia Journal of International and Comparative Law
Geo Wash L Rev	George Washington Law Review
Goettingen J Int'l L	Goettingen Journal of International Law
Harv Hum Rts J	Harvard Human Rights Journal
Harv L Rev	Harvard Law Review
Hofstra L Rev	Hofstra Law Review
Hum Rgts Q	Human Right Quarterly
ICC	International Criminal Court
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICLR	International Criminal Law Review
ICTR	International Criminal Tribunal Rwanda
ICTY	International Criminal Tribunal Yugoslavia
ILC	International Law Commission
IMT	International Military Tribunal
Ind L J	Indiana Law Journal
Indiana Int'l and Comp L Rev	Indiana International and Comparative Law Review

Int J L C	International Journal of Law in Context
I J Soc Law	International Journal of the Sociology of Law
IJTJ	International Journal of Transnational Justice
Inter Stud Q	International Studies Quarterly
Isr L R	Israeli Law Review
J Crim L and Criminology	Journal of Criminal Law and Criminology
J Hist Int'l L	Journal of History of International Law
JICJ	Journal of International Criminal Justice
Md L Rev	Maryland Law Review
Melb J Int'l L	Melbourne Journal of International Law
Mich J Int'l L	Michigan Journal of International Law
Mich St Un Coll L J Int'l L	Michigan State University College Journal of International Law
Minn L Rev	Minnesota Law Review
MULR	Monash University Law Review
New Crim L Rev	New Criminal Law Review
NZJPIL	New Zealand Journal of Public and International Law
Ohio St J Dispute Resolution	Ohio State Journal of Dispute Resolution
Ottawa L Rev	Ottawa Law Review
OUP	Oxford University Press
Pace Int'l L Rev	Pace International Law Review
QCCS	Quebec Superior Court

S C R	Supreme Court of Canada
SCSL	Special Court for Sierra Leone
Soc Sc Q	Social Science Quarterly
Stan J Int'l L	Stanford Journal of International Law
Stan L Rev	Stanford Law Review
Suffolk Transnat'l L Rev	Suffolk Transnational Law Review
The Am Pol Sc R	The American Political Science Review
UCLA L Rev	University of California at Los Angeles Law Review
U Chi L Rev	University of Chicago Law Review
Un Colo L Rev	University of Colorado Law review
U Pa L Rev	University of Pennsylvania Law Review
Va J Int'l L	Virginia Journal of International Law
VCLT	Vienna Convention on the Law of Treaties
Vill L R	Villanova Law Review
Wash U Global Stud L Rev	Washington University Global Studies Law Review
Wash Un L R	Washington University Law Review
Wis L Rev	Wisconsin Law Review
Yale J Int'l L	Yale Journal of International Law
Yale J of Law and Human	Yale Journal of Law and the Humanities
YIHL	Yearbook of International Humanitarian Law

Chapter 1

The Problem of Punishment

'...Even as there is no word in human speech to describe the deeds such as the deeds of the appellant, so there is no punishment under human law sufficiently grave to match the appellant's guilt'¹
(Attorney General of the Government of Israel v Eichmann)

The justification for punishing those who have committed international crimes is problematic. It is problematic for the very reason voiced by the Supreme Court of Israel in the Eichmann case - the punishment imposed cannot, in most cases, either match or be perceived to match the heinous nature of the crimes committed. This is because most of the crimes prosecuted through international tribunals involve multiple victims, and involve the most degrading and horrendous actions perpetrated on fellow humans.² It is also problematic because the punishment imposed cannot, in most cases, ever satisfy the families of those victims who have been exterminated as a result of the actions of the convicted person. Kaing Guek Eav (Comrade Duch), known as the jailer in Cambodia during the Khmer Rouge regime, was found guilty of the torture and murder of over 12,000 people, and was initially sentenced to 35 years imprisonment.³ Family members of the victims were outraged at the sentence,⁴ demanding that the sentence for the then 67 year old should be increased to life imprisonment.⁵ The fact that he would probably die in

¹ *Attorney General of the Government of Israel v Eichmann* (1962) 36 ILR (SC) 277, 341.

² Obvious examples include the prosecution of those leaders in Germany responsible for the murder of millions of individuals and in recent times the prosecution of those leaders in Rwanda for the extermination of up to 800,000 Tutsis.

³ Alexander Topping, 'Khmer Rouge Chief Jailer Sentenced for War Crimes' The Guardian (London, July 2010) <<http://www.theguardian.com/world/2010/jul/26/khmer-rouge-chief-jailer-war-crimes>> accessed 29 April 2015.

⁴ *ibid.*

⁵ On appeal the sentence was increased to one of life imprisonment. See Mark Vlasic, 'Life for Comrad Duch: A Milestone for International Justice' The Guardian (London, 13 March 2012) <<https://www.theguardian.com/commentisfree/cifamerica/2012/mar/13/cambodia-khmer-rouge>> accessed 29 April 2015.

prison because of this lengthy sentence was immaterial. For the families of the victims of Comrade Duch it was the symbolic significance of the imposition of the most severe penalty available that was most important, as in comparative terms the punishment imposed would never match the gravity of the crimes committed in those cases.

The cases of Eichmann and Comrade Duch illustrate just some of the problems associated with the sentencing of individuals for international crimes. These are not the only problems facing an international tribunal at its sentencing stage. However, they are illustrative of the problems and related issues that must be addressed by international tribunals when considering the imposition of sentences on those convicted of genocide, crimes against humanity and war crimes.

The International Criminal Court (ICC) is just beginning to consider sentencing issues in its deliberations on cases before it.⁶ The process and substance for these sentencing considerations for the ICC are set out in Articles 75-80 of the Rome Statute,⁷ and in Rules 145-148 of the Rules of Procedure and Evidence.⁸ The broad research question addressed in this thesis is whether the ICC can, within the parameters provided to it by the Rome Statute and the Rules of Procedure and Evidence, establish a proper sentencing process for the court and thereby address the various problems and related issues associated with sentencing at the international level. This question can be subdivided into two related questions. The first is whether within the existing structure of the Rome Statute, including the Rules of Procedure and Evidence, there exist sufficient statutory guidance for the imposition of appropriate sentences for those convicted of any of the crimes within the jurisdiction of the court. The argument presented here is that

⁶ The court has released three sentencing decisions to the end of March 2016. These are *Prosecutor v Thomas Lubanga Dyilo* (Trial Chamber I) ICC-01/04-01/06-2901 (10 July 2012); *Prosecutor v Thomas Lubanga Dyilo* (Appeals Chamber) ICC -01/04-01/06-3122 A 4 A 6 (1 December 2014); *Prosecutor v Germain Katanga* (Trial Chamber II) ICC-01/04-01/07-3484-tENG (23 May 2014).

⁷ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3.

⁸ Rules of Procedure and Evidence ICC-ASP/1/3 (3-10 September 2002).

some of the sentencing issues can, by utilization of the interpretative provisions of the Vienna Convention on the Law of Treaties,⁹ be addressed within the sentencing structure of the Rome Statute and the Rules of Procedure and Evidence. However, because of the strictures placed on the court by Article 21 of the Rome Statute,¹⁰ other sentencing issues, in particular the justifications for the imposition of sentences, cannot be found within the wording of the Rome Statute or the Rules of Procedure and Evidence. This leads to the second of the research questions. That is, because of the constraints placed on the court by Article 21, can justifications for sentencing be even considered by the ICC at the sentencing stage, if they can what should they be, and can they interface with the existing provisions of the Rome Statute and the Rules of Procedure and Evidence to form a proper sentence process for the court?

The present chapter will introduce the main issues of this thesis. It provides a short overview of the development of the concept of individual responsibility in international criminal law and its necessary relationship to the establishment of a punishment regime. It then discusses the general structure of the Rome Statute and the limited focus on sentencing in the Statute and Rules. The approach to the research questions will then be discussed in some detail, followed by an outline of how the various issues will be addressed in the subsequent chapters.

Section 1 Individual Responsibility and Punishment in International Criminal Law

International criminal law is a new and a distinct branch of public international law. Antonio Cassese has characterized international criminal law as a hybrid branch of law, in that it is ‘public international law impregnated with notions, principles and legal

⁹ Vienna Convention on the Law of Treaties (adopted 23 May 1969, in force 27 January 1980) 1155 UNTS 331. This treaty will be referred to throughout the thesis as the VCLT.

¹⁰ Article 21 is entitled ‘Applicable Law’ and requires the court to undertake a three stage hierarchical process in interpreting any provisions of the Rome Statute, or in filling any lacunae in the legislation. Only if the court cannot find meaning within the legislation itself can it proceed to other sources of law enumerated in Article 21 to provide interpretation and/or to fill lacunae in the statute.

constructs derived from national criminal law and human rights law'.¹¹ What is most distinctive of international criminal law is that it is premised on the notion of individual obligations rather than of state obligations. In international criminal law the individual is figuratively stripped of his statehood, and his behaviour is scrutinized to determine if it conforms to international humanitarian norms. The focus is on individual responsibility, and not state responsibility.¹²

The recognition of individual responsibility for violations of international law was a novel concept, but one that initially did not receive universal acceptance.¹³ However, it was a concept that was adopted by the victors at the close of the Second World War,¹⁴ and formed the basis of prosecutions for war crimes, crimes against peace and crimes against humanity at the International Military Tribunal at Nuremberg and the International Military Tribunal Far East.¹⁵ The International Criminal Tribunal

¹¹ Antonio Cassese, 'International Criminal Law' in Malcolm D Evans (ed), *International Law* (2nd edn, OUP 2006) 719, 722. Cassese makes similar observations of the composition of international criminal law in Antonio Cassese, *International Criminal Law* (2nd edn, OUP 2008) 6 and in Antonio Cassese and others, *International Criminal Law: Cases and Commentary* (OUP 2011) 1.

¹² The state may as well have responsibility, but not within the context of international criminal law. It may have responsibility because of either treaty obligations, or because customary law has recognized state responsibility. The case of *Bosnia and Herzegovina v Serbia and Montenegro* [2007] ICJ Rep 43 illustrates that states may have responsibilities under treaty obligations for violations of those treaties. Such violations can, depending on the wording of the treaty, result in a state being found to have committed one of the recognized crimes prohibited by the terms of the treaty. The majority of the court concluded that the respondent, Serbia and Montenegro, did not commit genocide, but it did fail to prevent genocide. It was therefore in violation of its treaty obligations under the Convention on the Prevention and Punishment of the Crime of Genocide.

¹³ See the analysis in George Manner, 'The Legal Nature and Punishment of Criminal Acts of Violence Contrary to the Laws of War' (1943) 37 AJIL 407.

¹⁴ The classic comment on this issue is from the Chief Prosecutor of the IMT Robert Jackson who, in his opening statement to the Court stated: 'This principle of personal liability is a necessary as well as logical one if international law is to render real help to the maintenance of peace. . . . the idea that a state, any more than a corporation commits crimes, is a fiction. Crimes always are committed only by persons. While it is quite proper to employ the fiction of responsibility of a state or corporation for the purpose of imposing a collective liability, it is quite intolerable to let such a legalism become the basis of personal immunity'. Opening Statement of Robert Jackson at IMT November 21, 1945 <<http://law2.umkc.edu/faculty/projects>> accessed 19 April 2012.

Yugoslavia (ICTY) and the International Criminal Tribunal Rwanda (ICTR) also focused on the concept of individual responsibility for perpetration of international crimes, but there was some recognition that many of these crimes had a collective aspect to them.¹⁶ The very crimes that have been criminalized by these newest tribunals – crimes against humanity, serious war crimes, genocide and for the ICC the crime of aggression, are crimes that, at a minimum, arise from or are influenced by collective choices.¹⁷ Although the individual makes his or her individual choice to commit the crime, that choice is influenced or indeed coerced by the collective will of the governing body, the influential group or sub group, the belligerent territory or the rogue state.¹⁸ Yet, despite this realization, the concept of individual responsibility took ‘center stage’ in international criminal law.¹⁹ Individual responsibility for the commission of international crimes was reflected in the adoption of the positive law concepts of the *actus reus* and *mens rea* components of the offences charged,²⁰ and in the imposition of the appropriate

¹⁵ Edoardo Greppi ‘The Evolution of Individual Criminal Responsibility under International Law’ (1999) International Review of the Red Cross No. 835. <<https://www.icrc.org/eng/resources/documents>> accessed 19 April 2012.

¹⁶ Gerry Simpson, ‘Men and Abstract Entities : Individual Responsibility and Collective Guilt in International Criminal Law’ in Andre Nollkaemper and Harmen van der Wilt (eds), *System Criminality in International Law* (CUP 2009) 69, 82 .

¹⁷ J Alvarez, ‘Crimes of State/Crimes of Hate: Lessons from Rwanda’ (1999) 24 Yale J Int’l L 365, 367-368.

¹⁸ Herbert C Kelman, ‘The Policy Context of International Crimes’ in Andre Nollkaemper and Harmen van der Wilt (eds), *System Criminality in International Law* (CUP 2009) 27.

¹⁹ Simpson (n 16) 86. However, Simpson also argues that what he calls the Versailles Model of state criminality does still co-exist with the concept of individual responsibility. At the time there was a prosecution in the Hague at the ICTY of Slobodan Milosevic, there was at the same time an action by Bosnia against Serbia at the ICJ for state responsibility for the crime of genocide.

²⁰ Articles 6, 7 and 8 of the Rome Statute define in detail the three offence types-in essence the *actus reus* of the offences. Article 30, contained in Part 3 titled General Principles of Criminal Law, sets out the general *mens rea* components of the offences within the jurisdiction of the ICC. There is some dispute with respect to the meaning to be ascribed to the *mens rea* components, and the meaning of some of the wording of Article 30. (See Roger S Clark, ‘The Mental Element in International Criminal Law: The Rome Statute of the International Criminal Court and the Elements of Offences’ (2001) 12 Crim L F 291; Mohamed Elewa Badar, ‘The Mental Element in the Rome Statute of the International Criminal Court: A Commentary From A Comparative Criminal Law Perspective’ (2008) 19 Crim L F 473). However, the adoption of the more detailed definition for both crimes against humanity and war crimes, and the adoption of a general mental element common to the three offences does emphasize the focus on the individual responsibility for offences under the jurisdiction of the ICC.

punishment for those convicted of the particular crimes under consideration. In the field of international criminal law it was the individual who was the subject of scrutiny, and it was the individual, and not the collective who must suffer the consequences for the actions taken.

The acceptance of the concept of individual responsibility for the commission of international crimes legitimizes the imposition of punishment on those individuals found guilty of the commission of such crimes. The individual has made the choice to complete certain acts which have been classified as crimes under international criminal law. As such, the violator of international criminal law, as a rational individual, is to be punished for any transgressions in accordance with the penalties available in the statute under which each tribunal operates. However, the recent tribunals sanctioned by the United Nations have provided little guidance on sentencing in international criminal law.²¹ These tribunals have simply borrowed the domestic law principles of the western legal systems and applied them to the international setting.²² In undertaking such a process there has been no attempt to develop an ‘internationalized’ sentencing regime reflective of the purposes of the particular international tribunal exercising jurisdiction, and focused on the international setting.²³ The result, it will be argued here, has been an inadequate approach to sentencing in international criminal law, and should not be adopted by the ICC in its sentencing practice.

²¹ These tribunals include the International Criminal Tribunal Yugoslavia (ICTY), the International Criminal Tribunal Rwanda (ICTR), the Tribunal for East Timor, the tribunal for Sierra Leone, and most recently the tribunal for Cambodia. See in particular the analysis of Mirko Bagaric and John Morss, ‘International Sentencing Law: In Search of a Justification and Coherent Framework’ (2006) 6 ICLR 191.

²² Mark Drumbl in his study of punishment in international law has recognized and questioned the transfer of domestic justifications of punishment to the international setting. Drumbl concludes that there is a need for a different approach to sentencing in international criminal law, and that the borrowing of domestic justifications just does not fit the form and nature of the international crimes of concern. See Mark Drumbl, *Atrocity, Punishment, Atrocity and International Law* (CUP 2007), especially ch 5 ‘Legal Mimicry’.

²³ ibid.

Section 2 Punishment/Sentencing in International Criminal Law Tribunals

The emphasis in international criminal law is placed on the trial.²⁴ This includes the process from the initiation of the charge, the capture of the recalcitrant offenders, the pre-trial motions, the presentation of evidence and the arguments with respect to the sufficiency of the evidence.²⁵ While the trial process satisfies the goal that any person who is within the court's jurisdiction can be the subject of prosecution for their perceived role in the commission of atrocities, its focus is concentrated on due process concerns, evidential rules and the legal analysis associated with determinations of guilt or innocence.²⁶ While finding of guilt vindicates one of the primary goals of the ICC that it put an end to impunity, the trial process and its findings provides little opportunity for the court to comment on, to emphasize, and to elaborate on the ultimate goals of the Rome Statute. Rather it falls to the sentencing phase of that process to fulfill that role.

It is this sentencing phase, and the infliction of the appropriate punishment itself, that is the most public face of any criminal justice system.²⁷ This is as true of any criminal justice system, whether international or domestic in nature. What penalty is

²⁴ David Luban, 'Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law' in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 575, 582.

²⁵ At the ICC the process requires that the Office of the Prosecutor apply to the court for the issuance of a summons or a warrant for the arrest of any individual under investigation. It is for the Pre-Trial Chamber to make a determination if there is sufficient evidence for the issuance of either the summons or the warrant. (See Part 5, in particular Article 58 of the Rome Statute).

²⁶ The four trial decisions that have been completed by the ICC up to March 31, 2016, that of *Prosecutor v Thomas Lubanga Dyilo* (Trial Chamber I) ICC-01/04-01/06-2842 (14 March 2012), *Prosecutor v Mathieu Ngudjolo Chui* (Trial Chamber II) ICC-01/04-02/12-3-tENG (18 December 2012), *Prosecutor v Germain Katanga* (Trial Chamber II) ICC-01/04-01/07-3436 (7 March 2014), and the *Prosecutor v Jean-Pierre Bemba Gombo* (Trial Chamber III) ICC-01/05-01/08-3343 (21 March 2016) are lengthy , and focus on the various evidentiary and other legal issues so essential for the determination of the charges against the individuals. Issues with respect to the purpose or function of the ICC and the intent of the framers of the Rome Statute receive scant if any attention during the trial process. They are typical examples of the approach of international tribunals to the decision making process necessary to their mandate. An examination of the many trial decisions of the ICTY and the ICTR reflect the same approach.

²⁷ Stuart Beresford, 'Unshackling the paper tiger- the sentencing practices of the ad hoc international criminal tribunals for the former Yugoslavia and Rwanda' (2001) 1 ICLR 33.

imposed and more importantly the reasons for its imposition are central to the sustained legitimacy of any criminal justice system, whether domestic or international. The reasons for the imposition of a sentence should reflect the values that are held most sacred by the system, values which are recognized and accepted by the community at large. Because of either social or cultural differences or other contextual influences, sentencing purposes can differ from state to state, and in the international context from one tribunal to the next. In the international context, like the domestic context, it sentencing purposes really depends on the purpose of the particular tribunal and its particular focus.²⁸ What norms do punishment enhance or protect, and what are the best punitive means to enhance or protect those norms? Rationales of sentencing are important because they help justify the type of penalty to be imposed, and the quantum of that penalty. Bagaric and Morss note that

'the absence of a justificatory rationale for international sentencing is largely the reason for the confused and somewhat formless state of international sentencing practice which is marked by a high degree of discretion and uncertainty regarding the considerations that are relevant to the determination of an appropriate sanction. . . . international sentencers regularly invoke the principal domestic favorites' of deterrence, retribution and rehabilitation. However, generally insufficient consideration is given to how these objectives sit with the rationale for international sentencing and the efficacy of punishment to achieve these goals'.²⁹

In the domestic sphere classical criminal law theory recognizes a number of justifications for sentencing – deterrence, retribution, public protection and rehabilitation.³⁰ Sentences imposed are generally reflective of one or more of these justifications. Some writers have questioned the transportability of the domestic justifications for sentencing onto the international scene, asking how appropriate such justifications are for the types of offences that have been recognized as international

²⁸ Adrian Hoel, 'The Sentencing Provisions of the International Criminal Court' (2005) 1 IJPS 37, 51; Robert Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law' (2007) 43 Stan J Int'l L 39, 48.

²⁹ Bagaric and Morss (n 21) 193.

³⁰ Andrew Ashworth, *Sentencing and Criminal Justice* (3rd edn, Butterworths 2000) 62-78.

crimes.³¹ Others have suggested the need for the development of a new criminology, and a new penology for those who commit international crimes.³² However, to date the issue of punishment in the form of sentencing in international criminal law has received scant attention. The sentencing provisions of the ICTY and the ICTR consist of a recitation of the penalties available to the tribunal and little more.³³ The justifications for the imposition of the penalty are not provided in statutory framework, leaving it to the particular tribunal to provide, where it is deemed necessary, the reasons for the imposition of the punishment. Traditionally, as Schabas notes, the imposition of a penalty by an international tribunal was ‘. . .little more than an afterthought’.³⁴ Little justification was provided for the imposition of the penalty, and where a justification was espoused, the explanation for its use lacked detail, and was at times confusing.³⁵

The statutes of the ICTY and the ICTR were created by a resolution of the Security Council of the United Nations.³⁶ The Rome Statute creates a treaty based court. That is, a State party must agree to be bound by the treaty, either through signature, ratification, accession, or by some other agreed means.³⁷ Many of the State parties to the Rome Statute had a role to play in negotiating the content of the treaty, and all those

³¹ Sloane (n 28); Drumbl (n 22).

³² Mark Drumbl, ‘Collective Violence and Individual Punishment: The Criminality of Mass Atrocity’ (2004-2005) 99 Northwest U L Rev 539.

³³ William Schabas, ‘Sentencing by International Tribunals: A Human Rights Approach’ (1997) 7 Duke J Comp & Int’l L 498.

³⁴ William Schabas, ‘From Leipzig (1923) to Arusha (1996)’ in M Cherif Bassiouni (ed), *International Criminal Law Vol 3* (Transnational Publishers 1999) 171.

³⁵ See Silvia D’ Ascoli, *Sentencing in International Criminal Law* (Hart 2011) for an analysis of the decision making of the ICTY and the ICTR on sentencing and the problems of justifications for punishment.

³⁶ UNSC Res 827 (25 May 1993) UN Doc S/Res /827 (ICTY); UNSC Res 955 (8 November 1994) UN Doc S/Res/955 (ICTR).

³⁷ Anthony Aust, *Modern Treaty Law and Practice* (CUP 2000)75-89.

bound by the treaty are only so bound by their consent.³⁸ The Rome Statute creating the International Criminal Court is a more complete Code for the investigation, charging, trial, sentencing and release of those who have been the subject of the court's jurisdiction than any other international statute in the area of international criminal law.³⁹ Divided into 13 Parts, the Rome Statute contains detailed sections on Jurisdiction, Admissibility and Applicable Law,⁴⁰ General Principles of Law,⁴¹ Investigation and Prosecution,⁴² and The Trial.⁴³ It also has, through the Assembly of State Parties, adopted a detailed analysis of the Elements of Crimes, which, pursuant to Article 9 of the Rome Statute, are to assist the court in its interpretation of the crimes under the court's jurisdiction. A set of Rules of Procedure and Evidence have also been adopted by these state parties, consisting of 225 Rules setting out in detail how the court should proceed in dealing with various matters. Sentencing is addressed in Part 7 of the Rome Statute, and consists of only four sections of a very general nature. Sentencing is also addressed in Chapter 7 of the Rules of Procedure and Evidence, and consists of only four Rules. Interestingly the sentencing provisions of the Rome Statute and the Rules of Procedure and Evidence are more

³⁸ The only exception to this general principle is when a reference is made to the ICC by a Resolution of the Security Council. Article 13(b) authorizes the ICC to exercise jurisdiction with respect to a crime under its jurisdiction when such is referred by the Security Council under the authority of Chapter V11 of the Charter of the United Nations. In such a circumstance the particular State may not be a signatory to the Rome Statute, yet by the operation of Article 13(b) the ICC will still exercise jurisdiction. There are presently two situations in which matters have been referred to the ICC by a Resolution of the Security Council where the State in which the crimes are alleged to have occurred is not a signatory to the Rome Statute. The first is the situation in Sudan, referred to the ICC by Resolution of the Security Council in March 2005 (United Nations Security Council Res 1593 (31 March 2005) UN Doc S/Res/1593. The second is the situation in Libya, referred to the ICC by Resolution of the Security Council in February 2011 (United Nations Security Council Res 1970 (26 February 2011) UN Doc S/Res 1970. The ICC has taken up both cases, and both matters are presently in the process of being dealt with by the court.

³⁹ Hoel (n 28) 68; Shahram Dana, 'Beyond Retroactivity To Realizing Justice: A Theory of the Principle of Legality in International Criminal Law Sentencing' (2009) 99 J Crim L & Criminology 857, 920; Kenneth Gallant , *The Principle of Legality in International and Comparative Criminal Law* (CUP 2009) 331-337; Leena Grover, 'A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the International Criminal Court' (2010) 21 EJIL 543, 552-553.

⁴⁰ Part 2 Rome Statute Articles 5-21.

⁴¹ Part 3 Rome Statute Articles 22-33.

⁴² Part 4 Rome Statute Articles 53-61.

⁴³ Part 5 Rome Statute Articles 62-76.

detailed than in any other statute establishing an international tribunal for the prosecution of international crimes.⁴⁴ Yet these sentencing provisions fail to address the justifications for sentencing, to consider the hierarchy of offences or provide any detailed guidance for the factors to be considered in the determination of the type and quantum of sentence.⁴⁵ The Rome Statute provides minimal guidance with respect to when a life imprisonment should be imposed, when a fine should be considered and little guidance when and if restitution and reparations to victims should be imposed. This is in stark contrast to many of the other provisions of the Rome Statute which are very detailed in nature, and provide clear guidance to the court.⁴⁶ It is therefore left to the ICC to attempt to determine, if it can, the justifications for the imposition of the particular sentence. It is also left to the ICC to determine, if it can, what role any justifications of sentencing should play in the sentencing process, how they might work in combination with other factors, such as offence types to attract more severe sentences, or how they might influence the decision to impose a fixed term of imprisonment versus a life sentence. It is also left to the ICC to determine, if it can, how these justifications should combine with the various factors set out in Article 78 of the Statute and Rule 145 of the Rules of Procedure and Evidence to determine the appropriate sentence.

Section 3 The Approach of the Thesis

The broad question this thesis wishes to address is whether the ICC can establish a systematic approach to sentencing, and, if so, what form should it take? To answer this question, the thesis addresses this issue within the context of Article 21 of the Rome Statute and the role it plays in the determination of the law to apply to sentencing at the ICC. Article 21 is titled ‘Applicable Law’ and it sets out a three stage process which the ICC must follow in determining the law to apply to any issue before the court. The first

⁴⁴ Dana (n 39) 857.

⁴⁵ See Part 7 Penalties Rome Statute.

⁴⁶ See for example Part 2 (Jurisdiction, Admissibility and Applicable Law), Part 3 (General Principles of Criminal Law), Part 5 (Investigation and Prosecution) and Part 6 (The Trial).

stage is to determine if, within the parameters of the Statute and Rules the applicable law can be found. If not then the second stage is to look to applicable treaties and the principles and rules of international law. If the use of the second stage does not yield success, the third stage is to apply general principles of law found in the legal systems of the world that are applicable to the issue for consideration by the ICC. In following this mandatory process set out in Article 21, the first question the thesis addresses is whether within the Rome Statute and the Rules of Procedure and Evidence there is sufficient statutory guidance for the imposition of appropriate sentences for those convicted of any of the crimes within the jurisdiction of the ICC. The approach is a traditional application of the doctrinal method of research, looking at the legislative provisions, using the interpretative aids in the VCLT, and analyzing the existing case law from the ICC to determine what meaning can be ascribed to the words provided.⁴⁷ The result of the application of stage one is that by utilizing the interpretative provisions of the VCLT some clarity can be provided to many of the provisions of the Statute and Rules that pertain to sentencing. However, there is no reference to any justifications for sentencing in the Rome Statute, and the interpretative provisions of the VCLT can provide no assistance in determining if and what types of justifications of sentencing the ICC should apply.

The second question that therefore follows is whether the provisions of Article 21 permit justifications for sentencing to be considered at the sentencing stage by the court, if so what should be the justifications of sentence to apply, and can those justifications interface with the existing provisions of the Rome Statute and the Rules of Procedure and Evidence to form a proper sentence process for the ICC? This again calls for a doctrinal approach to the meaning to be ascribed to Articles 21(1)(b) and 21(1)(c) of the Rome Statute. While treaties and the principles and rules of international law do not assist, under Article 21(1)(c) there exists among nations of both the common law and civil law

⁴⁷ The traditional doctrinal approach to legal research is canvassed by Terry Hutchinson, in his article titled ‘Doctrinal Research’. In the article Hutchinson canvasses various definitions of the meaning of doctrinal research, and concludes ‘In this method, the essential features of the legislation and the caselaw are examined critically and then all the relevant elements are combined or synthesized to establish an arguably correct and complete statement of the law on the matter in hand’. (See Terry Hutchinson, ‘Doctrinal Research’ in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2013) 7, 9-10.

traditions attempts to apply justifications for the imposition of appropriate sentences for those in domestic jurisdictions who have committed offences of war crimes, crimes against humanity or genocide. These justifications are encapsulated within the concept of ‘principles of sentencing’ to apply to each of the cases before the court. While the particular principles may receive different emphasis in different domestic jurisdictions, what is common to them all is that each relies on ‘principles of sentencing’ to justify the imposition of the appropriate punishment in a particular case.

Once it is determined that the court can consider principles of sentencing in its decisions on the appropriate penalty, an analytical approach to the social science research on the effectiveness of the traditional principles of sentencing in both domestic and international law is adopted and applied. The result is that the traditional principles of sentencing that have been applied to sentencing in domestic and international criminal law are found to be wanting. To determine what principles of sentence should apply at the ICC an analysis of the purpose of the ICC, determined by focusing on the interplay of the historical and political factors that influenced the development of the Rome Statute is undertaken to ascertain which principles best fit its purpose.⁴⁸ The analytical approach employed in this part of the analysis is influenced by Garland’s 1990 study on the concept of punishment as a social institution.⁴⁹ Punishment for Garland is a complex process involving ‘law-making, conviction, sentencing, and the administration of penalties’.⁵⁰ He argues that punishment is grounded in history, and its present forms are not only influenced by history, but also by present social and cultural circumstances and present social policy.⁵¹ But, as Garland argues, this is only part of what punishment is. It

⁴⁸ Dermott Feenan has described such an approach as ‘transdisciplinarity’, cutting across various disciplinary lines to provide an analysis of a legal construct. (See Dermot Feenan, ‘Forward. Socio-legal Studies and the Humanities’ (2009) 5 Int J L C 235, 238). See also Philip Handler, who has also recognized the use of a broader approach to the investigation of legal history, which encroaches on the ‘political, intellectual and social realms’ (See Philip Handler, ‘Legal History’ in Dawn Watkins and Mandy Burton (eds), *Research Methods in Law* (Routledge 2013) 85,86.

⁴⁹ David Garland, *Punishment and Modern Society* (University of Chicago Press 1990).

⁵⁰ *ibid* 17.

⁵¹ *ibid* 21.

is also a social process which, in his words, ‘shapes the social environment as much as the reverse’.⁵² In essence he argues that to understand punishment is to understand it in two contexts. On one side of the equation punishment is the ‘broad patterns of cultural meanings’ which influence the form punishment will take.⁵³ But the forms punishment takes also influences the ‘overarching culture’ and contributes to its changing structure.⁵⁴

The analysis advanced at this stage in the thesis uses Garland’s general approach to an understanding of punishment to determine what form sentencing, as one aspect of the punishment regime, should take, how it can be justified, and what potential effects it could have on the broader world community.⁵⁵ It is well recognized that Garland’s approach to an analysis of punishment, as set out in his study, is focused on either individual societies, or at best western societies. Such societies have certain integrated sets of beliefs, goals and structures which are based on a particular culture and are influenced by that culture. The nature of international criminal law does not have as a base a cohesive society with a set of beliefs, goals and structures which all interact to support that societal order. Yet, it is the position here that Garland’s analytical approach is of use in exploring the factors relevant to the development of the Rome Statute and relevant to determining which sentencing purposes, principles and processes should be adopted by the ICC. It will be argued there is an understanding among state parties as to the purpose of the Rome Statute, and what within the broader social order and the practical parameters of penal process can be accomplished by sentencing in this international context. Within that broad context, the proposal here is to ask what principles of sentencing reflect the historical backdrop to the particular institution that is the ICC, what reflects its purpose, and on the reverse, what form should principles of sentencing take to focus the broader international social reality? In essence what type of

⁵² ibid 22.

⁵³ ibid 249.

⁵⁴ ibid 249.

⁵⁵ See Garland (49) ch 1, 6 & 7.

approach to punishment, in the form of sentencing, should develop at the ICC to form an integrated whole within the international setting, and what role should it play in the international setting? It will be argued that the expressive principle of sentencing best reflects the reasons for the historical development of the ICC, and best engenders what the sentencing of convicted persons for these heinous crimes should reflect.⁵⁶ As Garland has shown, this does not mean that other factors are not of some importance in the sentencing process. It is only that this principle is the best fit with the history of the development of the ICC, the best fit within the context of what is being sanctioned within the broader social order, and the best fit with what can be accomplished in that broader social order. In one sense it encompasses an analysis of what Ralph Henham describes as ‘context’, that is, the influence of the interplay of the legal, social and political factors in determining how sentencing should be approached in international criminal law.⁵⁷ However, its scope is broader than the immediate context, and also encompasses what was and what should be the effect of the sentencing process.

As the ICC is an international tribunal, what is proposed in this thesis is that an ‘internationalized approach’ to sentencing must be developed. This ‘internationalized approach’ focuses on the expressive justification of sentencing as its major sentencing principle. It utilizes this principle to justify the imposition of a sentence of imprisonment

⁵⁶ Joel Feinberg is the acknowledged early advocate for the use of the expressive function of punishment. In his 1969 article ‘The Expressive Function of Punishment’ (1969) 49 *The Monist* 397, Feinberg claims that punishment is distinguished from penalties by its expressive capacity. For Feinberg ‘Punishment is the conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, either on the part of the punishing authority himself or of those in whose name the punishment is inflicted . Punishment, in short, has a symbolic significance largely missing from other kinds of penalties’. (400). Other writers have expanded on the notion of the expressive function of law, and in particular of punishment. These include Igor Primoratz, ‘Punishment as Language’ (1989) 64 *Philosophy* 187; Jean Hampton, ‘Correcting Harms Versus Righting Wrongs: The Goal of Retribution’ (1991-1992) 39 *UCLA L Rev* 1659; Cass Sunstein, ‘On the Expressive Function of Law’ (1995-1996) 144 *U Pa L Rev* 2021,2026; Dan Kahan, What do Alternative Sanctions Mean?’ (1996) 63 *U Chi L Rev* 591; Elizabeth Anderson and Richard Pildes ‘Expressive Theories of Law: A General Restatement’ (1999-2000) 148 *U Pa L Rev* 1503; Diane Amann ‘Group Mentality, Expressivism and Genocide’ (2002) 2 *ICLR* 93. Some others have focused on the educative/communicative function of punishment. See A C Ewing, *The Morality of Punishment* (Kegan Paul 1929) c IV. See also Gordon Hawkins ‘Punishment and Deterrence: The Educativve, Moralizing and Habituation Effects’ [1969] *Wis L Rev* 550. A detailed analysis of the expressive function of punishment is found in chapter 6.

⁵⁷ Ralph Henham, *Punishment and Process in International Criminal Trials* (Ashgate 2005) 126.

and fine for those who commit offences within the jurisdiction of the ICC. The quantum of sentence is then determined by the court's recognition of a hierarchy of offence types within its jurisdiction, combined with a consideration of the various specific factors set out in Article 78 of the Rome Statute and Rule 145 of the Rules of Procedure and Evidence. In developing an appropriate method for the determination of a fit sentence at the ICC, within the context of the principles of sentence, consistency and some measure of predictability must infuse the sentencing method. Lack of consistency and some modicum of predictability will invariably lead to a loss of legitimacy or at least a perception of loss of legitimacy to the entire process. The adoption of the expressive principle of sentencing combined with a recognition of the hierarchical nature of the offences within the court's jurisdiction and the particularization of the factors the Rome Statute permits allows for the development of such a sentencing regime.

Section 4 The Structure of the Thesis

To provide an analysis of this much neglected area of international criminal law, this thesis is divided into seven chapters. Chapter 1 is the general introduction, setting out the issues and the approach which the researcher wishes to take to address the issues. It is contained within the present chapter.

Chapters 2 and 3 address the general question - within the existing structure of the Rome Statute, including the Rules of Procedure and Evidence, does there exist sufficient statutory guidance for the imposition of appropriate sentences for those convicted of any of the crimes within the jurisdiction of the ICC. Chapter 2 commences with a recognition of the important role played by Article 21 of the Rome Statute, and that in any analysis of the law to apply to any issue before the ICC the three tiered hierarchical approach set out in Article 21 must be followed. Chapter 2 analyzes the particular provisions of the Rome Statute and the Rules of Procedure and Evidence that pertain to sentencing, noting that the wording in Articles 77 and 78 of the Rome Statute and Rule 145 of the Rules of Procedure and Evidence are, on their face, ambiguous and uncertain. However, it argues

that when the interpretative provisions of Articles 31 and 32 of the VCLT are applied, meaning can be ascribed to the words of Article 77 and 78 and Rule 145. Particular reference is made to the factors for consideration for the imposition of life imprisonment, the fine, restitution and reparations to victims. While some of the words pertaining in particular to life imprisonment and restitution are difficult of interpretation, the majority of the provisions, utilizing the interpretative provisions of the VCLT, are of sufficient particularity that meaning can be ascribed to them. In that way they can provide guidance to the court for the imposition of an appropriate sentence. However, there is no mention of the justifications of punishment in the Statute or the Rules. To determine the justifications for punishment the ICC must utilize the other provisions of Article 21. Chapter 2 argues that it must look outside the parameters of the wording of the Rome Statute to fulfill that goal.

Chapter 3 addresses stages two and three of Article 21, concluding that international treaties and customary international law are of no assistance in determining what justifications of punishment should apply at the sentencing stage. Chapter 3 explores whether within the concept of ‘general principles of law’ recognized by the major legal systems of the world some assistance can be attained. It analyzes the approach to sentencing in international criminal law from a sample of countries of the common law and civil law traditions, and concludes that these jurisdictions recognize that ‘principles of sentencing’ for international crimes are essential to guide the imposition of penalties for those who commit such international crimes. The question the ICC has to determine is which principle or principles should be applied to sentencing of offenders within its jurisdiction.

Following from the analysis in chapters 2 and 3, Chapter 4 reviews the traditional justifications of punishment that exist in domestic law - that of retribution and utilitarianism - and that have been adopted as principles of sentencing in the sentencing decisions of the ICTY and the ICTR . The analysis demonstrates that there is a problem with the adoption of either position to sentencing in international criminal law. It recognizes that the retributive justification is today based on the desert principle, that is,

that the punishment must reflect the gravity of the offence and the responsibility of the offender. It argues that the three traditional types of desert - vengeful desert, deontological desert and empirical desert are not compatible with sentencing for offences in international criminal law. The analysis also demonstrates that the utilitarian justifications for sentencing, deterrence, rehabilitation and incapacitation, cannot be shown to be effective principles of sentencing for those international crimes within the jurisdiction of the ICC. The result of this analysis leads to the conclusion that there is a need for a new approach to sentencing at the ICC, what writers in the area have labelled an ‘internationalized approach’ to sentencing.

Chapter 5 investigates what is the essence of this new proposed approach to sentencing in international criminal law. While there is a difference of view among writers with respect to the principles that should apply to sentencing determinations at the international level, each recognizes that the carte blanche transfer of the domestic justifications for sentencing to the international context fails to acknowledge and to reflect the purpose or purposes of the international criminal law of which it is a part, and that the principles of sentencing developed should reflect those purposes.⁵⁸ Writers such as Mark Drumbl,⁵⁹ Mariam Aukerman⁶⁰ and Robert Sloane⁶¹ call for this new internationalized approach to sentencing, reflective of the purpose of international criminal law, with Margaret de Guzman⁶² and Nancy Coombs⁶³ arguing that such an approach must be reflective of what the particular international criminal tribunal wishes

⁵⁸ This is in accord with Garland’s view that sentencing, as one aspect of the punishment regime, should be reflective of the purpose of the institution of which it is a part. (See Garland (n 44) 20-22).

⁵⁹ Drumbl (n 22).

⁶⁰ Mariam Aukerman ‘Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice’ (2002) 15 Harv Hum Rts J 39.

⁶¹ Sloane (n 28).

⁶² Margaret de Guzman, ‘Proportionate Sentencing at the International Criminal Court’ (May 27, 2014) Temple University Legal Studies Research Paper Series. (Research Paper No 2014-15).

⁶³ Nancy Coombs, ‘Seeking Inconsistency: Advancing Pluralism in International Criminal Sentencing’ (2016) 41 Yale J Int’l L 1.

to accomplish. The key is to determine what are the goals or purposes of the international tribunal that is to dispense punishment for those crimes within its jurisdiction. This chapter proposes that some understanding of that purpose can be ascertained by reviewing the development of the ICC, with a particular emphasis on any theoretical and or philosophical reasons behind its development. The overt expression of the purpose of the ICC is contained in the Preamble to the Rome Statute. Its focus, according to the preamble, is to be on ‘grave crimes that threaten the peace, security and well-being of the world’. According to the preamble its purpose is to affirm that ‘the most serious crimes of concern to the international community as a whole must not go unpunished’, and to ‘put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes’. The covert expression of the purpose of the ICC is found in the historical reasons for the selection of the offence types to be included within the *ratione materiae* of the Rome Statute. While the framers of the Rome Statute were less than clear in their reasons for the selection of particular offence types, the common rationale was that whatever offences were selected, they must be ones that threatened the very foundation of order in societies and thus the ones that demand sanction. Based on the goals of the ICC as set out overtly in its preamble, and as determined from the selection of offences within its jurisdiction, the purpose of sentencing persons who commit such heinous crimes should therefore be to express the condemnation of the violation of the appropriate law, and, as a possible consequential impact, to thereby reform, educate or provide a moral barometer of appropriate behavior.

Chapter 6 proposes that the expressive justification of punishment best encapsulates the rationale for the existence of the Rome Statute, and best expresses what the future purpose of the Rome Statute should be. This is because the essence of the expressive justification of punishment, in essence its principal tenet, is that punishment is an emphatic condemnation of the crime committed which ‘vindicates the law which has been broken, reaffirms the right which has been violated, and demonstrates that the misdeed was indeed a crime’.⁶⁴ The chapter then proceeds to integrate the expressive

⁶⁴ Primoratz (n 56)196.

justification of punishment into a sentencing matrix for the ICC. It proposes that it is essential that the ICC recognize the hierarchical nature of the crimes within its jurisdiction, and that focus on the chapeau of each of the three present offences within its jurisdiction will set this hierarchical structure. The focus on the ‘*in abstracto*’ aspects of the offence places genocide on the top of the hierarchical structure, with crimes against humanity next, and war crimes next to that. The court must shed itself of the positions taken by the ICTY and the ICTR on this issue, and set a sentencing matrix based on this hierarchical structure. Once that recognition is in place, the court can then, in accordance with Article 78 and Rule 145 of the Rules of Procedure and Evidence, consider the ‘*in concreto*’ factors of a particular case to determine the appropriate sentence for each particular crime for which a person has been convicted. This consideration is not only for a sentence of imprisonment but also for the possible imposition of a fine.

The ICC can also consider the imposition of forfeiture of the proceeds, property and assets of crime and reparation to victims at the sentencing stage. However, issues of justification of punishment do not come into play in considering those aspects of the sentence. The approach is more clinical in nature, assessing the facts available and determining if forfeiture is available, and if reparations are appropriate, and also determining if reparations to victims can be imposed, and in what type and manner they can be imposed.

Chapter 7 is the concluding chapter. It reviews the arguments set out in chapters 2 through 6 of this thesis and highlights how the ICC can, within the parameters of Article 21 of the Rome Statute, establish a proper sentencing procedure for the court. It emphasizes that while an evaluation of the sentencing provisions in the Rome Statute and the Rules of Procedure and Evidence, using the interpretative provisions of the VCLT, can provide meaning to many of the sentencing provisions, the justifications of punishment must be found elsewhere. And, it highlights the fact that they are found outside the traditional approaches to sentencing of the ad hoc tribunals, and within the expressive theory of law and punishment. It notes the argument in the thesis that the adoption of an expressive principle of sentencing at the ICC is consistent with the

approach the framers of the Rome Statute took to its development, and can be used to form an integrated sentencing process for the court.

Chapter 7 re-emphasizes the fact that punishment, in the form of sentencing, is an important part of the criminal justice continuum. It is the public face of the justice system, and the perception of how and why punishment is dispensed is important for the sustained legitimacy of that system. Some measure of legitimacy is necessary for the integrity of the ICC and the integrity of the process by which sentences are imposed. It proposes that the approach suggested here can assist. It can provide a principle for the court to rely on to anchor its sentencing decisions. It does not require the court to espouse principles that are known to be problematic and are known to cause some to specifically deny their applicability to international criminal law. It can also allow for the offence type to play a significant role in the determination of the quantum of sentence, and also allow individual factors of the offence and the offender to intersect to develop a proper sentencing process. In the longer term it can also allow the court to develop a consistent sentencing matrix which will provide guidance to the court within the parameters set by the sentencing regime proposed. It argues that if there is no consistent principle or principles adopted and if the international courts continue to ignore the reality of hierarchy of offence types, sentencing at the ICC will continue to be plagued by adherence to local conditions and local considerations without any recognition of an overall sentencing philosophy. This in the end will cause difficulties for the legitimacy of the entire process.

Chapter 2

The Approach to Sentencing in the Rome Statute

The drafters of the Rome Statute recognized the importance of the general principles of law and their application to matters under the jurisdiction of the ICC.¹ Article 23 addresses the issue of punishment. Titled '*Nulla Poena Sine Lege*' (no punishment without law), it states 'A person convicted by the Court may be punished only in accordance with this Statute'.² The penalties available to the court, the principles the court should consider and the processes it must follow in determining the appropriate penalties must comply with the *nulla poena* principle. How one determines the penalties available, and the principles and processes that are applicable at the sentencing stage of the trial process is addressed in Article 21 of the Rome Statute.³ The wording of Article 21 is mandatory in nature, requiring the ICC to follow a three step hierarchical process to determine what law is to apply to any issue before the court. This three step hierarchical process requires the court to first look to the words of the Statute, Elements of Crimes and Rules of Procedure and Evidence to determine the law to apply in relation to any issue before the court. Only if the applicable law cannot be determined through stage one can the court proceed to stage two - applying applicable treaties and the principles and rules of international law. And, only if this does not assist can the court proceed to the

¹ See Part 3 of the Rome Statute, in particular Articles 22 to 33.

² Article 23 Rome Statute. *Nulla Poena Sine Lege* is one of the indicia of the principle of legality, one of the recognized principles of criminal law. (See Jerome Hall, 'Nulla Poena Sine Lege' (1937-1938) 47 Yale L J 165; Aly Mokhtar, 'Nullum Crimen, 'Nulla Poena Sine Lege: Aspects and Prospects' (2005) 26 Stat L R 41. It is traditionally broken down into four distinct attributes, consisting of two threshold requirements reflected in the principles *lex scripta* (the law on punishment must be written) and *lex certa* (the type of punishment and its severity must be clearly defined and distinguishable), and two prohibitions reflected in the principles *lex praevia* (the prohibition against retroactive application of a penalty not in existence at the time of the commission of the offence) and *lex stricta* (the prohibition against applying a penalty by analogy). See Shahram Dana, 'Beyond Retroactivity to Realizing Justice: A Theory of the Principle of Legality in International Criminal Law Sentencing' (2009) 99 J Crim L & Criminology 857,864-866. Kenneth Gallant recognizes these principles as various formulations in legal systems of various countries of the principle of legality (See Kenneth Gallant, *The Principle of Legality in International and Comparative Criminal Law* (CUP 2009) 12-13).

³ See Article 21(1)(a), 21(1)(b), 21(1)(c) and Article 21(3) of the Rome Statute.

third stage - applying general principles of law derived by the court from national laws of legal systems of the world. In determining the law to apply to any aspect of the sentencing process, the ICC must follow the three steps set out in Article 21.

This chapter will focus on stage one of Article 21 of the Rome Statute. It looks to the words of the Statute and the Rules of Procedure and Evidence to determine if the wording itself provides sufficient guidance to the court for the determination of an appropriate sentence for anyone found guilty of the crimes within the court's jurisdiction. It recognizes the important role that the interpretative provisions of the VCLT play in providing meaning to the wording of the Rome Statute and the Rules of Procedure and Evidence. The provisions of the Rome Statute and the Rules of Procedure and Evidence that address the issue of sentencing are reviewed in detail, noting that some of the wording of Articles 77 and 78 of the Rome Statute and Rule 145 of the Rules of Procedure and Evidence require interpretation. The analysis suggests that although at first blush some of the words of both Articles 77 and 78 and of Rule 145 appear problematic, when they are read in their plain meaning and with each other a definite meaning can be ascribed to most of the words that provide general guidance to the court on sentencing. What is missing from these provisions is any reference to the justifications of punishment at the sentencing stage. To determine if justifications of punishment can be utilized by the ICC, stage two and if necessary stage three of Article 21 must be used to determine if those provisions allow the court to consider justifications of punishment, and if they do what form these justifications take.

Section 1 The Applicable Law for the ICC

a. The parameters of Article 21

Unless specifically set out in a treaty or convention, the law applicable to an issue in international law has to be gleaned from the recognized sources of international law.⁴ These recognized sources of international law are those sources set out in Article 38 of the Statute of the International Court of Justice,⁵ and include: treaties, customary international law, general principles of law recognized by civilized nations, and judicial decisions and the writings of highly qualified publicists, as secondary sources of international law.⁶ International criminal law, as a specific category of international law, relies on these recognized sources of international law.⁷ These principal sources of international law are treated as equal in importance as there is nothing in the wording of the ICJ statute or in customary international law to give priority to either of the first three sources of international law.⁸ The drafters of the Rome Statute have gone some steps further in their attempts to delineate the applicable law that applies to all matters before the ICC. Not willing to rely on the recognized sources of international law as set out in the Statute of the International Court of Justice, the parties to the Rome Statute set out in Article 21 a hierarchical order to determine the law that shall be applied specifically to determinations by the ICC.⁹

⁴ Hugh Thurley, ‘The Sources of International Law’ in Malcolm D Evans (ed), *International Law* (2nd edn, OUP 2006); David Kennedy, ‘The Sources of International Law’ (1987) 2 Am J Int’l L & Pol’y 1.

⁵ Statute of the International Court of Justice (adopted 26 June 1945 in force 24 October 1945) 15 UNCIO 355.

⁶These sources of international law have been recognized by customary international law as the sources of international law. (See Malcolm N Shaw, *International Law* (6th edn, CUP 2008) 71; A Casse, *International Criminal Law* (2d edn, OUP 2008) 13-25.

⁷ Casesse (n 6) 14.

⁸ Thurley (n 4).

⁹ See Gerhard Hafner and Christina Binder, ‘The Interpretation of Article 21(3) ICC Statute’ (2004) 9 ARIEL 163,165; Gundun Hochmayr, ‘Applicable Law In Practice and Theory: Interpreting Article 21 of the Rome Statute’ (2014) 12 JICJ 655.

Article 21 commences with the words ‘The Court shall apply. .’. The word ‘shall’ is mandatory in nature and means that by statute the ICC is required to follow the order set out in the Statute.¹⁰ That order is to first consider the words of the Statute, the Elements of Crimes and the Rules of Procedure and Evidence to determine if within them the applicable law can be determined.¹¹ If the words of the Statute, Elements of Crime and Rules of Procedure and Evidence are not clear, leaving gaps in the legislative structure, then Article 21 mandates that the court proceed to stage two of the process. This is to apply applicable treaties and the principles and rules of international law. Again if application of stage two does not yield results, the Statute requires that the court proceed on to stage three. This requires that the court apply general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of states that would normally exercise jurisdiction over the crime. Finally whatever interpretation is gleaned from this process, at whatever stage it is determined, must pass through the sieve which is Article 21(3) of the Statute, which requires that the application and interpretation of law must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin,

¹⁰ Robert Cryer has argued that the establishment of this hierarchical procedure was intended by the negotiating states to provide a ‘high level of state control over the interpretative mandate granted to the court’. See Robert Cryer, ‘Royalism and the King: Article 21 of the Rome Statute and the Politics of Sources’ (2009) 12 New Crim L Rev 390, 391. This is in keeping with the enhanced degree of mistrust which the negotiating states had towards the judges on the international tribunals, in that there was a perception that if there was not some attempt to confine the interpretative musings of such judges, judicial activism might run rampant, contrary to the expressed wishes of those states who would become signatories to the Rome Treaty. See in particular David Hunt, ‘The International Criminal Court: High Hopes, “Creative Ambiguity” and the Unfortunate Mistrust in International Judges’ (2004) 2 JICJ 56; A Casseese, ‘The Statute of the International Criminal Court: Some Preliminary Reflections’ (1999) 10 EJIL 144, 163).

¹¹ There is no indication in the Article itself if there is any priority to the three listed provisions. However, Article 51, paragraph 5 states that in the event of a conflict between the Statute and the Rules of Procedure and Evidence, the Statute shall prevail. And, Article 9, paragraph 3 states that the elements of crime are to be consistent with the statute. This suggests as well that the Statute would prevail as no inconsistency can exist between the two. (See Margaret de Guzman, ‘Applicable Law’ in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, Hart Publishing 2008) 701, 705.

wealth, birth or other status.¹² Most decisions of the Pre-Trial, Trial and Appeal Chambers of the ICC have acknowledged that the wording of Article 21 mandates this hierarchical approach to the application of any applicable law.¹³ The case of *Prosecutor v Al Bashir* summarized the approach that the ICC has taken and continues to take to the interpretation of Article 21.¹⁴ It stated

...according to Article 21(1)(a) of the Statute, the Court must apply “in the first place” the statute, the elements of crimes and the Rules those other sources of law provided for in paragraphs 1(b) and 1(c) of article 21 of the Statute can only be applied when the following two conditions are met: (i) there is a lacuna in the written law contained in the Statute, the Elements of Crimes and the Rules; and (ii) such lacuna cannot be filled by the application of the criteria provided for in Articles 31 and 32 of the Vienna Convention on the Law of Treaties and Article 21(3) of the Statute.

Article 21 pervades the entire decision making process of the ICC, as it applies to every decision of the court in which legal interpretation is at issue.

¹² Article 21(3) Rome Statute. See Hafner and Binder (n 9); Daniel Sheppard, ‘The International Criminal Court and Internationally Recognized Human Rights: Understanding Article 21(3) of the Rome Statute’ (2010) 10 ICLR 43; Stephen Bailey, ‘Article 21(3) of the Rome Statute: A Plea for Clarity’ (2014) 14 ICLR 513.

¹³ This strict approach has pervaded most of the decisions of the ICC since its earliest days. One of the first decisions to consider the effect of the wording of the first criteria in Article 21 was the case of *Situation in the Democratic Republic of Congo* (Appeals Chamber) ICC-01-04-168 (OA 3) (13 July 2006). The issue in that case was whether the Rome Statute included within its legislative structure all the provisions respecting appeals, or whether there was a lacunae in the legislation that would permit the utilization of other aspects of Article 21. The court referenced the plain meaning of the words of the Rome Statue on the issue of appeals and concluded that the wording was clear and definitive on the issue. It left no room for any consideration of other potential rights of appeal. (See in particular paragraphs 33, 34 and 35 of the decision). The court took a similar approach in determining if the doctrine of ‘abuse of process’ can be considered by the court. (see *Prosecutor v Thomas Lubanga Dyilo*) (Appeals Chamber) ICC- 01/04-01/06-1486 (OA 13) (21 October 2008). However, in a few cases judges of the Pre-Trial and Trial Chambers have ventured beyond the strict hierarchical approach set out in Article 21 and have referenced decisions of the ICTY, the ICTR and domestic jurisdictions to support their interpretation of the particular legislative provision. (See in particular majority decision of *Prosecutor v Lubanga Dyilo* (Trial Chamber I) ICC-01/04-01/06-2705 (30 March 2011); *Prosecutor v Thomas Lubanga Dyilo* (Trial Chamber I) ICC-01/04-01/06-2727 (28 April 2011). Robert Cryer has also noted there are occasions when the court has strayed from the strict adherence to this hierarchical source requirement, and has referred to academic writings, to the jurisprudence of the ICTR and the ICTY and to decisions of the ICJ (see Cryer (n 10) 404 and also see Robert Cryer ‘The Definitions of International Crimes in the al-Bashir Arrest Decision’ (2009) 7 JICJ 283.

