

SENTENCING POLICIES IN WAR CRIMES

Justin Jos*

“International justice is central to foreign policy. It is essential for securing the rights of individuals and states, and for securing peace and reconciliation.”

- Written statement to Parliament by Justice Minister Jeremy Wright following a request from the Special Court for Sierra Leone (SCSL) convicting former Liberian President Taylor.

I. UNDERSTANDING THE SENTENCING POLICIES VIS-À-VIS AD HOC TRIBUNALS.

The International Criminal Tribunal for the former Yugoslavia (hereinafter ICTY) was created by the United Nations Security Council (hereinafter UNSC) in 1993 and was mandated to prosecute persons responsible for genocide, crimes against humanity, and war crimes committed on the territory of the former Yugoslavia since 1991. The territory witnessed multi ethnic violence among the Croats, Serbs, Bosnian Muslims, and Albanians that occurred in Bosnia-Herzegovina, Kosovo and Croatia resulting into death of approximately 2,50,000 individuals. The International Criminal Tribunal for Rwanda (hereinafter ICTR) was established with the aim to cover crimes committed in Rwanda in 1994, when an extremist government comprised of members of Rwanda's Hutu ethnic group coordinated the genocide of the minority group of the country namely the Tutsi's. The idea of sentencing differed in matters of ICTR's jurisdiction being time limited to 1994, the ICTY's jurisdiction having no ending date. This permits ICTY to have a larger field of jurisdiction in matters of *Ratione Temporis*. To understand the sentencing policies we first need to identify the difference between genocide, crimes against humanity, and war crimes.⁴⁸

Genocide is defined as “any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; [and] forcibly transferring children of the group to another group.”⁴⁹ The aim of the Genocide Convention is to prevent the intentional destruction of entire human groups, and the part targeted must be significant enough (substantial) to

* Student, National Law University Odisha, B.B.A LL.B. (Hons.) 4th Year
Robert Cryer and others, *An Introduction To International Criminal Law And Procedure* (2nd edn, Cambridge University Press 2010).

⁴⁹The Convention on the Prevention and Punishment of the Crime of Genocide 1948, Art 2.

have an impact on the group as a whole.⁵⁰ Crimes against humanity, as defined by the Rome Statute of the International Criminal Court Explanatory Memorandum, “are particularly odious offenses in that they constitute a serious attack on human dignity or grave humiliation or a degradation of human beings.”⁵¹ 'War crimes' include grave breaches of the Geneva Conventions and other serious violations of the laws and customs applicable in international armed conflict and in conflicts “not of an international character” listed in the Rome Statute, when they are committed as part of a plan or policy or on a large scale.⁵² These prohibited acts include:

- murder;
- mutilation, cruel treatment and torture;
- taking of hostages;
- intentionally directing attacks against the civilian population;
- intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historical monuments or hospitals;⁵³
- pillaging;
- rape, sexual slavery, forced pregnancy or any other form of sexual violence;
- Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.

The structure of the tribunals allows for the defendants and the Prosecution to appeal from the judgments. Both also can appeal the sentences imposed by the Trial Chambers.⁵⁴ It is noted that many such appeals are still pending which reflects the fact that the tribunals have yet not accomplished a foreseeable configuration of sentencing in cases of war crimes.

⁵⁰Office of the UN Special Adviser on The Prevention Of Genocide (Osag) Analysis Framework, Legal definition of genocide accessed 2 February 2014.

⁵¹Rome Statute of the International Criminal Court, United Nations Treaty Collection, United Nations.

⁵²Rome Statute of the International Criminal Court, Art 8.

⁵³ibid.

⁵⁴Mark A. Drumbl and Kenneth S. Gallant, 'Appeals in the Ad Hoc International Criminal Tribunals: Structure, Procedure, and Recent Cases' [2001] 3 J. App. Practice and Process 589, 610-613.

II. DISCIPLINARY AND PENAL PROVISIONS REGARDING SENTENCING IN WAR CRIMES.

Focusing on ICTR and ICTY we have to appreciate the fact that both the rules of evidence and procedure along with the Statute creating the Tribunals address the sentencing issues. Article 23(1) provides for “The Trial Chambers shall pronounce judgments and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.” and, Article 24 (1) states that “The penalty imposed by the Trial Chamber shall be limited to imprisonment.” In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia. Thus we observe that limitations have also been imposed upon the authority of ICTY therefore working in tandem with sentencing policies. Moreover, the statute has also precluded death penalty which is a reflection of maintenance of human rights in an era of violations of human rights. The trial chambers also have the power to return the property to the rightful owners which have been acquired through coercive measures.⁵⁵ Other than disgorging gains of criminal conduct, the Tribunals cannot order restitution for damage done to personal property.⁵⁶ There are also no provisions for alternative sentences that might form part of a more comprehensive system of restorative