¹⁴ (Pre-Trial Chamber) ICC-02/05-01/09-3 (4 March 2009) para 126.

b. Step one and the VCLT

The first stage of the process is the interpretative stage, in which ‘a court or other legal tribunal has to determine the meaning of legal language in a way sufficiently precise to make a decision in the case and to provide a justification for the decision...’.¹⁵ It is to be distinguished from the gap filling process, set out in stages two and three of Article 21(1). Bitti describes the gap filling process in this way:

...a gap in the Statute may be defined as an ‘objective’ which could be inferred from the context or the object and purpose of the Statute, an objective which would not be given effect by the express provisions of the Statute or the Rules, thus obliging the judge to resort to the second or third source of law-in that order- to give effect to the objective.¹⁶

In applying the interpretative process outlined in Article 21(1)(a), the court must consider first the words of the Statute, the Elements of Crime and the Rules of Procedure and Evidence. In determining the meaning to be ascribed to the text of the Statute, Elements of Crime, and the Rules of Procedure and Evidence, the Court, from its earliest decisions, has acknowledged the applicability of Articles 31 and 32 of the VCLT.¹⁷ These two Articles set out the approach courts take to the interpretation of treaty provisions.¹⁸ That approach focuses on the text of the treaty, looking at the words in their ordinary meaning, within their own context and in the light of the object and purpose of the treaty. The approach does not single out one interpretative principle as being superior to any other, but as Grover notes, has resulted in the development of three schools of interpretation,

¹⁵ Zenon Bankowski and others, ‘On Method and Methodology’ in D Neil MacCormack and Robert S Summers (eds), *Interpreting Statutes: A Comparative Study* (Ashgate 1991) 9, 13.

¹⁶ Gilbert Bitti, ‘Article 21 and the Hierarchy of Sources of Law before the ICC’ in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2015) 410, 426.

¹⁷ See early decisions of the Pre-Trial Chambers in the cases of *Situation in the Democratic Republic of Congo* (Appeals Chamber) ICC-01/04-168 (OA 3) (n 13); *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (Appeals Chamber) ICC-01/04-01/07-521 (OA 5) (27 May 2008).

¹⁸ It is recognized that Articles 31 and 32 of the VCLT are part of customary international law relating to the interpretation of treaties. (See Anthony Aust, *Modern Treaty Law and Practice* (CUP 2000) 11; Campbell McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ (2005) 54 ICLQ 279, 293.

which are not necessarily mutually exclusive.¹⁹ These approaches are the textual, drafter's intent and the object and purpose approaches to the interpretation of words in a treaty.²⁰ While the strict hierarchical nature for the determining of applicable law set out in Article 21 would cast doubt on the use of provisions of any treaty, such as the VCLT, at stage one of the interpretative process, even to interpret words in the treaty, Hochmayr offers an explanation to such a concern which is compelling. He notes that as the Rome Statute does not contain a set of systematic rules for the interpretation of the meaning of its own words, Article 21(1)(b) can be used to apply applicable treaties to determine such meanings.²¹ The VCLT, as the preeminent interpretative treaty, could be utilized by the ICC for that purpose. Hochmayr also correctly argues that as the rules of interpretation in the VCLT are also a part of customary international law, they would also be considered 'principles and rules of international law' as set out in Article 21(1)(b) of the Rome Statute.²²

The ICC has, for the most part, applied the textual approach to the interpretation of the words of the Rome Statute.²³ Powderly has argued that this approach to Article 21 'conceives of the judicial function as a mechanical and (crucially) manageable process in which the text of the statute is omniscient'.²⁴ Indeed, the Court has jealously guarded the mandate given to it by the framers of the Rome Statute as set out in Article 21 to confine any analysis of the applicable law principally to stage one of the three stage process to

¹⁹ Leena Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court* (CUP 2014) 43. See also *Prosecutor v Jean-Pierre Bemba Gombo* (Trial Chamber III) ICC-01-05/01/08-3343 (21 March 2016) para 77.

²⁰ Grover (n 19).

²¹ Gudrun Hochmayr, 'Applicable Law in Practice and Theory' (2014) 12 JICJ 655, 667.

²² *ibid*. See *Prosecutor v Jean-Pierre Bemba Gombo* (n 19) para 76.

²³ See as examples *Situation in the Democratic Republic of Congo* (Appeals Chamber) (n 13); *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* (Pre-Trial Chamber I) ICC-01/04-01/07-717 (30 September 2008); *Prosecutor v Thomas Lubanga Dyilo* (Appeals Chamber) ICC-01/04-01/06-1486 (OA 13) (21 October 2008) among others.

²⁴ Joseph Powderly, 'The Rome Statute and the Attempted Corseting of the Interpretative Judicial Function' in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2015) 444, 447.

determine the meaning of the various provisions.²⁵ It is recognized that in a few decisions the ICC has adopted a more expansive approach to the words in the Statute, Elements of Crime and the Rules. In the 2011 decision of the *Prosecutor v Thomas Lubanga Dyilo* the majority concluded that it had inherent authority to change its evidentiary rulings after they had been made, referencing in part Article 64 (2) of the Rome Statute (fairness of the trial), while also referencing decisions of the ad hoc tribunals to support its position.²⁶ The minority took the established approach as outlined in Article 21(1)(a), focusing only on the words of the Rome Statute and Rules of Procedure and Evidence to reach the same conclusion.²⁷ And, in the *Decision on the Confirmation of Charges in Prosecutor v Lubanga Dyilo* the Pre-Trial Chamber effectively ignored the provisions of Article 21(1) of the Rome Statute, adopting the control of the crime theory in relation to co-perpetrators under Article 25 of the Statute.²⁸ While the majority in the subsequent Trial Chamber decision in this matter accepted the applicability of the control of the crime theory, Judge Fulford in dissent specifically stated that the acceptance of this theory did not accord with the interpretative structure of Article 21.²⁹ He notes that in order to consider domestic law sources, compliance must be made with Article 21(1)(c) of the Rome Statute. No such compliance occurred in this case. In addition to these cases, Bitti notes a few other cases in which the Court has been willing to stretch its analysis beyond the strict requirements of Article 21.³⁰ However, there is no evidence of any attempt by the Court to systematically circumvent the strict textual interpretation that it has

²⁵ Hochmayr (n 21) 662.

²⁶ *Prosecutor v Thomas Lubanga Dyilo* (Trial Chamber I) ICC-01/04-01/06-2705 (30 March 2011) para 15.

²⁷ *Prosecutor v Thomas Lubanga Dyilo* (Trial Chamber I) ICC-01/04-01/06-2707 (30 March 2011) (dissent of Judge Rene Blattmann).

²⁸ *Prosecutor v Thomas Lubanga Dyilo* (Trial Chamber I) ICC-01/04/01/06-2842 (14 March 2012). See also comments by Powderly (n 24) at 467-468.

²⁹ *Prosecutor v Thomas Lubanga Dyilo* (Trial Chamber I) ICC-01/04-01/06-2842 (14 March 2012) para 10 dissent of Judge Fulford. See also the dissent of Judge Christine Van den Wyngaert in the case of the *Prosecutor v Mattheu Ngudjolo Chui* (Trial Chamber II) ICC-01/04-02/12-4 (18 Dec 2012) who in relation to the adoption of the same theory-control over the crime theory- adopts the conclusion of Judge Fulford that the majority, by adopting that theory, fail to properly apply Article 21(1)(c).

³⁰ See Bitti (n 16) 415-421.

traditionally applied in interpreting the words of the Rome Statute, the Elements of Crimes or the Rules. Indeed in a recent unnamed judgment Judge Morrison essentially refused to consider the interpretation provided by the ad hoc tribunals that concluded that seizure of assets must relate to assets obtained by the crimes committed. Judge Morrison follows the dictates of Article 21(1)(a), analyzes the words of the Statute and the Rules, and concludes that assets subject to seizure do not have to be related to the crimes committed in order to be seized.³¹

Article 31(3)(c) of the VCLT can also assist in the interpretative process. Styled by McLachlan as the ‘neglected son’ of treaty interpretation, Article 31(3)(c) has received renewed life following its resurrection in the case of *Case concerning Oil Platforms*³² where it was recognized as an important interpretative tool to be used by a court in any interpretative process.³³ Article 31(3)(c) references the use of ‘any relevant rules of international law applicable in the relations between the parties’ as potential guides to interpretation to be taken into account in the interpretative process.³⁴ This would include custom, general principles of international law, and where applicable other treaties.³⁵ In the case of the *Prosecution v William Samoei Ruto and Joshua Arap Sang* the Trial Chamber specifically addressed the influence of Article 31(3)(c) on the interpretation of the provisions of the Rome Statute.³⁶ At paragraph 102 the Trial Chamber stated that Article 31(3)(c) of the VCLT

³¹ *Unnamed decision* (Appeals Chamber) ICC-ACRed-01/16 (15 February 2016). See also other examples of such stricter interpretation of the process for interpretation in *Prosecutor v Dominic Ongwen* (Pre-Trial Chamber II) ICC-02/04-01/15-277 (27 July 2015) (interpretation of words of Article 56(1)(a) Rome Statute); *Prosecutor v Jean-Pierre Bemba Gombo* (n 19)(strict interpretation of words of Article 28(a) of the Rome Statute ‘as a result of’).

³² See *Case concerning Oil Platforms (Iran v United States of America)* (2003) ICJ Rep 161

³³ McLachlan (n 18) 289.

³⁴ Grover (n 19) 61.

³⁵ McLachlan (n 18) 290.

³⁶ Trial Chamber V(A) ICC-01/09-01/11-777 (18 June 2013).

. . . does not say that a treaty must be given a subservient standing relative to broader international law. All that article 31(3)(c) does is require the interpreter to keep broader international law in view, in order to determine both the question whether the drafter of the particular treaty has truly indicated an intention to displace applicable broader international law in a particular respect, as well as the true scope of any such displacement according to the proven intention revealed in the particular treaty. It is a sensible provision that preserves the unity and intrinsic integrity of international law in its various respects. It is an approach that prevents undue haphazardness in the development of international law.

The Trial Chamber was not willing to subsume the authority of Article 21 within a broader interpretation of the power of Article 31(3)(c) of the VCLT. It wished to preserve the hierarchical structure of Article 21, even though Article 31(3)(c) makes it clear that consideration can be given to customary international law, general principles of international law and relevant treaties in the interpretative process. Three years later, in the case of *Prosecutor v Jean-Pierre Bemba Gombo* the court gave explicit recognition to the important role of Article 31(3)(c) in the process of interpretation of the words of the Rome Statute, Elements of Crimes and the Rules of Procedure and Evidence.³⁷ At paragraph 79 the court stated:

The Chamber agrees with Trial Chamber II insofar as Article 31(3)(c) of the VCLT empowers the Chamber to consider the caselaw of other international courts and tribunals as a means of interpretation of the applicable law.... Under the approach contemplated by Trial Chamber II, the pertinent case law may be used to assist the Chamber in interpreting the applicable law referred to in Article 21(1)(a).

However, the court was also quick to state that it must not use the concept of treaty interpretation to replace applicable law. This again inputs a word of caution so that the court does not exceed the parameters of what the framers of the Statute envisioned.

Bitti and Hockmayr both take the position that the Court must be careful not to ignore the words of the Rome Statute, as in their view the intention of the drafters should

³⁷ *Prosecutor v Jean-Pierre Bemba Gombo* (n 19).

be given priority.³⁸ Powderly takes a more liberal approach, arguing that the Court needs to remove what he calls the ‘corseting of the interpretative function’ of the court.³⁹ While it is legitimate for the Court to utilize the provisions of Article 31(3)(c) in its interpretative process, it should not expand its interpretative efforts beyond Article 21(1)(a) of the Rome Statute and Articles 31 and 31 of the VCLT in order to fulfill its interpretative function, as it has done in some cases.⁴⁰ To do so would be to ignore the intent of the framers of the Rome Statute in setting out this strict hierarchical structure for the determination of applicable law. However, as will be argued in this thesis, by adherence to the textual interpretation of the Rome Statute, the ICC can assist in the interpretation of the mechanisms to be used to impose an appropriate sentence. The court need not stray outside the words of the Statute, and utilize inventive sources in the interpretative process, to accomplish that goal. However, because there are gaps in the Statute and Rules with respect to the justifications for sentencing, the court must follow stages two and three of Article 21 to determine what justifications should apply.

Section 2 The Sentencing Process For the ICC

The imposition of a sentence in any criminal context involves two processes. The first is the reason or justification for the imposition of the punishment.⁴¹ The second, which is in part dependent on the first, is the determination of the particular penalty, based on various factors including the rationale for the imposition of the sentence, coupled with the nature of the offence, the individual circumstances of the offender, and the various aggravating and mitigating factors which should influence the quantum of sentence to be imposed. In domestic law some statutes set out the reasons a court should

³⁸ Bitti (n 16) 443; Hochmayr (n 21) 462-463.

³⁹ Powderly (n 24) 444.

⁴⁰ See Bitti (n 16) 415-421.

⁴¹ This may be as simple as stating, without further explanation, that one of the traditional justifications or rationales of punishment/sentencing is retribution or deterrence or it may entail a more detailed philosophical analysis of the justifications of punishment.

consider for the imposition of an appropriate sentence.⁴² In international criminal law neither the statutes of the ICTY, the ICTR nor the SCSL set out the reasons for the imposition of a sentence.⁴³ It was left to the judiciary to determine the rationales for sentencing, and in most cases reliance was placed on the traditional western justifications of sentencing to sanction the imposition of the designated sentence.⁴⁴ These traditional justifications of retribution as signified by the ‘just deserts’ principle, deterrence, rehabilitation and incapacitation have not been shown in either domestic or international criminal law to be effective.⁴⁵ Yet these principles have been adopted without question or analysis by the ad hoc tribunals.

Nowhere in the Rome Statute is the issue of the justifications for sentencing addressed, and that is a serious deficiency in the Statute.⁴⁶ Some writers have argued that

⁴² Obvious examples include in Australia Crimes Act 1914 (Cth) Pt 1 B Div 2 16A as amended; in Canada Criminal Code of Canada R S C 1985 c C-46 s 718-718.4; in England and Wales Criminal Justice Act 2003 c 44 pt 12 s 142.

⁴³ Statute of the International Criminal Tribunal Yugoslavia UNSC Res 827 (25 May 1993) UN Doc S/Res /827; Statute of the International Criminal Tribunal Rwanda UNSC Res 955 (8 November 1994) UN Doc S/Res/955; Statute for the Special Court for Sierra Leone UNSC Res 1315 (14 August 2000) (by agreement between the government of Sierra Leone and the United Nations).

⁴⁴ See as examples *Prosecutor v Aleksovski* (Appeal) IT-95-14/1-A (24 March 2000); *Prosecutor v Kordic and Cerkez* (Appeal) IT-95-14/2-A (17 December 2004); *Prosecutor v Krajisnik* (Appeal) IT-00-39-A(17 March 2009); *Prosecutor v Kambanda* (Sentencing Judgment) ICTR 97-23-S (4 September 1998); *Prosecutor v Serushago* (Sentencing Judgment) ICTR 98-39-S (5 February 1999); *Prosecutor v Rutaganda* (Judgment) ICTR-96-3-T (13 December 1999); *Prosecutor v Alex Tamba Brima, Brima Bazzi Kamara and Santigie Borbor Kanu* (Sentencing Judgment) SCSL -2004-16-T-624 (19 July 2007); *Prosecutor v Moinina Fofana and Allieu Kondewa* (Appeal) SCSL-04-14-A-829 (28 May 2008).

⁴⁵ With respect to reliance on the ‘just desert’ principle see Paul Robinson, ‘Competing Conceptions of Modern Desert: Vengeful, Deontological and Empirical’ (2008) 67 Camb L J 145; Margaret de Guzman, ‘Choosing to Prosecute: Expressive Selection at the International Criminal Court’ (2011-2012) 33 Mich J Int’l L 265. With respect to the effectiveness of the deterrent principle, both general and specific see Jack P Gibbs, ‘Deterrence Theory and Research’ in Gary B Melton (ed), *The Law As a Behavioral Instrument* (University of Nebraska Press 1986) 87; Daniel S Nagin, ‘Deterrence in the Twenty-First Century’ (2013) 42 Crime and Justice 199; Padraig McAuliffe, ‘Suspended Disbelief? The Curious Endurance of the Deterrence Rationale in International Criminal Law’ (2012) 10 NZJPIL 227. With respect to the rehabilitation principle see Francis Allen, ‘The Decline of the Rehabilitative Ideal’ in Andrew von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing* (3rd edn, Hart Publishing 2009) 11. And with respect to the incapacitation principle see Andrew von Hirsch, ‘Incapacitation’ in Andrew von Hirsch and Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing* (3rd edn, Hart Publishing 2009) 75 .

⁴⁶ Many commentators have noted the failure of the Rome Statute to contain any provisions relating to the purposes or rationale of sentencing. See in particular Ralph Henham, ‘The Philosophical Foundations of

some general references in the words of the preamble to the Rome Statute suggest the rationale that should be considered when imposing sentence at the ICC. King and LaRosa have argued that the wording of the preamble suggests that retribution is a goal of the ICC.⁴⁷ They rely on a part of the preamble where it states that ‘the most serious crimes of concern to the international community as a whole must not go unpunished’ to justify their position. However, it must be noted that the words quoted are part of a longer statement set out in the preamble which focuses on the general issue of prosecution of such crimes rather than on the imposition of punishment.⁴⁸ To suggest that these particular words in the preamble mandate that retribution is to be the focus of sentencing at the ICC is to give to the words a speculative meaning beyond which they can rationally go.

Schabas has suggested that the preamble signals something different.⁴⁹ It is his position that the section of the preamble which states that one of the purposes of the ICC is to put an end to impunity for those persons who commit such heinous crimes will ‘contribute to the prevention of such crimes’ signals at least that the existence of the court will have some deterrent effect. However, Schabas is quick to recognize that such a position set out in the preamble is far from conclusive that the statute recognizes that

International Sentencing’ (2003) 2 JICJ 64, 85; Ralph Henham, *Punishment and Process in International Criminal Trials* (Ashgate 2005) 15-17; Adrian Hoel, ‘The Sentencing Provisions of the International Criminal Court’ (2005) 1 IJPS 37, 38; Notes, ‘Laser Beam or Blunderbuss? Evaluating the Usefulness of determinate Sentencing for Military Commissions and International Criminal Law’ (2006-2007) 120 Harv LR 1848, 1860; William Schabas, *The International Criminal Court* (OUP 2010) 899 footnote 10. (Schabas has explained that there was some attempt in a joint proposal by Canada, Australia and Germany to at least discuss the purposes of sentencing through a joint proposal to the Preparatory Committee on the Rules of Procedure and Evidence. It was not accepted by the Committee); Margaret de Guzman, ‘Proportionate Sentencing at the International Criminal Court’ (May 27, 2014) Temple University Legal Studies Research Series (Research Paper No 2014-15).

⁴⁷ Faiza P King and Anne-Marie La Rosa, ‘Penalties Under the ICC Statute’ in Flavia Lattanzi and William Schabas (eds), *Essays on the Rome Statute of the International Criminal Court Vol 1* (Editrice il Sirente piccolo societa cooperative a r.l 1999) 311, 312-313.

⁴⁸ The full text of that section of the preamble reads as follows: Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation.

⁴⁹ William Schabas, *An Introduction to the International Criminal Court* (3rd edn, CUP 2007) 314.

deterrence is an aim or purpose of sentencing at the ICC.⁵⁰ What Schabas does recognize is that the Rome Statute is effectively silent about the purposes of sentencing.

A review of the preparatory work for the development of an international criminal court does not assist in uncovering any debate on the rationale for the justifications of punishment at the ICC.⁵¹ The drafters of the Rome Statute relied heavily on the Draft Statute for the Establishment of an International Criminal Court.⁵² Nowhere in that Draft Statute was there any reference made to the justifications for the imposition of any sentence to be imposed.⁵³ Rather, reference was made in that Draft Statute to the mechanics by which a sentence was to be determined – the seriousness of the offence and the degree of responsibility of the offender.⁵⁴ The Preparatory Committee for the Establishment of the International Criminal Court reviewed in detail the ILC's Draft Statute for the International Criminal Court in finalizing the various provisions for sentencing for the Rome Statute.⁵⁵ There is no reference in the published documents of

⁵⁰ ibid.

⁵¹ There is a potential argument that Article 78(1) in its reference to the court considering the gravity of the crime and the individual circumstances of the convicted person in its determination of the sentence is intending to focus on the just deserts model of retribution. While that provision sets out the manner in which the sentence is to be determined, it does not by itself suggest that the principle of sentence to apply is that of retribution.

⁵² See ‘Draft Statute for an International Criminal Court with Commentaries’ in Yearbook of the ILC 1994 Vol 11 (Part Two) UN Doc A/CN.4/SER.A/1994/Add.1 (Part 2) 26-67. This draft was the result of the work of the ILC over an extended period of time. The draft was presented to the United Nations in 1994 and following its review by the United Nations more work was undertaken. The draft committee had the advantage of previous draft codes which had been proposed since the end of the First World War, but which had never been adopted by either the League of Nations or the United Nations (See generally ILC, ‘Historical Survey of the Question of International Criminal Jurisdiction’ UN Doc A/CN.4/7/Rev.1 (1949) < http://legal.un.org/ilc/documentation/english/a_cn4_7_rev1.pdf > accessed 3 February 2012).

⁵³ ‘Draft Statute for an International Criminal Court with Commentaries’ (n 52).

⁵⁴ Article 46(2) of the Draft Statute for an International Criminal Court with Commentaries’ (n 52).

⁵⁵ See in particular ‘Report of the Ad Hoc Committee on the Establishment of an International Criminal Court’ (6 September 1995) UN Doc A/50/22 Supplement No 22 p 36 Article 47; ‘Report of the Preparatory Committee on the Establishment of an International Criminal Court’ Vol 11 (13 September 1996) UN Doc A/51/22 Supplement No 22A p 63-64 para 303-309; Decisions Taken by the Preparatory Committee on the Establishment of an International Criminal Court (18 December 1997) (Report of the Working Group on Penalties) UN Doc A/AC.249/1997/L.9/Rev.1 p 67-73; ‘Report of the Preparatory Committee on the Establishment of an International Criminal Court’(14 April 1998) UN Diplomatic Conference of

the Ad Hoc Committee or Preparatory Committee of any discussion of the justifications of punishment.⁵⁶ Following passage of the Rome Statute the Assembly of Nations met to consider the Rules of Procedure and Evidence, and such were passed by the Assembly in 1992.⁵⁷ In the preparatory work for the compilation of these Rules, again there was no direct discussion of the justifications of punishment.⁵⁸ A proposal submitted by Canada, Australia and Germany on Part 7 of the Rules did reference sentencing justifications, but apparently as these were not considered as falling within the category of ‘aggravating or mitigating’ factors they were not addressed by the Commission.⁵⁹ For whatever reason, those responsible for the drafting and passage of the Rome Statute ignored the rationales upon which sentences should be imposed.

The failure to consider the reasons for the imposition of sentence in the Roman Statute is not surprising. This is because, as noted in chapter 1, the principal focus in international criminal law has traditionally been on the trial.⁶⁰ Other than by the process itself exemplifying the heinous nature of the crimes committed, the trial process does not provide the court the opportunity to overtly express the individual or collective view of the acts committed, the importance of their prosecution to the international community, and why it is necessary to sanction that activity through the punishment process. It is left to the sentencing process to perform that function. A court performs these functions by focusing on the rationales for the imposition of the punishments for the particular accused. As D’Ascoli has emphasized:

Plenipotentiaries on the Establishment of the International Criminal Court (Rome 15 June-17 July 1998)
Official Records Vol III UN Doc A/CONF.183/2 p 62-66.

⁵⁶ ibid.

⁵⁷ Rome Statute, Rules of Procedure and Evidence ICC-ASP/1/3 (3-10 September 1992).

⁵⁸ Schabas (n 46) 899, fn10.

⁵⁹ ibid.

⁶⁰ David Luban, ‘Fairness to Rightness: Jurisdiction, Legality and the Legitimacy of International Criminal Law’ in Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 469,475. He distinguishes the trial process-the decision on guilt or innocence - from the sentencing process, which in his analysis and meaning is a distinctively different stage of the process.

Goals of punishment are essential to any system of criminal justice in so far as they determine the character of the legal system and its effectiveness, the severity of sentences and the process of their execution. the absence of penological justifications in the Statutes of the ad hoc Tribunals and of the ICC weakens attempts by those institutions to exercise principles of criminal justice in a rationally founded and accepted way. To determine the appropriate goals of international sentencing is therefore of vital importance for the system of international justice. . . international justice might pursue different strategies of prosecution depending on which purpose of sentencing is considered most important. . . .⁶¹

In the international criminal law context these rationales make the connection between the nature of the acts committed, their effects on the individuals as victims of these actions, and their impact on the larger community, both particular communities and the global community. These rationales also influence the type and quantum of the particular sentence that should be imposed for the perpetration of particular offences.⁶² And, by this process a court justifies or at least attempts to justify any deprivation of liberty that results from the sentencing process.⁶³ The rationalizes for sentencing perform these vital functions in the international criminal law process, and are essential to the sustained legitimacy of international criminal law, and , as will be argued, essential to the sustained legitimacy of the ICC.

As the ICC is in its infancy, it is important that its work be continually justified. One of the avenues by which this can be done is through the rationales for the imposition of a sentence. Because the Rome Statute does not address the rationales for the

⁶¹ Silvia D'Ascoli, *Sentencing in International Criminal Law* (Hart Publishing 2011) 33-34.

⁶² Bagaric and Morss have argued that in order to decide what punishment to impose and the amount of that punishment it must first be established what is the justification for punishment and why is this justification appropriate in this case. That decision gives credence to the imposition of the punishment, and also that determination, they suggest, will also have some influence on the type and quantum of the penalty to be imposed. They argue that a sentence may well be different depending if the justification for it is because of rehabilitative principles versus retributive principles. The mechanism by which the actual type and quantum of sentence is imposed is for them a distinct aspect of the process - it is the 'method of sentencing'. (See Mirko Bagaric and John Morss, 'International Sentencing Law: In Search of a Justification and Coherent Framework' (2006) 6 ICLR 191,195,224.

⁶³ Duff and Garland argue that the failure to justify the deprivation of liberty would result in that deprivation of liberty being considered morally wrong. See Antony Duff and David Garland, 'Thinking About Punishment' in Antony Duff and David Garland (eds) *A Reader on Punishment* (OUP 1994) 1,2.

imposition of punishment Article 21(1)(a) will be of no assistance to the court in its attempt to determine such rationales. The ICC must look outside the wording of the Rome Statute to determine what justifications apply when considering the imposition of an appropriate sentence. As noted, Article 21 must focus this search, as its mandatory provisions dictate the manner in which to search for the applicable law. That search will be addressed in Chapter 3.

The mechanics by which one is to determine an appropriate sentence receives some recognition in the Rome Statute and the Rules of Procedure and Evidence. Article 21(1)(a) can assist in determining what the words of the Statute and the Rules mean as they relate to sentencing. However, as will be noted, the wording at times lacks the precision that one would like to provide certainty to sentencing decisions. The mechanisms of sentencing, as interpreted within the parameters of Article 21(1)(a) will be the focus of the remainder of this chapter.

Section 3 The Sentencing Options in the Rome Statute

Article 77 of the Rome Statute sets out the basic penalties that the court can impose. It states:

Applicable penalties

1. Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:

(a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or

(b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.⁶⁴

2. In addition to imprisonment, the Court may order:

⁶⁴ The reference to Article 110 of the Rome Statute is a reference to an application for review of a sentence after its imposition, and requires the convicted person to await until two thirds of the sentence is served or 25 years in the case of life imprisonment before a sentence can be reviewed to determine if the individual should be released.

- (a) *A fine under the criteria provided for in the Rules of Procedure and Evidence;*
- (b) *A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties*

The word ‘may’ that precedes the actual numerical penalties that can be imposed might, standing on its own, initially suggest that the court is not obliged to impose imprisonment. However, subsection 2 begins with the words ‘In addition to imprisonment the court may order’, which makes it clear that the ordering of a fine and/or forfeiture is in addition to rather than in substitution of the term of imprisonment.⁶⁵

Thus, if an individual is convicted of one or more of the designated offences, the court must impose as a penalty a period of imprisonment. The Court can make a choice between two imprisonment options - imprisonment for up to 30 years or life imprisonment. The most difficult issue facing the ICC at the sentencing stage is what criteria to apply to determine the length of imprisonment to be imposed. The court may also impose a fine in addition to imprisonment. The fine is optional. The first consideration for the court is whether a fine should be imposed. Rule 146 of the Rules of Procedure and Evidence states that when the court is considering whether a fine should be imposed, and in fixing the amount of the fine, ‘the Court shall determine whether imprisonment is a sufficient penalty’. In making such a determination, especially the determination whether to impose the fine at all, the reasons for imposing the sentence will play an important role in deciding if these reasons are satisfied through the imposition of a period of imprisonment. The criteria set out in Rule 145(1)⁶⁶ and the particular criteria set out in Rule 146 will determine the quantum of the fine.

⁶⁵ Claus Kreb, ‘Penalties, Enforcement and Cooperation in the International Criminal Statute’ (1998) 6 Eur J Crim Cr L Cr J 442,445; King and LaRosa (n 47) 315; Hoel (n 46) 51; Rolf Fife, ‘Article 77 Applicable Penalties’ in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, Hart Publishing 2008) 1419,1420.

⁶⁶ This is because Rule 145 (1) specifically states that the totality of any sentence of imprisonment ‘and fine’ must reflect the culpability of the convicted person. Therefore, if a fine is part of the consideration for sentence, it along with the term of imprisonment must be sufficient to satisfy the culpability of the convicted person.

The court has two additional sentencing options. The first is the forfeiture of proceeds of crime, and the second is to determine the scope of any damage to victims of crime. The forfeiture of proceeds of crime is contained within the ‘Applicable Penalties’ section of Part 7 of the Rome Statute (Article 77(2)(b)). The authority to consider reparations to victims is not contained in the penalties section but in Article 75, which is in Part 6, the Trial.⁶⁷ Article 75 gives the court the power and authority to ‘determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting’. And in subsection 2 the Rome Statute specifically gives the court the authority to ‘make an order directly against a convicted person specifying appropriate reparations to or in respect of victims, including restitution, compensation and rehabilitation’.⁶⁸ Although not included within Part 7 of the Rome Statute, the decision on reparations to victims is still a part of the sentencing process for the court. It is therefore a legitimate focus at the sentencing stage of the process.

⁶⁷ The reason for the inclusion of reparations to victims in Part 6 of the Rome Statute rather than Part 7 is puzzling, but may be because it is considered to be a restorative process rather than a penalty, and therefore should not be included as part of the penalty regime. However, it cannot be invoked until a conviction is registered, and therefore does have some of the trappings of a penalty.

⁶⁸ Adrian Hoel is one of the few commentators to emphasize that the types of sentencing options available to the court includes reparations to victims ordered against the convicted person. (See Hoel (n 46) 51). How the court is to determine these reparations and the process by which it will do so has been addressed by the court in Rules 94 to 99 of the Rules of Procedure and Evidence. The references to the procedure to be undertaken here is essentially to make the appropriate application to the court, with notice to the various parties. The determination of the amount of reparation is governed by Rule 97, and allows the use of experts to determine the value of the reparations, if any to be awarded on an individual or a collective basis. Such a provision is unique to the ICC, and has not before been addressed in statutory form by any of the other tribunals.

Section 4 The Mechanics for Determining a Sentence at the ICC - The General Provisions

Article 78 is titled ‘Determination of the Sentence’ and Article 78(1) addresses what has been described as the mechanics by which the court imposes the sentence.⁶⁹ It states:

In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.

An initial reading of these words within the context of the section does create some confusion.⁷⁰ The word ‘shall’ in that provision qualifies the remainder of the words of the subsection.⁷¹ It might appear that this wording mandates that the court take the two factors - gravity of the crime and the individual circumstances of the convicted person-into account, and that these are the principal factors for consideration in the imposition of sentence. However, the wording itself does not suggest that these are the only factors that the court need consider in the imposition of a sentence. As noted the section states that the court ‘shall take into account such factors as’. This suggests that the court must consider factors, but whether the types of factors mentioned are like the two outlined is not clear. Nor do these need be the only factors to apply. Thus, looking at the plain meaning of the words, as mandated by Article 31 of the VCLT, the wording does lead to some uncertainty as to the manner in which the sentencing court is to exercise its sentencing function.⁷²

⁶⁹ Stuart Beresford, ‘Unshackling the paper tiger- the sentencing practices of the ad hoc international criminal tribunals for the former Yugoslavia and Rwanda’ (2001)1 ICLR 33,51.

⁷⁰ Dana (n 2) has also recognized the imprecise language that has been used by the drafters of the Rome Statute and the Rules of Procedure and Evidence.

⁷¹ It is interesting to note that in both the Statutes of the ICTY (Article 24) and of the ICTR (Article 23) the wording is similar, but not quite the same. The word ‘should’ is placed before the phrase ‘take into consideration such factors as ‘in both Article 24 of the ICTY Statute and Article 23 of the ICTR Statute. It is also of note, as will be discussed in chapter 4, that the two Tribunals have crafted their sentences around the gravity of the crime, and secondly the individual circumstances of the convicted person.

⁷² It should be noted that the Appeals Chamber in the case of *Prosecutor v Thomas Lubanga Dyilo* (Appeals Chamber) ICC-01/04-01/06-3122 A4 A6 (1 December 2014) suggests that the factors mentioned

Article 78 also mandates that the sentence to be imposed ‘shall’ take into account the Rules of Procedure and Evidence.⁷³ The Rules of Procedure and Evidence were supposed to particularize and thereby provide guidance to the Court with respect to the processes undertaken by the court in its decision making processes. At times, on their plain reading they are less than emphatic in their approach. The general rule that applies is Rule 145. This Rule is obviously intended to provide some particulars for the sentencing process. However, like the wording of Article 78(1) itself, the wording used is less than particular and directive in nature and leaves much flexibility and therefore some uncertainty in determining the appropriate sentence.

The opening wording of Rule 145(1) contains the mandatory verb ‘shall’. This verb qualifies three subsections that follow it. Each of these three subsections each also contain qualifying words which are less than mandatory in nature, and effectively dilute the mandatory nature of the word ‘shall’ imposed at the beginning of the section. For example, subsection 145(1)(a) states that the court shall ‘bear in mind’ that the totality of the sentence ‘must reflect the culpability of the convicted person’. These first words ‘bear in mind’ on their ordinary meaning would suggest that it only be considered. It does not imply that it must be considered. However, the word ‘must’, which follows later in the same subsection is a mandatory word, and means that it is required to be done. When the phrase ‘bear in mind’ is combined with the word ‘must’, it is questionable whether subsection 1(a) mandates that something actually be done, or whether something only be considered to be done. It is arguable however, that when the subsection is read in its totality, as is required by Article 31 of the VCLT, that the implication is that the entire

in Article 78 are two factors to be considered, but are only some of the factors that the court can consider. The other factors mentioned in Rule 145 (1)(c) and Rule 145(2) are also factors to be considered (See para 32 of that decision and footnote 66 and 67 in relation to that paragraph.) The Appeals Chamber at paras 61-64 suggests that there are three approaches to the intersection of Article 78 and Rule 145 of the Rules of Procedure and Evidence, but leaves to another day which interpretation of the intersection between the Article and the Rules should apply.

⁷³ The Article is careful to state that all sentencing is in accord with the section and also in accord with the Rules of Procedure and Evidence. Rule 145 of the Rules is the general Rule that applies. Subsequent Rules address in particular the imposition of a fine (Rule 146) and any orders for restitution (Rule 147).

sentence, composed of either imprisonment alone or imprisonment and a fine, must be sufficient to reflect the culpability of the convicted person. In other words, in combination with the nature of the offence as a factor for consideration, the culpability of the offender must be a factor that must be reflected in the totality of the penalties imposed. This of course does not mean in the absolute sense, but must mean within the parameters of the sentencing options that are available pursuant to the Statute - maximum of 30 years imprisonment or life imprisonment and any fine to be imposed. How responsible the convicted person is would also be an essential factor in the determination of the length of the sentence of imprisonment and whether a fine will be imposed in addition to imprisonment, and the quantum of the imprisonment and the fine.⁷⁴

Rule 145(1)(b) also mandates that the court shall balance all relevant factors, including aggravating and mitigating factors. It is in subsection 2 that these factors are considered in more detail. Subsection (2) does state that the court shall ‘take into account’ these factors, but then uses the term ‘as appropriate’. It does not prioritize any of these factors, but leaves it to the court to effectively consider whatever factors are appropriate. And, in listing the mitigating factors it does not provide an exhaustive list, but lists just two and qualifies them by the phrase ‘such as’. This suggests there may be more mitigating factors considered, but what they are is unknown. The Statute lists five aggravating factors that the court is to ‘take into account’, and then states it can also consider other circumstances of similar type to those enumerated.

Rule 145(1)(c) states that the court ‘shall give consideration’ to the extent of the damage caused, and in particular to the harm caused to victims and family, the nature of the crime, the involvement of the convicted person, and the personal circumstances of the convicted person. Again, although the mandatory verb ‘shall’ is used to suggest the other types of considerations that the court need consider, the wording that qualifies the remaining words of the subsection does not either suggest or require that the other factors be relied on by the court. The drafters could have chosen words that carry a mandatory

⁷⁴ This of course is because imprisonment is a mandatory sentence for anyone convicted under the provisions of the Rome Statute.

requirement, such as the word ‘apply’ or such other mandatory wording. Yet they did not, leaving it open to the court to choose which if any of the factors listed should be used in the imposition of the appropriate punishment.

It therefore appears that in accordance with Rule 145, the only mandatory factor the court is required to consider is that the total sentence must reflect the degree of responsibility of the individual for the offence or offences that have been committed. All the other factors that are listed are for the consideration of the court if the court deems them appropriate in determining the ultimate sentence that is to be imposed. How these factors fit together to construct a particular sentence is dependent on the individualized nature of each particular sentence. In accordance with the strict approach to the interpretation of the wording of its statute, reference to the wording and phrasing does provide some interpretative guidance for the court in its sentencing endeavors.⁷⁵ While the wording is not as clear and unambiguous as one would like, it is of sufficient particularity that the words provide statutory guidance to the court with respect to the mechanics of determining the sentence. It would therefore be unnecessary to look outside the parameters of the statute to determine how it will apply the mechanics of sentencing.⁷⁶

Section 5 Particular Provisions

a. Life imprisonment

Life imprisonment can only be imposed if it can be justified on two grounds. The first is that the offence is one of extreme gravity. The second is the individual

⁷⁵ Hochmayr (n 9) argues that the ICC makes strong efforts to find meaning for words of the Statute within the confines of the Statute itself. He argues that this approach by the ICC ‘merits approval’. He argues that internal law should be applied even if it is ambiguous. Otherwise external law will trump internal law. This would lead to the loss of the unique nature of the Rome Statute. (See p 662-663).

⁷⁶ ibid.

circumstances of the convicted person warrant the imposition of life imprisonment.⁷⁷ Because of the conjunctive ‘and’ between the two criteria, both must be present before the court can impose a life sentence. These are the same criteria to be considered for the imposition of any sentence with the additional qualifier that the offence must be one of ‘extreme gravity’. There is no definition of what constitutes ‘extreme gravity’ in the Rome Statute itself. Rule 145 of the Rules of Procedure and Evidence states that the two criteria can be met by the existence of one or more aggravating circumstances. These aggravating circumstances relate either to the circumstances of the offence or the personal circumstances of the perpetrator.⁷⁸ The evidence of one or more of these aggravating circumstances are the threshold requirement for the imposition of a life sentence. However, the existence of one or more of these factors does not necessitate the imposition of a life sentence. That is within the discretion of the court, and what other criteria that could be considered is not enumerated in the Rome Statute or the Rules of Procedure and Evidence.

In accordance with Article 31(1) of the VCLT the words used must be considered in their ordinary meaning. The ordinary meaning of ‘one or more aggravating circumstances’ suggest that the phrase qualifies both aspects of the criteria - the extreme gravity and the individual circumstances of the convicted person. That is, there must be one or more aggravating circumstance to qualify each of the two criteria to be considered

⁷⁷ The wording of the subsection 1(b) of Article 77 reads as follows: ‘A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person’.

⁷⁸ The threshold aggravating circumstances have been partially enumerated in Rule 145(2) of the Rules of Procedure and Evidence. These aggravating circumstances are either focused on the circumstances of the offence itself or on the perpetrator of that offence. Those that apply to the circumstances of the offence include:

- commission of the crime with particular cruelty Article 145(2)(b)(iv)*
- commission of the crime where there are multiple victims Article 145(2)(b)(iv)*
- commission of the crime for any motive involving discrimination on any grounds referred to in Article 21(3) Article 145(2)(b)(v)*
- commission of the crime through abuse of power Article 145(2)(b)(ii)*
- commission of the crime where the victim is particularly defenceless Article 145(2)(b)(iii)*

Aggravating factors which are focused on the individual circumstances of the perpetrator are:

- relevant prior criminal convictions for crimes under the jurisdiction of the Court or of a similar nature Article 145(2)(b)(i)*
- official capacity of the perpetrator Article 145(2)(b)(ii)*

for the determination of a sentence of life imprisonment. Otherwise there could be a circumstance where a relevant prior criminal conviction pursuant to Rule 145(2)(b)(i), which would not qualify the ‘extreme gravity’ of the offence but rather the individual circumstances of the convicted person, would be sufficient to provide the base criteria for the imposition of a life sentence. This would completely ignore and nullify the criteria of ‘extreme gravity’ of the offence, which is the principal criteria which distinguishes the imposition of a fixed term of imprisonment from one of a life sentence. However, the difficulty and limiting aspect of this interpretation of the wording as provided in the Article and the Rules is that there are only two aggravating criteria which apply to the ‘individual circumstances of the convicted person’⁷⁹ and five criteria would apply to qualify ‘extreme gravity’.⁸⁰ There is a catch all category listed in Rule 145(2)(b) (vi) which states in part ‘Other circumstances which . . . by virtue of their nature are similar to those mentioned’. However there is no specificity to that category, requiring the determination of factors that could be considered to impose life imprisonment to be determined by analogy. It must be remembered that Article 23 of the Rome Statute adopts the *nullum crimen sine lege* principle of law. One of the four attributes of this principle is that of ‘*lex stricta*’.⁸¹ This provision prohibits the application of a penalty by analogy. Boot argues in the civil law context that this includes providing certainty to the law for purposes of judicial interpretation, as well as permitting the perpetrator to foresee the general legal consequences of his actions.⁸² The inclusion of a catch all general category to apply as an aggravating criteria that could trigger a consideration of a life sentence appears to run afoul of the *lex stricta* principle. As a result the ICC will have

⁷⁹ Rule 145(2)(b)(i) and possibility part of (ii)(official capacity).

⁸⁰ Rule 145(2)(iii)(iv)(v) and part of (ii) (abuse of power).

⁸¹ Dana (n 2) 864-866. Dana suggest that the interpretation of *lex stricta* as prohibiting punishment by analogy comes from the civil law tradition.

⁸² Machteld Boot, *Nullem Crime Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Intersentia2002) 94-95
<<https://books.google.ca/books?id=6QjrSHfoEiAC&pg=PA100&lpg=PA100&dq=lex+stricta&source=bl&ots=5sLHauhNJ7&sig=n04pM6CbsRGS6WvvYZT1QfQA01Q&hl=en&sa=X&ei=bJEBVaymA8iqggSFpI0ADA&ved=0CDgQ6AEwAw>> accessed 12 March 2015.

difficulty applying Rule 145(2)(vi), thus limiting the criteria for consideration to the ones already enumerated in the Rule.

The third issue is the interpretation to be given to particular words used to characterize the aggravating circumstances necessary to trigger a consideration of the sentence of life imprisonment. There are two criteria which are of particular concern. The first is the meaning to be ascribed to the words ‘official capacity’. These words are not defined in the Statute or the Rules of Procedure and Evidence. Article 21 of the Rome Statute requires the court to limit its interpretative efforts in accordance with the three step process set out in that Article, but again does acknowledge the use to be made of Article 31 of the VCLT. Within that context the term ‘official capacity’ appears in Article 27 of the Rome Statute. Reference is made in that Article to a number of categories of ‘official capacity’ including a ‘Head of State or Government, a member of a Government or parliament, an elected representative or a government official’. In addition, in Article 48 of the Rome Statute, reference is made to the immunity conferred on judges of the court when acting in their ‘official capacity’.⁸³ In these references in Article 27 and Article 48, the reference to ‘official capacity’ refers to someone who holds an office and acts within the authority of that office, such as a head of state, a government official or a judge. In addition the ordinary meaning to be given to the term ‘official capacity’ is that it is that of an office holder. Thus, the abuse of authority of an office holder of one’s official capacity would constitute an aggravating circumstance which could, if other factors are present, result in the court considering a life sentence. The ICC can also take comfort that at both the ICTY and the ICTR abuse of authority by an official in his official capacity was recognized as an aggravating factor in the imposition of sentence.⁸⁴

⁸³ Article 48(2).

⁸⁴ See for the ICTY cases such as *Prosecutor v Obrenovic* (Sentencing Judgment) IT-02-60/2-S (10 December 2003) para 99; *Prosecutor v Martic* (Appeal) IT-95-11-A (8 October 2008) para 9 (separate opinion of Judge Schomburg). See for the ICTR cases such as *Prosecutor v Rukundo* (Judgment) ICTR - 2001-70-T (27 February 2009) para 605; *Prosecutor v Gatete* (Judgment) ICTR 2000-61-T (31 March 2011) para 678. According to Pruitt, ‘abuse of authority’ was cited in 37 cases as an aggravating factor. What ultimate role it had in the determination of the appropriate sentence is unknown (See William Pruitt,

Reference is also made in Rule 145(2)(b)(iii) to the commission of crimes where the ‘victim is particularly defenceless’. There are no other references to that term in either the Rome Statute or the Rules of Procedure and Evidence. The ordinary meaning of that phrase would suggest that it applies to vulnerable persons, as these are persons who are unable to defend themselves. However, the phrase ‘particularly defenceless’ appears to limit the category further, but it is particularly difficult to determine who might be included within that category. The court may have to show some flexibility in its interpretative process in order to obtain some assistance to explain the phrase.⁸⁵ It is interesting to note that in only four of the sixty cases studied by Pruitt was the vulnerability of the victim considered an aggravating factor in sentencing.⁸⁶

Reference to the background material leading to the establishment of the ICC provides no assistance in addressing the various issues raised in this subsection. In the long and difficult history that has characterized the development of an international criminal court, the reason for the selection of the type of penalty has received little attention.⁸⁷ Articles 46 and 47 of the Draft Statute for an International Criminal Court addressed sentencing.⁸⁸ The penalties provided for in Article 47 of the Draft Statute include ‘life imprisonment, or of imprisonment for a specified number of years’. There is

⁸⁵ ‘Aggravating and Mitigating Sentencing Factors at the ICTR-An Exploratory Analysis’ ((2014) 14 ICLR 148, 162.

⁸⁶ As noted in this chapter and as will be emphasized in chapter 3, the court has on occasion looked outside the strict parameters of Article 21 to obtain meaning for particular words or phrases in the Statute. (See for example *Prosecutor v Thomas Lubanga Dyilo* (Trial Chamber I) ICC-01/04-01/06-2705 (30 March 2011); *Prosecutor v Thomas Lubanga Dyilo* (Trial Chamber I) ICC-01/04-01/06-2727(28 April 2011); *Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* (Trial Chamber IV) ICC-02/05-03/09-410 (26 October 2012).

⁸⁷ Pruitt (n 84) 166.

⁸⁸ See ILC, ‘Historical Survey of the Question of International Criminal Jurisdiction’ (n 52). See also ILC ‘Draft Code of Offences Against the Peace and Security of Mankind’ (Part 1) Summary (3 August 2015) <http://legal.un.org/ilc/guide/7_3.shtml> accessed 10 August 2015; ILC ‘Draft Code of Crimes against the Peace and Security of Mankind (Part II) Summary’ (15 July 2015) <<http://legal.un.org/ilc>> accessed 20 July 2015.

⁸⁹ Draft Statute for an International Criminal Court (n 52).

no particular reference as to how this is to be determined. And, there is no clear direction from Article 47 when life imprisonment may be imposed. Life imprisonment as one possible penalty appears in the subsequent drafts prepared by the Preparatory Committee,⁸⁹ and appeared in the early drafts of the Working Group on Penalties for the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.⁹⁰ However, the present wording of the penalty section referencing a ‘term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person’ appeared in the text of draft articles on the 4th of July 1998.⁹¹ No explanation is provided for the inclusion of the phrase ‘extreme gravity’. As noted earlier, the best approach the court can take is in referencing Rule 145(2)(b) and determining the meaning to be ascribed to the words of that section.⁹²

⁸⁹ See for example ‘Report of Preparatory Committee for the Establishment of an International Criminal Court–Penalties’ (27 August 1996) UN Doc A/AC.249/L.17/Add.1; ‘Report of the Preparatory Committee on the Establishment of an International Criminal Court’ (13 September 1996) (n 55); ‘Report of the Preparatory Committee on the Establishment of an International Criminal Court’ (14 April 1998) (n 55).

⁹⁰ See in particular ‘Report of the Working Group on Penalties’ UN Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court (Rome 15 June-17 July 1998) (4 July 1998A/CONF.183/C.1/WGP/L.14; ‘Report of the Working Group on Penalties’ UN Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court (Rome 15 June-17 July 1998) (9 July 1998) A/CONF.183/C.1/WGP/L.14/Add.2.

⁹¹ ‘Report of the Working Group on Penalties’ UN Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court (Rome 15 June-17 July 1998) (4 July 1998) (n 90). It is noted in one of the footnotes to this subsection that some delegates expressed concerns about imposing a sentence of life imprisonment, without a mechanism for review of lengthy sentences. Others required that in addition to a lengthy sentence there was a need for strict criteria to focus any review.

⁹² The issue of the death penalty was raised throughout the discussions on penalties. A proposed draft of the section on applicable penalties proposed by Barbados, Dominica, Jamaica, Singapore and Trinidad and Tobago included as one of the penalties that of the death penalty. (See ‘Barbados et al Proposal on the Death Penalty’ UN Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court (Rome 15 June-17 July 1998) (4 July 1998) UN Doc A/CONF.183/C.1/WGP/L.13). However, after much discussion a compromise was reached. Mr. Yee of the Singapore delegation explained that there was a recognition that even though his country supported the death penalty, the penalties proposed in the final document were a compromise and it did not preclude individual countries from continuing to impose the death penalty in their domestic legislation (See ‘Summary Records of Meeting of Committee of the Whole’ UN Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court (Rome 15 June - 17 July 1998) (16 July 1998) UN Doc A/CONF.183/C.1/SR.41.

b. The fine⁹³

What is surprising in the list of penalties available to the court is the option of imposing a fine in addition to the sentence of imprisonment.⁹⁴ The guidance found in the Rome Statute with respect to the imposition of a fine is the same general guidance as found for all sentences ‘the court shall....take into account such factors as the gravity of the crimes and the individual circumstances of the convicted person’.⁹⁵ The only other reference in the Statute to the imposition of a fine is the provision in Article 77(2)(a) that states that the Court may order a fine ‘under the criteria provided for in the Rules of Procedure and Evidence’. Rule 145 first specifically states that the totality of a sentence of imprisonment and fine must reflect the culpability of the convicted person. Since the provisions of Rule 145 apply to the determination of a sentence, which would include a

⁹³ Article 77(2)(a) Rome Statute.

⁹⁴ The possibility of a fine along with other penalties had long been considered in drafts of statutes for the development of a Permanent International Criminal Court. ‘The Historical Survey of the Question of the International Criminal Jurisdiction’ notes that as early as 1925 the Resolution of the Inter-Parliamentary Union on the Criminality of Wars of Aggression and the Organization of International Repressive Measures proposed that the penalties include a fine (See ‘Historical Survey of the Question of the International Criminal Jurisdiction’ (n 52) 72). There is no reference to a fine as a penalty in either the Nuremberg or Tokyo Charter, nor does it appear in the Draft Code of the International Law Commission of Offences against the Peace and Security of Mankind of 1951 or 1954 (See ILC ‘Draft Code of Offences against the Peace and Security of Mankind (1951)’ (Report of the International Law Commission on the Work of its Third Session 16 May-27 July 1951) in Year Book of ILC Vol 11 1951 p 134-137 UN Doc A/CN.4/48 and Corr. 1 &2 and ILC ‘Draft Code of Offences against the Peace and Security of Mankind (1954)’ (Report of the International Law Commission on the Work of its Sixth Session 3-28 July 1954) in Year Book of the ILC Vol 11 1954 p 149-152 UN Doc_A/CN.4/88). When the International Law Commission was asked to renew its work on a Draft Code of Offences Against the Peace and Security of Mankind by United Nations General Assembly Resolution Res 36/106 (10 December 1981) the submission of a Draft Statute for an International Criminal Court included in Article 47 a list of applicable penalties, one of which was a fine. In the Commentaries to the Draft Statute there is no reason given for the inclusion of the fine as a penalty. (See ‘Draft Statute for an International Criminal Court with Commentaries 1994’ (n 52) 60). Even though the Report of the Preparatory Committee on the Establishment of an International Criminal Court Vol 1 (13 September 1996) (n 55) p 63 para 303 had stated that after due consideration the use of a fine as an appropriate penalty was considered inadequate because of the seriousness of the offences and the difficulty collecting such fines, the imposition of a fine as a possible penalty for the commission of an international crime remained in the various drafts of a statute for an international criminal court from that date to the passage of the Rome Statute in 1998. Neither the ICTR statute nor the ICTY statute allows a fine as one of the possible penalties.

⁹⁵ Article 78(1) Rome Statute. An analysis of the parameters of this subsection has already been provided earlier in this chapter when considering the general criteria for sentencing, and applies equally to the imposition of a fine.

fine, then all the subsections of Rule 145, including the aggravating and mitigating factors, would apply to the determination of the imposition of a fine,⁹⁶ with the exception of Rule 145(3).⁹⁷ However, in addition to those factors, which have already been alluded to earlier in this chapter, Rule 146 references three specific factors to be considered by the court in the imposition of a fine. The first is that the Court ‘shall’ first determine if ‘imprisonment is a sufficient penalty’. This is the threshold criteria, for if imprisonment is considered sufficient, then the other two factors appear superfluous. How one determines that is not set out with any particularity in either the Rome Statute or the Rules of Procedure and Evidence. Broad discretion is given to the presiding judges to make such a determination on this issue, and to decide if a fine should accompany the sentence of imprisonment. It seems obvious that this determination has to be made within the context of the reasons for sentence - in other words the justifications that the court can call on to justify the imposition of the particular sentence. This, as will be argued throughout this thesis requires adherence to an internationalized approach to sentencing, which is not addressed within the confines of the Rome Statute.

If the threshold criteria is met, then the additional criteria for consideration are set out in Rule 146(1). These criteria - financial capacity and the degree to which the crime was motivated by personal gain - are factual in nature and ascertainable. What is surprising with respect to the imposition of a fine is that the criteria for consideration of a fine are much more defined than the criteria for the imposition of a period of incarceration. Once one gets past the decision to impose the fine, the particular criteria with respect to the amount and the conditions for its imposition are set out with reasonable particularity.

⁹⁶ Rule 146(1) makes it clear that the factors enumerated in Rule 145 do apply. It states in part ‘The Court shall take into account, in addition to the factors referred to in rule 145 above. . . .’.

⁹⁷ Rule 145(3) refers only to life imprisonment.

c. Orders of forfeiture

Article 77(2)(b) of the Rome Statute states that in addition to imprisonment and a fine the court can also order ‘...forfeiture of proceeds, property and assets derived directly or indirectly from that crime. . .’. Rule 147 of the Rules of Procedure and Evidence sets out the general procedure that should be undertaken to determine if a forfeiture order should issue. The key issue is the distinction between the words ‘proceeds’, ‘property’, and ‘assets’ of crime. Because they are distinct terms the meaning to be ascribed to each term should necessarily be different. There is nothing in the Rome Statute or in the Rules of Procedure and Evidence to distinguish these terms from each other.

The issue of the inclusion of forfeiture of proceeds of crime had been addressed in general terms in earlier attempts to draft a statute for an international criminal court.⁹⁸ The present wording of the forfeiture provisions in the Rome Statute appeared in the first report of the Working Group on Penalties of July 4, 1998,⁹⁹ and that wording, without changes was adopted by the state parties to the Rome Conference. There is nothing in the written material to add any light to the meaning to be ascribed to the words adopted.

Robert Fife, the Chair of the Working Group on Penalties at the Rome Conference has acknowledged the difficulties with the interpretation of this section, and suggested that reference to other international conventions using similar language may help to add

⁹⁸ See in particular Convention for the Creation of an International Criminal Court 1937 Article 39 (Historical Survey of the Question of International Criminal Jurisdiction) (n 52); Draft Convention for the Creation of an International Criminal Court (London International Assembly 1943) Article 45 (Historical Survey of the Question of International Criminal Jurisdiction) (n 52); Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT) Annex (adopted 8 August 1945) (1951) 82 UNTS 279. (There was no similar provision in the Charter of the International Military Tribunal Far East); Draft Statute for an International Criminal Court with Commentaries 1994 (n 52) p 60. There was not always unanimity on the issue, as such a provision was also considered by the International Law Commission in its work on a Draft Convention for an International Criminal Court. There was concern by some members that it would be extremely difficult to trace this type of property, and that the court would be delving into the area of domestic law it was thought better left to the domestic jurisdictions to deal with the matter.

⁹⁹ ‘Report of the Working Group on Penalties’ (4 July 1998) (n 90) p 2.

meaning to the words of the Rome Statute.¹⁰⁰ The UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988) in Article 5 permits confiscation of ‘proceeds derived from . . . or property the value of which corresponds to the value of such proceeds’.¹⁰¹ However, the definition of the term ‘proceeds’ in Article 1 of the Convention states it means ‘property’ derived from criminal activity. And ‘property’ is defined broadly to include ‘assets of every kind’, and includes ‘corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments evidencing title to, or interest in, such assets’.¹⁰² In the International Convention against the Suppression and Financing of Terrorism proceeds is defined by the use of the term ‘funds’. That term is then defined as is the term ‘property’ in the other two noted Conventions, except that it is broadened to include ‘electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travelers cheques, bank cheques, money orders, shares, securities, bonds, drafts, letters of credit’.¹⁰³ Nowhere is the term ‘assets’ defined in these conventions. What the court could derive from the use of some of these terms in other international instruments is that they are in international law considered broad in scope, with the attempt to include all types of property, both corporeal and incorporeal, tangible and intangible. Mr. Fife’s suggestion effectively requires the ICC to utilize Article 31(3)(c) of the VCLT. That would permit the court to consider in its interpretation of words of the Rome Statute ‘any relevant rules of international law’.¹⁰⁴ That would allow the court to consider some of the definitions of the various words set out in the noted treaties. As noted earlier in this

¹⁰⁰ Rolf Fife, ‘Applicable Penalties: Article 77’ in Otto Triffterer *Commentary on the Rome Statute of the International Criminal Court* (Hart Publishing 2008) 1419, 1425-1426.

¹⁰¹ (Adopted 20 December 1988, in force 11 November 1990) 1582 UNTS 95.

¹⁰² The United Nations Convention on Transnational Organizational Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209 uses the same definitions as the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (n 101). (See Article 2 of that Convention).

¹⁰³ See Article 1 of the International Convention for the Suppression and Financing of Terrorism (adopted 9 December 1999 in force 10 April 2002) 2178 UNTS 195.

¹⁰⁴ Article 31(3)(c) of the VCLT.

chapter, while the court has been reluctant to whole heartedly adopt Article 31(3)(c) and apply it in its decisions, that reluctance may now be softening.

d. Reparations to victims

The power to order restitution to victims of crime is set out in Article 75(2) of the Rome Statute. This power is included in Part 6 of the Rome Statute, which is entitled Trial. It is not included in the penalty section probably because an order for restitution to victims is not a penalty, but rather is a form of restorative justice open to the court.¹⁰⁵ Even though it is not a penalty per se, it does take place at the sentencing phase of the trial process, and therefore fits within that broader scope of the sentencing continuum. Article 75(2) states in part that the court may consider reparations to victims in the form of ‘restitution, compensation and rehabilitation’. Article 75(1) further states that the court may establish principles upon which it should operate in determining the particular form that the reparations should take. Reparations to victims are addressed in Rules 94-99 of the Rules of Procedure and Evidence. These Rules address the procedure for application for reparations,¹⁰⁶ and do note that reparations may be made on an individual or group basis.¹⁰⁷ They also note that experts may be appointed at the request of victims or the court to assist in the assessment of reparations.¹⁰⁸ Beyond these basic parameters the Rules are silent on the method and manner for the determination of reparations for victims. Schabas reports that there was an attempt by judges of the court to draft a set of principles, but it was not completed.¹⁰⁹

¹⁰⁵ It is indeed arguable that reparations to victims is part of the restorative justice initiative that is very prevalent within a number of provisions of the Rome Statute. Its focus is not on punishing the convicted person, but rather its focus is on the victim(s), and the need to, as much as is possible help them to re-establish themselves in their community or some other community and provide them with the assistance they require for that purpose. Restorative justice is an evolving concept, and it is probably because of that fact that the Statute is ambiguous with respect to the criteria to apply.

¹⁰⁶ Rule 94 and 95 Rules of Procedure and Evidence.

¹⁰⁷ Rule 97(1) Rules of Procedure and Evidence.

¹⁰⁸ Rule 97(2) Rules of Procedure and Evidence.

¹⁰⁹ Schabas (n 46) 881.

On August 12, 2012 the ICC issued its first decision on reparations to victims.¹¹⁰ The judgment set out some basic guidelines for the determination of reparations for victims. These include some general principles that should guide future cases, including a recognition of the importance of going beyond punitive justice, ‘towards a solution which is more inclusive, encourages participation and recognizes the need to provide effective remedies for victims’.¹¹¹ The Court further recognized that the scope of possible reparations should be broad, reflecting not only the three listed types of reparations, compensation and rehabilitation but also those ‘with a symbolic, preventative or transformative value....’¹¹² The judgment also outlined some possible parameters of restitution,¹¹³ compensation,¹¹⁴ and rehabilitation.¹¹⁵ This judgment was subject to appeal and on March 3, 2015 the Appeals Chamber issued its decision.¹¹⁶ It set out five basic principles that are to apply to all cases in which reparations to victims are to be considered,¹¹⁷ overturning the Trial Chamber’s position that any principles set out in that

¹¹⁰ *Prosecutor v Thomas Lubanga Dyilo* (Trial Chamber I) ICC-01/04-01/06-2904 (7 August 2012).

¹¹¹ *ibid* para. 177.

¹¹² *ibid* para. 222.

¹¹³ *ibid* para 223-225.

¹¹⁴ *ibid* para 226-231. Included in these paragraphs are examples of the type of damages that could be considered (See para. 230).

¹¹⁵ *ibid* para 232-236.

¹¹⁶ *Prosecutor v Thomas Lubanga Dyilo* (Appeals Chamber) ICC-01/04-01/06-3129 (A A2 A3) (3 March 2015).

¹¹⁷ These five principles are: 1) it must be directed against the convicted person; 2) it must establish and inform the convicted person of his or her liability with respect to the reparations awarded in the order; 3) it must specify, and provide reasons for, the type of reparations ordered, either collective, individual or both, pursuant to rules 97 (1) and 98 of the Rules of Procedure and Evidence; 4) it must define the harm caused to direct and indirect victims as a result of the crimes for which the person was convicted, as well as identify the modalities of reparations that the Trial Chamber considers appropriate based on the circumstances of the specific case before it; and 5) it must identify the victims eligible to benefit from the awards for reparations or set out the criteria of eligibility based on the link between the harm suffered by the victims and the crimes for which the person was convicted. (See *Prosecutor v Thomas Lubanga Dyilo* (n 116) para 32, 55).

trial decision were limited to that case only.¹¹⁸ The decision also affirmed the position taken in a previous decision on this appeal that the Prosecutor is not a party to the appeal of the reparations hearing decision.¹¹⁹ The process set out in this decision appears detailed, extensive and time consuming. It falls outside the traditional sentencing processes that are considered by courts, and adopts a separate process beyond the set determination of punishment for the consideration of reparation to victims. Future cases will have to determine how extensive are the reparation hearings for victims in these cases.

Section 6 Conclusion

The provisions of the Rome Statute and the Rules of Procedure and Evidence do not address any justifications for punishment that should be considered when sentencing those convicted of any of the offences under the jurisdiction of the ICC. While the mechanics by which a fit sentence is to be determined is addressed within the parameters of the Rome Statute and the Rules of Procedure and Evidence, there is still some ambiguity with the choice of wording and the lack of definition of such wording. However much of the meaning to be ascribed to these words can be addressed by reference to the interpretative provisions of Articles 31 and 32 of the VCLT. The Court has to look closely at the words of the Statute and how they operate in concert with the Rules of Procedure and Evidence. As shown in this chapter, by close adherence to the interpretative provisions of the VCLT, many of the words, while initially appearing ambiguous and uncertain, can be given a meaning by reference to their plain meaning, how they relate to other words and sections of the Statute, or interpreted in accordance with how such words have been treated in other parts of the Statute and Rules. What cannot be determined within the parameters of the Statute and Rules are the justifications of punishment that the ICC could apply to any determination of sentence. If the ICC is to develop a principled approach to sentencing through adoption of justifications of punishment, as is proposed in this thesis, it must look outside the words of the Rome

¹¹⁸ See *Prosecutor v Thomas Lubanga Dyilo* (n 110) para 181.

¹¹⁹ *Prosecutor v Thomas Lubanga Dyilo* (n 116) para 86.

Statute, Elements of Crimes and Rules of Procedure and Evidence. Since such justifications are not addressed in the Rome Statute or in the Rules of Procedure and Evidence, the ICC will have to utilize Articles 21(1)(b) and if necessary Article 21(1)(c) to make such determinations. Chapter 3 addresses that issue, and suggests that a particular interpretation of Article 21(1)(c) can allow the court to adopt principles of sentencing to rationalize its sentencing positions.

Chapter 3

How the ICC Must Address the Gaps in the Statutory Framework for Sentencing

The gaps in the statutory framework for sentencing, especially with respect to the justifications of punishment need to be addressed. As discussed in chapter 2, many of the wording difficulties with the mechanics of sentencing can be addressed using the interpretative provisions of the VCLT. However, the failure to consider justifications of punishment cannot be addressed in that way, and requires a further analysis within the structure of Article 21. In accordance with Article 21 of the Rome Statute, if the statute itself does not provide the necessary legal tools for the imposition of sentence, then the court must follow the second and third tiers of the hierarchical structure to determine the law to apply to impose an appropriate sentence. The particular language of the second tier has been commented on by the ICC, but the third tier has not, to March 31, 2016, received judicial interpretation by the ICC. As such it will be necessary to assess whether some meaning and parameters can be set for these provisions before determining if they can assist the court in finding appropriate factors to apply to sentencing by the ICC.

This present chapter reviews the parameters of Article 21(1)(b) and concludes that there are several international treaties that can, in a general way, apply to sentencing at the ICC. However, there are at present no rules of customary international law that can apply. A detailed analysis of Article 21(1)(c) follows, adopting the approach proposed by Raimondo to the application of Article 21(1)(c).¹ This approach consists of a comparative law analysis to determine if there are legal principles that can be derived from national legal systems with respect to sentencing for international crimes. The analysis focuses on a sample of countries from the common law and civil law traditions, as those traditions, and in particular the sample countries chosen, have a strong history of developing and applying legislation that encompasses international criminal law issues. The analysis concludes that while the particular components of the approach to sentencing for

¹ Fabian Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Martinus Nijhoff 2008).

international crimes differs in different countries within the common law and civil law legal systems, the overriding principle is that justifications of punishment in international criminal law require consideration of ‘principles of sentencing’ that can apply in the international context. The subsequent issue, to be addressed in the following chapters is which principle or principles should apply to sentencing at the ICC.

Section 1 Applicable Treaties

The provisions in Article 21(1)(b) focus on the application of international law to fill any gaps that occur in the application of the Rome Statute, the Elements of Crimes and the Rules of Procedure and Evidence. This is in keeping with the general thrust of the Rome Statute as a statute dealing with international matters, rather than a focus on domestic matters.² The history of the provision, from the first drafts in 1951 to its final formulation as Article 21 of the Rome Statute is reflective of the focus on the application of international law.³ The concept of treaties, as one of the principal determinants of international law, is not defined in the statute. The VCLT defines a treaty as ‘an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation’.⁴ The Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations recognizes that a treaty may also be concluded between states and

² The earliest drafts of a statute for the development of an international criminal court contained a provision dealing with applicable law, but the references were to international law, international criminal law, and ‘where appropriate, national law’ (See United Nations, ‘Committee on International Criminal Jurisdiction, (1952) 46 AJIL No 1, Supplement, Official Documents, Jan 1952 p1-11). Quincy Wright, when commenting on the early drafts of the statute, noted that there was always an international focus to the court, because of its international jurisdiction, while recognizing that in some circumstances there may be a need to reference domestic law (Quincy Wright, ‘Proposal for an International Criminal Court ‘(1952) 46 AJIL 60, 70).

³ See the analysis in Ida Caracciolo, ‘Applicable Law’ in Flavia Lattanzi and William Schabas (eds) *Essays on the Rome Statute of the International Criminal Court* (Editrice il Sirente piccola societa cooperativa a r.1, 1999) 211.

⁴ Vienna Convention on the Law of Treaties (adopted 23 May 1969 in force 27 January 1980) 1155 UNTS 331 Article 2.

international bodies recognized as such by the international community.⁵ The use of the term ‘treaty’ in Article 21 of the Rome Statute will probably encompass both contexts.⁶ What is of greater concern is the qualifications placed on the word ‘treaties’. The entire subsection is qualified by the phrase ‘where appropriate’ and the term ‘treaties’ itself is qualified by the term ‘applicable’.⁷ Thus in order to even consider treaties, it first must be appropriate to do so, and secondly the treaties of concern must be applicable to the issue of law with which the ICC is grappling. As the focus here is on sentencing, the appropriateness of the treaties for consideration would be those that have any impact on sentencing in international criminal law. Whether a particular treaty is applicable will depend on the sentencing provision of concern at the time of its consideration. In the context of the gaps in the provisions on sentencing in the Rome Statute, any consideration of treaties must relate to the deficiencies noted, in this case the justifications for the imposition of a sentence.

Those instruments for consideration include the Universal Declaration of Human Rights,⁸ the European Convention on Human Rights,⁹ the International Covenant on Civil

⁵ U N Doc A/CONF.129/15 (21 March 1986, open for signature 21 March 1986) Article 2. Article 4 of the Rome Statute does permit the ICC, as an international body, to enter into agreements with other organizations and with states with respect to matters under the jurisdiction of the ICC (see Article 4 Rome Statute).

⁶ Vladimir-Djuro Degan has argued that as ‘treaties’ only bind states or other international persons who agree to be bound by them, it is really those treaty provisions that have become part of customary international law that would be applicable as sources of international criminal law. (See Vladimir-Djuro Degan, ‘On the Sources of International Criminal Law’ (2005) 4 Chinese J Int’l L 45, 50. Robert Perrin has also recognized the problem of the application of international law treaties and principles to international criminal law, as these treaties and principles relate to states and state relations, and may not be adaptable to matters relating to individuals. (See Robert Perrin, ‘Searching for Law While Seeking Justice: The Difficulties of Enforcing International Humanitarian Law in International Criminal Trials’ (2007-2008) 39 Ottawa L Rev 367, 373. However, the term exists, and some meaning must be provided to it.

⁷ There had been some discussion at the preparatory committee stage between the use of the word ‘relevant’ to qualify treaty, and the use of the word ‘applicable’. The word ‘applicable’ was finally chosen, but the reasons for the adoption of that word appears to have been lost in the discussion. (See Caracciolo, (n 3) 214.)

⁸ (adopted 10 December 1948) UNGA Res 217A (III).

⁹ Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950 in force 3 September 1953) 213 UNTS 221.

and Political Rights,¹⁰ the American Convention on Human Rights,¹¹ the African Charter on Human and Peoples Rights,¹² the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment,¹³ and the Charter of the Fundamental Rights of the European Union.¹⁴ A review of these instruments suggests that Article 16(1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,¹⁵ Article 5(2) of the American Convention on Human Rights,¹⁶ and Article 5 of the African Charter on Human Rights¹⁷ each state that no one is to be subject to ‘cruel, inhuman or degrading treatment or punishment’. While these provisions do not directly assist the court in the determination of which justifications of punishment are applicable to sentencing at the ICC, they do require the court to consider in its choice of justifications that their application do not lead to the imposition of any sentence that is cruel, inhuman or degrading. Article 49(3) of the Charter of Fundamental Rights of the European Union¹⁸ may also have some impact on the selection by the court of justifications of punishment. That subsection requires that the ‘severity of a sentence must not be disproportionate to the criminal offence’. While this provision is arguably more applicable to the determination of the quantum of sentence, its general requirement could also influence the selection of the justifications of punishment by the ICC. Any justification selected must not be one that could, by its selection alone, lead to the imposition of a sentence which is disproportionate to the offence committed. Finally Article 10 of the International Covenant on Civil and Political Rights may also have some

¹⁰ (adopted 16 December 1966 in force 23 March 1976) 999 UNTS 71.

¹¹ (adopted 21 November 1969 in force 18 July 1978) 1144 UNTS 123.

¹² (adopted 27 June 1981 in force 21 October 1986) 1520 UNTS 217.

¹³ (adopted 10 December 1984 in force 26 June 1987) 1465 UNTS 85.

¹⁴ (26 October 2012, 2012C 326/02).

¹⁵ (n 12).

¹⁶ (n 10).

¹⁷ (n 11).

¹⁸ (n 13).

indirect application to the sentencing issues at the ICC.¹⁹ In considering the appropriate sentence to be imposed, the ICC would have to be certain that any justifications of punishment must treat all persons to be sentenced with humanity, and must be cognizant that in imposing the appropriate sentence there must exist sufficient flexibility to allow those sentenced to avail of rehabilitative and reformatory opportunities. This would not in any way deflect from the primary principles that should be applied at the sentencing stage, but only to recognize that once sentenced, all should be treated in accordance with the requirements of Article 10. The court can sentence for the overriding reasons of deterrence, denunciation or any other appropriate principle. Yet once incarcerated the individual can be given access to all programming that will assist in the person's reformation and social rehabilitation without detracting from the principles of sentence.²⁰

These human rights treaties would also come into play with the application of Article 21(3) of the Rome Statute. That provision requires that the application and interpretation of law must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender, age, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.²¹ The ICC has, in several cases, recognized that both the

¹⁹ Article 10 of the Covenant states :

1. *All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.*

2. . . .

3. *The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.*

²⁰ Roisin Mulgrew, *Towards the Development of the International Penal System* (CUP 2013) 214-216. She has argued this very point, and has advocated for an international penal system that focuses on rehabilitation/resocialisation as its primary goal. She recognizes that this is distinct from the justifications for the imposition of a sentence, which could include retribution and deterrence as its justification.

²¹ Article 21(3) Rome Statute. See Gerhard Hafner and Christina Binder "The Interpretation of Article 21(3) ICC Statute" (2004) 9 ARIEL 163; Daniel Sheppard, 'The International Criminal Court and Internationally Recognized Human Rights: Understanding Article 21(3) of the Rome Statute' (2010) 10 ICLR 43; Stephen Bailey, 'Article 21(3) of the Rome Statute: A Plea for Clarity' (2014) 14 ICLR 513.

interpretation and the application of the law it is to apply must accord with the provisions of Article 21(3) of the Rome Statute.²²

Section 2 Principles and Rules of International Law

There has been some debate in the literature with respect to the meaning to be ascribed to the phrase ‘the principles and rules of international law’.²³ Margaret de Guzman has suggested that the ‘rules of international law’ would traditionally be derived from customary international law.²⁴ However she is unsure whether the phrase ‘principles of international law’ refers specifically to customary law, general principles of law derived from domestic law or if it refers to principles derived from ‘the international legal conscience, the nature of the international community or natural law’.²⁵ Ida Caracciolo has concluded that the phrase means customary international law, inclusive of general principles of law as referenced in Article 38 of the Statute of the International Criminal Court.²⁶ Alain Pellet is emphatic in his view that the phrase principles and rules of international law ‘refers exclusively, to customary international law. . . .’²⁷ Vladimir-Djuro Degan is also of the view that it refers to customary international law.²⁸ Gudrun Hochmayr, using a more analytical approach, also concludes that ‘...subparagraph (b) of

²² See an excellent analysis of the influence of Article 21(3) in the decisions of the ICC in Gilbert Bitti, ‘Article 21 and the Hierarchy of Sources of Law before the ICC’ in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2015) 410, 433-436; Joseph Powderly, ‘The Rome Statute and the Attempted Corseting of the Interpretative Judicial Function’ in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (OUP 2015) 444, 484-489.

²³ Margaret de Guzman, ‘Applicable Law’ in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, Hart Publications 2008) 701; Alain Pellet, ‘Applicable Law’ in Antonio Cassese et al (eds), *The Rome Statute of the International Criminal Court: A Commentary* Vol 2 (OUP 2001) 1051 ; Caracciolo (n 3).

²⁴ de Guzman (n 23) 707-708.

²⁵ ibid 707.

²⁶ Caracciolo (n 3) 227.

²⁷ Pellet (n 23) 1068.

²⁸ Vladimir-Djuro Degan (n 6) 80.

Article 21(1) of the ICC Statute encompass customary international law, but not general principles of law'.²⁹

The phrase, in a modified form, appeared in the 1994 Draft Statute of the International Criminal Court compiled by the International Law Commission.³⁰ It read as follows:

Article 33

The Court shall apply

a)

b) Applicable treaties and the principles and rules of general international law;

The commentary to the Draft Statute stated:

*The expression “principles and rules” of general international law includes general principles of law, so that the court can legitimately have recourse to the whole corpus of criminal law, whether found in national forums or in international practice, whenever it needs guidance on matters not clearly regulated by treaty.*³¹

This wording did not change until the July 11th 1998 Draft of the Report of the Working Group on Applicable Law.³² Subsection (b) of the Article now read ‘In the second place, where appropriate, applicable treaties and the principles and rules of international law’. While the word ‘general’ was removed, a footnote to the change noted that ‘It is understood that the term ‘international law’ means public international law’.³³ Although the explanatory note suggests that the phrase was intended to be broad in scope,

²⁹ Gundun Hochmayr, ‘Applicable Law in Practice and Theory: Interpreting Article 21 of the Rome Statute’ (2014) 12 JICJ 655, 669. The analysis used by Hochmayr relies principally on the fact that in the various attempts at drafting Article 21 the final changes for the entirety of Article 21(1) were made to Article 21(1)(c), in which the general principles of law were included. He argues that Article 21(1)(b) remained unchanged.

³⁰ ‘Draft Statute for an International Criminal Court with Commentaries’ in Yearbook of the ILC 1994 Vol 11 Part Two UN Doc A/CN.4/SER.A/1994/Add.1 (Part 2) 26-67.

³¹ *ibid* 51.

³² ‘Committee of the Whole Working Group on Applicable Law ‘UN Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court (Rome 15 June-17 July 1998) (11 July 1998) A/CONF.183/C.1/WGAL/L.2.

³³ *ibid*.

in view of the comments of noted writers and in view of the wording of Article 21(1)(c), the better position is that the subsection refers to customary international law. Pellet argues that the use of the words ‘rules and principles’ together is nothing more than a verbal tick, while Caracciolo is much more expansive in her view and concludes it means customary international law, which would also include those principles of international law that have now been accepted as part of customary international law.³⁴ The ICC in the recent decision of *Prosecutor v Jean Pierre Bemba Gombo* concluded that ‘principles and rules of international law are generally accepted to refer to customary international law’.³⁵ While the court did not reference any authority to support its position, or go into any analysis, its position is in keeping with the authoritative writers on the subject.

It is important to recognize, however, that while the source of international law may be customary international law,³⁶ it is the application of that law through the rules and principles developed through that source which is the focus of Article 21(1)(b). Raimondo has recognized this point, noting that

. . . .international courts and tribunals do not apply sources of international law, but the rules and principles derived there from. These rules and principles come into existence in different ways. These ways are the so-called formal sources of international law, notwithstanding that the formation of international law is rather deformalized. Despite their deformalized creation, general principles of law (and custom) are usually studied in the context of the formal

³⁴ (See Pellet (n 23)1071-1072; See Caracciolo (n 3) 227).

³⁵ *Prosecurot v Jean Pierre Bemba Gombo* (Trial Chamber III) ICC-01/05-01/08 (21 March 2016) para 71.

³⁶ Customary international law is generally understood as that which has been accepted by nations of the world. The two criteria associated with the determination whether a particular rule has become part of customary international law are that there is a consistent practice among states that endures over an extended period of time , and that such practice is so recognized by states as constituting a practice by which they are bound (opinion juris). See Brian D Lepard, *Customary International Law* (CUP 2010) 6. However there has been much debate in recent years on the effectiveness and validity of these two criteria (See in particular Jack Goldsmith and Eric A Posner, ‘Understanding the Resemblance Between Modern and Traditional Customary International Law’(1999-2000) 40 Va J Intl L 639; Anthea Elizabeth Roberts, ‘Traditional and Modern Approaches to Customary International Law’(2001) 95 AJIL 757; Andrew T Guzman, ‘Saving Customary International Law’ (2005-2006) 27 Mich J Intl L 115. Yet to date they still remain the acknowledged criteria by which customary rules become a part of international law.

*sources of international law. This is so because the rules and principles derived therefrom fulfill normative functions in international law.*³⁷

While the sources are not the focus of Article 21(1)(b), it still has to be determined whether the principles and rules of international law flow from customary international law before they can be applied by the ICC. Otherwise they do not have the authority of law as recognized in international law. In looking at the matter in that light, then customary international law should be considered in determining if there are rules and principles of international law which can be considered applicable law to be relevant to any matter of concern for the court.

Because international criminal law is still very much in its infancy, there is limited development of customary rules with respect to many aspects of international criminal law,³⁸ and in particular sentencing in international criminal law. The ICTY, the ICTR and the SCSL have, in addition to the statutory requirements that the court consider the gravity of the offence and the individual circumstances of the offender,³⁹ followed certain principles in determining sentences. These principles include retribution, denunciation, deterrence, rehabilitation, for the ICTY general affirmative prevention, and for the SCSL to protect the norms and values of the international community.⁴⁰ Although they may have some persuasive value, their use by these tribunals does not make them principles and rules of customary international law. The two criteria of *opinion juris* and state practice are not established by the sentencing practice of these international

³⁷ Raimondo (n 1) 36.

³⁸ There has begun to develop some recognition of the parameters of the three basic offences that constitute offences in international criminal law.

³⁹ Article 24(2) of the ICTY Statute; Article 23(2) of the ICTR Statute; and Article 19(2) of the Statute for the Special Court of Sierra Leone.

⁴⁰ See for example *Prosecutor v Krajisnik* (Appeal) IT-00-39-A (17 March 2009) para 775 and for the SCSL the case of *Prosecutor v Moinima Fofana and Allieu Kondewa* SCSL-04-14-T-796 (Sentencing Judgment) (9 October 2007) para 30.

tribunals. Indeed none of the ad hoc tribunals considering genocide, crimes against humanity or war crimes have suggested such is the case.⁴¹

Section 3 General Principles of Law Derived by the Court from National Laws of Legal Systems of the World

The concept of ‘general principles of law’ as constituting part of the law to apply in international disputes has been utilized for a long time by international courts and tribunals to fill legal gaps, interpret legal rules, and to substantiate legal reasoning.⁴² The phrase appeared in statutory form in the Statute of the Permanent Court of International Justice as constituting one of the sources of international law.⁴³ The wording was repeated in Section 38(1)(c) of the Statute of the International Court of Justice.⁴⁴ It states that in applying international law the court shall apply ‘general principles of law recognized by civilized nations’.⁴⁵ There has been a long and unresolved debate whether these principles, now recognized in international law, are considered part of customary law, or whether they have an existence independent of the rules of customary international law.⁴⁶ Cheng argues that they are distinct, noting in particular that they only require recognition and not practice, unlike customary international law.⁴⁷ The proponent of the wording of Article 38(3) of the Statute of the Permanent Court of International Justice, Lord Phillimore, originally intended that ‘the general principles of law as

⁴¹ The SCSL did not have jurisdiction to consider the crime of genocide, but only crimes against humanity and war crimes (See Articles 3 and 4 of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone (adopted 16 January 2002, in force 12 April 2002) 2178 UNTS 138.

⁴² Raimondo (n 1) 7.

⁴³ See Article 38(3) of the Statute of the Permanent Court of International Justice (adopted 16 December 1920 in force 16 December 1920) 170 LON 380.

⁴⁴ Article 38(1)(c) of the Statute of the International Court of Justice (adopted 26 June 1945 in force 24 October 1945) 15 UNCIO 355.

⁴⁵ ibid.

⁴⁶ Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (CUP 1953) 23-24; Raimondo (n 1) 36-42.

⁴⁷ ibid 24.

recognized by civilized nations' meant legal maxims that had been accepted *in foro domestico*.⁴⁸ While some particular legal maxims have received recognition in decisions of international courts as constituting principles of international law, such principles are not confined to such maxims.⁴⁹ Both Cheng and Raimondo provide examples of principles of law that extend beyond legal maxims that have been recognized as principles of law adopted into international law. In particular, Raimondo includes the principles that 'courts must be established by law'⁵⁰, 'no appeal lies unless conferred by statute'⁵¹, 'the definition of the crime of rape as a general principle of law'⁵² and 'the impartiality of the judiciary'.⁵³

Some writers have opined that what is meant by 'general principles of law' in Article 38(3)(c) of the Statute of the ICJ differs from what is meant by the 'general principles of law' in Article 21(1)(c) of the Rome Statute. Schabas implies that the use of the phrase 'general principles of law' in Article 21(1)(c) is not in reference to one of the primary sources of international law, but rather references a process, using a comparative criminal law methodology.⁵⁴ He argues that that 'the better interpretation is to treat Article 21(1)(c) as an invitation to consult comparative criminal law as a subsidiary

⁴⁸ *ibid* 24; Raimondo (n 1)19. See also the analysis of the work of Alfred Verdross in Bruno Simma, 'The Contribution of Alfred Verdross to the Theory of International Law' (1995) 6 EJIL 33 at 47-50 where it is argued that 'general principles of law' 'derived from the shared legal conscience (*Rechtsbewußtsein*) of the peoples of the world'. Verdross argued these general principles of law were anchored in natural law.

⁴⁹ Both Cheng and Raimondo provides numerous examples of the recognition by courts of principles such as *audi alterim partem* (Cheng (n 46) 296); *nemo jurex in sua propria causa* (Cheung (n 46) 258; *res judicata* (Cheung (n 46) 326, Raimondo (n 1) 104 &146; *nullum crimen nulla poena sine lege* (Raimondo (n 1) 105-109; *nulla poena sine culpa* (Cheung (n 46) 208-212; Raimondo (n 1)145; *lex mitior* (Raimondo (n 1) 140 ;*favour rei* (Raimondo (n 1) 140.

⁵⁰ Raimondo (n 1) 87-91.

⁵¹ *ibid* 91-93.

⁵² *ibid* 112-115 and 133-135.

⁵³ *ibid* 128-130. It should be noted that Raimondo analyzes twenty nine such examples in his study. The ones noted are but examples of the ones he analyzes.

⁵⁴ William Schabas, *The International Criminal Court* (OUP 2010) 391.

source of norms'.⁵⁵ Powderly too sees the subsection inviting a comparative criminal law analysis. He is more emphatic in his position on the substance of Article 21(1)(c).⁵⁶ He states that the general principles of law falling under Article 21(1)(c) are 'not related' to the general principles of law referenced in Article 38(1)(c) of the Statute of the ICJ.⁵⁷ While it seems clear that the process envisioned by Article 21(1)(c) invites a comparative criminal law approach to the determination of 'principles of law' accepted by major legal systems of the world, that does not preclude the acceptance of legal principles that have been acknowledged to exist in accordance with Article 38(1)(c) of the Statute of the ICJ. A comparative law approach may indeed determine that such principles are accepted by the major legal systems of the world. Indeed, Raimondo proposes such an approach to be used to determine if there are principles of law under Article 38(1)(c).⁵⁸ It seems only if Schabas and Powderly are confining the concept of 'general principles of law' to their historical roots as proposed by Lord Phillimore, would their position be justified. Otherwise, as will be argued below, the better position is that as put forward by Raimondo, through a comparative law analysis, general principles of law derived from national laws of legal systems of the world can be discovered which could include those principles of law recognized through Article 38(1)(c) of the Statute of the ICJ.

Raimondo analyzes the provisions of Article 21 of the Rome Statute, and argues that the purposes of Article 21(1)(c) is primarily to fill the gaps that exist if the other two approaches to determining the applicable law do not yield results.⁵⁹ These principles are ones that are to be determined by the ICC from its analysis of the national laws of the major legal systems of the world. In doing so the plain wording of the section establishes that what is to be considered are not the laws of any particular jurisdiction but rather 'general principles of law' that are derived from a review of the legal systems of the

⁵⁵ ibid 393.

⁵⁶ ibid 482-483.

⁵⁷ Powderly (n 22) 482.

⁵⁸ Raimondo (n 1) 45-46.

⁵⁹ ibid 149-150.

world. This suggests a need for a comparative law analysis utilizing an extrapolation from the major legal systems. Raimondo has described this approach as having a vertical and a horizontal component.⁶⁰ The vertical component consists of abstracting these principles from national legal systems.⁶¹ The horizontal component consists of verifying that the majority of nations recognize the legal principle involved.⁶² The latter involves a comparative law analysis of the various legal systems to make that determination.⁶³

The wording of Article 21(1)(c) refers to national laws of ‘legal systems of the world’. There is no clear guidance from the statute itself as to which legal systems should be the subject of comparison, and indeed how many would suffice. Pellet suggests that the legal systems of the world would include those of the common law, civil law, and ‘perhaps’ Islamic law.⁶⁴ The tradition of the ICTY has been to review sufficient jurisdictions to satisfy the presiding court of the existence or otherwise of a particular tradition.⁶⁵ The approach of the ICTY has been considered somewhat weak in its application of the appropriate legal systems of the world to provide the basis for a conclusion that there exists either customary international law or principles of law that could be relied on by the courts to fill the lacunae in the existing law.⁶⁶

⁶⁰ ibid 45.

⁶¹ ibid 46-50.

⁶² ibid 50.

⁶³ ibid 50. Pellet describes the approach in similar terms, although his approach has three steps to it. (Pellet (n 23) 1073).

⁶⁴ Pellet (n 23) 1074.

⁶⁵ See analysis in Perrin (n 6).

⁶⁶ See Perrin (n 6) 382, 399; Degan (n 6) 375-377. Perrin has also postulated that the approach may represent a departure from the stricter approach envisaged through the application of Article 38(1)(c) of the ICJ, towards a less stringent and more discretionary position of the modern international criminal law tribunal. This more liberal discretionary position, taken especially by the judges of the ICTY is both a reflection of the recognition by the judges of that tribunal that as an emerging branch of international law, international criminal law must take some latitude in responding to the atrocities with which it is mandated to consider, while at the same time providing some principled approach to filling the gaps with the existing legislation it must interpret. Perrin suggests it is a struggle between concerns for the application of humanitarian law and the need to be fair to the accused (Also see comments of Judges McDonald and Vohrah in *Prosecutor v Erdemovic* (Appeal) IT 96-22 -A (7 October 1997) para 57.

The ICC implicitly addressed the approach to be undertaken in its use of Article 21(1)(c) in one of its earliest decisions in an appeal of a pre-trial matter. The issue was the power of review on appeal where the Rome Statute itself did not specifically address the right to appeal Pre-Trial Chamber decisions on ancillary matters.⁶⁷ The Appeals Chamber addressed the approach the Prosecutor had proposed to deal with this lacuna through the use of Article 21(1)(c). The court concluded that there was no principle of law emanating from the legal systems of the world that supported the prosecution's position. The importance of the decision, however, is not in its particular finding but in its process and method of analysis. Although the court did not specifically adopt the approach proposed by the prosecutor, by applying that approach and dismissing the prosecutor's argument, the court has implicitly acknowledged that this approach is a possible way to analyze a case involving an Article 21(1)(c) analysis. However, it appears that the court did take a rather strict approach, suggesting that all countries of a particular tradition should be canvassed. At paragraph 27 Judge Pikis for the court stated with reference to the practice of states of the Romano-Germanic tradition

*That the legislation of the countries enumerated above reflects a uniform rule finding application in all states having the Romano-Germanic system of justice, the Appeals Chamber cannot confirm.*⁶⁸

If that is the approach to be followed, then the reference to all states of the Romano-Germanic tradition sets an almost impossible standard that has to be met before the court could conclude there are general principles of law that can be recognized.⁶⁹ The wording of the statute itself references 'national laws of legal systems of the world', and does not state all legal systems of the world or all national laws of the legal systems

⁶⁷ *Situation in the Democratic Republic of Congo* (Appeals Chamber) ICC-01/04-168 (13 July 2006).

⁶⁸ *ibid* (my emphasis).

⁶⁹ However, in the end Judge Pikis does not have to rely on this analysis, as he concludes that there is no lacunae in the legislation and that the wording of the statute itself is determinative of the issue. There is no necessity to reference Article 21(1)(c) at all to reach a determination in the case.

analyzed. If one is to apply Articles 31 and 32 of the VCLT to this section, the plain meaning of the words used lead to only one conclusion. That is that reference is to legal systems of the world, and how many depends on the context and the available information with respect to them. As well, ‘national laws’ does not include all national laws, but rather sufficient national laws to be representative of the legal tradition being surveyed. Again, what is sufficient will depend on the issue at hand as well as the availability of the information. This approach is closer to that proposed by the ICTY than that of the ICC. It provides a proper balance between the need to address the serious issues at hand, while providing a degree of fairness to the person charged with the international crime.

The wording of Article 21(1)(c) of the Rome Statute itself will require the court to determine if there are principles common to national laws of legal systems of the world that relate to sentencing of international crimes. It is important to note that the focus is on principles that relate specifically to sentencing for international crimes. This is because it has been recognized by writers such as Henham,⁷⁰ Drumbl⁷¹ and Sloane⁷² and is the argument of this thesis, that the focus of sentencing does depend on context. And, what purposes and principles that apply to sentencing for domestic crimes need not apply to sentencing for crimes recognized in international criminal law.⁷³ Thus the focus must be on justifications of punishment in the international context.

How many legal systems and how many national systems will suffice for examination is, as has been noted, difficult of determination. A number of jurisdictions of the common law and the civil law traditions have in the past participated in the prosecutions of international crimes utilizing their own domestic legislation, or have

⁷⁰ Ralph Henham, *Punishment and Process in International Criminal Trials* (Ashgate 2005).

⁷¹ Mark Drumbl, *Atrocity, Punishment, and International Law* (CUP 2007).

⁷² Robert Sloane, ‘The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law’ (2007) 43 Stan J Int’l L 39.

⁷³ Henham (n 70); Drumbl (n 71); Sloane (n 72).

adopted implementing complementary legislation to that of the Rome Statute. If the ICC is to follow the dictates of Article 21(1)(c), it would at least have to consider what principles relating to sentencing in international criminal law can be derived from certain jurisdictions within major legal systems.

Since the major gap identified in the sentencing provisions of the Rome Statute is the failure to set out within the statute any justifications of punishment, the ICC will be required to look at any legislation that has been adopted by at least a sample of countries within these jurisdictions on the issue of international criminal law, as well as any court decisions that might be available from these various countries that pertain to sentencing for these crimes.⁷⁴ At a minimum countries belonging to the common law and civil law traditions should be included in this grouping. In addition, it may be appropriate to consider any country of the Islamic tradition that has addressed sentencing for international crimes.

Section 4 The Approaches to Sentencing for International Crimes Adopted by Countries of the Major Legal Systems of the World

In accordance with the complementary principle set out in Article 17 of the Rome Statute, a number of countries of the common law and civil law traditions have enacted legislation to prosecute and if found guilty to sentence those individuals within their jurisdiction who have committed genocide, crimes against humanity or war crimes. A review of the approach to sentencing for international crimes in these statutes enacted by a sample of countries from these common law and civil law traditions establishes that the general principle that the ICC can generate from such an analysis is that ‘principles of sentencing’ for international crimes are essential to guide the imposition of penalties for those who commit such international crimes. Various principles of sentencing are given

⁷⁴ See Raimondo (n 1) 48. He also suggested that decrees and resolutions of administrative organs may also be relevant. However, in the area of sentencing in international criminal law, one does not expect to find such decrees or resolutions of administrative organs. Thus one is limited to the review of the legislative endeavours and the cases decided in that area.

priority depending on the approach to sentencing adopted by each country. A review of the sentencing approaches for those found guilty of international crimes from the common law tradition - Australia, Canada, and the United Kingdom,⁷⁵ and from the civil law tradition - France and Germany,⁷⁶ support the existence of this general principle.

a. Common law countries

The approach of common law countries to the prosecution of international crimes commenced at the close of World War II. There were three phases to these prosecutions. The first involved those prosecutions undertaken by national jurisdictions at the close of the war. Such prosecutions were undertaken by Military Tribunals against mainly German and Japanese military personnel as violations of the laws of war, as crimes against peace and as crimes against humanity.⁷⁷ The second approach occurred in the 1980's and was a response to a public outcry against the presence in many countries of individuals who had escaped the initial prosecutions in the immediate aftermath of World War II, and who had emigrated and had gained admission to these common law countries.⁷⁸ Phase one and two of the prosecutions of international crimes by Australia,⁷⁹

⁷⁵ The reason these were chosen is because the legislation and past history of these matters is readily available.

⁷⁶ These countries were chosen for the same reasons as noted for the common law countries.

⁷⁷ In addition to the prosecutions pursuant to the jurisdiction given to the IMT and IMTFE, Control Council 10 was used by the Allies in prosecutions against German military and civilian personnel who were in violation of war crimes, crimes against humanity and crimes against peace. Both the British Military authorities and the American authorities conducted prosecutions within their own zones against individuals considered to be violators of these international crimes. Other countries, including Australia, Canada, Belgium and France, used their own legislation to ground their prosecutions against German military and civilian personnel who had allegedly violated international law.

⁷⁸ Gillian Triggs, 'Australia's War Crimes Trials: A Moral Necessity or Legal Minefield?' (1987-1988) 16 MULR 382, 382-383; W J Fenrick, 'The Prosecution of War Criminals in Canada' (1989-1990) 12 Dal L J 256, 257; A T Richardson, 'War Crimes Act 1991' (1992) 55 MLR 73.

⁷⁹ The War Crimes Act 1945 No 48 assented to October 11, 1945 authorized the arrest and prosecution of those who had committed war crimes in respect to Australian citizens during World War II. A military tribunal was constituted to hear the charges, (See Triggs (n 78) 382) with 924 persons actually prosecuted by military courts under the Australian War Crimes Act for war crimes committed during World War II. (See D C S Sissons 'The Australian War Crimes Trials and Investigations 1942-1951' <www.ocf.berkeley.edu/~changmin/documents/Sissons%20Final%20War%20Crimes%20Text%2018-3>

Canada,⁸⁰ and the United Kingdom⁸¹ resulted from the enactment of domestic legislation by each country to authorize such prosecutions either through military courts or domestic courts. Issues of sentence type was addressed in the legislation of each country. In phase one, section 11 of the War Crimes Act 1945 of Australia set out the sentence type available to the court.⁸² This included death (by hanging or shooting), imprisonment for life or for a lesser term, a fine and confiscation of property.⁸³ A provision with similar penalties was contained in the Canadian legislation,⁸⁴ and in the authority to prosecute

06.pdf 19 > accessed 31 August, 2012). The War Crimes Amendment Act 1988 (Cth) was enacted to grant jurisdiction for the domestic courts to hear the prosecutions of those individuals who had committed war crimes during World War II, and who were now living in Australia. No one has been successfully prosecuted under the provisions of this statute. (See Michael Kirby, ‘War Crimes Prosecution-An Australian Update’ (1993) 10 Aust Bar Rev 109,115; See also Gideon Boas, ‘We are Obliged to Act on Atrocities’, The Australian (27 October 2009) < <http://www.theaustralian.com.au/news/opinion/we-are-obliged-to-act-on-atrocities/story-e6frg6zo-1225791529908> > accessed 1 September 2012.

⁸⁰ Canada passed the War Crimes Regulations Aug 30, 1945 (PC 5831 Aug 30, 1945) which were annexed to the War Measures Act (10 Geo V1 c 73, 1946) and these became the basis of any prosecutions before military tribunals for war crimes committed against Canadian personnel during World War II. Seven persons were convicted of war crimes by the military tribunal. Canada amended its Criminal Code (Criminal Code R S C, 1985, c C-46, as amended by RSC. 1985, c 30 (3rd Supp) s. 1 to allow prosecution of persons living in Canada who had committed war crimes and crimes against humanity during World War II. No one was ever successfully prosecuted under these provisions. (See L C Green ‘Canadian Law and the Punishment of War Crimes’ (1980) 28 Chitty’s L J 249; Fenrick (n 78); *R v Finta* [1994] 1 S C R 708.

⁸¹ The Royal Warrant 0160/2498 A O 81/1945 issued pursuant to the Royal Prerogative authorized the participation of the United Kingdom in the prosecution of those responsible for the three international crimes agreed to by the Allies. In addition to being one of the major participants in the IMT, Britain prosecuted over 500 trials of individuals in Europe accused of these three crimes (See A P V Rogers, ‘War Crimes Trials under the Royal Warrant: British Practices 1945-1949’ [1990] ICLQ 780,787). In 1991 Parliament passed the War Crimes Act 1991 c 13 ss1(2) for the purpose of prosecution of individuals presently living in Britain who had committed war crimes in Germany or its occupied territories. Only one person was ever successfully prosecuted under this Act. (See Richardson (n 78) 74; *R v Sawoniuk* [2000] 2 Crim App R 220 (CA Crim Div); David Omerod, ‘A Prejudicial View’ [2000] Crim L R 452.

⁸² War Crimes Act 1945 No 48 (Cht).

⁸³ This Act was utilized by the Australian government between 1945 and 1951 in the prosecution of approximately 1000 war criminals. Sentences ranged from short periods of incarceration to death by hanging. A review of the extensive report of these military trials by D.C.S. Sissons suggests that the sentences imposed were based on the nature of the offences committed and the culpability of each of those prosecuted. Detailed reasons for the sentences were not provided in his report. (See Triggs (n 78) 382.

⁸⁴ War Crimes Regulations (n 80). In Canada four war crimes trials were held by Canadian military authorities involving seven accused between 1945-46. All were convicted and four were sentenced to death and executed, while Kurt Meyer’s sentence of death was commuted to life imprisonment. A sixth was sentenced to life imprisonment and the last, because of the lesser role he played, was sentenced to 15 years. A review of the sentencing report on Kurt Meyer simply states that ‘Meyer was sentenced to death by

under the Royal Warrant in the United Kingdom.⁸⁵ However the rationales for sentencing were not specifically addressed by the enacting legislation in either jurisdiction. The reasons for sentencing in court decisions in phase one were limited to one or two sentences setting out the sentences to be imposed.⁸⁶ In phase two, the Australian legislation provided for penalties of life imprisonment or a lesser term for war crimes in which the predicate offence was murder, and a maximum of twenty five years for other war crimes offences.⁸⁷ In Canada and Britain, the penalties were the penalties available under domestic legislation, which included a mandatory sentence of life imprisonment for murder and lesser penalties for all other offences.⁸⁸

The third phase of this process was the adoption by signatories to the Rome Statute of implementing legislation that would allow the prosecution in the domestic jurisdictions of those individuals having some connection to the domestic jurisdiction

shooting. The Convening Authority, however, commuted the death sentence to one of life imprisonment (See *Trial of S.S. Bridedeführer Kurt Meyer*, 4 LRTWC 97, 109). Again, like the reports of sentencing in Australia, there is little to determine the reasons for sentencing of these military courts, except to suggest that the sentence was based on the severity of the offences committed. (See Green (n 80); Fenrick (n 78) 257, 289-290.

⁸⁵ Royal Warrant (n 81). The British authorities acted under the Royal Warrant of 1945 in conducting over 500 trials of individuals in Europe accused of these three crimes. Such trials were conducted by military courts, with the ultimate penalty being death. As with the trials conducted before the IMT, the issue of sentence was dealt with in a perfunctory way. No reasons for the sentence were given. As a result they provide little assistance in the determination of the principles that applied to the imposition of punishment. A review of a number of cases contained in the Law Reports of Trials of War Criminals, found in digital format at <<http://www.ess.uwe.ac.uk/WCC>> accessed 21 August 2014 generally provide one or two lines just setting out the sentence imposed , and if death, whether it was subsequently commuted.

⁸⁶ A review of the sentences comments of the IMT in particular shows a lack of justification for the imposition of the sentence for those convicted of the international crimes. (See the decision of the IMT on the sentence of the 19 individuals found guilty of the Nuremberg crimes at (1946) 41 AJIL 172.

⁸⁷ War Crimes Amendment Act 1988 No 3 (1989) (Cht) s 10.

⁸⁸ Criminal Code, R S C 1985 C-46, as amended (n 80); War Crimes Act 1991 c 13 (UK). It should also be noted that Canada , through amendments to its Criminal Code, in particular s 7 and Britain through various legislation amendments and enactments (see in Redress ‘Ending Impunity in the United Kingdom for Genocide, Crimes Against Humanity, War Crimes, Torture and others Crimes under International Law’ July 2008 <<http://www.redress.org/downloads/publications/UJ-Paper-15%20Oct%2008%20-4.pdf>> accessed 3 August 2014 granted their domestic court’s jurisdiction to prosecute persons who are citizens or now resident in the respective countries of offences such as torture, hostage taking of certain officials, and in the UK certain war crimes even if the offences were committed abroad.

who have committed either war crimes, crimes against humanity or genocide.⁸⁹ To date only two of these cases have been prosecuted in the three domestic jurisdictions. However, a review of the legislation and of the one case that has been successfully prosecuted does illustrate that justifications of punishment through the adoption of principles of sentencing for international crimes are common to all these jurisdictions, even if the priority given to particular justifications are not consistent.

i. Australia

As a signatory to the Rome Statute, Australia enacted complementary legislation through the passage of the International Criminal Court Act (Consequential Amendments Act) 2002.⁹⁰ The Australian legislation sets out the definitions of war crimes, crimes against humanity and genocide, and attempts where possible to mirror the definitions provided by the Rome Statute. The penalty sections are specific to Australia, however, with the maximum penalty being life imprisonment for all offences of genocide,⁹¹ some crimes against humanity such as murder,⁹² and extermination,⁹³ and some war crimes such as killing as a war crime,⁹⁴ and attacking civilians as a war crime.⁹⁵ Some other crimes against humanity can attract maximum sentences of 10, 17 or 25 years, and some other war crimes can also attract sentences with maximums of 10, 17 or 25 years. There are no sentencing guidelines set out, but the Crimes Act 1914 as amended applies to

⁸⁹ International Criminal Court Act 2002 (Cth); Crimes Against Humanity and War Crimes Act S C 2000 c 24; International Criminal Court Act 2001 (UK).

⁹⁰ International Criminal Court Act (Consequential Amendments Act) 2002 (Cth).

⁹¹ S 268.3-268.7 Australian Criminal Code 1997 (Cth) as amended by the International Criminal Court Act (Consequential Amendments) 2002.

⁹² S 268.8.

⁹³ S 268.9.

⁹⁴ S. 268.24(2).

⁹⁵ S. 268.35.

sentencing of federal offences, of which these crimes form a part.⁹⁶ The main sentencing approach is contained in section 16A of that Act.⁹⁷ The general approach is a focus on the severity of the offence. This appears to be a form of the proportionality principle. Other factors that must be considered are set out in subsection 2 of the section. They include, in no order of importance, deterrence,⁹⁸ general punishment⁹⁹ and rehabilitation.¹⁰⁰ The result is an emphasis on the offence itself, while taking into consideration the circumstances of the offence as well as the circumstances of the offender and others.

There have been no sentences imposed under the new provisions of the International Criminal Court Act to March 31, 2016. Thus it is unknown how the courts will interpret sentencing in this context. However, because there have been set out different maximum imprisonment lengths, the concept of hierarchy of offences will potentially play some role in the process of determining the appropriate sentence to be imposed.

ii. Canada

Following the passage of the Rome Statute, Canada enacted enabling legislation to allow prosecutions of persons accused of war crimes, crimes against humanity and genocide who committed such offences in Canada. The legislation also confers jurisdiction on Canadian courts over a person who committed such offences elsewhere and that person was a Canadian citizen or employed by Canada, the person was a citizen of a state engaged in armed conflict with Canada, the victim was Canadian, the victim was a citizen of a state involved with Canada in an armed conflict, or after the time of

⁹⁶ Crimes Act 1914 (Cth) as amended.

⁹⁷ Crimes Act 1914 (Cth) Pt 1B Div 2 16A as amended.

⁹⁸ 16A(2)(j).

⁹⁹ 16A(2)(k).

¹⁰⁰ 16A(2)(n).

the alleged offence, the person is now living in Canada.¹⁰¹ The definitions of war crimes, crimes against humanity and genocide were taken from the definitions provided in the Rome Statute.¹⁰² Sections 4(2), 5(3) and 6(2) of the Act provide the penalties for those who commit these crimes inside or outside Canada. Section 6(2) in conjunction with section 8 states that if such crimes were committed outside Canada by a person now residing in Canada, and an intentional killing forms the base of the crime, that person shall be sentenced to life imprisonment.¹⁰³ In any other case the maximum punishment for those who have committed such crimes is life imprisonment.¹⁰⁴

The provisions of the Criminal Code of Canada with respect to sentencing apply to offences under the Crimes Against Humanity and War Crimes Act.¹⁰⁵ Section 718 and section 718.1 of the Criminal Code are the pertinent sections. Section 718 sets out the purposes of sentencing, and these include deterrence, denunciation, rehabilitation, and the acceptance of responsibility.¹⁰⁶ The main principle of sentence is set out in s. 718.1. It states that `a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender'. Thus, except for those offences that have a mandatory sentence of life imprisonment,¹⁰⁷ in the determination of the appropriate sentence the sentencing provisions of sections 718 and 718.1 of the Criminal Code apply. How they will apply to these most serious crimes is unknown to date. There are only two completed prosecutions under the 2000 Act. Desire Munyaneza, a former

¹⁰¹ Crimes against Humanity and War Crimes Act (n 89) s 8. Unlike most legislation this Act applies to offences committed before the Act came into effect. (See Sec 8).

¹⁰² S 4(3) Crimes Against Humanity and War Crimes Act (n 89).

¹⁰³ Crimes against Humanity and War Crimes Act s 6(2)(a).

¹⁰⁴ ibid s 6(2)(b).

¹⁰⁵ Pursuant to the Interpretation Act of Canada, the provisions of the Criminal Code of Canada apply, as appropriate to any federal offence. (See Interpretation Act R S C 1985 c I- 21). This applies to those cases where there is no mandatory sentence of life imprisonment.

¹⁰⁶ Section 718 of the Criminal Code of Canada R S C 1985 c C-46.

¹⁰⁷ These are the offences of war crimes, crimes against humanity and genocide that involve the intentional killing of another.

resident of Rwanda, had immigrated to Canada and was charged with offences under the Crimes against Humanity and War Crimes Act. He was found guilty of genocide, crimes against humanity and war crimes committed in Rwanda during 1994. In the sentencing judgment of October 29, 2009 Denis J concluded that since he had found that the accused had participated in the intentional killing of hundreds of Tutsis, the mandatory sentence of life imprisonment applied. And, because he had concluded that the killings were planned and deliberate, the legislation also required that the accused not be eligible for parole for 25 years.¹⁰⁸ The sentencing judge added that even if the legislation did not require it, the nature of the acts committed were so horrendous that a sentence of life imprisonment, to reflect the seriousness of the offences, should be imposed, without parole eligibility for 25 years.¹⁰⁹ In other words, the principle of proportionality would require that the sentence be the severest one able to be imposed in Canadian law. The only other case, that of Jacques Mungwarere, resulted in an acquittal on all charges.¹¹⁰

The legislative structure and the one case that has used that structure points to the seriousness of the offence being the overriding factor to be considered in the imposition of the appropriate sentence. However the legislation does call for a consideration of principles of deterrence, denunciation and rehabilitation as principles for consideration in the imposition of the appropriate sentence. Each principle can play a role in the justification for the implementation of the appropriate penalty.

iii. United Kingdom

In conformity with the complementarity principle of the Rome Statute, Parliament enacted the International Criminal Court Act 2001.¹¹¹ The Act mirrors the definitions of war crimes, crimes against humanity and genocide as found in the Rome Statute, and

¹⁰⁸ S. 15(1)(a) Crimes against Humanity and War Crimes (n 89).

¹⁰⁹ *R v Desire Munyaneza* (2009) QCCS No. 4865 (October 29, 2009) para 56.

¹¹⁰ See *R v Jacques Mungwarere* [2013] ONCS 4594 (Ont S C).

¹¹¹ International Criminal Court Act (n 89).

confers jurisdiction on courts in England and Wales pursuant to section 50 of the Act, and Northern Ireland, pursuant to section 60 of the Act, to prosecute those individuals who committed such offences in those jurisdictions, or who committed those offences outside the jurisdiction by persons who are UK nationals, UK residents or for England and Wales, who are subject to UK service jurisdiction.¹¹² These offences may have been committed before the individual acquired the status of a UK resident or a UK national, provided they were committed after the coming into force of the Act.¹¹³ Sentences for those offences involving murder or as ancillary to murder are the same as sentences for corresponding offences in domestic law.¹¹⁴ In cases other than murder and ancillary to murder the maximum penalty is 30 years imprisonment.¹¹⁵ In imposing sentence the court must be guided by the purpose and principles of sentence, as set out in s 142 of the Criminal Justice Act 2003 as amended.¹¹⁶ The purpose of sentence as set out in that section is to punish offenders, to deter them, to rehabilitate them and to protect the public and make reparations for harm done. These are not given any particular priority in the legislation. How these sentencing provisions will operate in practice is unknown at present, as to March 31, 2016 there have been no prosecutions undertaken under the International Criminal Court Act 2001.¹¹⁷

¹¹² ibid ss 51(2) and 58(2).

¹¹³ ibid ss 68(2).

¹¹⁴ ibid ss 53(5); ss 60(5). A good explanation of the various categories of murder is found in Sally Lipscombe and Jacqueline Beard, 'Mandatory Life Sentences for Murder' Briefing Paper. House of Common Library No 3626 12 November 2015 <<http://researchbriefings.parliament.uk>> accessed 14 December, 2015.

¹¹⁵ ibid ss 53(6); ss 60(6).

¹¹⁶ Criminal Justice Act 2003 c 44 pt 12. However these purposes do not apply to sentences which are fixed by law (ss 142(2)(b)).

¹¹⁷ There is an ongoing prosecution under section 134(1) of the Criminal Justice Act 1988 for torture. Colonel Kumar Lama of Nepal is charged with two counts of torture. (See Lekhanath Pandey, 'UK court seeks amicus curiae in Col Lama's Case' The Himalayan Times (Nepal, 27 Feb 2014) <<http://www.thehimalayantimes.com/fullNews.php?headline=UK+court+seeks+amicus++curiae+in+Col+Lama+s+case&NewsID=407275>> accessed 4 August, 2014. The trial began at the Old Bailey in London in February, 2015, but was adjourned on March 18, 2015 until August of that year. (See BBC 'Nepalese officer Kumar Lama torture trial adjourned' BBC News (18 March 2015) <<http://www.bbc.com/news/uk-england-sussex-31932371>> accessed 27 October 2015. As of March 31, 2016 the trial was continuing.

b. Civil law countries

Prosecutions for international crimes took on a somewhat similar tract to the common law experience in countries of the civil law system. There were prosecutions of war crimes by both German¹¹⁸ and French¹¹⁹ authorities after World War II. For both Germany and France, however, the interest in prosecuting war criminals soon waned, to be revived in Germany in the early 1960's and in France later in that decade.¹²⁰ In Germany, because of the statute of limitations, these prosecutions were first limited to murder, manslaughter and related cases, and in later years only to murder.¹²¹ The German Penal Code of 1871 was the operative piece of legislation.¹²² Lesser and lesser prosecutions occurred after 1979 mainly because of the age of those previously involved.

¹¹⁸ German courts were required to utilize the provisions of Control Council 10 when prosecuting German citizens for committing war crimes, crimes against humanity or crimes against peace against fellow Germans. The penalties were those set out in Control Council 10-death, imprisonment up to life, forfeiture of property, restitution of property and deprivation of certain civil rights. German law was reinstated in 1950 and the original German Criminal Code of 1871 was again used to prosecute those Germans who had committed atrocities against others (See Robert Monson, 'The West German Statute of Limitations on Murder: A Political, Legal and Historical Exposition' (1982) 30 Am J Comp L 605, 606-608; Fritz Weinschenk, 'The Murderers Among Them: German Justice and the Nazis' (1999) 3 Hofstra L & P Symposium 137, 138; Article II (3) Control Council Law No 10 <<http://avalon.law.yale.edu/imt/imt10.asp>> accessed 5 September 2013).

¹¹⁹ The French not only participated in the prosecutions at the IMT, but by Decree dated August 23, 1945, D 1945 L 216... they could and did prosecute those who had collaborated with the enemy, and by Ordinance dated 28 August 1944 titled 'Relative a la Repression des crimes de guerre' they could prosecute war crimes committed by enemy nationals or their agents. (See Leila Sadat Wexler, 'The Interpretation of the Nuremberg Principles in the French Court of Cassation: From Touvier to Barbie and Back Again' (1994-1995) 32 Colum J of Transnat'l L 289, 316-317). The first few years following the end of World War II saw the prosecution of many in the French courts. However, due to prescription rules that apply in French law, the time limitations for the prosecution of war crimes lapsed.

¹²⁰ The revival of interest in Germany resulted from the discovery of documentation from the Nazi regime which detailed the efforts of the Germany hierarchy in attempting to exterminate the Jews (See Monson (n 118) 607-608; Weinschenk (n 118) 140. In France prosecutions focused on those who had been the decision makers with respect to the deportation of Jews from France during the Second World War. Examples were the prosecutions of Klaus Barbie, Paul Touvier, and Maurice Papon. (See Cherif Bassiouni, *Crimes Against Humanity* (CUP 2011) 678.

¹²¹ Monson (n 118) 609-615; Weinschenk (n 118) 142-143.

¹²² Between 1965 and 1969 361 persons were prosecuted for Holocaust related crimes, 223 were convicted and of those 63 were sentenced to life imprisonment. And from 1970 to 1979 West German prosecutors prosecuted 219 individuals, with 137 convictions of which 32 received life sentences. (See Weinschenk (n 118) 147).

In 2002 Germany, as a signatory to the Rome Statute, passed legislation giving it complementary jurisdiction over war crimes, crimes against humanity and genocide.

France passed legislation making it clear that the laws of prescription did not apply to crimes against humanity.¹²³ In that way it could bring prosecutions against those three individuals - Klaus Barbie, Paul Touvier and Maurice Papon who had been instrumental in the deportation and subsequent deaths of members of the Jewish community in France.¹²⁴ These three prosecutions were very controversial in France, and took many years to complete.¹²⁵ In 1992 France enacted new legislation to address crimes against humanity. It was this new law, as modified, that was to be used to prosecute any individual found in France who had committed in France or elsewhere crimes against humanity.¹²⁶ France passed amendments to its Penal Code in 2010 to provide complementary legislation to the Rome Statute to prosecute war crimes, crimes against humanity and genocide.¹²⁷ Although existing legislation did allow for the prosecution of such offences in France, the 2010 amendments extended definitions of crimes against humanity and war crimes, and provided specific penalties for some of these offences.

i. Germany

In accordance with its acceptance of the Rome Statute in 2002, Germany adopted a Code of Crimes against International Law. This Code came into effect one day before the Rome Statute, and applies to any crimes committed after that time.¹²⁸ Article 1 gives the German courts universal jurisdiction over the offences in international law defined in

¹²³ Sadat Wexler (n 119) 320.

¹²⁴ Bassiouni (n 120) 678.

¹²⁵ Leila Nadya Sadat, 'The Nuremberg Paradox' (2010) 58 Am J Comp L 151, 186.

¹²⁶ ibid 188.

¹²⁷ Law No 2010-930 (9 August 2010) < <http://www.legal-tools.org/uploads> > accessed 13 December 2015 adopting criminal law at the establishment of the International Criminal Court.

¹²⁸ Steffen Wirth 'Germany's New International Criminal Code: Bringing a Case to Court' (2003) 1 JICJ 151,152.

the statute,¹²⁹ but pursuant to section 153(f) of the German Code of Criminal Procedure it is only required that prosecution proceed if the individual under investigation is within the country.¹³⁰ The offences substantially mirror those in the Rome Statute, with some minor adjustments to accord with German law.¹³¹ The penalty sections for the three offences in the Code, however, are unlike the penalty sections in the Rome Statute, in that they divide the penalties into life sentences for killing as genocide¹³² as a crime against humanity¹³³ or as a war crime¹³⁴ but for other offences under each head of crime type the penalties range from a minimum of mandatory minimums of not less than 10 years¹³⁵ or not less than 5 years¹³⁶ or for not less than 3 years¹³⁷ or for less serious war crimes for either not less than 2 years, 1 year or 6 months.¹³⁸ The legislation references the phrase ‘least serious cases’ to justify when the mandatory sentences may be reduced, but provides no criteria to explain that phrase.

¹²⁹ S 1 states ‘This Act applies to all criminal offences against international law designated under this Act, to serious criminal offences designated therein even when the offence was committed abroad and bears no relation to Germany’ (See Act to Introduce the Code of Crimes Against International Law, 2002 *Bundesgesetzblatt* (BGBl) Teil I at 2254 <<http://www.legal-tools.org/uploads/txtltpdb/>> accessed 13 December 2015.

¹³⁰ See Wirth (n 128) 158-159.

¹³¹ ibid.

¹³² (n 129) s 6(1).

¹³³ (n 129) s 7(1).

¹³⁴ (n 129) s 8(1).

¹³⁵ (n 129) s 8(4) involving civilian victims.

¹³⁶ (n 129) s 6(2) less serious cases of genocide for example.

¹³⁷ (n 129) s 7(1).

¹³⁸ (n 129) s 8(4).

The sentencing principles that are to apply in these cases are those contained in the German Criminal Code.¹³⁹ The German Criminal Code contains a section entitled Sentencing, encompasses section 46 through section 76 of the Code. The main purpose of sentencing a person under the German Code is retributive.¹⁴⁰ Section 46(1) of the German Criminal Code notes that ‘the guilt of the offender is the basis for sentencing’. It then goes on to note that the effect the sentence is expected to have on the offender’s future life ‘shall’ be taken into account, and under subsection 2 the court is required to weigh the circumstances in favour of and against the offender. However, concerns for either deterrence or rehabilitation can trump proportionality, and the maximum sentence the offence deserves cannot be increased because of other factors.¹⁴¹ Nor can it be decreased below what it deserves for the same reason. How this will translate into sentencing determinations for those crimes under the Code of Crimes under International Law is yet to be determined. Nor does one know how the retributive principle, focusing on the seriousness of the offence, will influence sentencing patterns in Germany.

The first prosecution using the new Code of Crimes against International Law is now completed. The case involves two individuals from Rwanda, Ignace Murwanashyaka and Straton Musoni charged with war crimes and crimes against humanity for their activities in the eastern region of the Democratic Republic of Congo in 2008-2009.¹⁴² The prosecution began at the Higher Regional Court in Stuttgart, and a decision was rendered on the 28th of September 2015.¹⁴³ Murwanashyaka was convicted of aiding and abetting

¹³⁹ German Criminal Code 13 November 1998, Federal Law Gazette [Bundesgesetzblatt] I p. 3322, amended by Article 1 of the Law of 24 September 2013, Federal Law Gazette I p. 3671 and with the text of Article 6(18) of the Law of 10 October 2013, Federal Law Gazette I p 3799.

¹⁴⁰ Thomas Weigend ‘Germany’ in Kevin Heller and Marcus Dubber *The Handbook of Comparative Criminal Law* (Stanford University Press 2011) 252, 258. In a previous article Weigend has noted that the German sentencing theory is complicated and conceptually murky. He suggests that the traditional desert based system has been more individualized with reforms since the 1960’s. (See Thomas Weigend ‘Sentencing and Punishment in Germany’ in Michael Tonry and Richard Fraise *Sentencing and Sanctions in Western Countries* (OUP 2001) 203).

¹⁴¹ Weigend ‘Germany’ (n 140) 258-259.

¹⁴² European Centre for Constitutional and Human Rights (3rd Report) February 2014
<http://www.ecchr.de/kongo-war-crimes-gdr.html> accessed 30 July 2014.

war crimes, while Musoni were convicted of leading a terrorist organization.¹⁴⁴ Murwanashyaka was sentenced to thirteen years incarceration while Musoni was sentenced to eight years.¹⁴⁵ The written judgment of the court's decision on culpability and sentence has not to March 31, 2016 been released.¹⁴⁶

ii. France

In 2010 France enacted enabling legislation as complementary jurisdiction to the Rome Statute.¹⁴⁷ The French Penal Code of 2004 had provided definitions of genocide and crimes against humanity. In Book II, Title 1 subtitle 1 the French Penal Code of 2004 at paragraphs 211-1 to 213-5 set out the definitions of genocide and crimes against humanity, and that the penalties for both was 'criminal imprisonment for life'.¹⁴⁸ With the amendments in 2010 a more detailed definition of crimes against humanity (Article 212-1) is provided, and a more detailed structure set out for the sentences available to the court depending on the type of violation of the law. Sentences range from a maximum sentence of life imprisonment for genocide¹⁴⁹, and incitement to genocide,¹⁵⁰ to 15 years maximum for the offence of engaging in humiliating and degrading treatment of persons

¹⁴³ TRIAL, 'Ignace Murwanashyaka' (22 July 2016) < <https://trialinternational.org/latest-post/ignace-murwanashyaka/> > accessed 30 August 2016.

¹⁴⁴ James Karuhanga, 'Government Lauds Guilty Verdict for FDLR Leaders' The New Times (Rwanda, 29 September 2015) < <http://www.newtimes.co.rw/section/article/2015-09-29/193003/> > accessed 30 August 2016.

¹⁴⁵ Musoni was released immediately as he had already spent six years in custody, and in accordance with German law, his sentence is remitted after two thirds is served. Murwanashyaka has appealed his sentence (See Trial (n 143)). The Prosecution has also appealed. (See Trial (n 143)).

¹⁴⁶ Patrick Kroger, Universal Jurisdiction in Germany? The Congo War Crimes Trial: First Case under Code of Crimes against International Law' (20 May 2016) European Centre for Constitutional and Human Rights e.V. <FDLR Report Executive Summary _EN 2010616.pdf > accessed 30 August 2016.

¹⁴⁷ Law 2010-930 (n 127).

¹⁴⁸ French Penal Code 2004 Article 211-1, 212-1 < <http://www.legal-tools.org/uploads> > accessed 13 December 2015.

¹⁴⁹ Law No 2010-930 (9 August 2010) (n 127) Article 211-1.

¹⁵⁰ Ibid Article 211-2.

of the opposite party (Art 461-5).¹⁵¹ In addition natural persons can also be subject to forfeiture of civic, civil and family rights, prohibition to hold office, area banishment, and confiscation of any and all assets.¹⁵² The French penal code also states that legal persons, who are distinct from natural persons, can also be found liable for genocide and crimes against humanity, and are subject to a grouping of penalties found in Articles 131-139 of the Penal Code, as well as confiscation of any or all of their assets.¹⁵³

The sentencing provisions of the Penal Code apply to the crimes of genocide, crimes against humanity, and war crimes, and it is clear from the provisions of the Penal Code that only those sentences provided are to apply. Book II, Title III Articles 131 to Article 133-17 set out the various penalties that can be imposed for violations of the penal laws of France. Two points are of particular note. The first is that under the provisions of this section if the penalty for felonies for natural persons is life, then ‘the court may impose criminal imprisonment for a term, or imprisonment for not less than two years’.¹⁵⁴ Secondly Article 132-24 states that the court imposes the penalties and sets their limits in accordance with ‘the circumstances and the personality of the offender’.¹⁵⁵ It therefore seems that the focus of all penalties is on the circumstances of the offence and the background of the offender. These are the guiding principles that infuse all sentencing practices in French courts, and should influence the sentencing provisions relating to war crimes and crimes against humanity.

France has set up a special investigative unit to determine if former Rwandan citizens, presently in France, should be prosecuted for international crimes committed during the Rwandan genocide. The pace at which the French authorities have proceeded

¹⁵¹ ibid Art 461-5.

¹⁵² French Penal Code (n 148) Article 213-1. But the bans are increased because of the conviction for international crimes (See Law No 2010-930 (9 August 2010) (n 129) Article 462-3).

¹⁵³ Law No 2010-930 (9 August 2010) (n 127) Article 213-3.

¹⁵⁴ French Penal Code (n 148) Article 132-18.

¹⁵⁵ ibid Article 132-24.

in these cases has resulted in much criticism of the French proceedings.¹⁵⁶ To the end of March 2016 only one person has been successfully prosecuted in France and convicted of genocide during the Rwandan massacre.¹⁵⁷

c. Islamic law

There are a number of states that have through their constitutions adopted Shari 'a law as the governing law of the state.¹⁵⁸ That is they ascribe to the law of Islam as the law governing state and individual actions within the state. Only Afghanistan of the countries that are considered Islamic states, is a member of the ICC. To March 31, 2016, however, Afghanistan has not adopted complimentary legislation to that of the ICC. As such it is not possible to determine how sentencing in international criminal law would be addressed by such states.

The country of Iraq, whose legal structure is considered at least partially based on Islamic law, did adopt a special tribunal to adjudicate upon those who had committed war crimes, crimes against humanity and genocide in Iraq from July 17, 1968 to May 1, 2003.¹⁵⁹ Although the law setting up the special tribunal was originally adopted under the

¹⁵⁶ See the case of Wenceslas Munyeshyaka, a Rwandan priest who has been a fugitive in France since the early 1990's. His case has been before the French courts on various issues since 1995, and the matter is still not completed. (See analysis in Asser documents at <http://www.asser.nl/default.aspx?site_id=36&level1=15248&level2=&level3=&textid=39966> accessed 13 September 2012.

¹⁵⁷ Kim Willsher, 'Rwandan former spy chief Pascal Simbikangwa jailed over genocide' The Guardian (London, 14 March 2014) <http://www.theguardian.com/world/2014/mar/14/rwanda-former-spy-chief-pascal-simbikangwa-jailed-genocide?CMP=share_btn_link> accessed 12 May 2015. Apparently 30 other individuals are under active investigation by French authorities (See Trial 'Universal Jurisdiction Annual Review' at <https://www.fidh.org/IMG/pdf/trial-ecchr-fidh_uj_annual_review_2014-2.pdf> accessed 26 October 2015.

¹⁵⁸ See Clark B Lombardi and Nathan J Brown, 'Do Constitutions requiring adherence to Shari 'a Threaten Human Rights' (2006) 21 Am Un Int'l L R 379, 381. They list the following states which adhere to Shari 'a law: Afghanistan, Egypt, Iran, Pakistan, Qatar, Sudan, Saudi Arabia and Yemen.

¹⁵⁹ Law No 102005, Law of the Iraqi Higher Criminal Court (Oct 9, 2005), Official Gazette of the Republic of Iraq, No. 4006 (Oct 19, 2005) <<http://gjpi.org/wp-content/uploads/>> accessed 13 December 2015.

authority of the ‘Coalition Provisional Authority Order 48’ of December 2003, it was re-enacted by the new Iraqi provisional government on October 18, 2005.¹⁶⁰ It was based to a large extent on a draft model statute prepared by Professor Cherif Bassiouni.¹⁶¹ The penalties available for the offences within the jurisdiction of the tribunal are those set out in the Law No (111) 1969 Penal Law of the country of Iraq.¹⁶² These included death, life imprisonment, imprisonment for a term of years, and fines.¹⁶³ Pursuant to Article 24 of the Supreme Iraqi Criminal Tribunal Statute, the penalty for breaches of Articles 11, 12 and 13 of the Statute where death is involved and a number of circumstances prevail, including that the offence was premeditated, is death.¹⁶⁴ In some other circumstances the penalty is either life imprisonment or death.¹⁶⁵ Pursuant to Article 24(5) it is only in circumstances where there is no equivalent in the Iraqi Penal Code of 1969 that the court may determine a penalty taking into account such factors like the gravity of the crime, the individual circumstances of the convicted person, guided by judicial precedents and relevant sentences issued by the international criminal courts. Article 24(6) permits the court to order forfeiture of proceeds, property or assets derived directly or indirectly from a crime, without prejudice to the rights of the *bona fide* third parties.

The Iraqi court had occasion to pronounce sentence on a number of individuals prosecuted under the provisions of the new law, including the country’s leader Saddam Hussein.¹⁶⁶ The sentence imposed for premeditated murder as breaches of crimes against

¹⁶⁰ The influence of the United States was well known in the development of this legislation (See John Gibeaut, ‘Rough Justice: Behind the Scenes with the American Advisors to the Iraqi v Saddam Hussein Court’ (May 2007) ABA J No 93, 34-41.

¹⁶¹ See Cherif Bassiouni and Michael W Hanna, ‘Ceding the Higher Ground: The Iraqi High Criminal Court Statute and the Trial of Saddam Hussein’ (2006-2008) 39 Case West R J Int’l L 21, 39 at footnote 73.

¹⁶² Iraqi Penal Code Law 1969 <http://law.case.edu/saddamtrial/documents/Iraqi_Penal_Code_1969.pdf> accessed 10 September 2012.

¹⁶³ Iraqi Penal Code 1969.

¹⁶⁴ Penal Code para 406(1).

¹⁶⁵ Penal Code para 406(2).

humanity for both Saddam Hussein AL-Majid, Barzan Ibrahim al-Hassan and Awwad Hamad al-Bandar was death by hanging.¹⁶⁷ There were no reasons given for the sentences imposed. Other defendants were sentenced to lesser terms of imprisonment, again for crimes of premeditated murder as crimes against humanity. No reasons were articulated for these sentences as well.¹⁶⁸

There are no criteria provided in the Statute, or in the 1969 Penal Code with respect to the sentence to be imposed, the length of that sentence, or as to why death is imposed as compared to life imprisonment. Nor are there any reasons provided with respect to potential hierarchy of offences, other procedures on sentence, and in what circumstances restitution and reparations can be imposed. Because of the influence of the United States in the drafting and execution of the Statute, it would be difficult to argue that such a tribunal is reflective of Islamic law.

Section 5 What of the Decisions of the Ad Hoc Tribunals?

The ICTY, the ICTR and the SCSL have issued numerous sentencing decisions. Each of the tribunals have put forth justifications for the imposition of sentencing. The ICTY, the ICTR and the SCSL have each stated that retribution and deterrence are the principal justifications for sentencing.¹⁶⁹ There has been some inconsistency in the

¹⁶⁶ Judgment of the Dujail Trial at the Iraqi High Tribunal 11/5/2006
<<http://www.ictj.org/static/MENA/Iraq/DujailVerdict.eng.pdf>> accessed 18 July 2012.

¹⁶⁷ ibid.

¹⁶⁸ ibid.

¹⁶⁹ Generally these two principles of sentence were given equal weight, and were to be combined in some manner with the gravity of the crime and the degree of responsibility of the offender. There have been several decisions in which the Trial Chambers have concluded that deterrence must be given primary consideration in the determination of a sentence. See *R v Delalic et al* (Judgment) IT-96-21-T (16 November 1998) at para 1234; *Prosecutor v Milomir Stakic* (Judgment) IT-97-24-T (31 July 2003) where at para 900 the court stated that 'Individual and general deterrence has a paramount function and serves as an important goal of sentencing'. However, it then goes on to state that 'An equally important goal is retribution. . .'. The majority of decisions that have a sentencing component to them reference these factors in their decisions. A relative sample include: *Prosecutor v George Rutaganda* (Judgment) ICTR-96-3-T (13 December 1999) para 455; *Prosecutor v Kupreskic et al* (Judgment) IT- 95-16-T (14 January 2000) para 848; *Prosecutor v Musema* (Judgment) ICTR-96-13-T (27 January 2000) para 986; *Prosecutor*

tribunal decisions of the ICTY and the ICTR in particular with respect to the priority of one or the other justifications being the predominant principle for consideration in sentencing.¹⁷⁰ However, Drumbl has noted, and the research conducted for this thesis confirms, that ‘a survey of all the cases of the ad hoc tribunals over time, though, reveals a preference for retributive motivations . . .’.¹⁷¹ And, any consideration by these tribunals of the justifications of punishment in their decisions are perfunctory in nature, without any analysis of why these justifications should apply, and in what context.¹⁷² Hola describes this as a *pro forma* listing of the purposes of sentencing, with no clear link to the ultimate reasoning for the imposition of a particular quantum of sentence.¹⁷³ Concentration is placed on the ‘gravity of the offence’ as the real determiner of the sentence to be imposed, noted in the cases as the litmus test for the determination of the

^{v Aleksovski} (Appeal) IT-95-14/1-A (24 March 2000) para 185; *Prosecutor v Kunarac et al* (Judgment) IT-96-23 and IT-96-23/1-T (22 February 2001) para 838; *Prosecutor v Kordic and Cerkez* (Judgment) IT-95-12/2-T (26 February 2001) para 847; *Prosecutor v Milan Simic* (Sentencing Judgment) IT-95-9/2-S (17 October 2002) para 33; *Prosecutor v Plavsic* (Sentencing Judgment) IT-00-39&40/1-S (27 February 2003) para 22; *Prosecutor v Cesic* (Sentencing Judgment) IT-95-10/1-S (11 March 2004) para 22(rehabilitation is also considered an important factor here); *Prosecutor v Emmanuel Ndindabahizi* (Judgment) ICTR-2001-71-I (15 July 2004) para 498; *Prosecutor v Strugar* (Judgment) IT-01-42-T (31 January 2005) para 458; *Prosecutor v Bralo* (Sentencing Judgment) IT-95-17-S (7 December 2005) para 22 (also stresses rehabilitation as important but not to be given undue weight); *Prosecutor v Krajsnik* (Judgment) IT-00-39-T (27 September 2006) para 1134 (also includes rehabilitation); *Prosecutor v Zelenovic* (Sentencing Judgment) IT-96-23/2-S (4 April 2007) para 31 (does not include rehabilitation); *Prosecutor v Alex Tamba Brima, Brima Bazzi Kamara and Santigie Borbor Kanu* (Sentencing Judgment) SCSL-2004-16-T (19 July 2007); *Prosecutor v Moinina Fofana and Allieu Kondewa* (Sentencing Judgment) SCSL-04-14-T (9 October 2007); *Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze* (Appeal) ICTR-99-52-A (28 November 2007) para 1057; *Prosecutor v Boskoski and Tarculovski* (Judgment) IT-04-82-T (10 July 2008) para 587; *Prosecutor v Milutinovic et al* (Judgment) IT-05-87-T (26 February 2009) para 1144; *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (Sentencing Judgment) SCSL-04-15-T (8 April 2009); *Prosecutor v Popovic et al* (Judgment) IT-05-88-T (10 June 2010) para 2128.

¹⁷⁰ Ralph Henham, ‘The Internationalisation of Sentencing: Reality or Myth’ (2002) 1 Int’l J Soc L 265, 269; Ralph Henham, ‘The Philosophical Foundations of International Sentencing’ (2003) 1 JICJ 64, 72; Drumbl (n 71) 61; Silvia D’Ascoli, *Sentencing in International Criminal Law* (Hart 2011) 297; Barbara Hola, ‘Sentencing of International Crimes at the ICTY and the ICTR’ (2012) 4 Am L F 3, 7.

¹⁷¹ Drumbl (n 71) 61.

¹⁷² When the ICTY in particular commenced its sentencing process, it had in the case of *Prosecutor v Erdemovic* expressed broader philosophical reasons for the imposition of sentence. These included stigmatising criminal conduct which infringe fundamental values of humanity (*Prosecutor v Erdemovic* (Sentencing Judgment) IT 96-22-Tbis (5 March 1998) para 21). However, such analysis is the exception, and has been labelled by Drumbl as an outlier (See Drumbl (n 71) 61).

¹⁷³ Hola (n 170) 7, 23.

sentence.¹⁷⁴ The justifications of punishment, whether retribution, deterrence and/or rehabilitation, play no overt role in the determination of the quantum of sentence. Rather, once reference is made to these justifications in the sentencing decisions, it is the concentration on the mechanics of the sentencing process that forms the framework for the determination of the particular sentence.¹⁷⁵ As a result of this approach, the decisions of the ICTY, the ICTR and the SCSL would provide little assistance to the ICC in determining the principles of sentencing to apply to persons convicted of offences under the Rome Statute.

In addition, in accordance with the approach that the ICC has taken to Article 21 of the Rome Statute, it is doubtful if the court would open its decision making process to consider decisions of the ICTY, the ICTR and the SCSL in its determination of the principles of sentencing to apply. Up to March 31, 2016 the ICC has not adopted an approach that should be taken to an Article 21(1)(c) analysis, and has been reticent to do so. In the review undertaken for this work of in excess of six hundred Pre-Trial, Trial and Appeal Chambers decisions in which Article 21 is referenced, the courts have generally resisted proposing any approach to the analysis of Article 21(1)(c).¹⁷⁶ For example, in the case of the *Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* the Appeals Chamber responds to the prosecution claim that there exists a general principle of law in the legal systems of countries of the world with respect to conflicts of interest for lawyers with the comment that:

¹⁷⁴ See *Prosecutor v Mucic et al* (Appeal) IT-96-21-A (20 February 2001) para 731.

¹⁷⁵ Such an approach has been a consistent one in the sentencing process. Hola as well comments on this process, noting that judges just list the justifications of punishment with no further reference as to the effect these justifications have on sentencing outcomes (See Hola (n 170) 23).

¹⁷⁶ Some trial courts have suggested that because of the diversity of positions in various domestic jurisdictions on the particular issue under consideration, there never will be found consistent principles common to all jurisdictions that could apply. (See *Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus* (Trial Chamber IV) ICC-02/05-03/09-168 (30 June 2011); *Prosecutor v Mathieu Ngudjolo Chui* (Trial Chamber II) ICC-01/04-02/12-4 (18 December 2012) (concurring opinion of Judge Christine Van den Wyngaert).

The main additional argument raised by the Prosecutor in the present appeal relates to the purported existence of a general principle of law establishing a ban for former prosecutors to join the defence immediately after leaving the prosecution. Without intending to define in any detail what is required to establish a general principle of law, the Appeals Chamber notes that the practice in the five countries to which the Prosecutor has referred is not consistent. Notably, as the Prosecutor accepts, the practice in one of them (the United Kingdom) appears to be opposite to the one contended for by the Prosecutor.¹⁷⁷

The above commentary by the ICC is in keeping with the generally conservative approach it has taken to its interpretation of Article 21. There have been occasions, as noted in chapter 2, when the ICC has been willing to set aside its conservative approach to the use of Article 21. It has at times, when the circumstances appeared to require it, either ignored the strict interpretation of the Statute demanded by the provisions of Article 21, or have interpreted them to accomplish certain goals. The Trial Chamber in the case of *Prosecutor v Thomas Lubanga Dyilo*, has on two occasions gone beyond the strict interpretation of the provisions of Article 21 of the Rome Statute.¹⁷⁸ In the March 30, 2011 decision, referred to in chapter 2, the issue was the authority of the court to revisit one of its earlier decisions on the re-numbering of exhibits, despite the fact that there had been no appeal filed within the appropriate time limits. The majority struggled with the strictures applied by Article 21, but concluded that fairness of the trial process dictated that it take an approach which was not addressed in the Rome Statute. Judge Fulford references decisions of the ICTY, the ICTR and the practice of courts in domestic jurisdictions to support his position that there is some inherent authority in the court to review and change its earlier decisions on substantive evidentiary matters. He does this while recognizing that in so doing he is outside the strict scope of Article 21. At paragraph 15 he states:

The jurisprudence of the ad hoc tribunals supports the interpretation that in certain circumstances a Chamber is entitled to depart from its decisions on

¹⁷⁷ (Appeals Chamber) ICC-02/05-03/09-252 (OA) (11 November 2011) para 33 (my emphasis).

¹⁷⁸ *Prosecutor v Thomas Lubanga Dyilo* (Trial Chamber I) ICC-01/04-01/06-2705 (30 March 2011); *Prosecutor v Thomas Lubanga Dyilo* (Trial Chamber I) ICC-01/04-01/06-2727 (28 April 2011).

matters of substance as regards the law or the facts of the case. Although the decisions of other international courts and tribunals are not part of the directly applicable law under Article 21 of the Statute, the ad hoc tribunals are in a clearly comparable position to the Court in this context, and their provisions are equally silent as to the power of reconsideration. In the result, their experience is potentially of direct relevance to the resolution of this issue

The minority refuses to move outside the parameters of the Rome Statute, finding authority within the Statute itself to renumber the exhibits.¹⁷⁹

In a subsequent decision on the admissibility of rebuttal evidence the Trial Chamber, consisting of the same three judges, unanimously concluded that the interpretation of the provisions of the Rome Statute does allow, in specific and unusual circumstances, the calling of rebuttal evidence. In doing so, the court again notes the following at paragraph 41:

*The jurisprudence of the ad hoc tribunals supports this approach. Although the decisions of other international courts and tribunals are not part of the directly applicable law under Article 21 of the Statute, the ad hoc tribunals are broadly, speaking, in a comparable position to the Court because, as set out above, the provisions of the Rome Statute are sufficiently broadly framed to permit the Chamber to allow evidence in circumstances sometimes described as “rebuttal evidence”. Therefore the jurisprudence of the ad hoc tribunals when addressing the circumstances in which evidence may be presented at the stage provided by Rule 85(A)(iii) of the Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and the International Criminal Trial for Rwanda (“ICTR”) (“prosecution evidence in rebuttal”) is potentially of relevance in this context.*¹⁸⁰

Yet, in a 14 March 2012 decision in the same case,¹⁸¹ Judge Fulford, this time in dissent, concludes that the adoption of the control over the crime theory to explain the constituent limits of Article 25(3)(a) (liability for committing a crime jointly with

¹⁷⁹ *Prosecutor v Thomas Lubanga Dyilo* (30 March 2011)(n 178) para 39.

¹⁸⁰ *Prosecutor v Thomas Lubanga Dyilo* (28 April 2011)(n 178).

¹⁸¹ *Prosecutor v Thomas Lubanga Dyilo* (Trial Chamber I) ICC-01/04-01/06-2842 (14 March 2012). This case was also referenced in chapter 2 with respect to the interpretation of Article 21(1)(a) of the Rome Statute.

another) does not conform with the requirements of Article 21(1)(c). He argues that the theory comes from post war German criminal law theory, and as such applies only to Germany and states that follow the Germanic code.¹⁸² Because of this limitation it is not a general principle of law adopted by the major legal systems of the world.¹⁸³

A few other cases have also seen judges of the various chambers either fail to acknowledge the apparent strictures of Article 21, or simply ignore the interpretation placed on them. In *Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*¹⁸⁴ in the concurring opinion of Judge Oboe-Osuji reliance is placed on many decisions of domestic courts to justify the authority of the ICC to entertain a temporary stay of proceedings.¹⁸⁵ And in the case titled only *Decision of the plenary of judges on the Defence Application of 20 February 2013 for the disqualification of Judge Sang-Hyun Song from the case of Prosecutor v Thomas Lubanga Dyilo* the unanimous court concluded that Judge Sang-Hyun Song was not biased and therefore could continue to sit on the appeal of Thomas Lubanga Dylio.¹⁸⁶ In reaching that conclusion the panel accepted the test for apprehension of bias annunciated in the case of *Prosecutor v Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*.¹⁸⁷ However, the court went further and specifically referenced decisions of the House of Lords, the Constitutional Court of South Africa and the Supreme Court of Canada to support the principles of law on which it based its decision.¹⁸⁸ No Article 21(1)

¹⁸² ibid para 10.

¹⁸³ See also the dissent of Judge Christine Van den Wyngaert in the case of the *Prosecutor v Mattheu Ngudjolo Chui* (Trial Chamber II) ICC-01/04-02/12-4 (18 Dec 2012) who in relation to the adoption of the same theory-control over the crime theory- adopts the conclusion of Judge Fulford that the majority, by adopting that theory, fail to properly apply Article 21(1)(c).

¹⁸⁴ ICC-02/05-03/09-410 (Trial Chamber IV) (26 October 2012).

¹⁸⁵ ibid paras 75-78.

¹⁸⁶ ICC-01/04-01/06-3040 Anx (11 June 2013).

¹⁸⁷ ICC-02/05-03/09-344 (5 June 2012).

¹⁸⁸ ibid paras 35-38.

analysis was undertaken or even attempted. Yet the court openly and clearly adopted legal positions from other jurisdictions without analysis of their applicability to the ICC.

While the court has, on what could be described as rare occasions, reached outside the ambit of Article 21 to consider both legislation of other jurisdictions and decisions of other courts, that approach is not the norm. Article 21 was placed in the Rome Statute by its framers for a purpose. That purpose was to confine its analysis to the Statute, Elements of Crime and its Rules, and only where appropriately permitted by the Statute to reference legal considerations outside the statute. The court should respect the wishes of the drafters of the statute. While Bitti commends this conservative approach, Powderly laments that the wealth of judicial analysis, especially from the ad hoc tribunals, is ignored.¹⁸⁹ However, as will be addressed in detail in chapter 4, with respect to the adoption of the principles of sentencing for the ICC, there is little if any analysis of the reasons for adoption of the justifications for sentencing by the ad hoc tribunals. Therefore, reference to their decisions would be of no real assistance.

Section 6 Principles of Sentencing in International Criminal Law as a General Principle of Law

The application of the Raimondo approach to the determination of the principles of sentencing that can apply to matters before the ICC reveals there is a general principle of law that principles of sentencing are essential to the proper determination of a sentence to be imposed for those who violate the provisions of the Rome Statute. It is recognized that there is no consistency among countries of the common law or civil law states surveyed as to the principles that should apply when sentencing for violations of international criminal law matters. Indeed, the analysis demonstrates that domestic courts that have adopted statutory provisions for the prosecution of international crimes have simply transposed their domestic justifications of punishment onto international crimes within their jurisdiction. None have analyzed the appropriateness of those justifications to international crimes. However, those states of the common law and civil law traditions

¹⁸⁹ Bitti (n 22) 443; Powderly (n 22) 483-484.

reviewed in this research do accept that justifications for punishment through utilization of principles of sentencing are an essential part of the decision making process at the sentencing stage. There is therefore a general principle of law recognized by the national laws of legal systems of the world that justifications of punishment as manifested in the adoption and application of principles of sentencing for those who perpetrate international crimes is an integral part of the sentencing process. Although the various states may prioritize different principles of sentencing, each state recognizes the necessity for the utilization of some principles in the justification for the punishment of those who violate international criminal law. The issue for the ICC will be which principles of sentence should apply to their determination of sentence. As will be argued the ICC has its own priorities, and the sentencing principles it adopts must be reflective of those priorities.

Section 7 Conclusion

Article 21 of the Rome Statute requires the ICC to find the law applicable to any issue before the court by application of the three stage process set out in that Article. Chapter 2 analyzed the sentencing provisions of the Rome Statute, and determined that many of the interpretative issues in the wording of the statute could be addressed through the application of the interpretative rules in the VCLT. The one major area that could not be addressed through the application of stage one was the issue of the justifications of punishment. The present chapter has applied stage two and three of the three stage process outlined in Article 21 to determine if justifications of punishment could be determined through that process. While stage two - the application of treaties and rules of international law - did not yield any positive results, stage three - 'principles of law of the major legal systems of the world' - could provide the ICC with some guidance. A comparative law analysis proposed by Raimondo to determine if there are legal principles that can be derived from national legal systems with respect to sentencing for international crimes was utilized. The analysis concludes that while the particular components of the approach to sentencing for international crimes differ, the overriding principle for countries of the common law and civil law traditions is that justifications of

punishment in international criminal law require principles of sentencing that can be applied to any sentencing decision making process. The emphasis on particular principles of sentencing do differ from one country to the next, as that very much depends on the general approach to sentencing within the context of that particular country. It also depends on the purpose of the particular statute under which the prosecution is undertaken and the purpose of sentencing for violations of that statute. The issue for the ICC is to determine which principle or principles of sentencing should apply to the sentencing of those who have committed one or more of the offences within the jurisdiction of that court. It will be argued in the next three chapters that the expressive principle of sentencing is the principle that should be adopted by the ICC to focus its sentencing decisions.

Chapter 4

The Viability of the Traditional Justifications of Punishment for the ICC

In criminal law punishment is imposed on an offender because that person has violated some legal norm.¹ In domestic law legislatures and courts have provided various justifications for the imposition of punishment. These include ‘principles of sentencing’ which provide the rationale upon which a court bases its sentencing decisions. Rationales for sentencing are necessary, because sentencing, whether in domestic or in international criminal law, can involve the deprivation of liberty which, if it were not classified as punishment, would be considered morally wrong.² These rationales for sentencing in the criminal law context have traditionally been classified into two broad categories - utilitarian justifications and retributive justifications.³ The first category is forward looking, in that sentencing is justified on the basis of its positive effect on either the perpetrator or the community at large.⁴ The retributive justification is backward looking, in that it justifies sentencing on the basis of the infliction of a penalty because the past behavior of an individual resulted in an offence being committed which deserves punishment.⁵ It is characterized today by proportionality, in which the main consideration

¹ C L Ten, *Crime, Guilt and Punishment* (OUP 1989) 2.

² Anthony Duff and David Garland, ‘Thinking About Punishment’ in Anthony Duff and David Garland (eds), *A Reader On Punishment* (OUP 1994) 1, 2.

³ Restorative justice principles have also at times been referenced to justify the use of community based responses to illegal behaviour. These principles focus not on justifications of punishment per se, but rather on the recognition of the need for participation of the victim and the community in the criminal justice process, in an attempt to make the criminal justice system more meaningful and effective for those who are most affected by the illegal behavior.

⁴ Deterrence, both general and specific, have traditionally been considered utilitarian, as the purpose is to punish the offender in order to effect some purpose - deter him or to deter others from committing such actions in the future. Rehabilitation is also considered a utilitarian purpose, as it too involves the future benefit of the offender and the punishment is imposed for that purpose. However, it needs to be noted that the triggering mechanism is always the illegal act, which has been defined as illegal by some authority, and for which the individual has been found responsible. This avoids the problem of the claim that the punishment of the innocent can also be justified if the result is to deter others from committing such crimes. (See Ten (n 1) 13; H B Acton (ed), *The Philosophy of Punishment* (McMillan and Co 1969) 20).

is what the penalty should be in proportion to the offence characteristics and the offender's degree of culpability.⁶

Domestic criminal law, especially in the common law tradition, has relied on some or all of these principles of sentencing to legitimate the development and implementation of sentencing policy, and courts have utilized them in reasoning with respect to the types and quantum of the sentences that they impose. International criminal law tribunals have to date adopted the western domestic principles of sentencing for the imposition of penalties of those found guilty of international crimes.⁷ Yet no attempt has been made by these tribunals to analyze the appropriateness or effectiveness of these traditional principles of sentencing for those who have violated international criminal law.

As demonstrated in the previous chapter, Article 21 of the Rome Statute does permit the ICC to consider justifications of punishment through the adoption of principles of sentencing for those convicted of international crimes. This chapter analyzes the retributive and utilitarian justifications of punishment and assesses their effectiveness in domestic law and their general applicability to international criminal law. The analysis demonstrates that the retributive justification for sentencing is based on the desert principle, that is, that the punishment must reflect the gravity of the offence and the responsibility of the offender. It argues that the three traditional types of desert - vengeful desert, deontological desert and empirical desert are not suitable for sentencing for offences in international criminal law. It also argues that the utilitarian justifications for

⁵ Ten (n 1) 5; A C Ewing, *The Morality of Punishment* (Kegan Paul 1929)13.

⁶ Duff and Garland (n 2)12.

⁷ The sentencing decisions of the ICTY and the ICTR reference the principal justifications of punishment in their decisions (See Mark Drumbl, *Atrocity, Punishment and International Law* (CUP 2007) 60-61). Other responses to violations of international criminal law have taken a different tact, and have focused on a restorative justice approach to both the process and/or to the sentencing process. For example in South Africa the Truth and Reconciliation Commission was established to both find the 'truth' of what happened, without the imposition of punitive sanctions, in the hope that there could be a reconciliation of all parties and a move forward as the society transitioned from a white dominated society to a multi-racial social order.

sentencing- deterrence, rehabilitation and incapacitation- cannot be shown to be effective justifications for sentencing for those international crimes within the jurisdiction of the ICC. There is no empirical evidence to justify reliance on deterrence or rehabilitation, and as the chances of such persons being in positions of authority again is highly unlikely, incapacitation is not a factor for consideration in the sentencing process. The latter part of the chapter looks beyond the traditional justifications of punishment to argue that in determining the principles of sentencing to apply in international criminal law, it is essential that the purpose or purposes of the international criminal tribunal exercising jurisdiction be determined. Such principles should reflect those purposes.

This chapter concludes that because of the problems identified with the application of the traditional justifications of sentencing to international crimes, the ICC must develop a different approach to sentencing. The approach must be reflective of the purpose of the Rome Statute, and the ICC must develop its own sentencing process based on that recognized purpose. The approach advocated uses the theoretical backdrop of the expressive theory of law and punishment to develop a sentencing process for the ICC.

Section 1 Retributive Justification

Retribution is based on the premise that only the guilty deserve to be punished, and then only punished to the extent of their desert.⁸ There has been a strong revival of the influence of the retributive justification of punishment in the last thirty years, mainly as a result of a decline of the influence of the rehabilitative justification of punishment. The concept of ‘desert’ or ‘just desert’ has taken a commanding position as a justification

⁸ Duff and Garland (n 2) 7. Moral philosophers have debated the use of retribution as a justification for punishment for centuries, and have provided varying justifications for its application. C W K Mundle has stated that retributive theory ‘implies that punishment of a person by the State is morally justifiable, if and only if he has done something which is both a legal and a moral offence, and only if the penalty is proportionate to the moral gravity of his offence’ (see C W K Mundle ‘Punishment and Desert’ in H.B. Acton (ed) (n 4) 79). More modern retributivist theorists include Michael Moore’s view that punishment needs no further justification than that those who commit wrong need to be punished, through to the unfair advantage theory of J M. Finnis (See Michael Moore, ‘The Moral Worth of Retribution’ in Ferdinand Schoeman (ed), *Responsibility, Character and the Emotions: New Essays in Moral Psychology* (OUP 1987) 179; J M Finnis, *Natural Law and Natural Rights* (OUP 1980)).

of punishment in western domestic criminal law, and has spawned policy and legislative changes to encapsulate that position.⁹

a. The approach of the ICTY and the ICTR

The influence of the retributive justification of punishment in domestic law has been mirrored by its influence in international criminal law. The focus of the justification for many of the sentencing decisions of the ad hoc tribunals has been on retribution.¹⁰ The general approach is one of condemnation of the behavior, and the imposition of a sentence reflecting many aggravating and mitigating factors which either enhances the condemnation or reduce its impact. However, it is difficult to determine from those sentencing decisions what form or type of retributive approach is being advanced, as what the ICTY courts meant by retribution changed over the course of the sentencing activities of the Tribunal. In *Prosecutor v Aleksovski* the Appeals Chamber provided a broad definition of what it meant by retribution.

An equally important factor is retribution. This is not to be understood as fulfilling a desire for revenge but as duly expressing the outrage of the international community at these crimes. This factor has been widely recognized by Trial Chambers of this International Tribunal as well as Trial Chambers of the International Criminal Tribunal Rwanda. Accordingly a sentence of the International Tribunal should make plain the condemnation of the international community of the behaviour in question and show “that the international

⁹ Andrew Ashworth, ‘Desert’ in Andrew Von Hirsch and Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing* (3rd edn, Hart Publishing 2009) 102. The work of Andrew Von Hirsch, based on the concept of censure and the use of the proportionality principle has been a strong influence in the rebirth of retribution as an important sentencing justification in domestic law. Von Hirsch focuses on the need for censure as the moral basis for sanctioning criminal behaviour, and the use of proportionality to determine the amount of that sanction. Proportionality is based on ordinal criteria and cardinal criteria. The ordinal criteria are relative in nature, in that they compare one crime to another to determine the seriousness of one versus the other, with the corresponding penalty increased or decreased depending on that classification. The cardinal criteria are non-relative and set certain limits for punishment, based on some principled position. It is the combination of these two which sets the proportional aspect of the sentence. (See in particular Andrew Von Hirsch, *Doing Justice. The Choice of Punishments* (Hill and Wang 1976); Andrew Von Hirsch, *Censure and Sanctions* (OUP 1996); and Andrew Von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (OUP 2005)).

¹⁰ See for example *Prosecutor v Aleksovski* (Appeal) IT-95-14/1-A (24 March 2000) para 185; *Prosecutor v Kordic and Cerkez* (Appeal) IT-95-14/2-A (17 December 2004) para 1075 among others and for the ICTR *Prosecutor v Rutaganira* (Judgement) ICTR-95-3-T (14 March 2005) para 108-109 among others.

community was not ready to tolerate serious violations of international humanitarian law and human rights".¹¹

In later decisions the Trial Chambers and the Appeals Chamber at the ICTY use an approach which attempts to combine the outrage at the commission of these offences with what it describes as the concept of just deserts. In the Kordic Appeal¹² the court adopts the reasoning of the Supreme Court of Canada with respect to the meaning to be ascribed to retribution.¹³ It states:

It is important to state that retribution should not be misunderstood as a way of expressing revenge or vengeance. Instead, retribution should be seen as

"an objective, reasoned and measured determination of an appropriate punishment which properly reflects the [...] culpability of the offender, having regard to the international risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct. Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more".

Therefore, retribution has to be understood in the more modern sense of "just deserts", as expressed already in Erdemovic...

The Trial Chamber also adopts retribution, or "just deserts", as legitimate grounds for pronouncing a sentence for crimes against humanity, the punishment having to be proportional to the gravity of the crime and the guilt of the accused.

In subsequent decisions both the Trial Chambers and the Appeals Chamber move towards the integration of a general need to express the outrage of the international community toward the perpetrator of the crime with the proportionality approach.¹⁴ A

¹¹ *Prosecutor v Aleksovski* (n 10) para 185.

¹² *Prosecutor v Kordic and Cerkez* (n 10).

¹³ ibid para 1075. The quotation is from the case of *R v M(C A)* [1996] 1 S C R 500 para 80. The Supreme Court of Canada was making the distinction between vengeance and the broader concept of retribution.

¹⁴ *Prosecutor v Simic et al* (Judgment) IT-95-9-T (17 October 2003) para 1059; *Prosecutor v Banovic* (Sentencing judgment) IT-02-65/1-S (28 October 2003) para. 33-34; *Prosecutor v Nikolic* (Sentencing Judgment) IT-02-60/1-S (2 December 2003) para 86-87; *Prosecutor v Obrenovic* (Sentencing Judgment) IT-02-60/2-S (10 December 2003) para 50; *Prosecutor v Cesic* (Sentencing Judgment) IT-95-10/1-S (11

typical example is found in the comments of the Appeals Chamber in the *Krajisnik* decision.¹⁵ At paragraph 775 the court stated:

It is well established that, at the Tribunal and at the ICTR, retribution and deterrence are the main objectives of sentencing. As to retribution, the Appeals Chamber has explained that “[t]his is not to be understood as fulfilling a desire for revenge but as duly expressing the outrage of the international community at these crimes”

The Appeals Chamber again then restates the comments set out in the Kordic Appeal.

The decisions of the ICTY Tribunals that address the issue of the justifications of sentencing typify the approach in *Kordic* and *Krajisnik*.¹⁶ What the ICTY in both its Trial Chambers and its Appeals Chamber is proposing is that retribution is to include the denunciatory aspect of sentence, which is to be reflected through the use of proportionality in the imposition of the appropriate sentence. Yet the Appeals Chamber

March 2004) para 22-24; *Prosecutor v Miodrag Jokic* (Sentencing Judgment) IT-01-42/1-S (18 March 2004) para 30-32; *Prosecutor v Brdanin* (Judgment) IT-99-36-T (1 September 2004) para 1090; *Prosecutor v Blagojevic and Jokic* (Judgment) IT-02-60-T (17 January 2005) para 818-819; *Prosecutor v Bralo* (Sentencing Judgment) IT-95-17-S (7 December 2005) para 22; *Prosecutor v Krajisnik* (Appeal) IT-00-39-A (17 March 2009) para 775.

¹⁵ *Prosecutor v Krajisnik* (n 14).

¹⁶ For example, the Trial Chamber in the case of *Prosecutor v Blagojevic and Jokic* (n 14) at paragraph 818 put it in these terms ‘The Trial Chamber observes that by the very wording of Article 24(2) of the Statute and the subsequent jurisprudence of the Tribunal, which has focused on gravity of the offence as the primary consideration in determining a sentence, retribution or “just deserts” as a purpose of punishment has enjoyed prominence. In light of the purposes of the Tribunal and international humanitarian law generally, the Trial Chamber understands retribution to be the expression of condemnation and outrage of the international community at such grave violations of, and disregard for, fundamental human rights at a time that people may be at their most vulnerable...’. And, in *Prosecutor v Bralo* (n 14) at paragraph 22 the Trial Chamber said: ‘In previous cases before the Tribunal, Trial Chambers and the Appeals Chamber have set out three broad purposes of punishment in this particular context. The first of these has been termed “retribution,” with the qualification that it is “not to be understood as fulfilling a desire for revenge but as duly expressing the outrage of the international community at these [international] crimes.” Thus, retribution as a purpose of punishment is here used to denote the concept that whatever sentence is imposed on a convicted person amounts to an expression of condemnation by the international community at the horrific nature of the crimes committed, and must therefore be proportionate to his specific conduct’.

consistently rejected any attempt to provide guidelines for sentencing,¹⁷ thereby rejecting the traditional ordinal components of the ‘just deserts’ approach to sentencing. As noted earlier, ‘just deserts’ is based on the concept of proportionality. It is composed of ordinal criteria and cardinal criteria. The ordinal criteria are relative in nature, in that they compare one crime to another to determine the seriousness of one versus the other, with the corresponding penalty increased or decreased depending on that classification. The cardinal criteria are non-relative and set certain limits for punishment, based on some principled position. It is the combination of these two which sets the proportional aspect of the sentence¹⁸ However, the ICTY took a different approach, determining the quantum of sentence by reference to the gravity of the offence and the degree of participation of the accused in the criminal process, with gravity being the most important determinant of sentence.¹⁹ It is that sense of proportionality that pervades the sentencing approach of the ICTY, which, as noted, is not reflective of the traditional ‘just deserts’ approach. And, in decisions subsequent to the *Krajisnik* appeal there is no analysis of the purposes and principles of sentence, with a focus principally on the gravity of the offence and the involvement of the offender in the particular offences.²⁰

¹⁷ *Prosecutor v Kvocka* (Appeal) IT-98-30/1-A (28 February 2005) paras 668-669; *Prosecutor v Simic* (Appeal) IT-95-9-A (28 November 2006) para 234. In *Prosecutor v Krstic* (Appeal) IT-98-33-A (19 April 2004) at para 242 the Appeals Chamber stated ‘The jurisprudence of the ICTY and ICTR has also generated a body of relevant factors to consider during sentencing. The Appeals Chamber has emphasized, however, that it is “inappropriate to set down a definitive list of sentencing guidelines for future reference,” given that the imposition of a sentence is a discretionary decision’.

¹⁸ See Von Hirsch, *Censure and Sanctions* (n 9).

¹⁹ *Prosecutor v Milan Simic* (Sentencing Judgment) IT-95-9/2-S (17 October 2002) para 32, 33 and 37.

²⁰ See as examples *Prosecutor v Dordevic* (Judgement) IT-05-87/1-T (23 February 2011) para 2206-2207; *Prosecutor v Lukic and Lukic* (Appeal) IT-98-32/1-A (4 December 2012) para 639. The court does consider aggravating and mitigating factors in its determination of the quantum of sentence, but these factors arguably either increase or decrease the quantum of sentence the court selects as a result of the gravity issue and the degree of involvement of the individual. The Trial and Appeals Chambers have set out a number of aggravating and mitigating factors which courts have considered in determining the quantum of sentence in any particular case. The decision of *Prosecutor v Popovic et al* (Judgment) IT-05-88-T (10 June 2010) paras 2139-2140 summarizes out these various aggravating and mitigating circumstances. The aggravating circumstances include abuse of the convicted person’s superior position of leadership, the duration of the criminal conduct, the active and direct participation of the person holding a superior position of authority, pre-mediation and motive, the enthusiasm with which the crime was committed, discriminatory state of mind, vulnerability of the victims, confined or wounded persons, the number of the victims, their status and the effect of the crimes upon them, the systematic nature of the crimes, the intimidation of witnesses, and the circumstances of the crime generally. The mitigating circumstances include cooperation with the

The ICTR has not been as specific in attempting a definition of retribution in any of its decisions. In several early decisions of the Trial Chambers retribution is defined simply as ‘seeing the crimes punished’.²¹ In the *Prosecutor v Rutaganira*²² decision there is an effort by the Trial Chamber to provide some explanation of the meaning of retribution.

*Retribution is the expression of the social disapproval attached to a criminal act and to its perpetrator and demands punishment for the latter for what he has done. The sentences handed down by the International Criminal Tribunal are therefore an expression of humanity’s outrage against the serious violations of human rights and international humanitarian law which an accused has been found guilty of committing. Retribution meets the need for justice and may also appease the anger caused by the crime to the victims and within the community as a whole. In citing retribution as a major purpose of the sentence, the Chamber underscores the gravity of the crime to which the accused has pleaded guilty, given the specific circumstances of the instant case.*²³

What shows in this decision and in many of the sentencing decisions of the ICTR, as was the case with the ICTY, is that it is the gravity of the crime which focuses the quantum of the penalty to be imposed, as it is the severity of the act which dictates the length of sentence. Thus retribution is not only seeing that the crimes are punished, but that they are punished in accordance with the severity of the act and the degree of responsibility of the offender. The denunciatory aspect of the sentence is subsumed

prosecution, admission of guilt, the expression of sincere remorse, compassion or sorrow for the victims of the crimes, voluntary surrender, good behavior while in detention, personal and family circumstances of the convicted person, the post conflict conduct of the convicted person, the duress under which he acted, indirect or limited participation in the crime, diminished mental responsibility, assistance to victims, fully complying with certain release obligations, and preventing others from committing crimes. These factors however, do not correspond to the ordinal or cardinal factors that are used to determine quantum of sentence in the ‘just deserts’ model of sentencing.

²¹ *Prosecutor v Kambanda* (Sentencing Judgment) ICTR 97-23-S (4 September 1998) para 28; *Prosecutor v Serushago* (Sentencing Judgment) ICTR 98-39-S (5 February 1999) para 20; *Prosecutor v Rutaganda* (Judgment) ICTR-96-3-T (13 December 1999) para 456.

²² *Prosecutor v Rutaganira* (n 10).

²³ ibid para 108-109.

within the response of the sentencing court to these two factors.²⁴ As such it does not play any independent role in the imposition of the sentence in either the ICTY or the ICTR decisions.

b. The problems with desert theory

The ICTY and the ICTR made little attempt to justify the adoption of retribution as the principle rationale for sentencing. Nor did they attempt to relate the adoption of the retributive principle of sentencing to the rationale for the existence of these ad hoc tribunals. The references to the adoption of desert theory fails to place sentencing decisions within the cardinal and ordinal categories recognized as the appropriate parameters of that theory.²⁵ In addition, an analysis of the various categories of desert suggest that its adoption for sentencing in international criminal law is also problematic, as it is not justified in either theory or practice. Paul Robinson, an influential and a strong advocate for the retributive justification of punishment notes that there are three competing conceptions of desert theory - vengeful desert, deontological desert and empirical desert.²⁶ The first is akin to the *lex talionis* principle, although the exact measure of the punishment may not equal the exact harm done.²⁷ The deontological position focuses on the blameworthiness of the offender, rather than the harm of the offence.²⁸ And, the third, that of empirical desert, focuses on the blameworthiness of the

²⁴ Although retribution is continually put forward as a justification for the imposition of a sentence, it is not explained further than the explanation provided in the *Rutagana* decision. See for example *Prosecutor v Serugendo* (Judgment) ICTR-05-84-I (12 June 2006) para 33; *Prosecutor v Seromba* (Judgment) ICTR-01-66-I (December 2006) para 376; *Prosecutor v Rugambarara* (Sentencing Judgment) ICTR-00-59-T (16 November 2007) para 11; *Prosecutor v Bagosora et al* (Judgment) ICTR-98-41-T (18 December 2008) para 2260 ; *Prosecutor v Rukundo* (Judgment) ICTR -01-70-T (27 February 2009) para 593; *Prosecutor v Kalimamzira* (Judgment) ICTR-05-88-T (22 June 2009) para 741; *Prosecutor v Ntawukulilyayo* (Judgment) ICTR-05-82-T (3 August 2010) para 463; *Prosecutor v Kanyarukiga* (Judgment) ICTR-02-78-T (1 November 2010) para 669.

²⁵ See *Prosecutor v Kordic and Cerkez* (n 10); Andrew von Hirsch, *Censure and Sanctions* (n 9).

²⁶ Paul Robinson, ‘Competing Conceptions of Modern Desert: Vengeful, Deontological and Empirical’ (2008) 67 Camb L J 145, 146-150.

²⁷ *ibid* 147.

²⁸ *ibid* 148.

offender but looks to the communities' views of the offence to determine the measure of the punishment to be imposed.²⁹

Vengeful desert looks to punish the offender in proportion to the harm that has been inflicted on the victim. There are inherent problems to the use of vengeful desert, many of which are noted by Robinson in his critique of the three types of desert.³⁰ The major problem is the absolute amount of punishment that would reflect the suffering experienced by the victim(s) as a consequence of the actions of the perpetrator.³¹ The Rome Statute sets out the sentence types and the ranges of sentences that can be imposed for those who violate any of its offences. The penal sentences range up to 30 years' incarceration, with the imposition of life imprisonment 'when justified by the extreme gravity of the crime and the individual circumstances of the convicted person'. The penalty could be reflective of the harm done to the victim if that harm was of a limited nature and the victims were of limited number. However, in situations where there are multiple victims and what could be classed as most horrendous conduct, no amount of punishment, even the death penalty, could properly reflect the equivalent punishment for those particular offences.³² As Drumbl has noted, the length of sentences for what is classed as extraordinary crime are no more severe than exist for serious crimes committed in domestic law.³³ How then could vengeful desert ever apply to many of the cases that face the International Criminal Court?

²⁹ ibid 149.

³⁰ Robinson (n 26).

³¹ ibid 150-151.

³² The Supreme Court of Israel, in the Eichmann case noted that 'we know only too well how utterly inadequate the sentence of death is as compared with the millions of unnatural deaths he decreed for his victims. (See *State of Israel v Eichmann* (1962) 36 ILR 277, 341).

³³ Drumbl (n 7) 155.

Deontological desert assesses culpability in accordance with the individual's transgression of moral values.³⁴ Its focus is on the blameworthiness of the offender. The basic problem with the development of a system of retributive justice based on the deontological approach is that moral philosophers disagree on what should constitute the moral base for retributive justice.³⁵ And, the inability of individuals to choose between these competing principles result in a difficulty in producing a system of desert based on deontological justice.³⁶ The ranking of behaviors, based on competing moral principles, becomes a difficult if not impossible task, as there is no common bench mark setting out the moral blameworthiness of the offender from which such rankings can be determined. As de Guzman notes, deontologists' claim to the existence and value of universal truths is highly controversial, and therefore such an approach is ill suited to 'the diverse context of international criminal justice'.³⁷

Empirical desert is based on the development of principles of justice derived from the communities' shared intuitions.³⁸ Its focus and intent is on the amount of punishment that will put the offender in a ranking order based on his degree of blameworthy behavior.³⁹ And this rank is determined by community standards. The argument put forth by Robinson is that the moral credibility of the law is enhanced where the community plays a role in the determination of what is just in the circumstances of a particular situation.⁴⁰

³⁴ Robinson (n 26) 148.

³⁵ ibid 163.

³⁶ ibid 169.

³⁷ Margaret de Guzman, 'Choosing to Prosecute: Expressive Selection at the International Criminal Court' (2011-2012) 33 Mich J Int'l L 265, 304.

³⁸ Robinson (n 26) 174.

³⁹ ibid 151.

⁴⁰ ibid 155.

The main difficulty with the empirical desert position is its reliance on the consistency of approach that the community has towards various types of offences. Robinson has conducted research in which he has shown a consistency among members of the community in the ranking which they place on various crimes.⁴¹ However, there has been much criticism of this research, from the view that it fails to recognize that views can vary depending on demographics and personal experiences,⁴² to the position taken by Ristroph criticizing the various scenarios used by Robinson in his studies as not reflecting reality.⁴³ Slobogin and Brinkley-Rubinstein have completed a detailed review of the theory of empirical desert proposed by Robinson, and have undertaken research to determine if the consensus hypothesis stands up if the scenarios presented by Robinson are enhanced by additional information about the offender, rather than just information about the offender's behavior.⁴⁴ By adding additional information about the particular offender, Slobogin and Brinkley-Rubinstein observed that the ordinal rankings changed from those observed by Robinson.⁴⁵ They conclude that 'Our research confirms that consensus about the ranking of core crimes exists, but it also shows that utilitarian concerns can change the ranking in ways inconsistent with desert'.⁴⁶ This research and the other criticisms of desert theory noted above challenge the reliance on empirical desert theory as an appropriate theoretical approach to punishment.

The criticisms that have been advanced against desert theory as a justification of punishment make its application to international criminal law highly suspect. For many of these cases, the measure of the suffering of the victims could never be equaled by the

⁴¹ Paul Robinson and Robert Kurzban, 'Concordance and Conflict in Intuitions of Justice' (2007) 91 Minn L Rev 1829.

⁴² See Deborah W Denno, 'The Perils of Public Opinion' (2000) 28 Hofstra L Rev 741,744; Donald Arman and Dan Kahan, and D Hoffman, 'Some Realism About Punishment Naturalism' (2010) 77 U Chi L Rev 1531, 1551-1556.

⁴³ Alice Ristroph, 'Third Wave Legal Moralism' (2011) 42 Ariz St L J 1151, 1165.

⁴⁴ Christopher Slobogin and Lauren Brinkley-Rubinstein, 'Putting Desert in its Place' (2013) 65 Stan L R 77.

⁴⁵ *ibid* 94.

⁴⁶ *ibid* 120.

punishment of the offender. The limitations placed on the penalties that can be imposed and the length of these penalties in the Rome Statute would severely reduce the effectiveness of vengeful desert. Nor is the deontological desert approach effective, principally because of the numerous disagreements among philosophers with respect to the issues of major importance. The failure of the drafters of the Rome Statute to obtain consensus on the theoretical backdrop to the development of the Rome Statute adds little faith that the process of establishing the moral principles upon which punishment could be imposed in the Rome Statute could be developed. The empirical desert approach does have some theoretical merit, in that it does respond to the public's perception of the culpability of the particular offender if that culpability is based solely on the facts of the particular case. However, once other factors are brought into the equation, that ordinal ranking, based on offence type, quickly disintegrates. In addition there would be a need of a world consensus with respect to the punishment for the various offences, or at least within the membership of those who are signatories to the Rome Statute. In view of the history of the problem with consensus in the development of the Rome Statute, the ability of these signatories to the Rome Statute to reach such a consensus is suspect.

c. The cardinal proportionality approach

Writers such as Jens Ohlin adopt a different approach to retribution than the just deserts approach analyzed by Robinson, Slobogin and Brinkley-Rubinstein. Ohlin advocates for a cardinal notion of punishment, based on the need for harsh treatment.⁴⁷ Ohlin is critical of the proportionality approach utilized by the ICTY and by implication by the ICTR.⁴⁸ He argues that the purpose of international punishment is to vindicate the Rule of Law, and this is accomplished by the imposition of harsh treatment.⁴⁹ Such harsh treatment should reflect the inherent gravity of the offences.⁵⁰ This for Ohlin is

⁴⁷ Margaret de Guzman, 'Harsh Justice for International Crimes' (2014) 39 Yale J Int'l L 1, 12.

⁴⁸ Jens Ohlin, 'Proportional Sentencing at the ICTY' in Bert Swart, Goran Sluiter and Alexander Zahar (eds), *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (OUP 2011) 322.

⁴⁹ ibid 332.

retribution.⁵¹ The focus of sentencing must be on offence gravity proportionality,⁵² based on the notion that the defendant receive punishment that is proportional to his/her wrongdoing. This is distinguished from defendant relative proportionality, which requires that the more culpable defendant should be punished more severely than the less culpable defendant.⁵³ These two types of proportionality at times conflict, as defendant relative proportionality would require that the sentence, based on offence gravity proportionality be reduced to accommodate the fact that another defendant, having committed a more heinous crime, would require a higher sentence. While the first offender, because of the nature of the offence, should be awarded a life sentence, defendant relative proportionality requires that his sentence must be less than the offence is actually worth. Ohlin rejects this approach, opting for the position that sentencing must exclusively focus on the gravity of the offence and must be reflective of that gravity. This is an ‘*a priori*’ good, created by such punishments that extends beyond any contingent instrumental benefits that the punishment might have. He sees retribution as the only legitimate sentencing goal for international criminal law, as it reflects the damage to the moral fabric of international society.⁵⁴

Ohlin also justifies his position by arguing that retribution through harsh treatment is the only approach to satisfy victims’ desire for punishment. By satisfying the victims, punishment also has the consequentialist effect of quelling any self-help measures to which they may aspire.⁵⁵ If the retributive goal is ignored ‘victims lose confidence in the system, the guilty are not adequately punished, the moral fabric to the

⁵⁰ *ibid* 337.

⁵¹ Jens Ohlin, ‘Towards a Unique Theory of International Criminal Sentencing’ in Goran Sluiter and Sergey Valisiev (eds), *International Criminal Procedure: Towards a Coherent Body of Law* (Cameron May 2009) 373, 387. Ohlin simply states that retribution means that the guilty deserve to be punished.

⁵² Ohlin (n 48) 328.

⁵³ *ibid* 324.

⁵⁴ *ibid*.

⁵⁵ Ohlin (n 51) 389.

international community is not repaired, ethnic conflict reignites, and the twin goals of collective peace and security . . . are not respected'.⁵⁶

The Ohlin approach does not identify how the sentencer is to determine the appropriate amount of harsh treatment.⁵⁷ Is it measured by the nature of the offence, the manner in which it is committed, the number of victims or its effect on the local community and/or the world community? Nor does it address the fact that on a balancing scale, most of the crimes involve multiple victims who suffer horrendous atrocities. Imposing life sentences for most of these offences, as Ohlin proposes, provides no sense of proportionality between these offences.⁵⁸ Even the suggestion by Ohlin that one option to solve this concern is to impose multiple sentences of multiple years, adding to hundreds of years of incarceration is no solution.⁵⁹ Any rational thinking person would know that these are all life sentences, and that whether 70 years or 700 years amounts to the same thing. It does nothing to satisfy what Ohlin wishes to be satisfied - the vindication of the rule of law.

Ohlin's approach also ignores the various factors pertinent to the perpetrator of the offence. While he would acknowledge this fact, the drafters of the Rome Statute have obviously already rejected his approach. Article 78 and Rule 145 of the Rule of Procedure and Evidence do allude to the offender and the background of the offender in the determination of the appropriate sentence to be imposed. Since these factors also play a role in the determination of sentence, the Rome Statute could make no room for Ohlin's approach.

⁵⁶ ibid 389-390.

⁵⁷ Margaret de Guzman argues that this is a common problem for all those who adhere to the use of the cardinal notion of desert to the exclusion of the ordinal factor. (See de Guzman (n 47)14).

⁵⁸ Ohlin (n 48) 337. Ohlin's answer to some of these problems is to include the death penalty as an option for some offences. Although he never directly states this fact, his defence of the death penalty as not contrary to international law (see Jens Ohlin, 'Applying the Death Penalty to Crimes of Genocide' (2005) 99 AJIL 747) and his comments on the abolitionist perspective of European countries as opposed to non-European countries gives one a sense that his position is that the death penalty should be one sentencing option for violators of international criminal law (See Ohlin (n 51) 399).

⁵⁹ Ohlin (n 48) 338.

One of Ohlin's main justifications for the adoption of his retributive approach to sentencing is that he assumes, without providing any evidence, that the principal goal which victims wish from international law is retribution.⁶⁰ While the punishment of the guilty is an obvious desire of most victims,⁶¹ the literature has also noted other victim interests which at times compete with simple punishment in international criminal law, especially in areas of transitional justice.⁶² These include the need for accountability to the victims and to the larger international community,⁶³ the need for the victim to participate in the account making process at international tribunals,⁶⁴ and the important right to reparations for harm done.⁶⁵ In particular, victims at the ICC are provided through statutory authority the right to participate in various aspects of the trial process.⁶⁶ This can take place through direct representation of the victims, or through counsel representing particular victims or groups of victims.⁶⁷ Article 75 of the Rome Statute specifically addresses reparations to victims, and the process that victims can undertake in seeking reparations. The ICC has been identifying the process and the factors for consideration in applications for reparations under Article 75.⁶⁸ While the approach to

⁶⁰ Ohlin (n 51) 389.

⁶¹ See Janine Clark, 'The Limits of Retributive Justice' (2009) 7 JICJ 463.

⁶² See Jonathan Doak, 'The Therapeutic Dimension of Transitional Justice: Emotional Repair and Victim Satisfaction in International Trials and Truth Commissions' (2011) 11 ICLR 263.

⁶³ Mark Findlay, 'Activating a Victim Constituency in International Criminal Justice' (2009) 3 IJTJ 183, 185.

⁶⁴ Rebecca Horn and Simon Charters and Saleem Vahidy, 'Testifying in an International War Crimes Tribunal: the Experience of Witnesses in the Special Court for Sierra Leone (2009) 3 IJTJ 135, 147. The authors noted that for the most part the experience of testifying at the SCSL was a positive one.

⁶⁵ See UN Declaration of Basic Principles for Justice and Abuse of Power UNGA Res A/RES/40/34 (29 November 1985) s 8; UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law UNGA Res A/RES/60/147 (16 December 2005) s 17-23.

⁶⁶ Article 68(3) Rome Statute. Rules 89 to 91 of the Rules of Procedure and Evidence.

⁶⁷ Rule 89(1) of the Rules of Procedure and Evidence makes it clear that victims must first apply to the Court to be permitted to participate in various parts of the proceedings, and such permission, if granted is subject to the rulings of the Court on the extent of participation.

victims does not satisfy all concerns in this area, it has moved the recognition of victims and their concerns in international criminal law to a higher level. Ohlin's suggestion that retribution is the goal of victims of international atrocities cannot be supported, and severely damages his strident argument that his form of retribution is the only appropriate sentencing approach.

Szoke-Burke and Glickman are also critical of what they consider is the failure of the international criminal tribunals to adopt a proper retributive approach to sentencing.⁶⁹ Both Szoke-Burke and Glickman argue that while the ad hoc tribunals have handed down sentences that espouse retributive justifications, most of their sentences are too lenient to satisfy retributive goals.⁷⁰ Each offers a different solution to the perceived problem. Szoke-Burke proposes a sentencing approach which recognizes the importance of cardinal proportionality, which measures the severity of each offence and which requires that the magnitude of the penalty reflect that severity.⁷¹ Since many of the international criminal law offences are extremely grave in nature, involving multiple victims including multiple offences Szoke-Burke proposes a cumulative harm based sentencing process.⁷² With its focus on cardinal proportionality, the cumulative harm based sentence would require that each offence be assigned a penalty commensurate with its gravity, resulting in a cumulative sentence of many years, more than the life span of the offender. Szoke-Burke argues, as did Ohlin, that such a sentence more correctly reflects the gravity of the offences committed. His approach is subject to the same criticisms already articulated with respect to the Ohlin approach. In addition he proposes

⁶⁸ See *Prosecutor v Thomas Lubanga Dyilo* (Trial Chamber I) ICC-01/04-01/06-2904 (7 August 2012); *Prosecutor v Thomas Lubanga Dyilo* (Appeals Chamber) ICC-01/04-01/06-3129 (A A2 A3) (3 March 2015).

⁶⁹ Sam Szoke-Burke, 'Avoiding Belittlement of Human Suffering' (2012) 10 JICJ 561; Steven Glickman, 'Victim's Justice: Legitimizing the Sentencing Regime of the International Criminal Court' (2004-2005) 43 Colum J Transnat'l L 229.

⁷⁰ Szoke-Burke (n 69) 566; Glickman (n 69) 247-248.

⁷¹ Szoke-Burke (n 69) 570.

⁷² ibid 579.

but does not explain a role for ordinal proportionality, and with the little commentary he provides seems no different than cardinal proportionality.⁷³

Glickman's answer to the perceived problem of sentence leniency is more direct. He argues that retribution would be satisfied by the adoption of mandatory minimum sentences for offence types within the jurisdiction of the ICC.⁷⁴ There would be a gradation of sentencing, with those convicted of genocide receiving a life sentence, and with those convicted of crimes against humanity and war crimes receiving sentences proportionally lesser in severity. However, Glickman admits this leaves no room for considerations of offender type as well as many aggravating and mitigating factors that may affect the sentencing process.⁷⁵ Factors such as the accused's responsibility or role for 'creating, maintaining and/or mentoring' the environment for mass atrocity, what Dana calls 'enabler responsibility' could play little or no role in the sentencing process, especially for sentences for the crime of genocide.⁷⁶ Nor does it give the ICC judges the flexibility which the framers of the Rome Statute wished them to have in the imposition of sentence.⁷⁷

⁷³ *ibid* 570.

⁷⁴ Glickman (n 69) 262.

⁷⁵ *ibid* 264.

⁷⁶ Shahram Dana has proposed a theory which he calls 'enabler responsibility', in which the role played by the perpetrator is a major factor in sentencing (See Shahram Dana, 'The Sentencing Legacy of the Special Court of Sierra Leone' (2014) 42 *Geo J Int'l and Comp L* 615, 684-685). However Dana references in this article a companion article he authored to provide a detailed explanation of his theory. The article has not to date been published. Email correspondence with Mr. Dana confirms that fact. Due to Mr. Dana's understandable reluctance to release his article before publication, this writer can only refer to a short comment on the theory in the publication referred to in this note.

⁷⁷ See Rolf Fife, 'Applicable Penalties Article 77' in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court* (2nd edn, Hart Publishing 2008).

Section 2 Utilitarian Justifications

The utilitarian position is that punishment is justified on the bases of the positive consequences that it will produce.⁷⁸ What is meant by these positive consequences is subject to some debate, with the majority position being that it includes the reduction in the amount of crime as a result of the punishment imposed.⁷⁹ Included within the utilitarian tradition are the concepts of deterrence, reformation and rehabilitation, and incapacitation.⁸⁰ Each of these justifications of punishment has its proponents and its detractors, and each from a principled perspective has benefits. The real question with these and all other justifications of punishment is whether each is an appropriate justification for the infliction of punishment for the offences under consideration, and from a practical perspective whether there is empirical data to justify their use, and where data is available, whether it supports the effectiveness of any of these justifications.⁸¹

a. Deterrence

The theory of deterrence is based on the belief that ‘if state imposed sanctions are sufficiently severe, criminal activity will be discouraged, at least for some’.⁸² It is a theory of choice, in that those who might commit offences balance the benefits and the costs of committing that particular crime.⁸³ Thus, deterrence occurs when an individual

⁷⁸ Ten (n 1) 7 where he refers to these positive consequences as the ‘good’. Ewing (n 5) 46-47 refers to utilitarian benefits as the advantages attributable to punishment, which he classifies as deterrence, reformation and prevention.

⁷⁹ Ten (n 1) 7; Nigel Walker describes it as the ‘reduction in the frequency with which people infringe the laws and rules which make for a contented society’ (See Nigel Walker, *Why Punish* (OUP 1991) 6.

⁸⁰ Ten (n 1) 7-8; Ewing (n 5) 46-47. Some have also included the concept of the expressive function of sentencing within the utilitarian tradition. Nigel Walker gives a good overview of those writers who acknowledge the influence of the expressive or educative function of punishment. The earlier philosophical approaches, while recognizing the influence of this educative function, stated that this was not the principal focus of punishment, but rather a secondary influence. (See Nigel Walker (n 79) 21-33.

⁸¹ See the readings in Andrew Von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing* (3rd edn, Hart Publishing 2009).

⁸² Daniel S Nagin, ‘Deterrence in the Twenty-First Century’ (2013) 42 Crime and Justice 199, 206.

either refrains from or scales down a criminal activity because there is a perceived threat of some legal punishment.⁸⁴

Deterrence is of two general types – individual deterrence and general deterrence.⁸⁵ Individual deterrence focuses on the influence that the infliction of punishment on a particular individual will have on the future behaviour of that individual. General deterrence is the communication of the potential imposition of punishment to the community at large, in order that those in that community will be deterred from committing similar or other offences in the future. Unlike individual deterrence, general deterrence contains a strong perceptual component - that is, its effect depends on the belief that an individual will be punished for transgressing the law.⁸⁶ Policy advocates, legislators and jurists have continually referenced deterrence as a justification for punishment, both general and specific, and its influence continues in the development and implementation of reasons for sentence.⁸⁷ In international criminal law, deterrence has been referenced as a justification for the imposition of a sentence in the decisions of the ICTY and the ICTR.⁸⁸

⁸³ *ibid* 205.

⁸⁴ Jack P Gibbs, ‘Deterrence Theory and Research’ in Gary B Melton (ed), *The Law as a Behavioral Instrument* (University of Nebraska Press 1986) 87.

⁸⁵ There is a third dimension to the deterrent principle, and that is educative deterrence. It will be dealt with when the expressive or communicative dimensions of punishment are analyzed.

⁸⁶ Gibbs (n 84) 90.

⁸⁷ Andrew Ashworth and Julian Roberts ‘Deterrence’ in Andrew von Hirsch and Andrew Ashworth and Julian Roberts (eds) *Principled Sentencing* (3rd edn, Hart Publishing 2009) 39-46.

⁸⁸ General deterrence has been utilized as one of the major justifications of punishment by both the ICTY and the ICTR. In earlier decisions of the ICTY general deterrence was utilized as a primary justification for punishment. In later decisions of both the ICTY and the ICTR retribution and deterrence were put forward as the two major justifications of punishment. However, at times the scope of the definition of general deterrence was much broader than the definition that has been proposed here. A detailed analysis of the approach of the ICTY and the ICTR can be found later in this chapter.

i. General deterrence

The influence or effect of general deterrence has been the subject of numerous studies in domestic law.⁸⁹ A comprehensive analysis by Nagin reviews many of the studies since the 1960's on the issue of general deterrence and its impact on crime, and supports an earlier position taken by Jack Gibbs that the severity of punishment alone cannot deter.⁹⁰ There is an additional requirement - that there be a possibility that a sanction will follow if the crime is committed.⁹¹ Nagin's analysis concludes that the certainty of punishment appears to have a more consistent deterrent effect than the severity of punishment.⁹² The certainty of punishment is the product of the intersection of four factors: the probability of apprehension after having committed the crime, the probability of prosecution after apprehension, the probability of conviction after prosecution and the probability of sanction after conviction.⁹³ However, of these four factors, apprehension probability is the most influential.⁹⁴ Thus, 'lengthy prison sentences cannot be justified on deterrent grounds, but must be justified either on crime prevention through incapacitation or on retributive grounds'.⁹⁵

Numerous articles have addressed the issue of the deterrent effect in international criminal law.⁹⁶ Most have addressed the issue from a theoretical or policy perspective, as

⁸⁹ Two of the most comprehensive compilation of these studies are found in Gibbs (n 84) and Nagin (n 82).

⁹⁰ Nagin (n 82) 206. The Nagin study is a compilation of the major research undertaken on deterrence since the 1960's, and is the most up to date review of the literature on the research in this area.

⁹¹ *ibid.*

⁹² *ibid* 201.

⁹³ *ibid.*

⁹⁴ *ibid* 202. This finding led Nagin to conclude that the focus from a policy point of view should be on policing, as that will influence the deterrent effects at the front end of the process.

⁹⁵ *ibid* 253; See also Gibbs (n 84) 110.

⁹⁶ See among others Farooh Hassan, 'The Theoretical Basis of Punishment in International Law' (1983) 15 Case W Res J Int'l L 39; David Wippman, 'Atrocities, Deterrence, and the Limits of International Justice' (1999-2000) 23 Fordham Int'l L J 473; Payan Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities' (2001) 95 Am J Int'l L 7; Jan Klappers, 'Just Revenge? The Deterrence

opposed to an experimental point of view.⁹⁷ The thrust of the argument of those writers who justify the imposition of international criminal law sanctions on the basis of deterrence is premised on belief rather than on actual known effects.⁹⁸ That is, there is no empirical evidence to support their position that international criminal law can deter further illegal behavior.⁹⁹ Yet, respected leaders in the field of international criminal law such as M Cherif Bassiouni, Michael P Scharf and David Scheffer have justified the advancement of international criminal law in part on the basis of its believed general deterrent effect.¹⁰⁰

This lack of empirical evidence has not deterred judges of international tribunals from relying on the principle of general deterrence to rationalize and justify their sentencing decisions.¹⁰¹ The Trial Chambers and Appeals Chamber of the ICTY acknowledge that general deterrence is a focus of sentencing for the tribunal. The definition set out in the ICTR decision of *Prosecutor v Jean Kambanda* is accepted by

Argument in International Criminal Law (2001) XII FYBIL 249; Julian Ku and Jide Nzelibe, ‘Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities’ (2006) 84 Wash Un L R 777; Kenneth Rodman, ‘Darfur and the Limits of Legal Deterrence’ (2008) 30 Hum Rts Q 529; Hunjoon Kim and Kathryn Sikkink, ‘Explaining the Deterrence Effect of Human Right Prosecutions for Transitional Countries’ (2010) 54 Inter Stud Q 939; Leslie Vinjamuri, ‘Deterrence, Democracy and the Pursuit of International Justice’ (2010) 24 Ethics and International Affairs 191; David Bosco, ‘The International Criminal Court and Crime Prevention: By-product or Conscious Goal?’ (2010-2011) 19 Mich St Un Coll L J Int’l L 163.

⁹⁷ Only the articles by Ku and Nzelibe using an economic model and by Kim and Sikkink , using a type of statistical analysis of the possible effects of prosecutions of human rights violations on neighboring states attempt any in depth analysis of the deterrent effects of prosecutions for international crimes.

⁹⁸ Tom J Farer, ‘Restraining the Barbarians: Can International Criminal Law Help’ (2000) 22 Hum Rgts Q 90, 92.

⁹⁹ Julian Ku and Jide Nzelibe (n 96) 790; James Alexander, ‘The International Criminal Court and the Prevention of Atrocities: Predicting the Court’s Impact’ (2009) 54 Vill L Rev 1, 4; de Guzman (n 37) 306-309; Padraig McAuliffe, ‘Suspended Disbelief? The Curious Endurance of the Deterrence Rationale in International Criminal Law’ (2012) 10 NZJPIL 227. As Ku and Nzelibe have noted however, it is difficult to determine the mind set of individuals in international situations whether they are influenced or deterred by the prospect of prosecution.

¹⁰⁰ Michael P Scharf, ‘The Prosecutor v Dusko Tadic, An Appraisal of the First International War Crimes Tribunal Since Nuremberg’ (1997) 60 Alb L Rev 861.868; David J Scheffer, ‘War Crimes and Crimes Against Humanity’ (1999) 11 Pace Int’l L Rev 319; M Cherif Bassiouni, ‘Combating Impunity for Serious International Crimes’ (2000) 71 U Colo L Rev 409, 410.

¹⁰¹ See the detailed analysis of the cases referenced with respect to the ICTY and the ICTR in this chapter.

one of the earliest decisions of the ICTY as encapsulating general deterrence.¹⁰² The court in part stated that general deterrence included

*.dissuading for good those who will attempt in future to perpetrate such atrocities by showing them that the international community was not ready to tolerate the serious violations of international humanitarian law and human rights.*¹⁰³

Yet, throughout the decisions of both the Trial Chambers and the Appeals Chamber of the ICTY there is no attempt to analyze the impact of general deterrence on future illegal behavior. And, there is a constant reminder that in considering general deterrence the Chambers are not to accord that principle undue influence.¹⁰⁴ In the *Kunarac et al* decision it was stated¹⁰⁵

.as to general deterrence, in line with the view of the Appeals Chamber, it is not to be accorded undue prominence in the assessment of an overall sentence to be imposed. The reason is that a sentence should in principle be imposed on an offender for his culpable conduct - it may be unfair to impose a sentence on an offender greater than is appropriate to that conduct solely in the belief that it will deter others.

¹⁰² *Prosecutor v Delalic et al* (Judgment) IT-96-21-T (16 November 1998) para 1203.

¹⁰³ *Prosecutor v Jean Kambanda* (Sentencing Judgment) ICTR 97-23-S (4 September 1998) para 28. This is the classic definition of general deterrence and it is one that pervades the decisions of both the Trial and Appeal Chambers. See for example *Prosecutor v Blaskic* (Judgement) IT-95-14-T (3 March 2000) para 761; *Prosecutor v Simic* (n 19) para 33; *Prosecutor v Naletilic and Martinovic* (Judgment) IT-98-34-T (31 March 2003) para 739; *Prosecutor v Cesic* (n 14) para 25; *Prosecutor v Krajisnik* (Judgment) IT-00-39-T (27 September 2006) para 1137; *Prosecutor v Martic* (Judgment) IT-95-11-T (12 June 2007) para 484; *Prosecutor v Haradinaj et al* (Judgment) IT-04-84-T (3 April 2008) para 487; *Prosecutor v Rasim Delic* (Judgment) IT-04-83-T (15 September 2008) para 559; *Prosecutor v Milutinovic et al* (Judgment) IT-05-87-T (26 February 2009) para 1146.

¹⁰⁴ See in particular *Prosecutor v Tadic* (Appeal) IT-94-1-A and IT-94-1-Abis (26 January 2000) para 48; *Prosecutor v Aleksovski* (n 10) para 185; *Prosecutor v Kunarac et al* (Judgment) IT-96-23-T &IT-96-23/1-T (22 February 2001) para 840; *Prosecutor v Miodrag Jokic* (n 14) para 34; *Prosecutor v Bralo* (n 14) para 22; *Prosecutor v Hadzihasanovic and Kubura* (Judgment) IT-01-47 (15 March 2006) para 2072; *Prosecutor v Martic* (n 103) para 484; *Prosecutor v Rasam Delic* (n 103) para 559.

¹⁰⁵ *Prosecutor v Kunarac et al* (n 104) para 840.

Although the Trial and Appeal Chambers of the ICTY may use the concept of general deterrence to provide some theoretical backdrop to the imposition of a sentence, its influence in the determination of the appropriate sentence is highly questionable.¹⁰⁶

In several cases at the ICTR there is some effort taken to bring some meaning to the concept of deterrence. In referencing deterrence, the Trial Chamber notes the distinction between what it calls ‘special’ and ‘general’ deterrence, and also in its definition appears to adopt some educative function for general deterrence.

With the sentence, an attempt is made to deter, that is, to discourage people from committing similar crimes. The main result sought is to discourage people from committing a second offence (special deterrence) since the penalty should also result in discouraging other people from carrying out their criminal plans (general deterrence).

The Chamber shall assess the factors relevant to « special deterrence » in considering circumstances in mitigation.

With respect to general deterrence, a sentence would contribute to strengthening the legal system which criminalizes the conduct charged and to assuring society that its criminal system is effective¹⁰⁷

Subsequent cases do reference the need for deterrence, but how both ‘special’ and ‘general’ deterrence fits within the sentencing regime is not addressed.¹⁰⁸

Despite reference to general deterrence at the ad hoc tribunals, recent scholarship continues to cast doubt on the value of general deterrence as a justification for the

¹⁰⁶ This conclusion should not be surprising, as the question of the influence of ‘general deterrence’ on the future behavior of individuals in the position of leaders in such situations has been questioned (see McAuliffe (n 99)). In addition it is arguable that the quantum of the penalty imposed, especially by the ICTY, on individuals for the most heinous crimes known to mankind in no way reflects either the seriousness of the offences nor the outrage of the international community against such individuals. How then could it be claimed that it may have some general deterrent effects, and that a particular individual should receive increased punishment for that reason.

¹⁰⁷ *Prosecutor v Rutaganira* (n 10) para 110-112.

¹⁰⁸ See as examples *Prosecutor v Bagosora et al* (n 24) para 2260; *Prosecutor v Rukundo* (n 24) para 593; *Prosecutor v Kalimamzira* (n 24) 741; *Prosecutor v Setako* (Judgment) ICTR-04-81-T (25 February 2010) 494.

development of international criminal law and its enforcement mechanisms. Both Margaret de Guzman and Padraig McAuliffe have argued that the evidence to support the deterrent effect of international criminal law is lacking.¹⁰⁹ Padraig McAuliffe in his survey of the literature on the effect of general deterrence in international criminal law concludes that ‘there is now widespread acceptance in the academic literature that the deterrence rationale is weak’.¹¹⁰ He argues that the influence of deterrence on the behavior of world leaders has not been established, noting in particular the failure of the threat of prosecution at the ICTY of Radovan Karadzic and Ratko Mladic did not deter their subsequent involvement in the attacks on the United Nations safe haven of Zepa and the indiscriminate shelling of Sarajevo.¹¹¹ Nor has the introduction of the Rome Statute shown positive deterrent effect. The failure of the ICC to exercise jurisdiction over Omar al-Bashir of Sudan, indicted in 2008 for genocide and crimes against humanity has been a prominent modern day example of the ineffectiveness of international criminal law to bring an indicted leader to the jurisdiction of the international criminal court for prosecution. Indeed al-Bashir has been permitted to travel to meetings in countries in Africa who are signatories to the Rome Statute, and who would have an obligation to turn him over to authorities at the International Criminal Court.¹¹² Yet he remains free to

¹⁰⁹ de Guzman (n 37); McAuliffe (n 99). While Shahram Dana recognizes the lack of empirical evidence to support the influence of deterrence on future behavior of those in positions to commit international crimes, he takes the opposite view from de Guzman and McAuliffe and contends that general deterrence of high ranking officials may still be a factor for consideration by international tribunals (See Shahram Dana, ‘The Limits of Judicial Idealism: Should the International Criminal Court Engage with Consequentialist Aspirations?’ (2014) 3 Penn State J L and Int’l Aff 31, 80).

¹¹⁰ McAuliffe (n 99) 232.

¹¹¹ ibid 234.

¹¹² Al-Bashir travelled to Chad, a signatory to the Rome Statute, on 22 July 2010 to meet with its president (see Xan Rice, ‘Chad Refuses to Arrest Omar Al-Bashir on Genocide Charges’ The Guardian (London, 22 July 2010) <<http://www.theguardian.com/world/2010/jul/22/chad-refuses-arrest-omar-al-bashir>> accessed 9 March 2014). He also travelled to Kenya, another signatory to the Rome Statute, in August of 2010 and again the Kenyan government refused to arrest him. (See Associated Press, ‘Kenya Defends Failure to Arrest Sudan’s President Omar Al-Bashir in Nairobi’ The Guardian (London, 29 August 2010) <<http://www.theguardian.com/world/2010/aug/29/kenya-omar-al-bashir-arrest-failure>> accessed 8 March 2014. President al-Bashir appears to have the support of many African Union states. For example the AU moved its annual meeting in 2012 from Malawi, a signatory to the Rome Statute, when that country refused to accept the presence of President Al-Bashir within its territory to attend such a meeting. (See Associated Press ‘African Union pulls Summit from Malawi in Row over Sudan’s President’ The Guardian (London, 8

govern his own country and to interact with leaders of countries who are signatories to the Rome Statute and to other world powers.¹¹³ And, despite the finding of an international committee that directly accuses President Assad of Syria of war crimes and crimes against humanity, he continues in power without having to answer to the International Criminal Court.¹¹⁴

The reality of assessing the influence of general deterrence on the actions of individuals, as seen from the domestic studies referenced in Nagin, is that where it is possible to measure such influences, the results show little or no effect on crime reduction, except if the prospect of being caught and prosecuted is perceived as probable. When certainty of being caught, prosecuted, convicted and sentenced is applied to the international criminal law setting, it is noted that the few prosecutions that have taken place does little to encourage the use of general deterrence. From 1945 to 2012 only 745 suspects have been indicted by international tribunals, 356 were prosecuted and 281 were convicted.¹¹⁵ These numbers are exceedingly small, and when combined with lack of enforcement due to the need for state cooperation to arrest, detain and transport to the jurisdiction of the ICC, the deterrent effect is highly questionable. Thus, to justify the imposition of punishment on the basis of general deterrence principles finds no actual justification for its use in international criminal law.

June 2012) < <http://www.theguardian.com/world/2012/jun/08/african-union-malawi-summit-sudan> > accessed 8 March 2014.

¹¹³ The continued conflict in South Sudan, with allegations of war crime type atrocities, again reflect the lack of deterrent power of the ICC. (See Simon Allison ‘Was South Sudan a Mistake’ The Guardian (London, 8 January 2014) < <http://www.theguardian.com/world/2014/jan/08/south-sudan-war-mistake> > accessed 8 March 2014.

¹¹⁴ Syria is not a signatory to the Rome Statute, and any efforts of the UN Security Council to apply sanctions against Syria has been thwarted by vetoes from Russia and China. (See Ian Black ‘Basar Al-Assad Implicated in War Crimes, says UN’ The Guardian (London, 2 December 2013) < <http://www.theguardian.com/world/2013/dec/02/syrian-officials-involved-war-crimes-bashar-al-assad-un-investigators> > accessed 8 March 2014.

¹¹⁵ Alette Smeulers and Barbara Hola and Tom van den Berg, ‘Sixty Five Years of International Criminal Justice: The Facts and Figures’ (2013) 13 ICLR 7. The number of indictments issued versus the number of prosecutions undertaken is somewhat misleading, as the Special Panels of Dili withdrew most of the indictments as persons could not be found and the panels were closing down.

ii. Individual deterrence

The influence of punishment on individual recidivism in domestic law remain questionable. Nagin, Cullen and Jonson, in a 2009 analysis of the state of the evidence on the effect of imprisonment on recidivism conclude that ‘most studies of the impact of imprisonment on subsequent criminality find no effect or a criminogenic effect. Only few studies find evidence of a preventive effect.¹¹⁶ Individual deterrence has not been a prominent factor for consideration in the sentencing decisions of the international tribunals. In particular the Trial and Appeal Chambers of the ICTY recognize that individual deterrence plays little if any role in the sentencing of those convicted by international tribunals.¹¹⁷ Academic writings that have considered the issue at all have all concluded that individual deterrence would play no role in considerations for the imposition of sentence.¹¹⁸ Many who have been prosecuted and convicted of such international crimes would never get the opportunity to function in a role that would allow them to exercise such influence over individuals in the future. Thus the chances of recidivism remain remote. Although the issue of individual deterrence may not be a consideration for sentencing at the ICC, if it were, then the evidence from domestic jurisdictions is not at all encouraging.

b. Rehabilitation

Reformation and rehabilitation as a justification for punishment in criminal law grew out of the development of the positivist tradition in the social sciences. It combined

¹¹⁶ Daniel S Nagin and Francis T Cullen and Cheryl Lero Jonson, ‘Imprisonment and Reoffending’ (2009) 38 *Crime and Justice* 115, 121. However these authors are also quick to point out that the research to date is not sufficient to make firm evidence based conclusions on a scientific basis or to influence public policy.

¹¹⁷ See *Prosecutor v Kunarac et al* (n 104) para 840; *Prosecutor v Cesic* (n 14) para 25-26; *Prosecutor v Miodrag Jokic* (n 14) para 34; *Prosecutor v Deronjic* (Sentencing Judgment) IT-02-61-S (30 March 2004) para 145 (the phrasing used by the Tribunal in this case is a little different. It says of specific deterrence that ‘this factor should attract not more than average importance’); *Prosecutor v Hadzihasanovic and Kubura* (n 104) para 2072 accepting the position in *Kunarac* that ‘only very limited weight should be attached to special deterrence’.

¹¹⁸ Alexander (n 99) 22; Bosco (n 96) 170.

the idea of the rational nature of man with the realization that this man had a past and a future.¹¹⁹ The result was the development of a host of programs fostered by the position that the criminal is sick, and that by focusing on his reformation and rehabilitation to address this sickness the individual will be cured. However, there were concerns expressed in the 1960's that the adoption of the rehabilitative ideal had negative impacts on individual liberty, as many forms of questionable deprivation of liberty were legitimized or justified on the bases of the rehabilitative ideal.¹²⁰ These concerns were supplemented by studies that questioned the effectiveness of rehabilitative programming, resulting in a gradual demise of the focus on rehabilitation in domestic law.¹²¹ It still formed some of the rationale for the imposition of punishment in criminal law, but its influence had been substantially reduced.

In international criminal law reformation and rehabilitation has received some mention in a few of the decisions of the ICTY and the ICTR, but its influence has been fairly minor.¹²² In its earliest sentencing decision, the ICTY Trial Chamber specifically stated that rehabilitation was not a consideration in its sentencing decision, due to the nature of the offences under consideration.¹²³ However it did not preclude its consideration in the appropriate circumstances. In subsequent cases rehabilitation appears

¹¹⁹ Ian Taylor and Paul Walton and Jock Young, *The New Criminology* (Routledge 1973) 9.

¹²⁰ The use of solitary confinement was justified by therapeutic reasons, and was labelled as therapeutic in nature. Juvenile offenders (as they were then called) were incarcerated for matters which, if committed by adults, would be considered of such insignificance as to not attract criminal sanction. And, the mental disordered or the dangerous were incarcerated on the basis of the prediction of future potential behavioural atrocities, when the science of prediction was highly suspect. (See Francis Allen, 'Legal Values and the Rehabilitative Ideal' in Leon Radzinowicz and Marvin Wolfgang (eds), *Crime and Justice Vol II* (Basic Books 1977) 12-17.

¹²¹ Duff and Garland (n 2) 10.

¹²² See *Prosecutor v Delalic* (Appeal) IT-96-21-A (20 February 2001) para 806; *Prosecutor v Deronjic* (Appeal) IT-02-61-A (20 July 2005) para 136; *Prosecutor v Rutaganira* (n 10).

¹²³ *Prosecutor v Erdemovic* (Sentencing Judgment) IT-96-22-T (29 November 1996) para 66. The Trial Chamber proceeds on to qualify its initial comment that the nature of the crime would 'rule out the rehabilitative function of punishment' and states that "Without denying any rehabilitative and amendatory function to the punishment. the Trial Chamber considers at this point in the determination of the sentence that the concern for the above mentioned function of the punishment must be subordinate to that of an attempt to stigmatise the most serious violations of international humanitarian law . . .".

to make its way back as a consideration, initially not as a principle of sentence,¹²⁴ but gradually as a subordinate consideration in the sentencing process.¹²⁵ Most of the sentencing decisions of the Trial Chambers and the Appeals Chamber of the ICTY from 2003 onward conclude that the three main justifications of sentence are retribution, deterrence and rehabilitation.¹²⁶ The third principle is defined or explained in the *Cesic* decision:

By rehabilitation, the Trial Chamber understands the need to take into account the rehabilitative potential of a convicted person; this will often go hand in hand with the process of reintegrating the convicted person into the society.

*The Trial Chamber is of the opinion that, when an accused pleads guilty, he or she takes an important step in the rehabilitation and reintegration processes. This acknowledgement is capable of contributing to the establishment of the truth; it forms an indication of the determination of an accused to face his or her responsibility towards the aggrieved party and society at large; it may contribute to reconciliation.*¹²⁷

The decisions make it clear that rehabilitation is not to play a prominent role in the sentencing process.¹²⁸ Indeed a review of the decisions suggest that rehabilitation

¹²⁴ *Prosecutor v Furundzija* (Judgment) IT-95-17/1-T (10 December 1998) para 291 where the Trial Chamber emphasizes other principles of sentence (retribution, deterrence, public reprobation and stigmatization), but also acknowledges that ... ‘none of the above should be taken to detract from the Trial Chamber’s support for rehabilitative programmes in which the accused may participate while serving his sentence...’.

¹²⁵ See *Prosecutor v Masic et al* (Appeal) IT-96-21-A (20 February 2001). The Court in *Music* acknowledged the subordinate role that rehabilitation was to play. At para 806 it stated ‘Although both national jurisdictions and certain international and regional human rights instruments provide that rehabilitation should be one of the primary concerns for a court in sentencing, this cannot play a predominant role in the decision-making process of a Trial Chamber of the Tribunal..... Accordingly, 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’. See also *Prosecutor v Nikolic* (n 14) para 93-94, *Prosecutor v Obrenovic* (n 14) para 53 and *Prosecutor v Kordic and Cerkez* (n 10) para 1079, among others.

¹²⁶ See in particular *Prosecutor v Nikolic* (n 14) para 92-94; *Prosecutor v Cesic* (n 14) para 24-28 ; *Prosecutor v Deronjic* (Appeal) (n 122) para 136; *Prosecutor v Milosevic* (Judgment) IT-98-29/1-T (12 December 2007) para 987; *Prosecutor v Haradinaj et al* (n 103) para 487-488; *Prosecutor v Rasim Delic* (n 103) para 559; *Prosecutor v Popovic et al* (n 20) para 2128-2130.

¹²⁷ *Prosecutor v Cesic* (n 14) para 27-28.

plays little if any role in the determination of the sentence. It is subsumed within the aggravating and mitigating factors that are a major consideration in the determination of the quantum of sentence in each case.

The concept of rehabilitation is also referenced in many of the sentencing decisions of the ICTR, but there is no attempt to explain in any detail what is meant by that term. Again, in the *Rutaganira* decision the Trial Chamber notes that it means ‘the need to take into account the ability of the person found guilty to be rehabilitated; such rehabilitation goes hand in hand with his reintegration into society’.¹²⁹ Despite the lack of any real explanation of the parameters of rehabilitation, as a concept in sentencing it is referenced in most of the decisions of the ICTR. However, in view of the lengthy sentences imposed at the ICTR as compared to the ICTY,¹³⁰ it is clear that rehabilitation has not played a role in the determination of the quantum of sentence in those cases. Indeed it is again stated in many of the ICTR decisions that its role is limited in the determination of the appropriate sentence.¹³¹ With little evidence to support its effectiveness in domestic law, and no evidence to justify reliance on its application in international criminal law, adherence to the rehabilitative principle by the ICC appears unjustified.

¹²⁸ In the *Popovic et al* decision from the ICTY the Trial Chamber stated ‘Another sentencing purpose is rehabilitation. In light of the serious nature of the crimes committed under the Tribunal’s jurisdiction, it has not played a predominant role in sentencing’ *Prosecutor v Popovic et al* (n 20) para 2130.

¹²⁹ *Prosecutor v Rutaganira* (n 10) para 113. Other than stating that it should be considered, there is no real explanation of what rehabilitation is within the context of sentencing at the ICTR.

¹³⁰ Barbara Hola and Alette Smeulers and Catrien Bijleveld ‘International Sentencing Facts and Figures’ (2011) 9 JICJ 411-439.

¹³¹ The concept of rehabilitation also plays a very limited role in determinations of early release after conviction for those sentenced by the ICTY and the ICTR. A study by Barbara Hola and Joris van Wijk shows that 45 % of those sentenced to imprisonment by the ICTY, the ICTR and the SCSL have been released. . Although rehabilitation is a factor for consideration by the president of the tribunal for purposes of early release, it plays a very limited role. Rather it is the fact that most countries where these prisoners are incarcerated release after two thirds of sentences that influences if such persons do get released. Most are released at the two thirds threshold. (See Barbara Hola and Joris van Wijk ‘Life after Conviction at International Criminal Tribunals’ (2014) 12 JICJ 109), and in particular p 112 and pp 121-127.

c. Incapacitation

Incapacitation as a justification of punishment also falls within the utilitarian theoretical position. It too is forward looking, as it looks to the reduction of future crime by the incapacitation of the offender. The length of the incapacitative penalty is based not only on the gravity of the offence, but is also based on the prediction if that the offender will re-offend in the future.¹³² The predictive capabilities of social science has been a highly debated issue, and the failure of social science to provide a fool proof predictable measure is one of the principle drawbacks to the reliance on the incapacitate approach as a justification for determining the length of a particular sentence.¹³³ The use of predictive tools for future offending behavior resulted in a tendency towards false positives, requiring offenders who may not re-offend, or who may reoffend in a different or lesser form than previously, to be incarcerated beyond what was necessary for the particular offence for which they have been sentenced.¹³⁴ The debate on the use of predictive techniques as a tool in determining sentence continues, with some maintaining the limited use of the predictive tool within the broad parameters of ranges of sentences for offence types,¹³⁵ while others continue to question the legitimacy of these predictive tools, and the ethical concerns about their continued use.¹³⁶ It appears not to have a role in international criminal law sentencing, mainly because of the inability of the prisoner to

¹³² A E Bottoms and R Brownsword, ‘The Dangerousness Debate After the Floud Report’ (1982) 22 B J Crim 12.

¹³³ Andrew Von Hirsch and Lila Kazemian, ‘Predictive Sentencing and Selective Incapacitation’ in Andrew Von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing* (3rd edn, Hart Publishing 2009) 95, 96-97.

¹³⁴ Andrew von Hirsch, ‘Incapacitation’ in Andrew von Hirsch and Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing* (3rd edn, Hart Publishing 2009) 75, 77.

¹³⁵ P W Greenwood and A Abrahamse, *Selective Incapacitation* (Rand Corporation, Santa Monica, California 1982); Norval Morris, ‘Incapacitation Within Limits’ in Andrew Von Hirsch, Andrew Ashworth and Julian Roberts (eds), *Principled Sentencing* (3rd edn, Hart Publishing 2009) 90.

¹³⁶ L Kazemian and D P Farrington ‘Exploring Residual Career Length and Residual Number of Offences for Two Generations of Repeat Offenders’ (2006), 43 Journal of Research in Crime and Delinquency 898; Von Hirsch and Kazemian (n 133).

attain a position in the future which would allow him to exercise the appropriate power to participate in such crimes.

Section 3 A Look Beyond the Traditional Approach to International Criminal Law

The problems with the application of the traditional justifications of punishment to international criminal law calls for a re-examination of the purpose of international criminal law, and correspondingly the justifications of punishment that best fit with that perceived purpose. It is important that international criminal law adopt a rationale for punishment that is applicable to it.¹³⁷ And, as has been argued throughout this thesis, the focus should not be on international criminal law in its broadest context, but rather the focus must be on the context in which a particular international tribunal operates.¹³⁸

One of the principal impediments to the adoption of justifications of punishment that fit the perceived purpose of international criminal law is the ambitious agenda of international criminal law. Traditionally international criminal law has focused on multiple goals, all of which cannot be met by the prosecution and sentencing of international criminal law offenders.¹³⁹ These goals have traditionally included retribution, deterrence, rehabilitation and incapacitation, already addressed in this chapter, but also included reconciliation, restoration, historical record building, preventing revisionism, expressivism, crystallizing international norms, general affirmative prevention, establishing peace, preventing war, vindicating international law

¹³⁷ Ohlin (n 51) 388.

¹³⁸ Chapter 1 argues that context is crucial to a determination of the approach to punishment that should be adopted by any particular international tribunal.

¹³⁹ Robert Sloane, ‘The Expressive Capacity of International Punishment’ (2007) 43 Stan J Int’l L 39, 45; Mirjan Damaska, ‘What is the Point of International Criminal Justice’ (2008) 83 Chi-Kent L Rev 329, 339; David Luban, ‘Fairness to Rightness: Jurisdiction, Legality and the Legitimacy of International Criminal Law’ in Samantha Beeson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 569, 575.

prohibitions, setting standards for fair trials, and ending impunity.¹⁴⁰ Not only are these goals too numerous, but some are the antithesis of others, and by focusing on the many, the influence of some of these goals are diminished.¹⁴¹ The answer is to trim down the many objectives proposed for international criminal law, and to focus on just a few. These objectives may not, and probably will not be the same objectives as set out in domestic law. Tallgren recognized this general point, as she questioned the application of utilitarianism and retribution justifications for law common in domestic jurisdictions to international events. She wondered if other forms of accountability were more appropriate to reflect the purpose or purposes of the particular international tribunal under consideration.¹⁴²

Luban, Damaska and Duff have each proposed a different but to some degree complementary focus for international criminal law.¹⁴³ Luban recognizes that the main focus of the international justice system has been on the trial, rather than the aftermath of that trial.¹⁴⁴ He states that ‘trials are expressive acts broadcasting the news that mass atrocities are, in fact, heinous crimes and not merely politics by other means’.¹⁴⁵ This he calls ‘norm projection’.¹⁴⁶ Punishment, as an essential part of the norm projection process, must focus on the imposition of penalties that continues the projection of the no-impunity norm.¹⁴⁷ The form punishment takes must therefore be expressive of the need to

¹⁴⁰ Damaska (n 139) 331.

¹⁴¹ ibid 331. He notes in particular the tension between the goals of establishing peace and ending impunity, producing an accurate historical record and the avoidance of collective responsibility by individualizing responsibility, the desire to protect the accused’s procedural rights and to satisfy victim interests. (See 332-334).

¹⁴² Immi Tallgren, ‘The Sensibility and Sense of International Criminal Law’ (2002) 13 EJIL 229, 233-238.

¹⁴³ Luban (n 139) 575; Damaska (n 139) 339-340; Antony Duff ‘Authority and Responsibility in International Criminal Law’ in Samantha Beeson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 592-594.

¹⁴⁴ Luban (n 139) 575. By the aftermath of the trial Luban refers to the sentencing stage of the trial process.

¹⁴⁵ ibid 576.

¹⁴⁶ ibid.

end impunity for those who violate international norms. Damaska takes a similar position, arguing that the purpose of international criminal law is to strengthen the sense of accountability for international crime by exposure and stigmatization of the inhuman nature of these crimes.¹⁴⁸ It is the didactic objective of international criminal law.¹⁴⁹ Such exposure would result in humanitarian norms being both recognized and respected.¹⁵⁰ As international crimes are seen as public wrongs,¹⁵¹ international criminal trials are the formal process to call to account those alleged perpetrators of international criminal law.¹⁵² Those who commit those wrongs must answer not just to local communities but to humanity.¹⁵³ Duff opines that the creation of the International Criminal Court with its focus on those offenders who cannot be prosecuted in their local communities is

*one of the ways in which the moral ideal of a human community might be given more determinate and effective institutional form: the existence of a community is often a matter more of aspiration than of achieved fact, and a recognition of human community could be a recognition of what we should aspire to create.*¹⁵⁴

Punishment for Duff would therefore be reflective of the violation of the norms of this human community. This is not an approach based on retribution, suggesting that those who commit such offences are vermin that the human community should rid itself of, but as fellow humans who must be held accountable for the deeds they have committed.

¹⁴⁷ ibid.

¹⁴⁸ Damaska (n 139) 345.

¹⁴⁹ ibid 343.

¹⁵⁰ ibid.

¹⁵¹ Duff (n 143) 595. Duff argues that it is not that such wrongs damage the public, but by their nature they ‘concern’ the public.

¹⁵² ibid 600.

¹⁵³ ibid 601.

¹⁵⁴ ibid.

What these approaches have in common is a recognition that the purpose of international criminal law extends beyond the traditional rationales proposed for its existence, and therefore the reasons for the imposition of punishment on those who violate international criminal law must be reflective of the purpose or purposes of the international criminal law to which jurisdiction is given. Each writer suggests an alternative approach to the purpose of international criminal law, distinct from the retributive or utilitarian approaches of main stream international criminal law. While both Luban and Damaska would be comfortable with the characterization of their approaches as some form of the expressive theory of law and punishment,¹⁵⁵ Duff would prefer to characterize his approach as one of communication rather than of expression.¹⁵⁶ Yet his approach as well exhibits trappings of a calling to account expressing through the prosecutorial and sentencing process the communities abhorrence of these types of crimes, and the need to express through sanctions the concern of all humanity for their commission.

The recognition of the need to appreciate the purpose of international criminal law, as proposed by Luban, Damaska and Duff is critical to the development of the appropriate justifications of punishment in international criminal law. It allows tribunals to focus on an approach to international criminal issues, with the ultimate goal of providing the world with a measure of comfort that atrocities such as experienced in the former Yugoslavia or in Rwanda will not be tolerated and will not go unpunished. Yet, while the recognition of the need to focus the approaches to international criminal law is important, neither writer provides a road map as to how this is to be accomplished. In particular, there is no focus on punishment and how it should be developed to reflect the purposes of international criminal law. In addition there is need for a note of caution that the general approach proposed by these writers should not be cast too broadly, with an underlying assumption that all international criminal law and therefore all international

¹⁵⁵ Luban in particular describes his concept of norm projection as expressive acts. He also acknowledges that he is ‘sympathetic’ with the view of expressivism set out in an article by Elizabeth Anderson and Richard Pildes ‘Expressive Theories of Law, A General Restatement’ (2000) 148 U Pa L Rev 1503. (See Luban (n 139) 576 footnote 9.

¹⁵⁶ Duff (n 143) 593.

criminal law tribunals have the same approach. As Coombs has noted such is not and should not be the case.¹⁵⁷ Different tribunals may have different interests, and therefore the purpose of that particular tribunal will be distinctive from others. It is therefore important not only to understand the need for an appreciation of the approach of international criminal law, but also to understand and appreciate the approach of particular international criminal law tribunals in order to properly determine the approach to sentencing for such tribunals. This recognition has been slow to develop with respect to sentencing in international criminal law. Chapter 5 will address the slow recognition and development of a different approach to sentencing in international criminal law, and will propose that an approach to sentencing at the ICC be based on the purpose of that court.

Section 4 Conclusion

This chapter has reviewed the traditional principles of sentencing that exist in domestic law - that of retribution and utilitarianism - and that have been adopted in the sentencing decisions of the ICTY and the ICTR. The analysis has shown that there is a problem with the adoption of either position to sentencing in international criminal law. There are also major problems with the adoption of the cardinal principle to sentencing as proposed by Ohlin, and as followed to varying degrees by Szoke-Burke and Glickman. There is a need to determine what is the purpose or focus of international criminal law, and to develop principles of sentencing to reflect the purpose or purposes of the international tribunal having jurisdiction. For the ICC, the approach to sentencing must be reflective of the purpose of criminalizing those acts which are the subject matter of the jurisdiction of the ICC, and must be reflective of what is to be accomplished by imposing sentences on those found guilty of such offences. It will be proposed that the adoption of the expressive principle of sentencing will best reflect the purpose of the ICC, and afford the best justification for imposing sentences at the ICC. A sentencing regime utilizing the

¹⁵⁷ Nancy Coombs, ‘Seeking Inconsistency: Advancing Pluralism in International Criminal Sentencing’ (2016) 41 Yale J Int’l L 1, 14-18.

expressive theory of punishment can then be developed to provide a systematic approach to the imposition of punishment.

Chapter 5

The Adoption of an Internationalized Approach to Sentencing at the ICC

The recognition of the need for a different approach to sentencing in international criminal law necessitates a search for the approach that best fits the mandate of the particular international tribunal exercising jurisdiction over any criminal matter. Writers who focus on sentencing in international criminal law began to recognize this fact, and have proposed approaches to sentencing that differ from the approaches in domestic law, and the approaches of the ad hoc tribunals.¹ Some writers also recognized, in one form or another, that context is an important determiner of the approach to sentencing in the international sphere.² To help understand context, it is important to appreciate the rationale behind the development of such international institutions that have the mandate to dispense punishment for violations of international criminal law, and the reasons for their continued existence.

Section 1 of this chapter reviews the work of those writers who call for a new approach to sentencing in international criminal law. It is important to understand the development of this new approach in order to assess the validity of the arguments for such an approach, and to determine whether the various approaches need modifications in order to apply to the ICC. There is a difference of view among writers with respect to the principles that should apply to sentencing determinations at the international level.

¹ See in particular the works of Jan Nemitz, ‘The Law of Sentencing in International Criminal Law: The Purposes of Sentencing and the Applicable Method for the Determination of the Sentence’ (2001) *Y Int’l H L* 87; Robert Sloane, ‘The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law’ (2007) 43 *Stan J Int’l L* 39; Nancy Coombs, ‘Seeking Inconsistency: Advancing Pluralism in International Criminal Sentencing’ (2016) 41 *Yale J Int’l L* 1 and to some extent Margaret de Guzman, ‘Proportionate Sentencing at the International Criminal Court’ (May 27, 2014) Temple University Legal Studies Research Paper Series (Research Paper No 2014-15).

² Coombs (n 1); see also the works of Ralph Henham, particularly Ralph Henham, *Punishment and Process in International Criminal Trials* (Ashgate 2005); Ralph Henham, ‘Developing Contextualized Rationales for Sentencing in International Criminal Trials’ (2007) 5 *JICJ* 757 for his particular understanding of context.

However, all recognize that the carte blanche transfer of the domestic justifications for sentencing to the international context fails to acknowledge and to reflect the purpose or purposes of the international criminal law of which it is a part, and that the principles of sentencing developed should reflect those purposes.³ Writers such as Mark Drumbl,⁴ Mariam Ackerman⁵ and Robert Sloane⁶ call for an internationalized approach to sentencing in international criminal law, with Margaret de Guzman⁷ and Nancy Coombs⁸ calling for that approach to be further refined to reflect the purpose of the international tribunal within whose jurisdiction sentencing is to occur, and reflective of what that tribunal wishes to accomplish. The key is to determine what are the goals or purposes of the international tribunal that is to dispense punishment for those crimes within its jurisdiction.

Following upon the proposed approach of such writers, Section 2 of this chapter investigates the purpose or rationale for the ICC. It briefly reviews the development of the concept of an international criminal jurisdiction after the Second World War, revealing a reluctance among state members to commit to any philosophical or theoretical justification for the development of such a court. They feared that the development of theoretical and philosophical criteria for the selection of offence types would force states to accept offences which could bring some of their citizens within the jurisdiction of some international tribunal.⁹ As a result, an agreement was reached on a most generic

³ This is in accord with Garland's view that sentencing, as one aspect of the punishment regime, should be reflective of the purpose of the institution of which it is a part. (See David Garland, *Punishment and Modern Society* (University of Chicago Press 1990) 20-22).

⁴ Mark Drumbl, *Atrocity, Punishment, and International Law* (CUP 2007).

⁵ Mariam Aukerman 'Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice' (2002) 15 Harv Hum Rts J 39.

⁶ Sloane (n 1).

⁷ de Guzman (n 1).

⁸ See Coombs (n 1).

⁹ This can be seen in the opposition of many states to the inclusion of offences such as the crime of intervention, colonial domination, recruitment of mercenaries, apartheid, terrorism, and drug trafficking,

statement with respect to the purpose of a code of offences. That statement was that the focus of crimes against the peace and security of mankind was on those crimes that were the most serious in the scale of criminal offences that affect the very foundation of human society. The selection of offence types to be included in the Rome Statute suffered the same fate. While the realization that the offences to be selected would include the generic belief that such offences affect the very foundation of human society, the ultimate selection of a limited number of offence types was based on political negotiation rather than based on theoretical or philosophical underpinnings.

What did emerge in the final weeks of the negotiations for the Rome Statute was an agreement on the wording of a preamble for the Rome Statute. The final wording of the preamble is also generic in nature, but does provide some guidance with respect to the purpose of the court. That purpose was to develop a court that was independent and free of political influence, encompassing the most serious crimes that threaten the peace and security of all, and that such crimes must not go unpunished, no matter the status of the perpetrator of such crimes. The stated reasons for the selection of offence types, coupled with the final development of a preamble during the last minute negotiations on the content of the Rome Statute are basic ones. However they provide for some appreciation of what was the consensus thinking on the broad reasons for the development of the ICC. The argument of this chapter is that it is in the fulfillment of these broad goals that punishment through the sentencing process should focus, as this is the function of punishment in any legal system.

Section 1 A Call for a New Approach to Sentencing in International Criminal Law

Concern with the inability of the traditional justifications of punishment to apply to the international setting has spurred a number of writers to search for a new approach

within the court's jurisdiction. (See ILC 'Thirteenth Report of the Special Rapporteur on the Draft Code of Crimes Against the Peace and Security of Mankind' in Yearbook of the ILC 1995 Vol II Part One UN Doc A/CN.4/SER.A/1995/Add.1 (Part 1)).

to sentencing in international criminal law.¹⁰ While the relationship between the purpose of international criminal law and the development of an internationalized approach to sentencing is essential to that process,¹¹ it is also essential to recognize that purposes of particular international criminal law tribunals differ because of the different mandates they have, the reasons they were implemented, the different types of crimes they prosecute, and the mechanisms and procedures they use to prosecute such crimes.¹² While a number of writers began to recognize the need for a distinctive approach to sentencing in international criminal law, most failed to couple that recognition with the need to first appreciate the purpose of the particular tribunal under consideration.¹³ Rather, they developed arguments that would apply sentencing rationales to all international criminal law.¹⁴ As Coombs has effectively argued, international criminal tribunals are not each separate parts of a one dimensional international criminal justice system, but are ‘discrete bodies designed to take the place of domestic courts when the prosecution of international crimes is not possible in those courts’.¹⁵ What should be adopted are sentencing principles and processes that meet the needs and advance the

¹⁰ See as examples Mark Drumbl, ‘Towards a Criminology of International Crime’ (2003-2004) 19 Ohio State J Dispute Resolution 263; Mark Drumbl, ‘Collective Violence and Individual Punishment: The Criminality of Mass Atrocity’ (2004-2005) 99 Northwest U L Rev 539; Drumbl, *Atrocity, Punishment and International Law* (n 4); Ralph Henham, ‘The Internationalization of Sentencing: Reality or Myth’ (2002) 30 I J Soc Law 265; Ralph Henham, ‘The Philosophical Foundations of International Sentencing’ (2003) 1 JICJ 64; Henham, *Punishment and Process in International Criminal Trials* (n 2); Henham, ‘Developing Contextualized Rationales for Sentencing In International Criminal Trials’ (n 2).

¹¹ See Mirjan Damaska, ‘What is the Point of International Criminal Justice’ (2008) 83 Chi-Kent L Rev 329; David Luban, ‘Fairness to Rightness: Jurisdiction, Legality and the Legitimacy of International Criminal Law’ in Samantha Beeson and John Tasioulas (eds), *The Philosophy of International Law* (OUP 2010) 569.

¹² See Coombs (n 1) 19.

¹³ See Stuart Beresford, ‘Unshackling the paper tiger-the sentencing practices of the ad hoc international criminal tribunals for the former Yugoslavia and Rwanda’ (2001) 1 ICLR 33; Allison Danner, ‘Constructing a Hierarchy of Crimes in International Criminal Law Sentencing’ (2001) 87 Va L Rev 415, 442; Drumbl, ‘Collective Violence and Individual Punishment: The Criminality of Mass Atrocity’ (n 8) 558; Margaret de Guzman, ‘Harsh Justice for International Crimes?’ (2014) Yale J Int’l L 1.

¹⁴ ibid.

¹⁵ Coombs (n 1) 24.

goals of that particular court.¹⁶ It has taken some time for writers in the field to reach that ultimate conclusion.

The recognition of the need to develop an internationalized approach to sentencing, as distinct from approaches in domestic law, was an essential first step in the attempt to develop a distinct approach to sentencing in international criminal law. The works of Ralph Henham and Mark Drumbl were instrumental in leading the way to this recognition. Henham was one of the early advocates of the necessity of international criminal law taking its own approach to sentencing. Henham focuses on the theoretical approaches that should infuse sentencing in international criminal law, and the need for appropriate and consistent rationales for the imposition of sentencing.¹⁷ While he recognizes that at times the dominant rationale used by international tribunals for the imposition of sentences is retribution, he is critical of the reliance on this rationale without analysis of how the issue of proportionality, based on the gravity of the crime and the degree of responsibility of the offender, is assessed.¹⁸ He is also critical of the inconsistent approaches of the early decisions of the ICTY and the ICTR in their treatment of the rationales of sentencing, recognizing that at times retribution is dominant, but at other times focusing on deterrence, and even rehabilitation as justifications for the sentences imposed.¹⁹ This failure to rationalize sentencing options impacts on the proper development of ‘alternative sentencing justifications and paradigms’.²⁰ Henham proposes that the answer to the issue of the rationale of sentencing in international criminal law is to place it within a contextual framework and to recognize the need for ‘moral resonance’.²¹ By this he means to justify sentencing policy within the

¹⁶ ibid.

¹⁷ Henham, ‘The Philosophical Foundations of International Sentencing’ (n 10) 65, 72.

¹⁸ See Henham, ‘The Internationalization of Sentencing: Reality or Myth’ (n 10) 277; Henham, ‘Developing Contextualized Rationales for Sentencing In International Criminal Trials’ (n 2) 760.

¹⁹ Henham, ‘The Philosophical Foundations of International Sentencing’ (n 10) 67-70.

²⁰ ibid 65; Ralph Henham, ‘Punishment and the Role of the Prosecutor in International Criminal Trials’ (2008) 19 Crim L F 395, 397.

specific context in which it arises, is applied and is to be understood, and that it have moral meaning in specific contexts. The concept of context pervades many of his writings in this area.²² Although his explanation of both context and ‘moral resonance’ lacks both clarity and specificity, it appears that the references in his writings is to the importance of referencing the audience to which the sentence is related – i.e. a specific area of a country which has group rivalries, or whole countries which have ethnic or other tensions with neighbouring countries. Henham is thus a strong advocate for a sentencing approach that includes a restorative justice focus for those who are the victims of international atrocities.²³ This would accommodate the contextual approach that he deems necessary for sentencing in international criminal law.

Henham is one of the few writers who addresses the ICC directly, and is critical of the sentencing provisions contained in the Rome Statute and the Rules of Procedure and Evidence.²⁴ He sees the need for a just and consistent sentencing practice at the ICC, and sees various problems in implementing that practice under the current legislative regime.²⁵ As there were no penological justifications for punishment in the background documents establishing the ICC, and nothing in the subsequent Statute to substantiate such justifications,²⁶ the challenge for the ICC to develop its penalty by:

²¹ Henham, ‘The Philosophical Foundations of International Sentencing’ (n 10) 66. See also Henham, ‘Developing Contextual Rationales for Sentencing in International Criminal Trials’ (n 2).

²² See in particular Henham, *Punishment and Process in International Criminal Trials* (n 2); Henham, ‘Developing Contextualized Rationales for Sentencing In International Criminal Trials’ (n 2); Henham. ‘Punishment and the Role of the Prosecutor in International Criminal Trials’ (n 20).

²³ See Henham, ‘The Internationalization of Sentencing: Reality or Myth (n 10); Henham, ‘The Philosophical Foundations of International Sentencing’ (n 10); Henham, *Punishment and Process in International Criminal Trials* (n 2); Henham, ‘Developing Contextualized Rationales for Sentencing In International Criminal Trials’ (n 2).

²⁴ Henham, ‘Developing Contextual Rationales for Sentencing in International Criminal Trials’ (n 2); Ralph Henham ‘Some Issues for Sentencing in the International Criminal Court’ (2003) ICLQ 81; Ralph Henham, ‘Procedural Justice and Human Rights in International Sentencing’ (2004) 4 ICLR 185; Ralph Henham, ‘International Sentencing in the Context of Collective Violence’ (2007) 7 ICLR 449; Henham, ‘Punishment and the Role of the Prosecutor in International Criminal Trials’ (n 20).

²⁵ Henham, ‘Developing Contextual Rationales for Sentencing in International Criminal Trials’ (n 2) 769.

²⁶ Henham, ‘The Philosophical Foundations of International Sentencing’ (n 10) 84.

*adopting principles and approaches designed to reconcile the local with the global at a moral and normative level, or whether it is designed to function merely as a symbolic component of globalization that exists to provide a language and mechanism for asserting hierarchies of international power.*²⁷

This challenge is reflected in his other writings that reference the ICC,²⁸ and note that sentencing in the international context must relate to both its ‘global and particular audiences’.²⁹ It is this reference to the particular audience that reflects Henham’s references to the victim(s), and his recognition of the need for consideration of restorative justice issues to reflect the local interests, especially in areas of transitional justice.

Henham advocates for substantive legislative changes to the Rome Statute in order to make sentencing more reflective of the purpose of the ICC, and in particular focus on ‘communitarian notions that resonate with rehabilitation, reconciliation and restorative justice’.³⁰ Such changes to the Rome Statute would be a herculean task, in view of the need for consensus for such changes to be implemented. And, this thesis argues that communitarian concerns were never the main focus of the framers of the Rome Statute. This is because the main focus, as set out in the introduction to this chapter, and as elaborated further in this analysis, was to enhance respect for international norms by prosecuting the most serious crimes the world knows, crimes that affect the very foundation of human society, and to develop a free and independent court, free of political influence and to establish a process whereby no one is immune from such prosecutions. Sentencing principles and procedures that reflect the purposes of the ICC can be developed within the existing provisions of the Rome Statute and the Rules of

²⁷ ibid 85.

²⁸ See Henham, ‘The Internationalization of Sentencing: Reality or Myth (n 10); Henham, ‘The Philosophical Foundations of International Sentencing’ (n 10); Henham, *Punishment and Process in International Criminal Trials* (n 2); Henham, ‘Developing Contextualized Rationales for Sentencing In International Criminal Trials’ (n 2); Henham, ‘Punishment and the Role of the Prosecutor in International Criminal Trials’ (n 20).

²⁹ Henham, ‘Punishment and the Role of the Prosecutor in International Criminal Trials’ (n 20) 407.

³⁰ Henham, ‘Some Issues for Sentencing at the ICC’ (n 24) 112.

Procedure and Evidence. There is no need to undertake legislative changes of the type Henham is suggesting. Henham's approach also fails to recognize that regional and local concerns can be addressed if the domestic authority claims jurisdiction over the offences. Where they do not and the ICC takes jurisdiction, international concerns would predominate, and the contextual concerns of the regional and the local would necessarily take second place to the broader international concerns reflective in the history of the development of the ICC and the concerns expressed in the preamble to the Rome Statute. This is not to trivialize the importance of regional interests and victims' interests. As has been argued in previous chapters, a number of such interests are accommodated within the structure of the Rome Statute and the Rules of Procedure and Evidence.³¹ What it does is place the major focus on broader interests of the larger international community.³²

Coombs is critical of this broader internationalized approach to sentencing for the ICC proposed in this thesis. Although she recognizes that particular tribunals may have different goals, she argues that the adoption of sentencing standards calibrated to the purposes of the particular tribunal are likely unattainable.³³ Her proposed solution is to individualize the principles and purposes of sentencing to reflect local community standards.³⁴ The principal justification for the focus on local community norms is the perceived dissatisfaction with the length of sentences imposed by the existing ad hoc tribunals.³⁵ This approach falls squarely within the retribution justification for sentencing, which as previously argued in this thesis and elsewhere, can rarely be satisfied through the sentencing of international criminal law offenders.³⁶ The focus on local norms, while

³¹ See in particular ch 4.

³² Damaska recognizes that as the focus of international criminal law is on global concerns, victims' interests will play a lesser role in international criminal law, but also acknowledges that there are other mechanisms, such as reparation processes at the ICC, which can in part satisfy some victims' concerns. (See Damaska (n 11) 333-335; 341-343).

³³ Coombs (n 1) 24-25.

³⁴ *ibid* 31.

³⁵ *ibid* 33-34.

understandable, would be to the detriment of the broader international goals that are the purpose of the ICC. The approach proposed by Coombs would not reflect those particular goals of the ICC, something which she effectively argued are essential to proper understanding of sentencing in international criminal law.³⁷

The inclusion of the needs of the local community to legitimate the sentencing decisions of international tribunals is also a theme that resonates throughout many of the writings of Mark Drumbl.³⁸ Drumbl takes a more empirical approach to his analysis than does Henham, and his major work '*Atrocity, Punishment and International Law*' is an excellent example of the use of empirical evidence to support his various conclusions.³⁹ Although Drumbl is less philosophical in his analysis of sentencing in international criminal law than Henham, he still focuses on the theoretical in his approach to this difficult subject. Drumbl questions how appropriate it is to borrow the domestic law justifications of punishment for crimes of atrocity from domestic law. He questions whether these justifications of retribution, deterrence, expressivism and to a minor extent rehabilitation, incapacitation and reconciliation⁴⁰ fit those individuals whose crimes are committed as part of a collective action, and whose justification may to them seem not only appropriate but normal within the societal order or subcultural order in which they operate.⁴¹ In such circumstances the traditional justifications of punishment in reality

³⁶ The analysis in ch 4 sets out the various arguments against the retributive justification of punishment being accepted as a sentencing principle in international criminal law.

³⁷ Coombs (n 1) 24. Coombs is not at all happy with the present state of international criminal law, and expresses concerns that its legitimacy is being questioned, mainly because of concerns for its effectiveness. This concern appears to be implicit in her suggested approach to focus on the local issue in order to gain legitimacy for international criminal law. (See Nancy Coombs, 'From Prosecutorial to Reparatory: A Valuable Post-Conflict Change of Focus' (2014-2015) 36 Mich J Int'l L 219).

³⁸ Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity' (n 10); Drumbl, *Atrocity, Punishment and International Law* (n 4); Drumbl, 'Towards a Criminology of International Crime' (n 10).

³⁹ Drumbl (n 4).

⁴⁰ Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity' (n 10) 559-560.

⁴¹ Drumbl (n 4) 30-32.

have little or no effect on a global basis, and little or no effect on a localized level. It is his position that the nature of the atrocity requires that the punishment be localized, in order to imbue it with meaning for those who are most affected by that atrocity. As the traditional justifications of retribution, deterrence and expressivism have not been shown empirically to have produced the desired effect in international criminal law,⁴² Drumbl argues for a movement away from ‘faith’— the general belief that the traditional goals of punishment are not only appropriate but also attainable, towards a more scientific approach in which the rationales put forward to justify punishment are subject to empirical scrutiny.⁴³ This position is also implicit in his earlier works on the subject.

While Drumbl’s works are very helpful in exposing the fallacies associated with the transference of the domestic justifications of punishment to the international setting, he as well fails to embrace the distinction between the requirements associated with general international criminal law and the need to focus on the particular orientation of various international tribunals and that the purposes of sentence need to reflect those diverse purposes.⁴⁴ Like Henham, he also fails to appreciate the distinction between the localized approach associated with some tribunals, and the broader international approach associated with the jurisdiction of the ICC. The concern in the Rome Statute is with the international community, and to focus attention principally on the local community would be to the detriment of the international community and the purposes that the ICC was established to deal with for that larger community.

A more particularized approach, directed towards what one wishes to achieve—what is the goal or goals of the international criminal justice system, and how this can be

⁴² Drumbl, ‘Collective Violence and Individual Punishment: The Criminality of Mass Punishment’ (n 10).

⁴³ Mark Drumbl, ‘International Criminal Law: Taking Stock of a Busy Decade’ (2009) 10 Melbourne J Int'l L 38, 44.

⁴⁴ Drumbl does recognize that because of the approach of the US military tribunals prosecuting Guantanamo Bay capturers that the specific approach to their sentencing should focus on the expressive principle of law and sentencing. However, this is not an international tribunal as such, and therefore it is a stretch to suggest that he has taken a different approach in recent writings. See Mark Drumbl, ‘Expressive Value of Punishing Terrorists’ (2006-2007) 75 Geo Wash L Rev 1165.

achieved can be seen in the works of Marian Aukerman, Jan Nemitz and particularly in the works of Robert Sloane and Margaret de Guzman. These writers go beyond the recognition of the problems created with the carte blanche adoption of the domestic law justifications of sentence to the international setting, and advocate for an approach to sentencing which is based on what one wishes to achieve. Aukerman directly addresses this issue, questioning the appropriateness of the use of prosecutions in transitional societies.⁴⁵ She recognizes that whether the prosecutorial approach is appropriate, or whether focus should be on the adoption of Truth Commissions or some other form of reconciliation, depends very much on the goals one wishes to achieve for the international justice system.⁴⁶ Is the focus to be on retributive justice through prosecution and sentencing or is it on the communication of the atrocities committed in an attempt to create social cohesion in the transitional society.⁴⁷ That will determine the approach to be taken to sentencing in those transitional societies.

While Nemitz and Sloane each recognize this point, they go further and each advocate for a particular approach to sentencing in international criminal law. While recognizing that the traditional utilitarian and retributive justifications of punishment applied in domestic law are not suitable to international criminal law, Nemitz proposes that sentencing in international criminal law should focus on affirmative general prevention.⁴⁸ He describes this approach as one where the purpose of sentence is to influence ‘the legal consciousness of the accused, the victim, the witness and the general public in order to reassure them that the legal system is implemented and enforced’.⁴⁹ It also has the function of reinforcing in the minds of the public that human rights cannot be transgressed and the prosecution of violators of these rights will allow the public to

⁴⁵ Aukerman (n 5).

⁴⁶ ibid 44.

⁴⁷ ibid 82-91.

⁴⁸ Nemitz (n 1) 90.

⁴⁹ ibid 95.

internalize these rights and values.⁵⁰ The focus is on the educative function of sentencing. While Nemitz recognizes that international criminal law requires a different approach to sentencing, he never explains why affirmative general prevention will satisfy the purposes of international criminal law.⁵¹ He, like most other writers in this area, never directly relates the adoption of this justification of punishment to the purposes of international criminal law. Nor does he attempt to analyze how the purposes of the ICC in particular would sanction the adoption of this justification of punishment.⁵²

Sloane provides a more in-depth and analytical approach to international sentencing than Nemitz.⁵³ While he too recognizes the fallacy of the carte blanche transference of domestic law principles and processes to international criminal law, he argues that in the area of punishment it is essential to first understand the purposes of international criminal law, for only then can the principles and processes of punishment be developed to reflect those purposes.⁵⁴ But, he additionally makes the important point that where it is the international tribunal which has jurisdiction, ‘international rather than local penal interests provide the more appropriate metric for evaluating the institution of punishment and developing an internally consistent, fair, and principled law of international sentencing’.⁵⁵ Like Henham and Drumbl, Sloane recognizes that the traditional retributive and utilitarian justifications for sentencing adopted in domestic law

⁵⁰ ibid 99.

⁵¹ Nemitz does attempt to address this issue at pp 99-101, but seems to fall back on the notion that as the other justifications for sentence are imperfect, this one appears to be an obvious choice because it focuses on enhancing the validity of international criminal law. The argument appears to be a tautology.

⁵² Nemitz does argue that paragraph 11 of the Preamble to the Rome Statute which resolves that the State Parties ‘guarantee lasting respect for and the enforcement of international justice’ indicates to him that affirmative general prevention has been written into the Rome Statute. However, it is quite an interpretative leap to read that conclusion into the words in paragraph 11.

⁵³ Sloane (n 1).

⁵⁴ ibid 48, 53. This general approach is similar to that advocated in particular by Damaska and also to a degree by Luban addressed in chapter 4. See Damaska (n 11); Luban (n 11).

⁵⁵ ibid 55-56.

do not provide a legitimate rationale for sentencing in international criminal law.⁵⁶ He proposes that within each of these theories there is an expressive component, and it is this expressive component that should be the focus of sentencing in international criminal law. That expressive component will set the parameters of the penalty that reflects the outrage of the community for the crime committed, and will also reflect the moral educative function of the penalty imposed. In his view it is the expressive capacity of punishment, once the objectives of the international system are known, that will best accomplish the goals of that system.⁵⁷ That of course is the greatest challenge – to determine what the goals are and to be satisfied they are the collective goals of those states that are the subject of the agreement, or in the case of the ICC, the treaty. While Sloane's analysis is helpful in focusing on a new approach to sentencing, utilizing the expressive principle, he never develops that approach beyond suggesting it is the appropriate principle to follow. He does not provide an analysis of the purposes of international criminal law that would allow the expressive principle to take center stage in the sentencing process. While he recognizes that the use of the expressive principle 'best captures both the nature of international sentencing and its most promising institutional capacity to make a difference. . .', he has trouble relating it to the general purposes of international criminal law.⁵⁸ In addition he too assumes, as do many of the other writers already discussed, that each approach by each international tribunal has the same purposes. As Coombs has noted such is not the case.⁵⁹ And, beyond some general comments on the need for the ICC to have a separate sentencing process, he, unlike this

⁵⁶ *ibid* 71.

⁵⁷ The approach proposed by Sloane is contrary to that proposed by both Henham and Drumbl. Sloane proposes a macro emphasis, arguing that the expressive component will set the parameters for the world community, and it is this that is most important in international criminal law. Although he does not ignore the localized impact of sentencing, his view is that the more important emphasis is at the international level. Sloane's recognition of the importance of the expressive component of punishment justifications is also acknowledged by Deidre Golash as the best hope for establishing a proper justification for sentencing in international criminal law. (See Deidre Golash, 'The Justification of Punishment in the International Context' in Larry May and Zachary Hoskins (eds), *International Criminal Law and Philosophy* (CUP 2010) 201.

⁵⁸ Sloane (n 1) 70.

⁵⁹ Coombs (n 1) 24.

research, never analyses the purposes of the ICC and how the expressive principle of sentencing is the best fit for that institution.

While all these writers give scant attention to sentencing at the ICC, Margaret de Guzman focuses exclusively on the ICC and the process that should be adopted in sentencing of crimes within its jurisdiction.⁶⁰ de Guzman recognizes the need to focus on the purpose of that particular tribunal in determining what should be its approach to sentencing. She recognizes the need for the ICC to establish its own legitimacy, and one way in which that is accomplished is through the ‘correct allocation of punishment’.⁶¹ She opines, without analysis, that the core mission of the ICC is to prevent international crimes, and then argues that a sentencing regime based on norm expression, accompanied by an emphasis on general deterrence, incapacitation and restorative justice can assist in accomplishing that goal. She adopts a utilitarian focus for sentencing at the ICC, concluding that the adoption of norm expression will educate the world community and along with the other utilitarian aims of punishment will form a legitimate focus for sentencing. While de Guzman does recognize the important role played by Article 21 in this process she glides over the influential role played by Article 21(1)(c), and concludes , with very limited analysis, that

sources of law applicable to the work of the ICC do not provide a clear answer to the principles of proportionality the Court should employ in sentencing. However, to the extent those sources suggest a relevant principle it is that the Court should privilege utilitarian concerns over retribution.⁶²

de Guzman bases her position in part on the use of concepts such as general deterrence, a concept whose effectiveness in international criminal law she questions in her earlier work on the use of the selection of cases to prosecute at the ICC.⁶³ And, she fails to

⁶⁰ de Guzman (n 1).

⁶¹ ibid 1.

⁶² ibid 17.

⁶³ Margaret de Guzman, ‘Choosing to Prosecute: Expressive Selection at the International Criminal Court’ (2011-2012) 33 Mich J Int’l L 265, 306-309.

provide any detail for the imposition of her sentencing approach at the ICC, suggesting in essence that such must wait further ‘scholarly and judicial attention’.⁶⁴ While de Guzman is the first writer to tackle in some detail the sentencing issues at the ICC, her analysis is problematic. This thesis has proposed a different approach to the Article 21 analysis, and proposes a different approach to sentencing at the ICC.

While there are different approaches to resolving the perceived problem with sentencing in international criminal law, the developments noted in the writings of these scholars over the past 15 years has greatly enhanced our understanding of what general approach should apply to sentencing in international criminal law. The common thread in the works of most of these writers on sentencing in this area is the recognition that the traditional justifications of punishment do not fit the focus of international criminal law. Rather, there is a need for the justifications of punishment to reflect the purpose of the international criminal law of which it is a part, and to develop those forms of punishment which reflect those purposes. And, as Sloane has argued that is the greatest task - to determine those objectives and to focus punishment based on those objectives. For the ICC, the need is to particularize the approach to it, to determine what, as Garland has argued, are the historical and political factors that influence the particular approach to punishment within that particular social context, and the influence that punishment should have on the development of that social context.⁶⁵ That is the focus of the remainder of this thesis. It will move the argument one step further by taking up the challenge of Sloane and others, and by providing some understanding of the purpose of the ICC and therefore the approach to sentencing that best reflects that purpose. It argues that the expressive principle of sentencing is the best fit with the particular purpose of the ICC as expressed by the drafters of the Rome Statute. It develops a sentencing structure grounded in this expressive principle of sentencing.

⁶⁴ de Guzman (n 1) 17.

⁶⁵ See Garland (n 3) ch 1.

Section 2 The Rationale for the Development of the ICC

a. The historical roots of an international criminal court

In the history of the development of international criminal law different reasons emerged at different times to explain the development of the law, and to justify the development of enforcement mechanisms for those violators of the law. It is well recognized that early efforts focused on the development and application of international humanitarian law to certain rules of engagement in times of armed conflict.⁶⁶ The purpose was to attempt to limit the destruction that could be caused by the modern methods of warfare.⁶⁷ Interest in the development of international criminal law itself and in the development of an international criminal court came mainly from the academic community following the First World War.⁶⁸ However, it was the surge in interest in

⁶⁶ These efforts resulted in the development of the Hague Conventions of 1899 and 1907, followed later by the acceptance of Additional Protocols that established a set of rules for the conduct of war. See Timothy McCormack, 'Selective Reaction to Atrocity, War Crimes and the Development of International Criminal Law' (1996-1997) 60 Alb L R 681; Timothy L McCormack 'From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime' in Timothy L McCormack and Gerry J Simpson (eds), *The Law of War Crimes : National and International Approaches* (Kluwer Law International 1997); Dietrich Schindler, 'International Humanitarian Law: Its Remarkable Development and Its Persistent Violation' (2003) 5 J Hist Int'l L 165; M Cherif Bassiouni, *The Legislative History of the International Criminal Court Vol I* (Transnational Publishers Inc 2005) 4-5.

⁶⁷ Schindler (n 66)166. Schindler proposes three reasons for the development of laws of war during this time frame-the introduction of compulsory military service changed the nature of warfare, making it more cruel and destructive; the number of victims greatly increased due to the enlargement of armies and the improvement of arms technology; a realization that civilization was rapidly advancing and there was a need to restrain the destructive force of war.

⁶⁸ See among others W G (Lord) Phillimore, 'An International Criminal Court and the Resolutions of the Committee of Jurists' (1922-9123) 3 Brit Y B Int'l L 79; Hugh Bellot, 'War Crimes: Their Prevention and Punishment' (1916) 2 Transactions of the Grotius Society 31-55; W Cave (Lord), 'War Crimes and Their Punishment' (1922) 8 Transactions of the Grotius Society xix-xliii. There had been efforts by some states to seek prosecution of those who had committed atrocities following World War I. However, despite the recommendations of the Commission on Responsibility of Authors of the War , the objections of the German people coupled with the Allies desire to leave the war behind resulted in an agreement that the Germans could prosecute their own citizens for the atrocities of war. Known as the Leipzig trials, only 30 were prosecuted with 15 convictions. (see James F Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (Greenwood Press 1982); M Cherif Bassiouni, 'World War I: "The War to End All Wars" and the Birth of a Handicapped International Criminal Justice System' (2001-2002) 30 Denver J Int'l L & Policy 244). The international crisis occasioned by the assassination of the King of Yugoslavia and the French Foreign Minister M Barthou in 1934 also precipitated the Council of the League of Nations to appoint a committee to study the issue of terrorism and the development of a court with jurisdiction to adjudicate such matters. Following the

international criminal law and in the development of an international criminal court after the Second World War that ignited the long march towards an international criminal court. The atrocities highlighted by the Nuremberg trials and the Tokyo trials encouraged nations to vow that such would never happen again. The General Assembly of the United Nations by resolution 95(I) of 11 December 1946 ‘affirmed the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal’⁶⁹ and directed the Committee on the Progressive Development of International Law and its Codification:

*To treat as a matter of primary importance plans for the formulation, in the context of the general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal.*⁷⁰

The goals set out by the UN, coming on the heels of the atrocities committed during World War II were goals that states could not ignore. The impetus for this development and the future development of international criminal law had moved from the academic community, evidenced by the work in the 1920’s and 1930’s, to the political arm of states which were directly involved in the discussions and the development of various proposals in the area of international criminal law.⁷¹

abatement of the crisis, only one state ratified the Convention on Terrorism and no state ratified the Convention on the Creation of an International Criminal Court. (See Benjamin B Ferencz, *An International Criminal Court: A Step Toward World Peace* (Oceana Publications 1980) 54.

⁶⁹ United Nations General Assembly Resolution Res 95(I) (11 December 1946).

⁷⁰ ibid. Along with this resolution was resolution 96(I) of the General Assembly of the same date which recognized and condemned the crime of genocide and called for the study of this crime for the purposes of establishing an international convention. (See United Nations General Assembly Res 96(I) (11 December 1946)).

⁷¹ The academic community was generally consistent in its call for the need for the continued development of international criminal law and the recognition of the need for an appropriate judicial forum to consider those crimes which had again captured the concern of many because of the atrocities committed by the Nazis during the hostilities leading up to and including the Second World War. See generally Manley O Hudson, ‘The Proposed International Criminal Court’ (1938) 32 AJIL 549; J Cohen, ‘The Problem of War Crimes Today’ (1940) 26 Transactions of the Grotius Society 125; Philip Marshall Brown, ‘International Criminal Justice’ (1941) 35 AJIL 118; Manley O Hudson, ‘International Courts in the Postwar World’ (1942) 222 Annals of the American Academy of Political and Social Science 117; George Weis ‘International Criminal Justice in Time of Peace’ (1942) 28 Transactions of the Grotius Society 27;

The greatest difficulty that faced those states interested in pursuing international criminal justice was their inability to set out the particular goals of the international criminal justice system. What was to be the purpose of an international code of crimes and what were to be the crimes within the jurisdiction of an international criminal court that reflected and complemented that purpose? This difficulty is particularly illustrated by the failure of states both to articulate and agree upon the philosophical and/or theoretical reasons for the inclusion of certain offence types as international crimes. In the early years after 1946, the ILC, as the successor to the Committee on the Progressive Development of International Law and its Codification focused on the development of a code of crimes against the peace and security of mankind. They concluded that the crimes to be included in the Code necessitated that they contained offences that had a political element to them.⁷² The ILC explained in its 1951 submission of a draft code to the General Assembly of the United Nations that the meaning of the term ‘offences against the peace and security of mankind’

should be limited to offences which contain a political element and which endanger or disturb the maintenance of international peace and security. For these reasons the draft code does not deal with questions concerning conflicts of legislation and jurisdiction in international criminal matters; nor does it include such matters as piracy, traffic in dangerous drugs, traffic in women and children, slavery, counterfeiting currency, damage to submarine cables, etc.⁷³

Sheldon Glueck, ‘By What Tribunal Should War Offenders Be Tried?’ (1943) 53 Harv L R 1059. But Arnold Anderson took an opposite viewpoint, questioning the utility of such prosecutions at a time after the war when there was a need to consolidate friendship with the enemy rather than isolating them by prosecuting their leaders. See Arnold Anderson, ‘The Utility of the Proposed Trial and Punishment of Enemy Leaders’ (1943) 37 The Am Pol Sc R 1081.

⁷² Bassiouni notes that the direction given to the ILC was to formulate a ‘codification of offences against the peace and security of mankind’. That direction itself had a limiting effect. It limited the work to offences that had historically been associated with that phrase - namely genocide, war crimes, crimes against humanity and crimes of aggression. It did not include many other crimes that might arguably be included as international crimes. Bassiouni lists twenty two crimes that he argues could be included within the broad category of international crimes. (See M Cherif Bassiouni, ‘The History of the Draft Code of Crimes Against the Peace and Security of Mankind’ (1993) 27 Isr L R 247, 248 and in particular footnote 8).

⁷³ ILC ‘Draft Code of Offences Against the Peace and Security of Mankind (1951)’ (Report of the International Law Commission on the Work of its Third Session 16 May-27 June 1951) in Year Book of the ILC 1951 Vol II 1951 p 134-137 UN Doc A/CN.4/48 and Corr 1 &2 para 58.

No final decision was made on the scope of the crimes to be included within the Code, and for the next thirty years the entire issue became marred in bureaucratic red tape.⁷⁴ The issue was again raised in 1978, with a Special Rapporteur, Mr. Doudou Thiam, appointed by the ILC to review the matter.⁷⁵ He immediately recognized that in order to tackle this issue some theoretical and philosophical decisions needed to be made with respect to the scope of the Code and in particular the scope of the offences to be included within the code.⁷⁶ For him the immediate issue was what was the purpose of the code, and what offences should be selected to reflect its purpose.⁷⁷

The Special Rapporteur attempted to find some acceptable rationale for the inclusion of certain offences within the scope of the code. He concluded that the focus on the political nature of such crimes, as had been proposed in the 1951 report was inadequate,⁷⁸ and that the offences to be included within the code must have an objective criteria, measured by their gravity,⁷⁹ and a subjective criteria, measured by

⁷⁴ Bassiouni (n 72) 251-252. From 1946 onward there were three tracks proceeding along somewhat parallel paths. One was the work being undertaken on the development of a convention on the law of genocide. The second was a study of the codification of offences against the peace and security of mankind, and the third was a study into the development of an international criminal court. The inability of states to co-ordinate their efforts resulted in only the Genocide Convention receiving early passage at the UN in 1948 (See *Convention on the Prevention and Punishment of the Crime of Genocide* (adopted 9 December 1948, in force 12 January 1951) 78 UNTS 277. The development of the Genocide Convention is detailed in the seminal work of William Schabas on the history and development of that convention. (See William Schabas, *Genocide in International Law*’ (2nd edn, CUP 2009) ch 1 & ch 2).

⁷⁵ On July 14, 1982 the ILC appointed Mr. Doudou Thiam as Special Rapporteur to report on the development of a Code of Crimes for the Peace and Security of Mankind (See ILC ‘Report of the International Law Commission on the work of its Thirty fourth session (3 May-23 July 1982)’ in Yearbook of the ILC 1982 Vol II Part Two UN Doc A/37/10 para 252.

⁷⁶ Special Rapporteur, ‘First Report of the Special Rapporteur on the Draft Code of Offences Against the Peace and Security of Mankind’ in Yearbook of the ILC 1983 Vol II Part One UN Doc A/CN.4/SER.A/1983/ Add.1 (Part I) p 137-152 paras 30-41.

⁷⁷ ibid para 30-31.

⁷⁸ ibid para 38.

⁷⁹ ibid para 39.

*the evaluation of the offence by the international community and the way in which the offence is perceived by that community - which determines whether that offence is to be transposed from the internal to the international level and made a crime under international law.*⁸⁰

The ILC agreed, changing its position from that proposed in 1951. It concluded it did not matter whether the offences were politically motivated to constitute crimes against the peace and security of mankind,⁸¹ but concluded that the code was to cover

*the category of the most serious international crimes. Accordingly, the present draft will clearly not relate to all international crimes defined in article 19, which would make it an international penal code, but only to those crimes which are at the top of the scale because of their especial seriousness.*⁸²

The Special Rapporteur proposed that the most serious international crimes should include a greater number of offences than had been included in the draft code of offences provided in the 1954 ILC report.⁸³ He noted that there was now a consensus of legal opinion that an international crime is no longer limited to the Nuremberg principles, but encompassed ‘a breach of an international obligation so essential for the protection of fundamental interests that its breach is recognized as a crime by the international community as a whole’.⁸⁴ For him, it was essential that there be a definition of what was

⁸⁰ ibid para 40.

⁸¹ ILC ‘Report of the International Law Commission on the Work of its Thirty fifth Session (3 May-23 July 1982’ in Yearbook of the ILC 1983 Vol II Part Two UN Doc A/38/10 p 13 para 49.

⁸² ibid para 48.

⁸³ Special Rapporteur, ‘Second Report of the Special Rapporteur on the Draft Code of Offences Against the Peace and Security of Mankind’ in Yearbook of ILC 1984 Vol 11 Part One UN Doc A/CN.4/SER.A/1984/Add.1 (Part 1) 94-100. It endorsed the fact that the 1954 Code had set out three categories of international crimes- offences against the sovereignty and territorial integrity of States; Offences violating the prohibitions and limitations on armaments or the laws and customs of war; crimes against humanity. But it also recognized that the concept of an international crime went beyond the Nuremberg principles and covers far wider areas. (See ILC ‘Draft Code of Offences against the Peace and Security of Mankind (1954)’ (Report of the International Law Commission on the Work of its Sixth Session 3-28 July 1954) in Year Book of the ILC 1954 Vol 11 UN Doc A/CN.4/88 p149-152.

⁸⁴ ibid 90 para 11. What he was adopting was the definition of an international crime in the Draft Articles on State Responsibility. He recommended that the draft code should include such crimes as colonialism, apartheid, taking of hostages, mercenarism, threats or use of violence against internationally protected

meant by ‘crimes against the peace and security of mankind’, in order to set some criteria for which offences should be encompassed within such a code, and therefore to focus the approach to the prosecution of such matters. However, the ILC was not inclined to such a deductive approach to determine the offence types to be included in the Code. The approach would be to collect those crimes that would be considered international crimes, and then to determine which of these would be considered the most serious. As a result the ILC could not reach a consensus on the definition of crimes against the peace and security of mankind.⁸⁵ As such the proposed Article 1 of the draft code now stated ‘the crimes under international law defined in the present code constituted offences against the peace and security of mankind’.⁸⁶ Despite the fact there was no definition to focus the selection of offences, it remained the position of the Special Rapporteur that the scope of the offences should include ‘the most serious crimes in the scale of criminal offences, deduced from the character of the act defined as a crime , or from the extent of its effects , or from the intention of the perpetrator’. They are crimes that ‘affect the very foundation of human society’.⁸⁷ The ILC accepted this position, and subject to the need for political consensus as to the type of offences to be considered the most serious to be included within the Draft Code, did pervade decisions on the content of what was approved.⁸⁸ Its particular failure was its generality, with the lack of any specificity as to what would constitute ‘seriousness’ in the international sphere, and what would be the very ‘foundation of civil society’.⁸⁹ The political realities faced by various state actors

persons, serious disturbance of public order by a diplomat or internationally protected person, taking of hostages, and serious damage to the environment. (See *ibid* 94-100).

⁸⁵ ILC ‘Report of the International Law Commission on the Work of its Thirty sixth Session (7 May-27 July 1984)’ in Yearbook of the ILC 1984 Vol II Part Two UN Doc A/39/10 p 12 para 39-40.

⁸⁶ Special Rapporteur, ‘Fifth Report of the Special Rapporteur on the Draft Code of Offences against the Peace and Security of Mankind’ in Yearbook of the ILC 1987 Vol 11 Part One UN Doc A/CN.4/SER.A/1987/Add.1 (Part 1) p 2 Article 1.

⁸⁷ *ibid*.

⁸⁸ ILC ‘Report of the International Law Commission on the Work of its Thirty ninth Session (4 May-17 July 1987)’ in Yearbook of ILC 1987 Vol 11 Part Two UN Doc A/42/10 p 13 Article 1 Definition.

⁸⁹ Margaret de Guzman has recognized the references to the seriousness of offences and the use of the term ‘gravity’ of offences in the Rome Statute to qualify certain actions under the statute, and has noted the abject failure to define what is meant by in particular the use of the term ‘gravity’. Like the early work on

caused them to oppose the selection of a large number of offences for inclusion in a code of crimes.⁹⁰ As a result, the Special Rapporteur had to substantially reduce the number of recommended crimes that were to be included in the Code.⁹¹ In passing the draft Code in 1996 the ILC acknowledged the political difficulties:

with a view to reaching consensus, the Commission has considerably reduced the scope of the Code. On first reading in 1991, the draft Code comprised a list of 12 categories of crimes. Some members have expressed their regrets at the reduced scope of coverage of the Code. The Commission acted in response to the interest

the development of offence types to be included within a code of crimes against the peace and security of mankind, there is little definition to focus a search for an acceptable meaning of terms. (See Margaret de Guzman, '*Gravity and the Legitimacy of the International Criminal Court*' (2008) 32 Fordham Int'l L J 1400).

⁹⁰ Special Rapporteur, 'Thirteenth Report of the Special Rapporteur on the Draft Code of Crimes Against the Peace and Security of Mankind' in Yearbook of the ILC 1995 Vol 11, Part One UN Doc A/CN.4/SER.A/1995/Add.1 (Part 1) 35 para 1-8. The comments of the various governments are contained in the Yearbook of ILC 1993 Vol 11 Part One UN Doc A/CN.4/448 and Add.1 p 59-109. The tenor of these comments showed a distinct reluctance to broaden the scope of the three categories of crimes to be included within the list of offences. In particular there was opposition to the establishment of a crime of intervention (See comments of Australia p 64, para 23; Netherlands p 86, para 54; United Kingdom p 101, para 22; United States p 103, para 10 and Switzerland p 108, para 12); the crime of colonial domination (See comments of Australia p 64, para 24; Netherlands p 87, para 64; Nordic Countries p 90, para 32,; United Kingdom p 101, para 29; United States p 103, para 10 and Switzerland p 108, para 13); the crime of apartheid (Netherlands p 87, para 58; Nordic countries p 91, para 33; United Kingdom p 101, para 25; United States p 104, para 13); and mercenaries (Australia p 65-66, paras 39-42; Nordic countries p 91, para 35; United Kingdom p 102, para 28 and United States p 104, para 16). There were also reservations with respect to the draft articles on apartheid, the recruitment, use, financing and training of mercenaries, international terrorism and the illicit traffic in narcotic drugs (para 11). Some countries also expressed their opposition based on questions of principle. What was particularly noteworthy was the comments of the Netherlands at p 83, para 10 to the effect that a universal system for the enforcement of criminal law should be based on three criteria: Crimes that violate fundamental humanitarian principles endorsed by the world community and outrage the conscious of mankind; crimes which by their nature are likely to preclude the effective administration of justice at the national level, and for which justice can only be dispensed at the international level, and crimes for which an individual can only be responsible on an individual level. Other governments were of the view that the draft code could not be divorced from a court able to impose violations for transgressions of the offences (See in particular comments of The Netherlands, the Nordic Countries and the United Kingdom).

⁹¹ The original group of crimes included crimes of aggression, threats of aggression, intervention, colonial domination, genocide, apartheid, systematic or mass violation of human rights, exceptionally serious war crimes, international terrorism and recruitment, financing and training of mercenaries, illicit traffic in narcotic drugs, and willful and severe damage to the environment. See 'Report of the International Law Commission on the Work of its Forty third Session (29 April-19 July 1991)' in Yearbook of the ILC 1991 Vol 11 Part Two UN Doc A/46/10 101. The commentary in this ILC Report on some of the crimes set out within the draft code are very helpful in explaining the rationale with respect to the acceptance of each of these provisions as forming part of the offences against the peace and security of mankind. Other crimes not detailed in this report have previously been commented on by the ILC as to their rationale.

*of adoption of the Code and of obtaining support by Governments. It is understood that the inclusion of certain crimes in the Code does not affect the status of other crimes under international law, and that the adoption of the Code does not in any way preclude the further development of this important area of law*⁹²

The offences included in the Code of Crimes Against the Peace and Security of Mankind were limited to the following: crime of aggression, genocide, war crimes, crimes against humanity and crimes against the United Nations and associated personnel.

⁹³ There was no overt theoretical or philosophical foundation to the selection of the offence types for the Code of Crimes Against the Peace and Security of Mankind. The only overt criteria used for the selection of the offences was that they were the most serious crimes known to mankind which affect the very foundation of human society. Issues of realpolitik were of major relevance in the selection of offence types, with the only rationale behind the selection of any offences being a generic one. That was to criminalize through an international treaty certain offences which violate the essence of what a human society is—one where genocide, crimes against humanity, war crimes and crimes against the UN and its personnel ‘assail the sacred values or principles of civilization’.⁹⁴

b. The development of an international criminal court

Like the development of a Code of Crimes Against the Peace and Security of Mankind, the development of an international criminal court effectively languished from 1954 to its revival in 1989.⁹⁵ While the work of the Special Rapporteur and the comments

⁹² ILC' Report of the International Law Commission on the Work of its Forty eighth Session 6 May-26 July 1996' in Yearbook of ILC 1996, Vol 11 (Part Two) UN Doc A/51/10 p 16 para 46.

⁹³ ibid 42-56. The four major crimes that were agreed to at the end of this lengthy process were the major crimes that had emerged from the Nuremberg principles, and had been debated since 1946. The addition of the crime against United Nations and other personnel was not considered in the formal texts provided, but seemed only to emerge from the work of the Drafting Committee in 1995-1996.

⁹⁴ 'First Report of the Special Rapporteur on the Draft Code of Offences Against the Peace and Security of Mankind' (n 76) 142 para 34.

of some members of the ILC had recognized the necessity of an inter-relationship of an international penal code with that of an international criminal jurisdiction for the prosecution of offences under international criminal law,⁹⁶ it was not until the General Assembly passed Resolution 49/39 of December 4, 1989 that the ILC commenced work on the issue of an international criminal court.⁹⁷ This work was, on the instructions of the General Assembly, initially taken up within the framework of the work by the Special Rapporteur Mr. Thiam on the Draft Code of Crimes Against the Peace and Security of Mankind.⁹⁸ His work on the development of an international criminal court was strongly influenced by his work on the draft Code, as discussion of issues of the *ratione materiae* of the court were similar to the previous work on offence types to be included within the

⁹⁵ The ILC had been invited by the United Nations General Assembly in 1948 to study the desirability and possibility of establishing an international judicial organ for the trial of individuals charged with genocide and other crimes of an international nature. (See United Nations General Assembly Res 260 B (III) (9 December 1948). Two Rapporteurs, Mr. Ricardo J Alfaro and Mr. Emil Sandstrom, were subsequently appointed to complete reports on the issue. The report of Mr. Alfaro was issued on March 3, 1950 (UN Doc A/CN.4/15) and recommended there should be a separate court to deal with matters of international criminal law. The report of Mr. Sandstrom was issued March 30, 1950 (UN Doc A/CN.4/20) and recommended that the time was not ripe for the establishment of such a court. The matter was referred off to another committee and languished until taken up by the General Assembly in 1989.

⁹⁶ ‘First Report of the Special Rapporteur on the Draft Code Of Offences Against the Peace and Security of Mankind’ (n 76) 149-151; ILC ‘Report of the International Law Commission on the Work of its Forty first Session (2 May-21 July 1989)’in Yearbook of the ILC 1989 Vol 11 Part Two UN Doc A/44/10 p 65-66 para 211-216.

⁹⁷ United Nations General Assembly Res 44/39 (4 December 1989). Trinidad and Tobago had sent a request to the General Assembly asking that the issue of the establishment of an international criminal court to determine responsibility of those engaged in the illegal drug trade be considered by the General Assembly. (See Request of Marjorie R Thorpe, Permanent Representative of Trinidad and Tobago to the United Nations UN Doc A/44/195). That request was, by Resolution of the General Assembly of the 4th of December 1989 passed on to the ILC for review. The Resolution was broader than that of drug trafficking and stated in part:

Requests the International Law Commission, when considering at its forty second session the item entitled “Draft Code of Crimes Against the Peace and Security of Mankind” to address the question of establishing an international criminal court or other international criminal trial mechanism with jurisdiction over persons alleged to have committed crimes which may be covered under such a code, including persons engaged in illegal drug trafficking in narcotic drugs across national boundaries.

⁹⁸ See Special Rapporteur, ‘Ninth Report of the Special Rapporteur on a Draft Code of Crimes Against the Peace and Security of Mankind’ in Yearbook of the ILC 1991 Vol 11 Part One UN Doc A/CN.4/SER.A/1991/Add.1 (Part 1) 37; Special Rapporteur, ‘Tenth Report of the Special Rapporteur on a Draft Code of Crimes Against the Peace and Security of Mankind’ in Yearbook of the ILC 1992 Vol 11 Part One UN Doc A/CN.4/SER.A/1992/Add.1 (Part 1) 51.

draft code.⁹⁹ At the same time as the Special Rapporteur was undertaking his work on the international criminal jurisdiction, the General Assembly asked the ILC to set up a special working group on the issue of an international criminal court.¹⁰⁰ This working group recognized the importance of the overall focus of such a statute stating

*. . . the task of constructing an international order, an order in which the values which underlie the relevant rules of international law are respected and are made effective, must begin somewhere. Although the solution to these problems cannot rely solely, or even mainly, on a system of individual criminal responsibility, it is a necessary part of an overall solution. Unless responsibility can be laid at the door of those who decide to commit heinous crimes of an international character, the suppression of those crimes will be that much more difficult.*¹⁰¹

A second working group continued the work, focusing on the detail of the development of a draft statute for an international criminal court. In the first draft, presented to the ILC in 1993, a general comment was made that the purpose of establishing the tribunal was to provide a tribunal that was fair and was available when other trial procedures were unavailable.¹⁰² And the only rationale for the acceptance of offence types within the court's jurisdiction was because they had already been recognized by states as constituting international crimes.¹⁰³ The report from this working group provided a very detailed draft of a statute for an international criminal court. It acknowledged the role played by the previous work on this issue, noting that it considered, among other things, the views of the drafters of the Draft Code of Crimes

⁹⁹ See the Ninth Report (n 98) 41 para 38; Tenth Report (n 98) 55 para 36-40.

¹⁰⁰ The working group was encouraged to consider the work of the Special Rapporteur in its approach to the development of a statute for an international criminal court. See 'Report of the Working Group on the Question of an International Criminal Jurisdiction' in Yearbook of the ILC 1992 Vol 11 Part Two UN Doc A/CN.4/Ser.A/1992/Add.1 (Part 2) p 67 para 68.

¹⁰¹ ibid p 64 para 40.

¹⁰² The commentary to the draft of Article 1 stated in part that the purpose was to 'provide a venue for the fair trial of persons accused of crimes of an international character in circumstances where other trial procedures may not be available or may be otherwise less preferable' See 'Report of the Working Group on a Draft Statute For an International Criminal Court' in Yearbook of the ILC 1993 Vol 11 Part Two UN Doc A/CN.4/SER.A/1993/Add.1 (Part 2) 101.

¹⁰³ ibid 106-107 Article 22 and commentary.

against the Peace and Security of Mankind, and the work of the Special Rapporteur on the draft statute for an international criminal court.¹⁰⁴ The offences within the jurisdiction of the court were of an international character, being the most serious crimes of concern to the international community as a whole.¹⁰⁵ A revised draft of the 1993 draft statute also contained for the first time a preamble to the statute. The Preamble stated in part¹⁰⁶

Desiring to further international cooperation to enhance the effective prosecution and suppression of crimes of international concern. . . .

Emphasizing that such a court is intended to exercise jurisdiction only over the most serious crimes of concern to the international community as a whole

Emphasizing further that such a court is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective.

The explanatory notes that accompanied the preamble explained that the preamble

*sets out the main purposes of the statute, which is intended to further cooperation in international criminal matters, to provide a forum for trial, and, in the event of conviction, to provide for appropriate punishment of persons accused of crimes of significant international concern. In particular it is intended to operate in cases where there is no prospect of those persons being duly tried in national courts*¹⁰⁷

This preamble was very general in nature, but its general wording is consistent with the approach taken from the beginning of the Special Rapporteur's work on the draft code of crimes against the peace and security of mankind. That is, the general purpose of these forays into the international criminal law arena was to prosecute the most serious crimes that affect the very foundation of civil society.¹⁰⁸ The draft and its explanatory

¹⁰⁴ ibid 100 para 3.

¹⁰⁵ 'Draft Statute for an International Criminal Court with Commentaries' in Yearbook of the ILC 1994 Vol 11 Part Two UN Doc A/CN.4/SER.A/1994/Add.1 (Part 2) 27.

¹⁰⁶ ibid 26-27.

¹⁰⁷ ibid 27.

notes did not delve into the philosophical basis of the offences to be included within the jurisdiction of the proposed court, or to at this stage elaborate on the general purposes of the statute. It saw the statute as ‘primarily a procedural and adjectival instrument’.¹⁰⁹

There were a number of working groups established from 1995 to the beginning of 1998 to fine tune the draft statute.¹¹⁰ The General Assembly by Resolution A/Res/51/160 recommended that the Preparatory Committee for the ICC, which was well underway by that time, take the work of the ILC Committee on a Draft Code of Crimes Against the Peace and Security of Mankind into account when drafting the statute that was to become the Rome Statute.¹¹¹ When the final work on the Rome Statute commenced on June 15, 1998, each representative at the Conference was given the opportunity to make an opening statement. All supported the development of an international criminal court.¹¹² The vast majority saw the essential function of the court to be independent, completely apolitical, having an open and fair process for the investigation and prosecution of offences within its jurisdiction.¹¹³ A number of representatives also recognized that the existence of an independent court would challenge the culture of impunity that had developed among leaders in a number of states,

¹⁰⁸ See ‘Fifth Report of the Special Rapporteur on the Draft Code of Offences against the Peace and Security of Mankind’ (n 86).

¹⁰⁹ ‘Draft Statute for an International Criminal Court’ (n 105) 38.

¹¹⁰ These included the Ad Hoc Committee established by United Nations General Assembly Resolution A/Res /49/53 (9 December 1994), and the Preparatory Committee for the Establishment of the International Criminal Court established by United Nations General Assembly Resolution A/Res/50/46 (11 December 1995).

¹¹¹ United Nations General Assembly A/Res/51/160 (30 January 1997).

¹¹² United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court Rome 15 June -17 July 1998 Official Records Vol 11 UN Doc A/CONF.183/13/SR.2-SR.8 64-121.

¹¹³ ibid. See for example the comments of Mr. Owada (Japan) p 67 para 41; Mr. El Maraghy (Egypt) p 69 para 76; Mr. Frlec (Slovenia) p 70 para 88; Mr. Ouedraogo (Inter-African Union for Human Rights) p 89 para 75; Mr. Valo (Slovakia) p 91 para 4; Mr. Fall (Guinea) p 92 para 20; Ms Hodak (Croatia) p 94 para 44; Mr. Leanca (Republic of Moldova) p 94 para 51; Mr. Rubinstein (Israel) p 99 Para 38 ; Mr. Cabello Sarubbi (Paraguay) p 102 para 85; Mr. Taib (Morocco) p 103 para 105; Mr. Imbiki (Madagascar) p 107 para 30; Mr. Nyasulu (Malawi) p 109 para 53-54; Mr. Nguyen Ba Son (Viet Nam) p 111 para 80; Mr. Mahara (Trinidad and Tobago) 112 para 99-100; Mr. Al-Adhami (Iraq) p 116 para 33 ; Mr. Larren Davila (Ecuador) p 118 para 61 among others.

requiring the recognition of the role of complementarity to investigate and prosecute those individuals whose states either could not or would not investigate and/or prosecute serious violations of international criminal law.¹¹⁴ These general comments were reflected in an expanded preamble, which received final approval July 17, 1998.¹¹⁵ The preamble was substantially enhanced from that presented by the Preparatory Committee in April 1998.¹¹⁶ Spain submitted a wording for the preamble which enhanced the wording provided in the work of the Preparatory Committee Report of April 3, 1998. It closely resembled the final wording proposed for adoption by the Committee of the Whole, although some of the wording was changed before submitted for final consideration. What was emphasized by the Spanish proposal was a recognition of the need for the ‘prevention and suppression’ of these crimes, as well as a recognition of a focus on the ‘most serious crimes affecting the international community as a whole’¹¹⁷ On June 30, 1998 Andorra submitted a draft of two sections for the preamble. In a note to the draft it was explained that the purpose of the preamble and its wording was important because ‘...the establishment of the International Criminal Court is a moment of unprecedented historical significance which merits the inclusion of some kind of inspiring yet focused language in the preamble, around a basic statement of purpose....’. The essence of the opening section of the preamble adopted for the ICC is patterned on

¹¹⁴ ibid. See the comments of Mr. Omar (South Africa) p 65 para 14; Mr. Johnson (Norway) p 65 para 17; Mr. Robinson (United Nations High Commission for Human Rights) p 70 para 98; Mr. Baja (Philippines) p 82 para 7; Mr. Mlo (Albania) p 82 para 11; Mr. Gomez (Chile) p 88 para 64; Mr. Al Noaimi (United Arab Emirates) p 91 para 6; Mr. Imbiki (Madagascar) p 107 para 29; Mr. Nguyen Ba Son (Viet Nam) p 111 para 80; Mr. Kirabokyamaria (Uganda) p 118 para 72.

¹¹⁵ The very general preamble proposed in 1994 was not changed during the work of the Preparatory Committee for an International Criminal Court. Changes to the preamble occurred during the final negotiations for Rome Statute between June 15 and July 17 1998.

¹¹⁶ Recommendations for changes had been made by Spain, Andorra and the Dominican Republic. (See for Spain ‘Spanish Proposal regarding the Preamble’ UN Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court (Rome 15 June-17 July 1998) (26 June 1998) UN Doc A/CONF.183/C.1/L.22; for Andorra ‘Andorra Proposal regarding the Preamble’ UN Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court (Rome 15 June-17 July 1998) (30 June 1998) UN DOC A/CONF.183/C.1/L.32; for Dominican Republic ‘Dominican Republic Proposal regarding the Preamble’ UN Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court (Rome 15 June-17 July 1998) (8 July 1998) UN Doc A/CONF.183/C.1/L.52).

¹¹⁷ UN Doc A/CONF.183/C.1/L.22 (n 116).

the draft of the opening section submitted by Andorra.¹¹⁸ On July 8, 1998 the final submission came from the Dominican Republic, which also included a detailed draft of a preamble for the Rome Statute. It reflected much of the wording of the Spanish draft of June 26 1998, but added a section which addressed the need to ‘put an end to the impunity with which such acts are committed’.¹¹⁹ The final wording of the preamble emphasized the ‘unimaginable atrocities’ that had victimized millions of people throughout the world, that such grave crimes do threaten the peace and security of all, that the most serious crimes of concern to the international community must not go unpunished, and that there should be an end to impunity for those who commit these crimes, and in that way there can be made a contribution to the prevention of such crimes. The preamble to the Rome Statute is important for a number of reasons. The first is that it is the expression of the general focus of those who are signatories to the Rome Statute. It is what they, through the substantive and procedural mechanisms set out in the statute wish to accomplish. This would be inclusive of the penalty provisions set out in Part 7 of the Rome Statute and the corresponding Rules of Procedure and Evidence. The second is that, in accordance with the VCLT the interpretation of a treaty will include its context, which includes its text ‘including its preamble and annexes’.¹²⁰ Thus in any attempt to interpret the meaning to be ascribed to words in the treaty, including the words in Part 7 dealing with sentencing, the focus of the preamble can assist.

As has been noted earlier there was no detailed criteria established for the types of offences to be included within the Draft Code of Crimes Against the Peace and Security of Mankind, nor was any such criteria developed at the various meetings in preparation for the development of the ICC. As it had been throughout the fifty years of negotiations on the establishment of the ICC, the acceptance of the types of crimes which would be included within the category of the most serious crimes of concern to the international

¹¹⁸ UN Doc A/CONF.183/C.1/L.32 (n 116).

¹¹⁹ UN Doc A/CONF.183/C.1/L.52 (n 116).

¹²⁰ Article 31, *Vienna Convention on the Law of Treaties* (adopted 23 May 1969 in force 27 January 1980) 1155 UNTS 331.

community was the most controversial issue that faced the negotiators during the Rome Conference.¹²¹ Negotiations on offence type were influenced more by the protection of state interest and state sovereignty than on issues of principle.¹²² The crimes of genocide,¹²³ crimes against humanity¹²⁴ and war crimes¹²⁵ were finally accepted as the three major crimes to be included within the jurisdiction of the court, with decisions on the crime of aggression deferred for a period of time.¹²⁶ The selection of the offence types

¹²¹ See Bureau: ‘Discussion Paper’ UN Diplomatic Conference of Plenipotentiaries on the Establishment of the International Criminal Court (Rome 15 June-17 July 1998) (6 July 1998) UN Doc A/CONF.183/C.1/L.53; See also Phillippe Kirsch, ‘The Rome Conference on an International Criminal Court: The Negotiating Process’ (1999) 93 AJIL 2, 3-4.

¹²² David Scheffer in his personal history of the establishment of war crimes tribunals, including the ICC, gives a first-hand account of the attempts, particularly by the United States, to make certain that crimes such as terrorism and international drug trafficking did not become part of the offences within the jurisdiction of the ICC (see p169-170). He also provides accounts of how other countries pressed for the inclusion or exclusion of offences to be within the court’s jurisdiction for strategic or other reasons. (See David Scheffer, *All the Missing Souls* (Princeton University Press 2102). See ch 7 and ch 8 for this part of the analysis of the negotiations leading to the acceptance of the Rome Statute.

¹²³ There was little debate on the acceptance of the crime of genocide, principally because it had been recognized for so long as an international crime. (See meeting of Committee of the Whole UN Doc. A/CONF.183/C.1/SR.3) (17 June 1998)).

¹²⁴ There was some lively debate with respect to some of the content of crimes against humanity, but in the end a consensus was reached with respect to the acts to be included within these categories of crimes. See the following summary of meetings of Committee of the Whole: UN Doc A/CONF.183/C.1/SR.3 (17 June 1998); UN Doc A/CONF.183/C.1/SR.4 (17 June 1998; UN Doc A/CONF.183/C.1/SR.7 (19 June 1998); UN Doc A/CONF.183/C.1/SR.26 (8 July 1998); UN Doc A/CONF.183/C.1/SR.27 (8 July 1998); UN Doc A/CONF.183/C.1/SR.28 (8 July 1998); UN Doc A/CONF.183/C.1/SR.30 (9 July 1998).

¹²⁵ There was also debate with respect to the content of war crimes, but again a consensus was reached within a few days. See summary of meetings of Committee of the Whole UN Doc A/CONF.183/C.1/SR.3 (17 June 1998); UN Doc A/CONF.183/C.1/SR.4 (17 June 1998); UN Doc A/CONF.183/C.1/SR.7 (19 June 1998); UN Doc A/CONF.183/C.1/SR.26 (8 July 1998); UN Doc A/CONF.183/C.1/SR.27 (8 July 1998); UN Doc A/CONF.183/C.1/SR.28 (8 July 1998); UN Doc A/CONF.183/C.1/SR.30 (9 July 1998).

¹²⁶ The major debate was with respect to the crime of aggression. A majority of states agreed that the crime of aggression should be included within the *ratione materiae* of the ICC, but it was a major problem for some states, and a consensus could not be reached. As a result it was decided to defer the issue to a future date. (See summary of meetings of Committee of the Whole UN Doc A/CONF.183/C.1/SR.7 (19 June 1998); UN Doc A/CONF.183/C.1/SR.26 (8 July 1998); UN Doc A/CONF.183/C.1/SR.27 (8 July 1998); UN Doc A/CONF.183/C.1/SR.33) (10 July 1998). There was also debate with respect to crimes known as ‘treaty crimes’, but due to the opposition of some states, were not included. There was extensive discussion of the inclusion of terrorism, illegal trafficking and crimes against UN personnel throughout the debates. Some of the concerns related to the problems with the definition of terrorism and concerns that trafficking in illegal drugs and crimes against UN personnel were not of the ‘most serious crimes’ of international concern that they should be included within the jurisdiction of the Rome Statute. Rather the crimes relating to illegal drug trafficking in particular could be dealt with on a regional or domestic basis, and would fall

to be included within the jurisdiction of the ICC was again a political compromise more than anything else. While including some of the ‘most serious crimes’ of concern to the international community, it certainly did not include many others.¹²⁷ Yet the inclusion of the Nuremberg type crimes was an implicit recognition of what the Special Rapporteur Mr. Thiam had emphasized some eleven years earlier - that the selection of international crimes, of whatever type, was a recognition that the Rome Statute must focus on crimes that affect the very foundation of human society.¹²⁸ And, coupled with the development of a Preamble which emphasized that such grave crimes do threaten the peace and security of all, that the most serious crimes of concern to the international community must not go unpunished, and that there should be an end to impunity for those who commit these crimes, a rationale for the development of the ICC was revealed. That rationale was not theoretically or philosophically intriguing, but was rather a basic one. It was as stated - to investigate and where necessary to prosecute the most serious crimes the world knows, crimes that affect the very foundation of human society, and to establish a process such that no one who came within the jurisdiction of the court is immune from prosecution.¹²⁹ It is in the fulfillment of these broad goals that punishment through sentencing must focus, as this is the function of punishment in any legal system.

within the category of transnational crimes. See summary of meeting of Committee of the Whole UN Doc A/CONF.183/C.1/SR.30 (9 July 1998).

¹²⁷ Bassiouni has listed some 22 crimes which could be considered international crimes. See M Cherif Bassiouni (n 72) 248 footnote 8.

¹²⁸ ‘Fifth Report of the Special Rapporteur on the Draft Code of Offences against the Peace and Security of Mankind’ (n 86).

¹²⁹ The concept of deterrence as a goal of the ICC was raised in a general way by a number of the participants at the Conference of Plenipotentiaries on the Establishment of an International Criminal Court 15 June-17 July 1998. (See Official Records Vol 11 UN Doc A/CONF.183/13/SR.2-SR.8 p 64-121). In particular it was mentioned by a number of delegates in their opening comments for the Rome Conference. See in particular the comments of Mr. Axeworthy (Canada) p 68, para 63; Mr. Chung Tae-ik (Republic of Korea) p 69, para 81; Mr. Pace (Observer for the NGO Coalition for an International Criminal Court) p 71, para 114; Mr. Gomez (Chile) p 88, para 64; Mr. Jensen (Denmark) p 114, para2; Mr. Sadi (Jordan) p 114, para 6; Mr. Nyabenda (Burundi) p 118, para 58. However, the concept never made its way into the final draft of the Rome Statute. (See David Bosco, ‘The International Criminal Court and Crime Prevention: By Product or Conscious Goal?’ (2101-2011) 19 Mich St U Coll L J Int’l L 163, at 172-175 where he espouses that deterrence was a conscious goal of many participants in the drafting of the Rome Statute, but any such desire was not manifested in the final draft of the Rome Statute).

As the traditional rationales for sentencing, as set out in chapter 4, are problematic for justifying sentencing at the ICC, the court must seek justifications of punishment which are both reflective of the purpose of the Rome Statute, and which are effective in accomplishing what they propose to do. Chapter 6 will propose that the expressive function of sentencing provides the best justification that the ICC can adopt for sentencing of offences under its jurisdiction.

Section 3 Conclusion

The argument in this chapter is that the justifications of punishment through the adoption of principles of sentencing should reflect the purpose or purposes of the particular tribunal under review. This chapter takes the work of the major writers on sentencing in international criminal law as a base, and argues that through tracing the historical development of the ICC some understanding of the broad theoretical and/or philosophical reasons for its purpose can be attained. The overt expression of the purpose of the ICC is contained in the Preamble to the Rome Statute. Its focus, according to the preamble, is to be on ‘grave crimes that threaten the peace, security and well-being of the world’. According to the preamble its purpose is to affirm that ‘the most serious crimes of concern to the international community as a whole must not go unpunished’. Its purpose is also to ‘put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes’, to ‘reaffirm the Purpose and Principles of the Charter of the United Nations’, and to ‘guarantee lasting respect for and enforcement of international justice’. The covert expression of the purpose of the ICC is found in the historical reasons for the selection of the offence types to be included within the *ratione materiae* of the Rome Statute. While numerous arguments had been made among states for the selection of certain offence types to be included within a Code of Crimes Against the Peace and Security of Mankind which later were considered in the development of the ICC, the overarching reason that appears from the numerous reports and debates on the issue was that these offences were the most serious offences which threaten the principles upon which human society was built. While the selection of types of offences to be considered serious offences was a political exercise, there can be no denying the fact that

those who participated in the process from the end of the Second World War to the adoption of the Rome Statute were concerned with protecting the essence of human society by criminalizing behavior which they considered serious enough to warrant sanction. While it was debated that other offences should also be included within the category of ‘serious offences’ or ‘grave offences’, the common rationale was that whatever offences were selected, they must be one that threatened the foundation of order in societies and the ones that demand sanction. As proposed throughout this thesis, punishment of those who commit the designated offences must be reflective of the goal or goals of the international criminal justice system of which it forms a part, and must be justified by the value it has for sustaining that international system. Based on the goals of the ICC as set out overtly in its preamble, and as determined from the selection of offences within its jurisdiction, the purpose of sentencing persons who commit such heinous crimes should therefore be to express the condemnation of the violation of the appropriate law, and, as a possible consequential impact, to thereby reform, educate or provide a moral barometer of appropriate behavior. That is the function proposed by the expressive theory of punishment, and as will be argued in the next chapter, can be operationalized within the sentencing structure of the ICC.

Chapter 6

The Rome Statute and the Expressive Principle of Sentencing

There is an important distinction between the justifications of punishment, in whatever form, and the method by which these justifications are implemented.¹ However, it is these justifications which determine the approach to sentencing that is undertaken by a sentencing tribunal. As has been demonstrated, the adherence to the traditional utilitarian or retributive justifications of punishment in international criminal law are problematic from both a theoretical and effectiveness perspective. In seeking an effective justification for punishment, it is important to remember that punishment depends on its social roots for its ‘continued legitimacy and operation’ and on its historical background to help understand and appreciate what its present form should take.² Punishment, in its various forms, is built upon ‘an ensemble of conflicting and coordinating forces’ and must not only be reflective of these conflicting and coordinating forces, but must also shape or attempt to shape its social environment.³ Sentencing and its justifications, as one aspect of the punishment continuum, must also be reflective of these goals. It is proposed that the expressive principle of sentencing is best reflective of the broad goals that influenced the development of the ICC in its present form, and can also perform the function that is essential for the sustained legitimacy of the ICC.

The present chapter argues that the expressive principle of sentencing best encapsulates the rationale for the existence of the Rome Statute, and best expresses what the future purpose of the Rome Statute should be. It seeks to integrate the expressive principle of sentencing into a sentencing matrix for the ICC. It proposes that it is essential that the ICC recognize the hierarchical nature of the crimes within its jurisdiction, and

¹ See Mirko Bagaric and John Morss, ‘International Sentencing Law: In Search of a Justification and Coherent Framework’ (2006) 5 ICLR 191; Jan Nemitz, ‘The Law of Sentencing in International Criminal Law: The Purpose of Sentencing and the Applicable Method for the Determination of the Sentence’ (2001) 4 YIHL 87.

² David Garland, *Punishment and Social Structure* (University of Chicago Press 1990) 21.

³ ibid 21-22.

that focus on the chapeau of each of the three present offences within its jurisdiction will set this hierarchical structure. The focus on the ‘in abstracto’ aspects of the offence places genocide on the top of the hierarchical structure, with crimes against humanity next, and war crimes next to that. Once that recognition is in place, the court can then, in accordance with Article 78 and Rule 145 of the Rules of Procedure and Evidence, consider the ‘in concreto’ factors of a particular case to determine the appropriate sentence for each particular crime for which a person has been convicted. This consideration is not only for a sentence of imprisonment but also for the possible imposition of a fine.

The ICC can also consider the imposition of forfeiture of the proceeds, property and assets of crime and reparation to victims at the sentencing stage. However, issues of justification of punishment do not come into play in considering those aspects of the sentence. The approach is more clinical in nature, assessing the facts available and on that basis it can be determined if forfeiture is available, and if reparations are appropriate, in what type and manner they can be ordered.

Section 1 The Expressive Theory of Law and Punishment

a. The theoretical positions

A number of theorists have argued that there is an expressive dimension to law. Scholarly writings have focused principally on the expressive function of law in constitutional and regulatory areas, and to a lesser degree, in the area of punishment.⁴ There is no unitary theoretical approach to the expressive function of law.⁵ However the essence of the expressive theory is set out with some particularity by Andersen and Pildes, in which they note that the concept of expression involves ‘the ways that an action

⁴ See Joel Feinberg, ‘The Expressive Function of Punishment’ (1965) 49 *The Monist* 397; Matthew Adler, ‘Expressive Theories of Law: A Sceptical Overview’ (1999-2000) 148 *U Pa L Rev* 1363, 1414-1415; Elizabeth Anderson and Richard Pildes, ‘Expressive Theories of Law: A General Restatement’ (1999-2000), 148 *U Pa L Rev* 1503.

⁵ Alan Strudler, ‘The Power of Expressive Theories of Law’ (2001) 60 *Maryland L Rev* 492,494; Diane Marie Amann, ‘Group Mentality, Expressivism and Genocide’ (2002) 2 *ICLR* 93, 118.

or expression (or a vehicle of expression) manifests a state of mind'.⁶ Individuals can express this state of mind or cognitive state through speech, writing or through action.⁷ Law is one mechanism by which the collective, in this case the State, can express the collective view of its actions or inactions. As Amann notes, 'Law reflects a society's values, what it esteems, what it abhors'.⁸ However, the State interpretation of its actions through law is not the only mechanism by which meaning is provided for legal action. They as well are 'socially constructed,' in that they must make sense in terms of the communities 'other practices, its history and shared meanings'.⁹ Context is thus important in the determination of the meaning to be ascribed to a particular State action. Courts will interpret and give meaning to State action, including legislative enactments. When they do so, they take into account not only what they interpret is the legislative intent, but also extrinsic reasons accounting for various systemic considerations.¹⁰ In other words, it is not only the meaning prescribed by the words of the enactment, but also the context in which it is applied that gives it meaning.

The expressive theory of law has two functional dimensions. The first is that law expresses societies' principles without a consideration for the effect this expression might have on future behavior.¹¹ The second is that law expresses societies' condemnation of some behaviour in the hope that such condemnation will change future behavior - it will have good consequences.¹² Exponents of the expressive theory of law adopt one and at times both of these functional dimensions in proposing that there is an expressive

⁶ Anderson and Pildes (n 4)1506.

⁷ ibid.

⁸ Amann (n 5) 118.

⁹ Anderson and Pildes (n 4) 1525.

¹⁰ ibid 1527.

¹¹ ibid. See also Cass Sunstein, 'On the Expressive Function of Law' (1995-1996) 144 U Pa L Rev 2021, 2026-2028. Sunstein focuses on the second dimension of the expressive function of law, as he is interested in law affecting changes to social norms.

¹² Sunstein (n 11) 2026.

dimension to law that must not only be acknowledged but embraced.¹³ This expressive function is seen not only in the wording of the law itself, but also in the application of the law to particular situations. In the criminal law context the condemnation of the particular behavior by a law which states such behavior is illegal and therefore can be the subject of sanction expresses the collectives' attitude toward the behavior that is condemned and toward the perpetrator of that behavior. In addition, there is in criminal law an additional expressive component, and that is the penalty imposed on those who have transgressed that law. The existence of that penalty itself is expressive of the society's attitude toward the offence and the offender, and the subsequent implementation of the punishment is an additional expression of society's attitude toward the particular offensive behavior.

There had been a flurry of interest in the latter part of the twentieth century in the use of the expressive theory of law to define and to justify punishment in the domestic context. Joel Feinberg was one of the early writers who recognized and embraced the expressive dimension of punishment.¹⁴ Feinberg makes a distinction between penalties and punishments, noting that penalties have a 'miscellaneous character', while punishments have an additional characteristic.¹⁵ That characteristic is

....a certain expressive function. Punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, either on the part of the punishing authority himself or of those "in whose name" the punishment is inflicted. Punishment, in short, has a symbolic significance largely missing from other kinds of penalties.

¹³ Writers such as Dan Kahan, Igor Primoratz and Joel Feinberg focus on the issue of moral condemnation of the act through the imposition of punishment, while writers such as Jean Hampton, A C Ewing and Anthony Duff recognize both its moral dimension and the effect of that symbolic significance on the future behaviour of the community. See A C Ewing, *The Morality of Punishment* (Kegan Paul 1929) ch IV; Feinberg (n 4); A Duff, *Trials and Punishments* (CUP 1986); Jean Hampton, 'Correcting Harms Versus Righting Wrongs: The Goal of Retribution' (1991-1992) 39 UCLA L Rev 1659; Igor Primoratz, 'Punishment as Language' (1989) 64 Philosophy 187; Dan Kahan, 'What do Alternative Sanctions Mean?' (1996) 63 U Chi L Rev 591.

¹⁴ Feinberg (n 4).

¹⁵ ibid 400.

This description of punishment is distinct from normative claims associated with the justification of punishment.¹⁶ Feinberg is not suggesting that language condemnation alone is sufficient to constitute the punishment. What he is advocating is that the infliction of a punishment, what he calls ‘hard treatment’ will itself carry the symbolic significance, the condemnatory aspect of the punishment.¹⁷ The degree of punishment imposed can be determined by examining the degree of harm inflicted by the crime coupled with ‘the degree to which people are disposed to commit it’.¹⁸

Feinberg’s definition of punishment has been both criticized and hailed as a springboard to other analyses of the expressive theory and dimension of punishment.¹⁹ What has been recognized about the expressive theory of punishment is that punishment in whatever form it is manifested has a symbolic quality, in which the process and culmination of punishment is, among other things, the communication of a message.²⁰ That message, with its condemnatory quality, expresses through the punishment process the legislature, the courts and therefore the community’s admonition for the behavior under scrutiny. This goes beyond the definition of punishment, and goes towards its justification. And its justification is not just that it is valuable in itself, in the sense that it is an ‘emphatic condemnation of the crime committed’, but that it also ‘vindicates the law which has been broken, reaffirms the right which has been violated, and demonstrates that the misdeed was indeed a crime’.²¹ Primoratz advocates for this function of

¹⁶ Adler (n 4) 1414; Primoratz (n 13) 188.

¹⁷ Feinberg (n 4) 419.

¹⁸ *ibid* 423.

¹⁹ Adler (n 4) is critical of the Feinberg approach and provides a detailed critique of that and other approaches to the expressive theory of punishment. Hugo Adam Bedau is also critical of Feinberg’s failure to set forth a theory of proportionality within his expressive position (See Hugo Adam Bedau ‘Feinberg’s Liberal Theory of Punishment’ (2001) 5 *Buff Crim L R* 103,136). Other writers such as A J Skillen ‘How to Say Things with Walls’ (1980) 55 *Philosophy* 509; Primoratz (n 13) and Kahan (n 13) recognize that the Feinberg approach is but an outline of an expressive principle of punishment, and that the justifications of that approach need more detailed analysis. Skillen and Primoratz in particular attempt a more detailed analysis of the use of expressivism as it relates to punishment.

²⁰ Skillen (n 19) 515.

²¹ Primoratz (n 13) 196.

punishment, which he calls intrinsic expressivism. This concept of intrinsic expressivism is to be distinguished from retribution. The classic formulation of retribution is that the offender is to be punished because he deserves it.²² It is, as Ohlin states, the infliction of harsh punishment on someone who has violated the law.²³ No other justification is required. Validating the law broken, reaffirming the rights violated, and the condemnation of the factual base supporting the crime is not a part of the classic retributive justification. They are part of the symbolic significance of both the law and the imposition of the punishment, but for the retributivist are unnecessary for punishment to be inflicted. Intrinsic expressivism is also to be distinguished from the ‘just deserts’ approach to punishment, based on the concepts of censure and proportionality advocated in particular by Andrew von Hirsch.²⁴ Censure is simply the expression of the reprehensible nature of the conduct in question.²⁵ Censure is not as expansive in its operation as the expressive principle, as it does not focus on the symbolic significance so crucial to expressivism.²⁶ Rather, it is that of blameworthiness, because the individual has broken the law. The degree of blameworthiness is based on cardinal and ordinal factors.

Primoratz also recognizes that there is another form of expressivism, which he calls extrinsic expressivism, which has as its goal a forward rather than a backward

²² See J D Mabbott, ‘Punishment’ in H B Acton (ed), *The Philosophy of Punishment* (Macmillan 1969) 29, 45; Michael Moore, ‘The Moral Worth of Retribution’ in Ferdinand Schoeman (ed) *Responsibility, Character and the Emotions: New Essays in Moral Psychology* (OUP 1987) 179.

²³ Jens Ohlin, ‘Towards a Unique Theory of International Criminal Sentencing’ in Goran Sluiter and Sergey Valisiev (eds), *International Criminal Procedure: Towards a Coherent Body of Law* (Cameron May 2009) 373, 387.

²⁴ Andrew von Hirsch, ‘Censure and Proportionality’ in Antony Duff and David Garland (eds), *A Reader on Punishment* (OUP 1994) 115, 118-125. See also Andrew Von Hirsch, *Doing Justice. The Choice of Punishments* (Hill and Wang 1976); Andrew Von Hirsch, *Censure and Sanctions* (OUP 1996); and Andrew Von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (OUP 2005).

²⁵ Von Hirsch, ‘Censure and Responsibility’ (n 24) 119.

²⁶ Feinberg (n 4) 402. In *Proportionate Sentencing: Exploring the Principles* (n 24) 17 it is recognized that the concept of censure does carry a denunciatory aspect, which can be directed to the community at large. Its function, however, is not to educate but rather it ‘serves as an appeal to people’s sense of the conduct’s wrongfulness, as a reason for desisting’.

looking focus.²⁷ Advocates of this position, like the utilitarians, postulate that the purpose of punishment is to express the condemnation of the violation of the appropriate law, and to thereby reform,²⁸ educate²⁹ or provide a moral barometer of appropriate behavior and thereby teach the community that violations of such laws are morally wrong.³⁰ It is future oriented, with the desire to improve things for both the perpetrator and the community.

The importance of these writings on the expressive theory of law and punishment is in the recognition given to the symbolic significance of punishment, with the attendant focus that this symbolic significance places on international crimes, the purpose for their existence, and the importance for maintaining respect for international humanitarian norms. These theoretical positions are complete only to the extent that they recognize that law, and in particular punishment, has an expressive quality which needs to be both recognized and expressed. They are all incomplete to the extent that none provide the next step in the process - how the expressive principle can be operationalized to form part of the sentencing process. Skillen accepts the fact that those who advocate for an expressive theory of law and punishment recognize that the expressive account does not in itself provide an exhaustive account of the application of the theory to specific situations.³¹ Feinberg also recognizes this fact, as he also acknowledges that the condemnatory aspect of the punishment must suit the crime by the imposition of harsh treatment, the material form of punishment.³² That too is symbolic, reflecting the degree of disapproval of one crime or another. What the expressive principle of punishment does is to focus the rationale for the sentence, which, when applied to the ICC, should reflect the purpose of that institution and why punishment should be imposed. The particulars of

²⁷ ibid 196, 201.

²⁸ Duff (n 13).

²⁹ Ewing (n 13).

³⁰ Hampton (n 13).

³¹ Skillen (n 19) 509. Skillen suggests that it is seen by many as a part of the framework of either retributivism or utilitarianism.

³² Feinberg (n 4) 423.

how these sentences are imposed will also have a symbolic significance, from the type of offence committed to the particulars of its commission. The challenge for the ICC is to develop a sentencing matrix whose foundation is based on the expressive theory of punishment, and whose particular analysis of the sentencing position is also influenced by the expressive theory.

b. The ad hoc tribunals and the expressive theory of punishment

Some semblance of the characteristics of the expressive principle of law and punishment crept into a few of the sentencing decisions in some of the ad hoc tribunals. In the early decisions of the ICTY, Trial Chambers were searching for a coherent framework within which to determine the sentences to be imposed on those found guilty of various international crimes. In the sentencing decision in *Prosecutor v Erdemovic*,³³ the Trial Chamber recognized the distinctive nature of international crimes, in particular crimes against humanity, and noted that the international nature of that crime in particular transcended the individual.³⁴

Crimes against humanity are serious acts of violence which harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health, and or dignity. They are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must perforce demand their punishment. But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterises crimes against humanity.

.....

³³ *Prosecutor v Erdemovic* (Sentencing) It-96-22-Tbis (5 March 1998). In this case the accused originally pled guilty to one charge of a crime against humanity. However, the guilty plea was overturned by the Appeals chamber in 2007, as the Chamber was of the opinion that the accused did not understand the nature of the offence to which he was pleading. At a new hearing in the Trial Chamber in 1998 *Erdemovic* pled guilty to the offence of the violation of the laws and customs of war, and received a 5 year sentence.

³⁴ *ibid* paras 28, 32.

It might be argued that the determination of penalties for a crime against humanity must derive from the penalties applicable to the underlying crime. In the present indictment, the underlying crime is murder (Article 5(a) of the Statute). The Trial Chamber rejects such an analysis. Identifying the penalty applicable for a crime against humanity - in the case in point the only crime falling within the International Tribunal's jurisdiction - cannot be based on penalties provided for the punishment of a distinct crime not involving the need to establish an assault on humanity

The Chamber also recognized the importance of the need to stigmatize criminal conduct that has been classified as a crime against humanity.³⁵

One of the purposes of punishment for a crime against humanity lies precisely in stigmatising criminal conduct which has infringed a value fundamental not merely to a given society, but to humanity as a whole... .

On the basis of the above, the International Tribunal sees public reprobation and stigmatisation by the international community, which would thereby express its indignation over heinous crimes and denounce the perpetrators, as one of the essential functions of a prison sentence for a crime against humanity. In addition, thwarting impunity even to a limited extent would contribute to appeasement and give the chance to the people who were sorely afflicted to mourn those among them who had been unjustly killed.

While the comments of the Trial Chamber in the *Erdemovic* decision are insightful, only a few of the subsequent decisions of the ICTY have referenced the broader purposes of sentencing that should apply to those found guilty of international crimes.³⁶ These general purposes reflect not only the purpose of the Tribunal as determined by the Security Council resolution, but also the impact of ‘its application of internationally recognized norms and principles on the global level’.³⁷ It had to focus its punishment not

³⁵ ibid para 64-65.

³⁶ *Prosecutor v Nikolic* (Sentencing Judgment) IT-02-60/1-S (2 December, 2003) para 82-84; *Prosecutor v Obrenovic* (Judgment) IT-02-60/2-S (10 December 2003) para 45; *Prosecutor v Blagojevic and Jokic* (Judgment) IT-02-60-T (17 January 2005) para 814-816.

³⁷ *Prosecutor v Nikolic* (n 36) para 84.

only to the needs of the former Yugoslavia but also to the needs of the international community.³⁸

There had been one point in the development of the sentencing rationale at the ICTY that some emphasis was placed on a concept labelled ‘individual and general affirmative prevention’. This concept appeared to incorporate some of the features of the expressive justification of punishment. Its aim was to influence ‘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 being implemented and enforced’.³⁹ This concept of ‘individual and general affirmative prevention’ as a principle of sentence was not referenced by the Trial or Appeals Chambers of the ICTY in the early years of its operation. An early reference to the need for punishment to generate respect from the world community for the development of international criminal law is found in the *Kupreskic* decision.⁴⁰ These general comments were encompassed within general comments on the use of general deterrence to not only deter others from committing such offences but also to ‘strengthen the legal order . . . and to reassure society of the effectiveness of its penal provisions’.⁴¹ They began to appear in other decisions of the Trial Chambers of the ICTY.⁴² One of the most expansive comments on the broader purposes of sentencing at the ICTY is contained in the *Deronjic* sentencing decision.⁴³ In discussing the influence of general deterrence in the sentencing process, the court states:

³⁸ ibid; *Prosecutor v Obrenovic* (n 36) para 47; *Prosecutor v Blagojevic and Jokic* (n 36) para 816. It is interesting to note that the Trial Chambers in all three decisions use the same wording to describe what they perceive as their obligations both at the national level and at the international level.

³⁹ *Prosecutor v Blaskic* (Appeal) IT-95-14-A (29 July 2004) para 678.

⁴⁰ *Prosecutor v Kupreskic* et al (Judgment) IT-95-16-T (14 January 2000) para 848.

⁴¹ *Prosecutor v Cesic* (Sentencing Judgment) IT-95-10/1-S (11 March 2004) para 26.

⁴² *Prosecutor v Miodrag Jokic* (Sentencing Judgment) IT-01-42/1-S (18 March 2004) para 34 (which contains the same comment using the same wording as in *Cesic*). See also *Prosecutor v Deronjic* (Sentencing Judgment) IT-02-61-S (30 March 2004) para 144-150 and *Prosecutor v Brdanin* (Judgment) IT-99-36-T (1 September 2004) para 1091.

⁴³ *Prosecutor v Deronjic* (n 42).

*one of the main purposes of a sentence imposed by an international tribunal is to influence the legal awareness of the accused, the surviving victims, their relatives, the witnesses and the general public in order to reassure them that the legal system is implemented and enforced. Additionally the process of sentencing is intended to convey the message that globally accepted laws and rules have to be obeyed by everybody. . . . This fundamental rule fosters the internalization of these laws and rules in the minds of legislators and the general public.*⁴⁴

These comments were couched under the broader umbrella of general deterrence, and did not in the early years constitute an independent justification for consideration in sentencing at the ICTY. The court appeared unsure as to how this consideration should fit within the general purposes of sentencing as set out in the vast majority of decisions of the ICTY. However, the concept of ‘individual and general affirmative prevention’ as an independent principle or purpose of sentencing in international criminal law appeared later in 2004 in the Appeals Chamber decision in *Prosecutor v Blaskic*.⁴⁵ When outlining the purposes to be considered in imposing sentence the Appeals Chamber lists after individual and general deterrence ‘(ii) individual and general affirmative prevention 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 being implemented and enforced’.⁴⁶ This definition incorporates almost verbatim the comments in the *Deronjic* decision that were made under the general guise of general deterrence. Now, however, it gains an independent status as a justification for the imposition of a sentence at the ICTY. The concept of ‘individual and general affirmative prevention’ disappears after 2004 in Trial Chambers decisions, and appears only once thereafter as one of the purposes of sentence in an Appeals Chamber decision. In *Prosecutor v Krajisnik* the concept is explained as having an educative function, in that the rules of humanitarian law are to be obeyed, and that such rules should be accepted by all members of the public.⁴⁷ While the ICTY did flirt with the concept of ‘individual and

⁴⁴ ibid para 149.

⁴⁵ *Prosecutor v Blaskic* (Appeal) (n 39).

⁴⁶ The same wording is used in the same context in the Appeals Chamber decision in *Prosecutor v Kordic and Cerkez* (Appeal) IT-95-14/2-A (17 December 2004) para 1073.

general preventive affirmation' in a number of decisions in 2004, with one exception noted above , it did not consider the concept an important one in the sentencing decision making process after that time. While it contained some of the more general references to the symbolic importance of sentencing in international criminal law, the court could not bring itself to break away from the traditional sentencing principles of retribution and deterrence. Its failure to follow this more innovative path to sentencing reflects the very conservative approach of the ad hoc tribunals to the sentencing process.

The ICTR does not make reference to the concept of 'individual and general affirmative prevention' in any of its decisions. However, the Trial and Appeal Chambers of the SCSL have addressed the wider principles that should apply to sentencing at that tribunal, principles somewhat akin to the expressive dimension of punishment. While the principles of retribution, deterrence and rehabilitation are recognized as the three principle justifications of punishment,⁴⁸ the Trial Chambers also note that one of the main purposes of sentencing in the international justice system is to

Influence the legal awareness of the accused, the surviving victims, their relatives, the witnesses and the general public in order to reassure them that the legal system is implemented and enforced. Additionally, sentencing is intended to convey the message that globally accepted laws and rules have to be obeyed by everybody.⁴⁹

What appears to receive some recognition in the decisions of the SCSL, both the Trial Chambers decisions and the Appeals Chamber decisions, is an acknowledgment that

⁴⁷ *Prosecutor v Kravischik* (Appeal) IT-00-39-A (17 March 2009) para 807.

⁴⁸ *Prosecutor v Alex Tamba Brima, Brima Bazzi Kamara and Santigie Borbor Kanu* (Sentencing Judgment) SCSL -2004-16-T-624 (19 July 2007) para 14; *Prosecutor v Moinina Fofana and Allieu Kondewa* (Sentencing Judgment) SCSL-04-14-T-796 (9 October 2007) para 26. It is noted in those decisions, however, that rehabilitation plays a lesser role in the process. The Trial Chamber in *Fofana and Kondewa* stated that 'although rehabilitation is considered an important element in sentencing, it is of greater importance in domestic jurisdictions than in International Criminal Tribunals'. (para 28).

⁴⁹ *Prosecutor v Alex Tamba Brima, Brima Bazzi Kamara and Santigie Borbor Kanu* (n 48) para 16. See also *Prosecutor v Moinina Fofana and Allieu Kondewa* (n 48) para 30); *Prosecutor v Issa Hassan Sesay, Morris Kallon and Augustine Gbao* (Sentencing Judgment) SCSL-04-15-T-1251 (8 April 2009) para 15. See also *Prosecutor v Moinina Fofana and Allieu Kondewa* (Appeal) SCSL-04-14-A-829 (28 May 2008) para 532. This is the 'individual and general affirmative prevention' concept that was referenced in some of the decisions of the ICTY.

the internationalized nature of the tribunals does require that internationalized concerns receive some focus in the sentencing process. This is referenced in the Trial Chamber decision of the *Prosecutor v Alex Tamba Brima, Brima Bazzi Kamara and Santigie Borbor Kanu*⁵⁰ and in a more extensive fashion in the Appeals Chamber decision of *Prosecutor v Moinina Fofana and Allieu Kondewa*.⁵¹ In the latter decision, in the context of analyzing whether political motive could be a mitigating factor in sentencing, the Appeals Chamber recognized the need in the sentencing process to ‘weigh its obligations to the individual accused in light of its responsibility to ensure that it is upholding the purposes and principles of international criminal law’.⁵² It also recognized its obligation in exercising its sentencing discretion that it had the responsibility to ‘protect and promote the norms and values of the international community’⁵³ and the ‘paramount . . . international interests in protecting humanity’.⁵⁴ The Appeals Chamber concludes its remarks on the general issue of sentence by stating that its obligation is to impose a sentence that reflects the revulsion of the international community to the crimes that have been committed, taking into consideration the various aggravating and mitigating factors in the case.⁵⁵ While the Appeals Chamber does conclude that its obligation to the international community is satisfied by the use of retribution as the governing principle in the imposition of any sentence for international crimes, some acknowledgment is made of the broader function of sentencing in international criminal law proceedings. Like at the ICTY, however, it does not play a significant role in the sentencing process.

While there has been some recognition in some of the ad hoc tribunals that the imposition of punishment also requires a justification which goes beyond the traditional

⁵⁰ (n 48) para 16.

⁵¹ (n 49) para 530-535; 561-565.

⁵² ibid para 531.

⁵³ ibid para 561.

⁵⁴ ibid para 563.

⁵⁵ ibid para 565.

retributive and utilitarian justifications of punishment, there has been no concerted attempt to integrate such a justification in any consistent way by these tribunals. Yet, as argued earlier in this thesis, punishment, as one aspect on the continuum of the international criminal law process from prosecution to sentencing, must be reflective of the goals of the international criminal law system that is its focus, and must as well be justified by the value it has for sustaining that international system. Punishment depends on its social roots for its ‘continued legitimacy and operation’, and on its historical background to appreciate what its present form should take.⁵⁶ As noted in chapter 5, while there was no overt effort to set out the particular goals of the international criminal justice system as it developed into the Rome Statute, the reasons behind the selection of offence types were premised on the view that such offences were the most serious crimes in the scale of criminal offences that affect the very foundation of human society. The Preamble to the Rome Statute also emphasized this point, and further emphasized that the perpetrators of such offences should be punished for their transgressions regardless of their status in their own states or in the international community. The purposes of punishment imposed at the ICC should reflect the noted purposes. Articulation of these purposes through the imposition of appropriate sentences can be accomplished by the court first setting out the more generalized reasons for the imposition of such punishment. To paraphrase Primoratz, the articulation of the purpose of the sentence is to let the world community know that these laws, which protect the very foundation of human society, have been broken, that to do so is a crime which will not be tolerated no matter who the perpetrator is, and that the punishment to be imposed is an emphatic condemnation of the crime(s) committed.⁵⁷ The development and utilization of an expressive principle of sentencing, based on the expressive theory of law and punishment, what Primoratz calls intrinsic expressivism, can best reflect the general purposes of the ICC. It fits with what the framers of the Rome Statute wished to accomplish. A systematic approach to sentencing, grounded in an expressive principle of sentencing can be developed by the ICC to reflect its purpose, and to provide justifications for sentences imposed by that

⁵⁶ Garland (n 2) 21.

⁵⁷ Primoratz (n 13) 196.

court. While writers such as Mark Drumbl have expressed concern about the adoption of the expressive principle for the sentencing of violators of international law,⁵⁸ using the term fragile to describe the influence of expressivism as a general goal of punishment in international penal law, he in particular does recognize the appropriateness of its application in particular circumstances.⁵⁹ The position here is that the inherent weaknesses of the application of the traditional justifications of punishment to ground sentencing at the ICC, coupled with the particular emphasis of the ICC as discussed in chapter 5, calls for the adoption of an expressive principle of sentencing to be utilized to form the basis for a sentencing regime at the ICC.

Section 2 The Imposition of a Sentence of Imprisonment at the ICC

a. The recognition of hierarchy of crimes

In domestic law one of the principal ways in which the state signifies the seriousness it prescribes to an offence is in the type and quantum of the penalty which it assigns to that offence. Punishment for murder carries a heavier penalty than for theft, thus reflecting the state's perception of the seriousness of a particular offence. As Nersession has observed, the punishment tariff is reflective of the transgression of societal and legal norms that labels such as 'murder' or 'theft' represent.⁶⁰ The Rome Statute provides the same penalties for the three present offences within its jurisdiction. Thus, the ICC cannot rely on the degree of penalty to signify the seriousness of the offence. Nor can it rely on the degree of penalty to differentiate whether one offence type should attract a greater degree of punishment than another. In the absence of some overt reference to the importance of one offence type over another, the ICC must

⁵⁸ See in particular Mark Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity' (2004-2005) 99 Northwest U L R 539, 592-602; Mark Drumbl, *Atrocity, Punishment and International Law* (CUP 2007) 173-180.

⁵⁹ Mark Drumbl, 'Expressive Value of Punishing Terrorists' (2006-2007) 75 Geo Wash L Rev 1165.

⁶⁰ David L Nersession, 'Comparative Approaches to Punishing Hate: The Intersection of Genocide and Crimes Against Humanity' (2007) 43 Stan J Int'l L 221, 256.

recognize a hierarchy of offences to anchor a proper sentencing process. The existence of such a structure should form the foundation upon which the court will impose any sentence under consideration. That is, if the predicate offence is murder, then if the act of murder formed part of the *actus reus* of the offence of genocide, that act should be considered more serious than the same act that forms the predicate offence of a crime against humanity. As such the characterization of the type of offence will determine, in part, the extent of the penalty to be imposed.

This issue has not been addressed in the Rome Statute, and to date the ICC has not been called on to consider the matter.⁶¹ Indeed, in the discussions leading to the development of the Rome Statute care was taken not to assign any order of seriousness to any of the crimes under the jurisdiction of the court.⁶² The Special Rapporteur for the development of a Code of Crimes against the Peace and Security of Mankind was of the view that these were the most serious crimes known to mankind and one penalty could apply to all.⁶³ However, some state representatives recommended that different offence types should attract different penalties, as in their view some crimes were more serious than others.⁶⁴ The debates on this issue suggested there was some realization that the

⁶¹ Micaela Frulli has argued that although the issue of hierarchy of offences is not specifically addressed in the Rome Statute, there are three statutory provisions which give some credence to an argument that the framers considered certain offences more serious than others. The first is that while self-defence is a specific defence recognized for all offences within the jurisdiction of the ICC, only defence of property pursuant to Article 31(1)(c) applies as a defence for war crimes. The suggestion is that the other two presently recognized offences are too serious to allow defence of property to be a defence. The second is that as the defence of superior orders only applies to war crimes and is specifically excluded for crimes against humanity and genocide pursuant to Article 33, war crimes are considered less serious than the other two offences. The third is that pursuant to Article 124 a state can defer application of Article 8 – war crimes – to its nationals for a period of seven years after entry into force of the Statute. This does not apply to crimes against humanity or genocide. (See Micaela Frulli, ‘Are Crimes Against Humanity More Serious Than War Crimes’ (2001) 12 EJIL 329, 339-340).

⁶² The International Law Commission was careful not to assign any ranking to the crimes proposed to be included within the draft code of crimes against the peace and security of mankind. At its 2236th to 2241st meetings the Commission was careful when setting out the structure of the draft code to make certain that the ordering of offences did not signify any order of seriousness to these offences. (ILC ‘Report of the International Law Commission to the General Assembly on the work of its Forty third session (29 April- 19 July 1991)’ in Yearbook of the International Law Commission 1991 Vol 11 Part 11 UN Doc A/46/10 p 93 para 170).

⁶³ ibid para 67.

various categories of offences did carry with them different degrees of seriousness, but there was no overt acknowledgment of a hierarchical structure to offence types.⁶⁵ The compromise reached was that there should be one penalty which applied to all offences, with differences in the factual circumstances of each case being reflected in the length of sentence imposed.

The ICTY and the ICTR had also struggled with this issue of the hierarchy of offence types. After the courts had initially concluded there was a hierarchy to the offences within their jurisdiction, with genocide being labelled the ‘crime of crimes’⁶⁶ the ICTY Appeals Chamber reversed that position in its *Tadic* decision.⁶⁷ Subsequent decisions have followed the *Tadic* decision and do not acknowledge a hierarchy to offence types within the jurisdiction of the ICTY and the ICTR.⁶⁸ However, research undertaken analyzing sentencing decisions of the ICTY and the ICTR have noted that crimes of genocide generally receive more severe sentences than do crimes against humanity and war crimes.⁶⁹ And generally crimes against humanity do receive heavier

⁶⁴ *ibid* para 81-82.

⁶⁵ *ibid*.

⁶⁶ See *Prosecutor v Tadic* (Sentencing Judgment) IT-94-1-T (14 July 1997) para 73; *Prosecutor v Tadic* (Sentencing Judgment) IT-94-1-Tbis-R117 (11 November 1999) para 28; *Prosecutor v Kambanda* (Sentencing Judgment) ICTR-97-23-S (4 September 1998) para 14, 16; *Prosecutor v Serushago* (Sentencing Judgment) ICTR-98-39-S (5 February 1999) para 15.

⁶⁷ *Prosecutor v Tadic* (Appeal) IT-94-1-A and IT-94-1-Abis (26 January 2000).

⁶⁸ *Prosecutor v Lukic and Lukic* (Judgment) IT-98-32/1-T (20 July 2009) para 1050; *Prosecutor v Mrksic et al* (Appeal) IT-95-13/1-A (5 May 2009) para 375; *Prosecutor v Kayishema and Ruzindana* (Appeal) ICTR-95-1 (1 June 2001) para 367; *Prosecutor v Rutaganda* (Appeal) ICTR-96-3-A (26 May 2003) para 590.

⁶⁹ See an excellent analysis completed by Barbara Hola, Alette Smeulers and Catrien Bijleveld ‘International Sentencing Facts and Figures’ (2011) 9 JICJ 411. Reference in particular should be made to the analysis at pages 421-429. At p 422 they state ‘The longest sentences have been handed down to defendants convicted of a combination of genocide, crimes against humanity and war crimes. Except for two cases, all were sentenced to life imprisonment. Similar to the ICTY, there are indications of a hierarchy of crimes. The ICTR sentencing practice shows that genocide receives the severest sentences followed by crimes against humanity’. The work by James Meernik focused on sentencing at the ICTY, the ICTR and the SCSL and concluded that those convicted of crimes against humanity received a higher sentence - on average of 127 months - and those convicted of at least one count of genocide received an additional sentence length average of 234 months (See James Meernik, ‘Sentencing Rationales and Judicial Decision Making at the International Criminal Tribunals’ (2011) 92 So Sc Q 588, 602).

sentences than war crimes.⁷⁰ While not recognized in theory, it appears that the practice is that there is, without acknowledgment, a hierarchical structure to the crimes within the jurisdiction of the ad hoc tribunals.

The literature that has addressed this issue is consistent that the position taken by the ICTY and the ICTR on the issue of hierarchy of offences is not sustainable in either theory or practice. The most persuasive of these positions focuses on the distinction between the chapeau of the various offences and the specific offences which constitute the crimes.⁷¹ The focus has been characterized as a focus on the ‘in abstracto’ aspect of the offences, rather than the concrete or ‘in concreto’ focus based on the facts of a particular offence.⁷² It is argued that the chapeau of each of the three offences- war crimes, crimes against humanity and genocide carry with each degrees of moral turpitude, both existing and perceived, which classify each offence on the hierarchical structure.⁷³ The chapeau contains a knowledge requirement about the background to the predicate offences, including, where appropriate, the intent to commit the offences based on the characteristics of the victims of the offence.⁷⁴ Because the knowledge requirement of war crimes does not necessarily focus on either group perpetration or group

⁷⁰ In a previous article by Hola, Smeulers and Bijleveld, where the researchers looked exclusively at the sentencing patterns of the ICTY, it was noted that a major predictor of sentence length was category of crime. They note that ‘. . . it is indeed the fact that those convicted of crimes against humanity are punished more severely than those found guilty of war crimes’. Barbara Hola and Alette Smeulers and Catrien Bijleveld, ‘Is ICTY Sentencing Predictable? An Empirical Analysis of ICTY Sentencing Practice’ (2009) 22 Leiden J Int’l L 79, 94. Meernik, King and Dancy came to a similar conclusion with respect to their study of sentencing patterns at the ICTY, concluding that ‘All other things being equal, the punishment for one convicted of crimes against humanity is 158 months longer than for individuals convicted of war crimes’. See James Meernik and Kimi Lynn King and Geoffrey Dancy, ‘Judicial Decision Making and International Tribunals: Assessing the Impact of Individual, National and International Factors’ (2005) 86 Soc Sc Q 683,697.

⁷¹ See Allison Danner, ‘Constructing a Hierarchy of Crimes in International Criminal Law Sentencing’ (2001) 87 Va L Rev 415; Adil Ahmad Haque, ‘Group Violence and Group Vengeance: Towards a Retributive Theory of International Criminal Law’ (2005-2006) 9 Buff Crim L Rev 273; and Nersessian (n 60).

⁷² Andrea Carcano, ‘Sentencing and the Gravity of the Offence in International Criminal Law’ (2002) 51 ICLQ 583, 607; Hola, Smeulers and Bijleveld (n 69) 423-427.

⁷³ *ibid.*

⁷⁴ See Danner (n 71) 463.

victimization, it is considered at the bottom of the hierarchical scale.⁷⁵ Crimes against humanity require an intent to commit the predicate acts because it is part of a state or organized policy to commit these acts as part of a wide or systematic attack against a particular population.⁷⁶ This has traditionally been considered more serious than war crimes, principally because it not only harms the individual but also because its broader group approach harms the group itself.⁷⁷ It is the group perpetration and the group as victim that carries with it the enhanced moral turpitude as compared to war crimes. And genocide is considered to be at the apex of the hierarchical structure because of the intent to destroy groups, rather than individuals.⁷⁸

Coupled with the focus on the chapeau of these three offences, what also distinguishes the three is the impact which these offences have on the international community.⁷⁹ The essence of the distinction is what Danner describes as ‘harm’ and what Haque describes as ‘expressive harm’.⁸⁰ Danner in particular recognizes that there is ‘harm’ caused to the particular victim or victims by the enumerated act. Obvious examples are murder, torture, or rape. However she also recognizes that harm also results when the act is part of a cumulative effort to attack a particular population, or that the particular act was committed with intent to destroy in whole or in part an identifiable group.⁸¹ Such additional aspect to the crime carries an additional harm element - to the larger group and to the broader social order. It is no longer an isolated act of murder, or torture or rape. This is the ‘expressive harm’ element that is championed by Haque.⁸² The

⁷⁵ Frulli (n 61) 335; Danner (n 71) 473.

⁷⁶ Article 7 Rome Statute.

⁷⁷ Danner (n 71) 471.

⁷⁸ Article 6 Rome Statute.

⁷⁹ Danner (n 71); Haque (n 71).

⁸⁰ Danner (n 71) 470; Haque (n 71) 308-310.

⁸¹ Danner (n 71) 464.

⁸² Nersessian focuses on fair labelling of criminal offences in international criminal law, yet he too recognizes that it is the expressive function of international criminal law which sets offences into a

harm inflicted by the commission of the crime of genocide is not only that members of the group are exterminated but that the intent to exterminate the group, in whole or in part, expresses morally reprehensible attitudes that must not go unpunished. And the desire to exterminate the group is more reprehensible than the killing of one or more persons as part of an ongoing enterprise. As Haque puts it

*Genocidal acts attempt to create a social hierarchy to mirror the perpetrators' distorted moral hierarchy. Through extermination, enslavement, expulsion and other methods, they seek to make the inferiority of the target group a social reality.*⁸³

This combination of the knowledge aspect flowing from the chapeau of the three offences, as well as the harm element which is particularly acute in crimes against humanity and genocide determines the seriousness of each of these offences. The analysis put forward by both Danner and Haque, focused as it is on the ICTY and the ICTR is compelling. Because of the nature of the offence types - war crimes, crimes against humanity and genocide - this hierarchical structure is as applicable to the offence types in the Rome Statute as it is to the ICTY and the ICTR. It should be adopted by the ICC as one determiner of the appropriate sentence for each offence committed by each offender.

The chapeau of each of the offences defined in the Rome Statute expresses what the signatories to the Rome Statute consider are its ‘values, what it esteems, what it abhors’.⁸⁴ It is one manifestation of the expressive function of law. And it expresses the signatories’ view of the seriousness of each of the offence types, based on the nature of the offences that have been criminalized. It is here that an expressive principle of sentencing performs a more particularized role in the process. When sentences are considered for any of the three offences, the first consideration for the punishment to be imposed should first be reflective of the factors which make these offences international

hierarchy of offence types which describes their seriousness one to the other and thereby affects the sentences imposed for such offences. (See Nersessian (n 60) 261).

⁸³ Haque (n 71) 316.

⁸⁴ Amann (n 5) 118.

crimes. That is, it should first reflect the chapeau of the offences, as it is the chapeau which characterizes them as international crimes. And, the degree of punishment considered should reflect which crime or crimes in the hierarchical structure is being punished. Because the seriousness or moral turpitude of genocide is higher than war crimes per se, the punishment for genocide needs to express the collective abhorrence for that type of offence. The hierarchical structure would form the base structure for the imposition of the appropriate penalty for each offence. The ‘in concreto’ aspects of the offences can then be considered as fact specific matters on a case by case basis. As such, it is in this expressive approach that the quantum of sentence must first be considered. In that sense sentencing is proportional in nature, but not for traditional retributive purposes. It is rather for expressive purposes.

The Rome Statute at present has three crimes within its jurisdiction - war crimes, crimes against humanity and genocide.⁸⁵ Each of these crimes is composed of a chapeau, which is the qualifying criteria, and then a list of acts which would constitute, with the chapeau, the offence. War crimes are defined in Article 8 of the Rome Statute. The chapeau of the offences consist of : grave breaches of the Geneva Conventions of 12 August 1949 involving international armed conflicts (protecting the wounded and sick in armed forces in the field; wounded, sick and shipwrecked members of armed forces at sea; prisoners of war; and civilians who find themselves under the rule of a foreign power in the event of international conflict) (Article 8(2)(a); other serious violations of the laws and customs applicable in international armed conflict (Article 8(2)(b); armed conflict not of an international character (Article 8(2)(c); and other serious violations of the laws and customs applicable in armed conflict not of an international character (Article 8(2)(e)).⁸⁶ The enumerated acts are then listed.⁸⁷ What particularly distinguishes them

⁸⁵ Article 5 Rome Statute.

⁸⁶ See ICRC Resource Centre at <<https://www.icrc.org/eng/resources/documents/publication/p0173.htm>> accessed 4 March 2015. See also Knut Dormann, *Elements of War Crimes under the Rome Statute of the International Criminal Court* (CUP 2003).

from offences in domestic law is the fact that they take place during armed conflicts, either international in nature,⁸⁸ or not international in nature but which are not ‘internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature’.⁸⁹ There must be a nexus with the armed conflict, and there must be knowledge of that armed conflict.⁹⁰ There is no additional intent requirement for this offence to be committed.

Crimes against humanity as set out in Article 7 of the Rome Statute are different. The chapeau of the offence is the commission of the enumerated acts, of which there are 11, ‘as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack’. Article 7 further defines a ‘widespread and systematic attack against any civilian population’ as conduct involving the multiple commission of any one or more of the enumerated acts against civilians by or through the auspicious of a State or ‘organizational policy to commit such attack’. The act or acts that constitute the enumerated acts, to constitute a crime against humanity, must conform to the chapeau that it be one of many such acts, and the perpetrator must be aware that it is one or more of many of these acts. The mischief to be addressed is that it is part of a concerted effort against any civilian population. In that sense it is not individualized, as in domestic law, but part of a larger enterprise of which the perpetrator is aware.

Genocide is defined in Article 6 of the Rome Statute. The chapeau of that offence is the commission of any of the enumerated acts, of which there are five, with ‘intent to destroy, in whole or in part, a national, ethical, racial, or religious group..’. Its focus is on

⁸⁷ A list of particular acts includes ‘wilful killing’, ‘torture’, ‘wilfully causing great suffering, or serious injury to body or health’, ‘taking of hostages’, ‘intentionally directing attacks against the civilian population...’, ‘killing or wounding treacherously individuals belonging to the hostile nation or army’, ‘employing poison or poisonous weapons’, and ‘employing bullets which expand easily in the human body....’. These are but a sample of the enumerated acts that form the particular actus reus of the offences. They are much more expansive than those set out in the Statutes of the ICTY or the ICTR.

⁸⁸ The term ‘international armed conflict’ is not defined in the Rome Statute.

⁸⁹ Article 8(2)(d) and Article 8(2)(f).

⁹⁰ William Schabas, *The International Criminal Court* (OUP 2010) 207-210.

the commission of the enumerated act in order to effect the purpose of eliminating, in whole or part one of the named groups from the face of the earth.

This structure, based on the degrees of responsibility and the degrees of harm that the perpetration of such offences cause, justify a greater degree of punishment for the most serious crime – genocide – than for the same enumerated act or acts that constitute either crimes against humanity or war crimes. While the initial approach to the sentencing decision advocated here has some trappings of a reliance on the retributive theory of punishment, it does so only to the extent that it recognizes that certain offences carry with them a greater degree of moral turpitude than other offences. However it does not advocate for an approach that the punishment imposed, based on the offence type itself, reflect the absolute gravity of the offence. Rather the approach advocated is that each of the three sentence categories each form an umbrella, one larger than the other under which the particular circumstances set out in Article 78 and Rule 145 can then be applied.

This initial approach also acknowledges that there may be utilitarian effects from the use of this sentencing model at the ICC. However, unlike the position advocated by de Guzman,⁹¹ these utilitarian effects would be incidental to the approach advocated here, and not the focus of the approach as suggested by de Guzman. This is simply because the research relied on in this thesis strongly suggests that there is no cause/effect relationship between punishment and curtailment of the commission of future crimes. In particular, general deterrence as an operational principle is without scientific foundation and as such should not be relied on by the ICC for its sentencing decisions.

b. The interplay between article 78 and rule 145

Once the overall approach is adopted, then the method of implementation of this approach to the particular sentencing case at hand needs to be addressed. The Rome Statute and the Rules of Procedure and Evidence set out general guidance for that

⁹¹ Margaret de Guzman, ‘Proportionate Sentencing at the International Criminal Court’ (May 27, 2014) Legal Studies Research Paper Series Temple University (Research Paper No 2014-15).

process. That is, as is set out in Article 78 of the Rome Statute, the factors to be considered in determining the quantum of sentence include, but are not limited to, the gravity of the offence and the individual circumstances of the offender.⁹² They work in combination with the Rules of Procedure and Evidence to produce the appropriate sentence. However, as has been shown, they should not be considered as factors going to deterrence, rehabilitation or towards retribution in the traditional sense in which that term is understood. Rather, they are to be considered within the context of an expressive principle of sentencing, to provide as Feinberg states, an expression of the condemnation by the international community for the crimes committed. The detail set out in Rule 145 of the Rules of Procedure and Evidence are to be considered to particularize the sentence to be imposed.

While the hierarchy of offence type may provide the setting for the imposition of an appropriate sentence, there is in the Rome Statute an interplay between Article 78 with Rule 145 of the Rules of Procedure and Evidence which will affect how the sentence of imprisonment is to be determined. As has been noted in the description of the sentencing provisions in the Rome Statute, Article 78 states in part - '*In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as . . .*'. The reference to the Rules of Procedure and Evidence within the wording of Article 78 clearly indicates that both are to work together to achieve the appropriate sentence. Rule 145(1)(a) in conjunction with Article 78 provides the overall legislative guidance to the court for the implementation of that sentence. That is, pursuant to Rule 145(1)(a) the quantum of sentence must reflect the overall culpability of the convicted person, and in making that determination, the Court must consider factors such as the gravity of the offence and the individual circumstances of the convicted person. How in particular the latter is accomplished has been the matter of some comment by the ICC.

⁹² Article 78 Rome Statute.

The Appeals Chamber of the ICC in the case of *R v Thomas Lubanga Dyilo* recognized a problem in interpreting the interplay between the Article 78 and in particular Rule 145(1)(c).⁹³ The court suggested there were three possible interpretations that could flow from the intersection of the two sections. The first was that the factors of the gravity of the crimes and the individual circumstances of the person were to be considered separate from the factors listed in Rule 145. This the court suggests is in accord with the plain reading of the words of the Statute and the Rule.⁹⁴ The second position was that some of the factors of Rule 145 are subsumed within the factors set out in Article 78.⁹⁵ And the third position is that the factors in Rule 145 could be seen as part of, and be taken into account for the purpose of assessing, the factors of Article 78 of the Statute.⁹⁶ The Appeals Chamber concluded that for the purposes of deciding the present appeal it need not decide which interpretation was the appropriate one.⁹⁷

However, an examination of the provisions of Article 78(1) shows no inconsistency between the phrase ‘gravity of the offence and the individual circumstances of the convicted person’ and in particular Rule 145(1)(c) of the Rules of Procedure and Evidence. That is, the enumeration of the factors in 145(1)(c) are particularizations of what constitutes either ‘gravity of the offence’ and/or ‘the individual circumstances of the convicted person’. The gravity of the offence would include the nature of the unlawful behavior and the means of execution, the degree of involvement of the convicted person, the degree of intent, the circumstances of the offence, and the harm caused to victims and families. Each of these factors have been considered as factors going to the gravity of the offence in decisions of the ICTY⁹⁸ and the ICTR⁹⁹, and they are, by their very nature,

⁹³ *Prosecutor v Thomas Lubanga Dyilo* (Appeals Chamber) ICC-01/04-01/06-3122 A4 A6 (1 December 2014).

⁹⁴ ibid para 62.

⁹⁵ ibid para 63.

⁹⁶ ibid para 64.

⁹⁷ ibid para 65-66.

factors that would affect how serious a particular offence would be determined. The individual circumstances of the particular offender would include the age, education, and social and economic conditions of the convicted person. These factors have also been considered by the ICTY¹⁰⁰ and the ICTR¹⁰¹ as individual factors of the person, and in many cases mitigating factors for the purpose of sentencing. The interpretation that has been followed by the ICTY and the ICTR and the one that logically makes sense for the ICC is that the factors set out in Rule 145(1)(c) are factors that can go to the gravity of the offence and the individual circumstances of the offender. They are not all those factors, as Article 78 suggests, but are enumerated as some of them for the consideration of the court. Thus, in setting out the structure of sentencing at the ICC, the ‘in abstracto’ nature of the offence would set the broad parameters for the sentence and then the particularization of the offence and the perpetrator , as set out in Rule 145(1)(c) will give some particularization to the details of the offence under consideration. It is not all the factors for consideration, as there are also aggravating and mitigating factors for consideration as set out in Rule 145(2) of the Rules of Procedure and Evidence. And, there may be others, as the court is not precluded from considering other factors in determining the appropriate sentence. Thus, the interplay between Article 78 and Rule 145 allows for the enumerated factors to be considered, but is also broad enough to permit other relevant factors to be considered as well.

⁹⁸ See in particular *R v Popovic et al* (Judgment) IT-05-88-T (10 June 2010) para 2134-2135 which provides a summary of the factors considered by courts at the ICTY going to the gravity of the offence. The factors listed in Rule 145(1)(c) are all included within the category of factors that go to the gravity of the offence in determining sentence at the ICC.

⁹⁹ See William R Pruitt, ‘Aggravating and Mitigating Sentencing Factors at the ICTR-An Exploratory Analysis’ (2014) 14 ICLR 148, and in particular table at p 158 and analysis following.

¹⁰⁰ See *R v Popovic et al* (n 98) at para 2140. Not all of these personal factors can be mitigating, as a higher level of education may at times be considered as aggravating factors. (See Hola, Smeulers and Bijleveld (n 69) 435 and Pruitt (n 99) 158.

¹⁰¹ Pruitt (n 99) Table p 167 and analysis following.

c. The structure of the sentencing process

i. Balancing process for imprisonment

The gravity of the offence and the individual circumstances of the perpetrator are case related factors which a court would consider in sentencing.¹⁰² de Guzman has recognized the gravity of the offence is a difficult concept to particularize, yet is a concept which has been relied on by the framers of the Rome Statute to justify the selection of offences to be considered worthy of pursuit by the Court,¹⁰³ and to inform decisions whether to continue with prosecutions, once initiated.¹⁰⁴ As noted, in the sentencing process, Rule 145(1)(c) directs the court to consider a number of factors which go to establishing the gravity of the offence. However, within the context of the term gravity the first issue for consideration is the nature of the act or action that constitutes the offence. That is, firstly what type of offence is it? In the normal scheme of things, the taking of another's life is considered the most serious of the acts included within the groupings of seriousness of the act. Within that category of the nature of the type of offence is the consideration of the number of victims, the gender and age of the victims, the way in which the act was perpetrated by the accused, and the type of role of the accused in the perpetration of the act (as principal or accessory). These are all factors for consideration within the concept of the gravity of the offence.¹⁰⁵ The effect of the offence on the victims, and the harm and level of suffering of survivors are also coupled within this category of 'gravity of the crime'.¹⁰⁶

¹⁰² Silvia D'Ascoli, *Sentencing in International Criminal Law* (Hart Publishing 2011) 133.

¹⁰³ Margaret de Guzman, 'Gravity and the Legitimacy of the International Criminal Court' (2008-2009) 32 Fordham Int'l L J 1400. See in particular Article 17(1)(d) – the prosecutor, after initial investigation determines that the case is not of 'sufficient gravity to justify further action by the court'.

¹⁰⁴ Article 53(2) Rome Statute.

¹⁰⁵ D'Ascoli (n 102) 133. There is consistency in the later decisions of especially the ICTY Trial and Appellate Chambers on the broad content of the phrase 'gravity of the crime'. (See for example *Prosecutor v Mrksic et al* (IT-95-13/1-T) (27 September 2007) para 684).

¹⁰⁶ D'Ascoli (n 102) 133. These factors are also encompassed within Rule 145(1)(c) of the Rules of Procedure and Evidence of the Rome Statute.

The individual circumstances of the particular accused are always factors for consideration in the imposition of sentence. They are not detailed within Article 78 itself, and are not directly addressed as constituting these individual circumstances in the Rules of Procedure and Evidence. However, in Rule 145(1)(c) the court shall give consideration to a number of factors including ‘the age, education, social and economic condition of the convicted person’.¹⁰⁷ And in the category of mitigating factors there is the ‘conduct of the convicted person after the act, including any efforts by the person to compensate the victims and any cooperation with the Court’.¹⁰⁸ As an aggravating factor any prior conviction of the accused is a factor for consideration.¹⁰⁹ Because of the enumeration of various factors that emphasize the gravity of the offence, with limited emphasis on enumerated factors relating to the individual circumstances of the offender the apparent legislative intent of the framers of the Rome Statute and the Rules of Procedure and Evidence is to primarily focus on the offence itself. This too is complementary to the expressive function of punishment, as the individual circumstances of the accused plays a much lesser role in the determination of the particular sentence to be imposed.¹¹⁰ The individual circumstances of the offender are not of primary concern in the expressive theory of punishment, and therefore although carrying some weight would not be of considerable weight in the determination of the ultimate sentence imposed.

¹⁰⁷ Rule 145(1) (c) Rules of Procedure and Evidence.

¹⁰⁸ Rule 145(2)(a)(ii) Rules of Procedure and Evidence.

¹⁰⁹ Rule 145(2)(b)(i) Rules of Procedure and Evidence.

¹¹⁰ D’Ascoli has argued that personal circumstances of the accused have ‘considerable weight’ in sentencing, (See D’Ascoli (n 102) 133). The ICTY in particular has set out numerous mitigating factors, many of which are personal circumstances of the individual accused that the Trial and Appeal Chambers have considered in mitigation of sentence (See *Prosecutor v Popovic et al* (n 98) para 2140. However, there is less emphasis placed on individualized sentencing factors in the Rome Statute and the Rules of Procedure and Evidence, where Rule 145(1)(a) emphasizes that the totality of the sentence ‘must reflect the culpability of the convicted person’. Emphasis on personal circumstances would also be inconsistent with the adoption of the expressive function of punishment, which as a purpose of sentence places emphasis on the act and its perceived consequences for the international community.

In an individual case where the various factors are the same, the sentence imposed for the commission of the crime of genocide should be greater than that of crimes against humanity, which should be greater than war crimes. The justification for the sentence should be based on an expressive principle of sentencing. That is, as the chapeau of the offence of genocide is expressive of the harm caused to the international community, the penalty should express the condemnatory aspect of the offence for that international community.

Where the predicate offences are different, as well as the various factors going to the gravity of the offence and the individual circumstances of the offence, the quantum of sentence will necessarily be different and reflect those individual factors. Yet the rationale for the sentence remains the same - it is to express through the punishment process the legislature, the courts and the community's admonition for the behavior under scrutiny.¹¹¹ This rationale is, to repeat what Primoratz has noted, not just that it is valuable in itself, but that it also 'vindicates the law which has been broken, reaffirms the right which has been violated, and demonstrates that the misdeed was indeed a crime'.¹¹² Its effect is what has been described as intrinsic expressivism. At a minimum this provides a moral barometer of appropriate behavior, thereby teaching the community that violations of the law are morally wrong.¹¹³ What the adoption of an expressive principle of sentencing will do is to add legitimacy in theory and in practice to the sentencing activities of the ICC. And, this applies not only to the consideration of incarceration in the normal course up to thirty years, but also to life imprisonment when required by the extreme gravity of the offence.

¹¹¹ See Appendix I for a graphic illustration of the proposed sentencing structure at the ICC. And see Appendix II for a sample approach to sentencing utilizing the expressive principle of sentence as well as the various factors set out in Rule 145.

¹¹² Primoratz (n 13) 196.

¹¹³ Hampton (n 13).

ii. The distinction between imprisonment for a fixed term and life imprisonment

The hierarchical nature of the crimes under the jurisdiction of the ICC should also set the initial parameters for the consideration of a sentence of life imprisonment.¹¹⁴ This is because of the mens rea component of the chapeau of each offence, as alluded to earlier in this chapter. Hola, Bijleveld and Smeulers have noted that the sentencing judges at the ICTR claim they do not focus on the ‘*in abstracto*’ aspect of the crime, but on the ‘*in concreto*’ aspects of that crime, in reaching decisions on the length of sentence to impose.¹¹⁵ Yet, as Hola, Smeulers and Bijleveld have observed, when sentences do not include genocide, the median sentences of the ICTR are shorter than that of the ICTY. However when genocide is one of the offences, then the sentences at the ICTR are substantially longer.¹¹⁶ This analysis confirms the general position that the nature of the offence type does affect sentence length. The influence of the offence type is always a factor for consideration in the imposition of a sentence. It will in particular be influential as the gravity of the offence of genocide, for example, will not only be ‘*in abstracto*’ influential in the sentencing determination, but it will generally carry in its factual component the very serious nature of the offence. Such will provide the base upon which decisions with respect to the imposition of a life sentence are to be made.

However, in order to consider the imposition of a life sentence, the existence of the gravity of the offence is not sufficient. Rule 145(3) clearly states that a life sentence may be imposed when justified by the extreme gravity of the crime and the individual circumstances of the convicted person, ‘as evidenced by the existence of one or more aggravating circumstances’. As has already been argued in chapter 2, the aggravating criteria must apply to both the extreme gravity and the individual circumstances of the

¹¹⁴ Hola, Bijleveld and Smeulers assert that at the ICTR the legal label is perceived only as the starting point for the sentence consideration. This is because of the failure of the ICTR and the ICTY to recognize the hierarchical nature of offences. (See Barbara Hola and Catrien Bijleveld and Alette Smeulers, ‘Punishment for Genocide - Exploratory Analysis of ICTR Sentencing’ (2011) 11 ICLR 745, 752.

¹¹⁵ *ibid* 750, 752.

¹¹⁶ Hola, Smeulers and Bijleveld (n 69) 422.

offence. Although there are a limited number of aggravating factors that apply to the gravity of the offence (5), and an even more limited number that apply to the individual circumstances of the offender (2), if the court is considering imposing a life sentence, then the prevalence of such aggravating factors should not limit that decision. The studies by Hola, Smeulers and Bijleveld¹¹⁷ and by Pruitt¹¹⁸ indicate that factors such as abuse of position of authority, defenceless victims and number of victims are prominent as aggravating factors in the decisions of the ICTY and the ICTR.¹¹⁹ Since many of these offences are committed by persons who have authority within the state or part of the state that is in conflict, that the victims are generally numerous, and that many are defenceless, it is not surprising that the percentages for those factors were relatively high at both the ICTY and the ICTR. In view of the types of cases that are presently before the ICC, involving persons in authority, with allegations of many victims, most of whom would be considered defenceless, the aggravating criteria necessary to warrant consideration of a life sentence will be available in many cases under consideration. The question and issue will be how the court will determine proportionality in such cases. Hierarchy of offences must play a major role in that determination.

Section 3 The Fine

The criteria for the imposition of a fine are set out in Article 78 of the Rome Statute and Rules 145 and 146 of the Rules of Procedure and Evidence. As noted in chapter 2, while Article 77 lists the possible penalties that could be imposed by the ICC, Article 78 focuses on the sentence. In so doing, it states that the court shall take into

¹¹⁷ ibid.

¹¹⁸ (n 84).

¹¹⁹ Hola, Smeulers and Bijleveld found that abuse of position of authority was found to be an aggravating factor in 58 % of cases at the ICTY and 77.5 % of cases at the ICTR (n 69) 435. Pruitt, in a study conducted with a greater number of cases, found that the same factor was an aggravating factor in 61.7 % of the cases at the ICTR. (n 99) 158. Hola, Smeulers and Bijleveld found that special vulnerability of victims were found in 46% of cases at the ICTY (n 69) 435, and Pruitt found only 6.7 % in this category at the ICTR (n 99) 158. However, Hola, Smeulers and Bijleveld found that number of victims as an aggravating factor was noted in 25% of cases at the ICTY and 27.5 % at the ICTR (n 69) 435. Pruitt found that this category was also high, at 26.7 % (n 99) 158.

account factors such as the gravity of the offence and the individual circumstances of the offender. Reference to the sentence, rather than the penalty itself confirms that the ICC should take into account the gravity of the offence and the individual circumstances of the offender when considering the imposition of a fine. This position is corroborated by the opening words of Rule 145(1) of the Rules of Procedure and Evidence. The interplay of Article 77, Article 78 and Rule 145 suggests that all the relevant provisions relating to the determination of a sentence of imprisonment also apply to the determination of a fine.

Rule 146 begins by stating that in determining if a fine should be imposed and the quantum of that fine ‘the Court shall determine whether imprisonment is a sufficient penalty’. While this phrase is not explained, the words in their ordinary meaning would encapsulate all the relevant criteria that apply to considerations for the imposition of a term of imprisonment. It would also encapsulate the justifications for the imposition of a sentence for the particular convicted person. The court would have to consider, within the context of the expressive principle of sentencing, whether the imposition of a fine would, in addition to the term of imprisonment imposed, be necessary to reflect what the international community holds sacred, and what it abhors. That is a most difficult task for the ICC, as theoretically issues of profit from the illegal activity can be addressed through the forfeiture provisions of the Rome Statute. However, where these forfeiture provisions cannot be applied, due to an inability to discover and/or seize various assets, then a fine in addition to a period of imprisonment may be an appropriate remedy.

Once a decision is made to include a fine within the penalty to be imposed, there is particular guidance on how that is to be determined. Rule 146(1) of the Rules of Procedure and Evidence states that the Court shall take into account factors, ‘in addition to the factors referred to in rule 145. . . .’. The Court is provided with some particular guidance in the Rules with respect to the determination of the quantum of the fine, and there is no interpretation needed of that criteria.¹²⁰ Since there are no previous examples

¹²⁰ The consideration include the financial capacity of the convicted person (Rule 146(1)); any orders for forfeiture and reparations (Rule 146(1); the damage and injuries cause and the proportionate gains; and the monetary limit of the fine or fines (Rule 146(2).

of the imposition of a fine for violations of international criminal law, the Court, within the broad parameters of the Rules of Procedure and Evidence, can, from a technical perspective, craft whatever financial penalty it considers appropriate.¹²¹

Section 4 Other Considerations

There are two other issues that the ICC can consider during the determination of the appropriate sentence. One is forfeiture of proceeds, property or assets of crime (Article 77(2)(b)) and the other is reparations to victims (Article 75). The first is set within the Penalties section of Part 7 of the Rome Statute, while the second is within the Trial Section of Part 6 of the Rome Statute. This is to distinguish penalties from reparations to victims, as the latter should not be considered as part of the penalty imposed. Neither of these two provisions rely on the justifications of punishment in order to apply. Each are independent provisions that must be interpreted within their own words in order to be applicable in the sentencing process in the Rome Statute.

a. Forfeiture of proceeds, property and assets of crime

The problems with the interpretation of the words used in Article 77(2)(b) to describe the types of items which could be the subject of forfeiture have been noted in chapter 2.¹²² The key issue is the distinction between the words ‘proceeds’, ‘property’,

¹²¹ At para 106 of the *Thomas Lubanga Dyilo* sentencing decision the trial court did consider the imposition of a fine, but concluded that because there was no evidence of any assets of the convicted person it declined to impose such a fine. (See *Prosecutor v Thomas Lubanga Dyilo* (Trial Chamber I) ICC-01/04-01/06-2901 (10 July 2012). And, at para 169 of the Germain Katanga sentencing decision the Trial Chamber did consider whether a fine should be imposed. However due to the impecunious nature of Mr. Katanga, the court declined to impose any fine. (See *Prosecutor v Germain Katanga* (Trial Chamber II) ICC-01/04-01/07-3484-tENG (23 May 2014).

¹²² Manuel Galvis Martinez, ‘Forfeiture of Assets at the International Criminal Court’ (2014) 12 JICJ 193 has also addressed the difficulties with the interpretation of various provisions of the forfeiture provisions in the Rome Statue, and has noted the lack of enthusiasm for the use of such provisions. Despite forfeiture provisions available at the IMT, the ICTY, the ICTR, the SCSL and the Extraordinary Chambers in Cambodia Martinez notes there is only one example in international criminal law where the forfeiture provision was used. In the case of *US v Krupp* the US Military Tribunal Nuremberg ordered forfeiture of all the Krupp assets. This decision was overturned by the High Commissioner. (See p 194-195).

and ‘assets’ of crime. Because they are distinct terms the meaning to be ascribed to each term should necessarily be different. As noted in chapter 2, there is nothing in the Rome Statute or in the Rules of Procedure and Evidence to distinguish these terms from each other.

While the factors to be considered for the imposition of a fine include the gravity of the offence and the degree of responsibility of the offender, specifically addressed in Rule 145 and Rule 146, those factors are not required to be considered when the issue of forfeiture of proceeds, property and assets are being considered. Rather, the approach is more clinical in nature. It is that if the convicted person profited from the crimes for which a conviction was entered, then if any assets are ascertainable, the court could order forfeiture of those assets. As again noted in chapter 2, Rule 147 of the Rules of Procedure and Evidence addresses in only a general way the issue of forfeiture of proceeds, property and assets of crime.

b. Reparations to victims

Article 75 addresses the issue of reparations to victims of crime. The court is given authority to make an order against a person convicted by the court specifying the appropriate reparations to victims of that person’s crimes.¹²³ As stated in chapter 2, to order reparations the court is required to develop principles relating to those reparations, including principles relating to restitution, compensation and rehabilitation. On March 3, 2015 the Appeals Chamber set out five principles to be considered when the issue of reparations to victims are to be considered.¹²⁴ As this part of the process, although at the sentencing stage, is not included in the sentencing provisions, the justifications for punishment and the particular processes to determine the sentence do not apply. From a legislative perspective, it is a stand alone process and the manner of its implementation is

¹²³ Article 75(2).

¹²⁴ *Prosecutor v Thomas Lubanga Dyilo* (Appeals Chamber) ICC-01/04-01/06-3129 (A A2 A3) (3 March 2015).

set out in separate sections of the Rome Statute and the Rules of Procedure and Evidence. Although important for the overall approach of the ICC to matters within its jurisdiction, it is also a separate clinical approach which the court must take to the reparations issue.

There is a debate among academic commentators and others with respect to the breath of the approach to the concept of reparation to victims. Hoyle and Ullrich have in particular noted the debate between those who characterize reparations being limited to mere proof of damages and assessment of those damages for compensation, and those who see reparations as broader in scope, embracing within its parameters the concept of transformative justice.¹²⁵ They note in particular a debate between the Trust Fund for Victims (TFV) and the Registry of the ICC with respect to the role the ICC should take to the issue of reparations.¹²⁶ The TFV had proposed that part of reparations should include supporting programs that could achieve broader societal transformations.¹²⁷ Hoyle and Ullrich suggest that a narrower, more clinical approach to reparations may characterize the breath of reparations. Judge Hans-Peter Kaul of the ICC is quoted by Hoyle and Ullrich as stating with respect to transformative justice approaches:

*I am not sure whether I entirely understand this idea of transformative reparations. The task to make our societies fairer, more just and less discriminatory is an eternal task which has to be addressed by the communities and the political systems of the world. To expect that a society can be transformed through the necessarily limited reparations system of the International Criminal Court is, in my view, just a little bit too much.*¹²⁸

It is suspected that the approach in the near term will focus on proof of damages, and an assessment of appropriate compensation, either monetary or otherwise, as set out in the Rules and the decision of the court in the case of *Thomas Lubanga Dyilo*.¹²⁹ It may

¹²⁵ Carolyn Hoyle and Leila Ullrich, ‘New Court, New Justice? The Evolution of Justice for Victims at Domestic Courts and at the International Criminal Court’ (2014) 12 JICJ 681, in particular 692-699.

¹²⁶ ibid.

¹²⁷ ibid 693.

¹²⁸ ibid 693-694.

be left to the domestic state to address broader transformative justice approaches to reparations for victims.¹³⁰

Section 5 Conclusion

The purpose of punishment is contextual. What theory of punishment is appropriate for the ICTY the ICTR and the SCSL may not be the appropriate reason for punishment at the ICC. Building on the analysis in chapter 5, the argument in this chapter is that the expressive theory of punishment best fits within the broad purposes proposed by the framers of the Rome Statute, and best fits with what the framers proposed as the effect the implementation of the Rome Statute should have on the international community. This chapter proposes that there is a hierarchical structure to the offences within the jurisdiction of the ICC, and that it is crucial that the ICC recognize this hierarchical structure in setting out a sentencing structure for the court. This hierarchical structure is focused on the ‘in abstracto’ aspects of the offences, recognizing that the *mens rea* of the chapeau of each offence reflects the seriousness of each of the offence types. This hierarchy reflects the expressive aspect of law, and should be reflected in an expressive principle of sentencing for such offences. Within the hierarchical structure recognized by the three offences, the particular circumstances of each offence, the ‘in concreto’ aspects of the offence, can then be considered to establish the appropriate sentence. Each sentence, however, must be influenced by the purpose of sentencing - to express the international communities’ abhorrence of the crime or crimes perpetrated, as well as reflect the factors that influence the gravity of the offence and the degree of responsibility of the offender. The gravity of the offence will play a prominent role in the determination of the degree of punishment imposed, while the individual circumstances of the offender will play a much lesser role in the process. The issue is one of proportionality, but a proportionality based not on retribution, but on the particular

¹²⁹ *Prosecutor v Thomas Lubanga Dyilo* (Trial Chamber I) ICC-01/04-01/06-2904 (7 August 2012).

¹³⁰ Hoyle and Ullrich appear to question whether the adoption of transformative justice approaches are better undertaken by the domestic state rather than an international judicial and administrative institution (see n 125) 699.

expression of the abhorrence of the particular crimes within the context and framework of the Rome Statute. Through time an appropriate grid of sentencing ranges can be developed by the ICC based on the expressive principle of sentencing, the hierarchy of offences, and the gravity of the offences and to a much lesser degree the individual circumstances of the offender. What this approach will do is provide the court and the international community with a focus and purpose at the sentencing stage of the trial process.

Chapter 7

Conclusion

As of March 31, 2016 the ICC has released three sentencing decisions.¹ In each of these decisions strict adherence to the wording of Article 78 of the Rome Statute and Rule 145 of the Rules of Procedure and Evidence has been the norm. The court has provided little interpretation of the sentencing provisions of the Rome Statute or the Rules of Procedure and Evidence in these three decisions. Nor has the court questioned the sufficiency of the sentencing provisions provided in the Rome Statute. Adherence to the mechanics of the provisions on sentencing has punctuated the approach to sentencing in the cases considered.

The purpose of this thesis was to address the sufficiency of the sentencing provisions in the Rome Statute, to highlight the deficiencies, and to offer a different approach to sentencing for the ICC. While some writers in the area of international criminal law have given some consideration to sentencing issues at the ICC, no one has addressed the issue in any detail. The thesis concludes that many of the perceived deficiencies in the wording of the Rome Statute and the Rules of Procedure and Evidence with respect to sentencing can be addressed through the use of the interpretative provisions of the VCLT. However, the issue of justifications for the imposition of a sentence is not addressed in the Statute or Rules. Reliance on the tradition retributive and utilitarian principles of sentencing in international criminal law are found to be wanting. It is argued in this thesis that the adoption of the expressive principle of sentencing as the main principle to be utilized by the ICC can provide the foundation for an integrated sentence process utilizing the provisions of the Rome Statute and the Rules of Procedure and Evidence.

¹ The ICC has released two sentencing decisions in the case of the *Prosecutor v Thomas Lubanga Dyilo*, the first from the Trial Chamber and the second from the Appeals Chamber. (See *Prosecutor v Thomas Lubanga Dyilo* (Trial Chamber I) ICC-01/04-01/06-2901 (10 July 2012); *Prosecutor v Thomas Lubanga Dyilo* (Appeals Chamber) ICC-01/04-01/06-3122 A 4 A6 (1 December 2014). It has released one decision in the case of *Prosecutor v Germain Katanga* (Trial Chamber II) ICC-01/04-01/07-3484-tENG (23 May 2014).

Section 1 The Two Principal Questions

This thesis approached the issue by focusing on two principal questions. The first is whether within the Rome Statute and the Rules of Procedure and Evidence there is sufficient statutory guidance for the imposition of appropriate sentences for those convicted of any of the crimes within the jurisdiction of the court. Concluding that there are deficiencies in the statutory provisions of the Rome Statute and the Rules of Procedure and Evidence that deal with sentencing, in particular with respect to the justifications for sentencing, the second of the research questions asks whether because of the strictures placed on the court by Article 21, can justifications for sentencing be even considered by the ICC at the sentencing stage, if they can what should they be, and can they interface with the existing provisions of the Rome Statute and the Rules of Procedure and Evidence to form an integrated sentencing process for the court? In answering these two questions, the thesis addresses four main areas. The first is the role which Article 21 of the Rome Statute plays in the determination of the law applicable to any issue before the court, including that of sentencing. This includes not only the existing legal concepts provided in the Rome Statute itself, but also the process by which other factors can be legitimately considered at the sentencing stage by the ICC. The second area of focus is on the traditional principles of sentence and the recognition that the traditional principles of sentencing are neither effective nor appropriate for application to sentencing determinations at the ICC. This is despite the fact that they have been invoked by other international tribunals to justify the imposition of sentences for those convicted of international crimes. The third area focuses on the importance attached to the need for sentencing in international criminal law to be reflective of the purpose of the institution of which it is a part, and be structured to emphasize the importance of that purpose. It advocates for a new ‘internationalized’ approach to sentencing at the ICC, an approach reflective of what the framers of the ICC agreed should be accomplished by the development of such a court. The final area is the development of an integrated sentencing structure for the ICC, based on the adoption of the expressive principle of

sentencing, and utilizing the provisions of the Rome Statute and the Rules of Procedure and Evidence.

a. The importance of Article 21

The important role played by Article 21 of the Rome Statute is recognized and addressed in Chapters 2 and 3 of the thesis. Article 21 provides the ICC with a method which it must follow in determining the law that is to apply to any matter before the court. Article 21 sets out a three stage hierarchical process to determine the applicable law, including sentencing. The court must adhere to this hierarchical process. It cannot skip a stage, and must exhaust stage one before it can proceed to stages two and three of that process. While providing a clear path to follow in addressing legal issues, the strictures provided by Article 21 limit the court's ability to consider decisions of other international tribunals, as well as any case law from domestic jurisdictions that might address the same or similar legal points. Where the applicable law cannot be determined through the application of stage one, the court must proceed to stage two - to determine if there is anything in applicable treaties or the principles and rules of international law that can assist the court in the determination of the law to apply. The analysis of treaties is not problematic, but the determination of rules and principles of international law has been determined to refer to customary international law. In the field of international criminal law this is especially problematic, mainly because as a new area of international law, customary rules have not as yet been developed. Finally if this stage is not helpful, the court can apply, if they exist, general principles of law on the issue at hand found in the national laws of legal systems of the world. This too is a difficult analysis as it requires a comparative law analysis of the major legal systems of the world to determine this issue. The ICC has utilized stage one of Article 21, and has also concluded that the principles and rules of international law means customary international law. The ICC has not as yet addressed the process to be undertaken in stage 3 of the interpretative process. The analysis in the two chapters proposes an approach to both stage two and three of Article 21, and applies this interpretation in reaching some conclusions with respect to sentencing provisions of the Rome Statute. However, they are difficult provisions, mainly

because of their lack of specificity. The analysis requires the court at times to be innovative in its approach to the interpretation of the wording of Article 21 if it wishes to provide a solution to the application of some law to an issue before the court.

Using the strictures set out in Article 21 of the Rome Statute, chapter 2 analyzes the particular provisions of the Rome Statute and the Rules of Procedure and Evidence that pertain to sentencing, noting that the wording in Articles 77 and 78 of the Rome Statute and Rule 145 of the Rules of Procedure and Evidence are, on their face, ambiguous and uncertain. However, when the interpretative provisions of Articles 31 and 32 of the VCLT are applied, meaning can be ascribed to the words of Article 77 and 78 and Rule 145. Reading the words in their plain meaning and with each other, a definite meaning can be ascribed to the words that provide general guidance to the court on sentencing. Particular reference is made to the factors for consideration for the imposition of life imprisonment, the fine, restitution and reparations to victims. While some of the words pertaining in particular to life imprisonment and restitution are difficult of interpretation, the majority of the provisions, utilizing the interpretative provisions of the VCLT, are of sufficient particularity that meaning can be provided for them. In that way they can provide guidance to the court for the imposition of an appropriate sentence. What is missing from these provisions is any reference to the justifications of punishment at the sentencing stage. To determine the justifications for punishment the ICC must utilize the other two provisions of Article 21 to attempt to ascertain the justifications of punishment to apply for the ICC. It must look outside the parameters of the wording of the Rome Statute to fulfill that goal.

Chapter 3 addresses the approach the ICC can take to address stages two and three of the interpretative process for sentencing. As there is nothing in international treaties or in customary international law that reference justifications of punishment, the ICC has to turn to general principles of law derived from national laws of legal systems of the world.

This thesis proposes that the approach utilized by Raimondo² can be applied by the ICC to determine if there are principles of law common to legal systems of the world that can be applied to sentencing. Utilizing the vertical and horizontal comparative law approach proposed by Raimondo,³ a sample of countries from the common law and civil law traditions suggest that the general principle that the ICC can generate from such an analysis is that ‘principles of sentencing’ for international crimes are essential to guide the imposition of penalties for those who commit such international crimes. While it is recognized that various principles of sentencing are given priority depending on the approach to sentencing adopted by each country, this revelation supports rather than challenges the general principle suggested in this analysis. This thesis recognizes that the ICC will need to use some innovation to reach this conclusion. However, the ICC has, on occasion done so before, and it is a conclusion that is within the general boundaries of an Article 21(1)(c) analysis.

b. The application of the traditional principles of sentencing at the ICC

Once the hurdles of Article 21 are overcome, the second area addressed is an analysis of the application of the traditional principles of sentencing to those convicted of offences within the jurisdiction of the ICC. The traditional principles of sentencing are retribution and the utilitarian principles of deterrence, incapacitation and rehabilitation. Chapter 4 of the thesis analyzes the retributive and utilitarian justifications of punishment and assesses their effectiveness in domestic law and their general applicability to international criminal law. The analysis demonstrates that the retributive justification for sentencing, based on the desert principle, requires that the punishment must reflect the gravity of the offence and the responsibility of the offender. It argues that the three traditional types of desert - vengeful desert, deontological desert and empirical desert are not suitable for sentencing for offences in international criminal law. It proposes that

² Fabian Raimondo, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals* (Martinus Nijhoff 2008).

³ ibid 45-50.

sentencing based on vengeful desert, which adopts the *lex talionis* principle, can never equal the harm caused by many of the international crimes within the jurisdiction of the ICC. Deontological desert suffers from a lack of consensus about the moral basis for retributive justice. And, empirical desert, based on a community's ranking of crimes, is subject to change when other utilitarian factors are introduced into the equation. The more stringent cardinal proportionality approach, proposed by Ohlin⁴ is also problematic, principally because it fails to address proportionality of offences, and fails to acknowledge the diverse concerns of victims, some of which could be addressed at the sentencing phase. The analysis also demonstrates that the utilitarian justifications for sentencing - deterrence, rehabilitation and incapacitation - cannot be shown to be effective justifications for sentencing for those international crimes within the jurisdiction of the ICC. There is no empirical evidence to justify the use of deterrence, either general or specific for either domestic or international crimes, and no empirical evidence to justify reliance on the principle of rehabilitation. And incapacitation is generally not of concern for the type of offender who is the subject of prosecution and sentencing at the ICC, as the chances of such persons being in positions of authority in the future is highly unlikely. The conclusion reached is that because of the problems identified with the application of the traditional justifications of sentencing to international crimes, the ICC must develop a different approach to sentencing, an approach based on the purpose of international criminal law, and an approach specific to the tribunal exercising jurisdiction.

c. An ‘internationalized’ approach to sentencing at the ICC

A number of writers in the field of international criminal law have recognized problems associated with the carte blanche transfer of the domestic principles of sentencing to the international sphere.⁵ These writers have called for a new approach to

⁴ Jens Ohlin, 'Towards a Unique Theory of International Criminal Sentencing' in Goran Sluiter and Sergey Valisiev (eds), *International Criminal Procedure: Towards a Coherent Body of Law* (Cameron May 2009) 373.

sentencing in international criminal law and in chapter 5 a review of their various positions on sentencing in international criminal law is undertaken. It is argued in this chapter that a synthesis of these various positions leads to the conclusion that the approach to sentencing in international criminal law should reflect the purpose or purposes of the international criminal law of which it is a part, and that the principles of sentencing developed should reflect those purposes.⁶ A number of writers have called for a new ‘internationalized’ approach to sentencing in international criminal law.⁷ The difficulty is in determining what is the purpose or purposes of the particular international tribunal that is the focus of inquiry. While punishment in domestic law can be ‘appraised in terms of the objectives of a single community’⁸ the existence of some uniform international community with a shared sense of values and interests toward which punishment can be directed is, as Sloane notes, ‘notoriously problematic and ambiguous’.⁹ Consensus of approach to a particular issue is not the norm. However, since it is the signatories to the Rome Statute who have accepted the statute, it is argued in this thesis that, to the extent that such states have agreed on the purpose and function of the ICC, such can provide the framework for the acceptance of principles of sentencing that reflect that purpose and function.

⁵ See Jan Nemitz, ‘The Law of Sentencing in International Criminal Law: The Purposes of Sentencing and the Applicable Method for the Determination of the Sentence’ (2001) 4 Y Int’l H L 87; Immi Tallgren, ‘The Sensibility and Sense of International Criminal Law’ (2002) 13 EJIL 229; Mariam Aukerman ‘Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice’ (2002) 15 Harv Hum Rts J 39; Mark Drumbl, *Atrocity, Punishment, and International Law* (CUP 2007); Robert Sloane, ‘The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law’ (2007) 43 Stan J Int’l L 39; Deidre Golash, ‘The Justification of Punishment in the International Context’ in Larry May and Zachary Hoskins (eds), *International Criminal Law and Philosophy* (CUP 2010) 201.

⁶ This is the concept of context advocated by Ralph Henhan, and the purposive approach to sentencing in international criminal law advocated by Robert Sloane and to some degree by Margaret de Guzman. (See Ralph Henham, *Punishment and Process in International Criminal Trials* (Ashgate 2005); Sloane (n 5); Margaret de Guzman, ‘Proportionate Sentencing at the International Criminal Court’ (May 27, 2014) Temple University Legal Studies Research Paper Series (Research Paper No 2014-15)).

⁷ See Aukerman (n 5); Drumbl (n 5); Sloane (n 5).

⁸ Sloane (n 5) 48.

⁹ ibid 53.

The focus of the second half of chapter 5 is therefore on the development of the Rome Statute as one way of discovering what the framers of the statute wished to accomplish. The analysis recognizes that there was a reluctance among states to agree to any theoretical or philosophical reason for the development of an international criminal court. This is reflected in the final agreement for the inclusion of offence types within the court's jurisdiction. Such was based on a very generic conclusion that the offences to be included within the court's jurisdiction were the most serious offences known to mankind which affect the very foundation of human society. The development of a preamble in the final days of the negotiation process also assists to unravel what the framers saw as the function of the court.¹⁰ That was to develop a court that was independent and free of political influence, encompassing the most serious crimes that threaten the peace and security of all, recognizing that such crimes must not go unpunished, no matter the status of the perpetrator of such crimes. While these comments are again generic in nature, they do provide some understanding of the purpose and function of the ICC. The sentencing process that needs to be developed by the ICC must be reflective of those generic purposes, and the principles of sentence adopted by the ICC must also be reflective of those noted purposes. This thesis proposes that the expressive principle of sentencing, coupled with the procedural elements in Article 78 and Rule 145 of the Rules of Procedure and Evidence can be utilized to develop a sentencing framework that is reflective of the purposes that the framers of the Rome Statute envisioned.

d. The development of an integrated sentencing framework at the ICC

Chapter 6 of the Rome Statute argues that the expressive theory of punishment best reflects the general purpose for the development of the ICC. While it is recognized that there is not a single uniform characterization of this theory, it is argued in this chapter that the essence of the expressive theory of punishment is that punishment is not

¹⁰ There was a very short and preliminary preamble proposed in a 1994 draft of a statute for an international criminal court, but this short preamble was substantially revamped and enhanced in the final days of negotiations at Rome.

just valuable in itself, in the sense that it is an ‘emphatic condemnation of the crime committed’, but it also ‘vindicates the law which has been broken, reaffirms the right which has been violated, and demonstrates that the misdeed was indeed a crime’.¹¹ By emphasizing the importance of these criteria in the sentencing context in international criminal law, the court expresses the international community’s abhorrence for these types of offences, and emphatically states that such crimes will not be tolerated. It affirms what it esteems, and as Amann has noted, it condemns what it abhors.¹² In view of the failure of the other principles of sentencing to accomplish what they claim within the international context, the application of the expressive theory to sentencing in international criminal law provides the court with a principle upon which it can rely to explain its sentencing rationale. The principle is consistent with the sentencing of the most serious offences which affect the very foundation of human society. It is also in accord and is reflective of the focus of the preamble to the Rome Statute.

The second issue addressed in this chapter is how the ICC can develop a sentencing structure which is reflective of the overriding purpose of sentencing, and which integrates that principle with the particular focus of Article 78 and Rule 145 of the Rules of Procedure and Evidence. What is proposed is that emphasis be placed on the hierarchy of offence types within the categorization of offences in the Rome Statute. Focus on the chapeau of each of the three present offences within its jurisdiction will set this hierarchical structure. The focus on the ‘*in abstracto*’ aspects of the offences places genocide on the top of the hierarchical structure, with crimes against humanity next, and war crimes next to that. The court must shed itself of the equal severity position taken by the ICTY and the ICTR on this issue, and set a sentencing matrix based on this hierarchical structure. Once that recognition is in place, the court can then, in accordance with Article 78 and Rule 145 of the Rules of Procedure and Evidence, consider the ‘*in concreto*’ factors of a particular case to determine the appropriate sentence for each particular crime for which a person has been convicted. This consideration is not only for

¹¹ Igor Primoratz, ‘Punishment as Language’ (1989) 64 *Philosophy* 187, 196.

¹² Diane Amann, ‘Group Mentality, Expressivism and Genocide’ (2002) 2 *ICLR* 93.

a sentence of imprisonment but also for the possible imposition of a fine. By focusing on the expressive principle of sentencing, and using the hierarchy of offences as a general umbrella, the particular ‘*in concreto*’ factors can be addressed by the court in any sentencing decision. This would provide a consistent principled approach to sentencing, while allowing the particulars of individual cases to be considered in the sentencing process. This focus would not preclude the court from also considering the imposition of forfeiture of the proceeds, property and assets of crime and reparation to victims at the sentencing stage. The only difference is that within the statutory framework provided by the Rome Statute, these issues do not require consideration of principles of sentencing, nor particular factors of the offence or the convicted person. A very clinical analysis can be made of the factors for consideration to address these two issues.

Section 2 The Future of Sentencing at the ICC

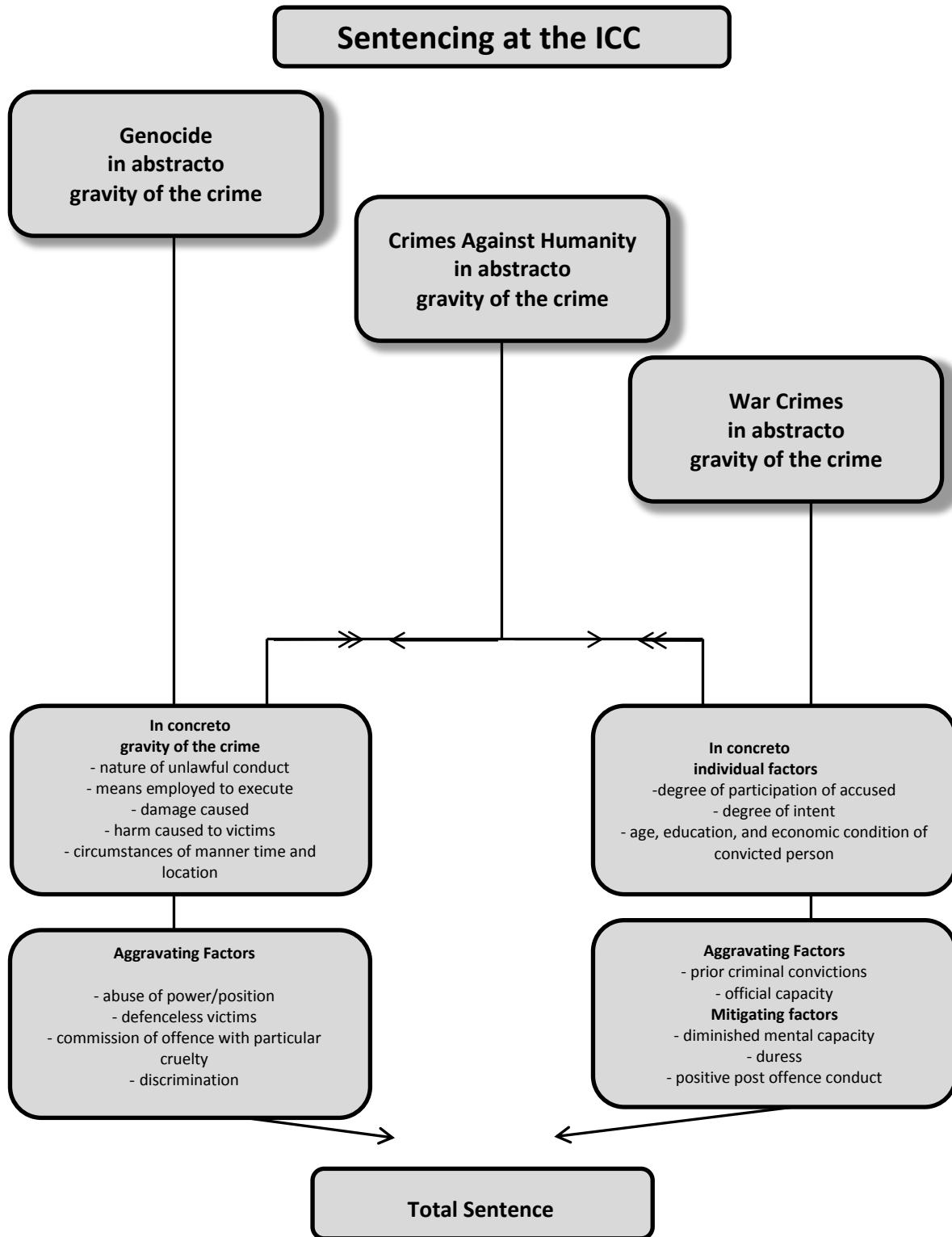
No sentencing process in international criminal law will satisfy all parties interested in the outcome of charges and sentences for those convicted of such heinous crimes. Yet, some measure of legitimacy is necessary for the integrity of the ICC and the integrity of the process by which sentences are imposed. The approach suggested here can assist. It can provide a principle for the court to rely on to anchor its sentencing decisions. It does not require the court to espouse principles that are known to be problematic and are known to cause some to specifically deny their applicability to international criminal law. It can also allow for the offence type to play a significant role in the determination of the quantum of sentence, and also allow individual factors of the offence and the offender to intersect to develop a proper sentencing process.¹³ In the longer term it can also allow the court to develop a consistent sentencing matrix based on the various factors under consideration. That sentencing matrix will provide guidance to the court within the parameters set by the sentencing regime proposed. If there are no consistent principles adopted and if the international courts continue to ignore the reality of hierarchy of offence types, sentencing at the ICC will continue to be plagued by

¹³ While this thesis has not addressed the offence of ‘aggression’, as such offence has yet to be incorporated within the jurisdiction of the ICC, the position annunciated here would also apply equally to that offence.

adherence to local conditions and local considerations without any recognition of an overall sentencing philosophy. This in the end will cause difficulties for the legitimacy of the entire process. As has been set out in the beginning chapter of this thesis, punishment is the public face of the justice system, and the perception of how and why punishment is dispensed is important for the sustained legitimacy of that system. A proper and set sentencing process can assist in developing and maintaining the legitimacy of the international criminal justice system established at the ICC.

Appendix I

Graphic Illustration of Proposed Sentencing at the ICC



Appendix II

An Approach to Sentencing at the ICC

Chapter 2 has set out the general approach that is taken to the imposition of sentence in criminal law. The case of *Prosecutor v Thomas Lubanga Dyilo* will be used to illustrate the approach to sentencing utilizing the expressive principle of sentencing.

Thomas Lubanga Dyilo

Thomas Lubanga Dyilo was found guilty as a co-perpetrator of war crimes by conscripting and enlisting children under the age of 15 years into the UPC/FPLC and using them to participate actively in the Ituri region of the Democratic Republic of Congo (DRC), contrary to section 8(2)(e)(vii) of the Rome Statute. In determining the sentence to be imposed on Mr. Lubanga Dyilo the following approach should be utilized.

A. Step 1 What is the purpose of the ICC

The first substantive analysis that the court must undertake is to express what is the focus and purpose of the ICC. This requires the following:

-historical background to the development of the ICC, highlighting the reasons for its development and the reasons for its selection of the various offence types within the jurisdiction of the ICC.

- analysis of the Preamble of the Rome Statute and what aspects of the Preamble best emphasize the purpose of the ICC.

-emphasis on those crimes that threaten the peace and security and well-being of the world, that such crimes should not go unpunished, that those who violate these international laws will be sanctioned.

-emphasize that its purpose is also to protect the broad standards that are enshrined in the Charter of the United Nations as referenced in the Preamble to the Rome Statute, and to demonstrate to the world community that there is an institution, the ICC, which adheres to basic principles of humanitarian law, and will not tolerate violations of these laws.

B. Step 2 The Justification of Sentencing

It must be recognized and acknowledged by the court that while past international tribunals have stated that the goals of retribution and deterrence as the main focus of sentencing for international crimes, there is little to no analysis why these justifications or goals of sentencing are appropriate.

It must be emphasized that the purposes of sentence must be reflective of the purposes of the ICC as set out in its history and in its Preamble.

It must be emphasized that the focus is international in scope, and that the purpose of sentencing must focus on expressing the concern of the international community for the violation of these laws.

It must be emphasized that the expressive theory of punishment, with its emphasis on the symbolic significance of both law and punishment can best encapsulate the purposes of the ICC and the reasons that punishment for violations of the three offences set out in the Rome Statute should be imposed.

C. Step 3 The Nature of the Offence

It must be emphasized that there is a hierarchy of offence types within the Rome Statute, based on the chapeau of each of the three offences. War crimes, for which Mr. Lubanga has been convicted is at the third level of the three level hierarchical structure. And, within the types of offences included within the broad category of war crimes, his crimes fall at the lower middle of such crimes. It must be emphasized that the sentence must express the particular nature of the offence, in that the recruiting and use of child soldiers affects not only the children at issue but the entire community from which they come. It destroys the social fabric of the community of which they were and are a part.

D Step 4 The Particular Factors of the Offence

1. Gravity of the crime

This crime involved the conscripting and use of vulnerable children in hostile and violent situations. They were put in dangerous situations, subject to injury and to death. These children need to be protected, not used by ambitious military leaders such as Mr. Lubanga. Because of their exposure to the militaristic life, many of these children have abused drugs and alcohol, suffer from depression and dissociation and have attempted suicide. Mr. Lubanga's direct participation in the recruitment process was limited, and can be broadly

construed as contributing to a common plan. These factors all contribute to the gravity of the crime.

2. The Individual Circumstances of the Accused

He is a well-educated relatively young man of 41 years, who would have understood the circumstances of the use of child soldiers and the potential effects upon them.

3. Aggravating and Mitigating Factors

Aggravating factors include:

- the circumstances under which the children were kept in the camps, including use of whips and canes in the training camps and the detention of children in a covered trench.

-mitigating factors include the desire of Mr. Lubanga to bring peace to the Ituri region, and his attempts to secure peaceful solutions to the conflict and his cooperation with the court.

E. Step Five The Sentence

Impose sentence emphasizing the purposes of the ICC, what sentencing is to express, and what particular factors in this case need emphasis. Consider a fine , and reparations to victims, or at least allow the latter process to be addressed in subsequent hearings.

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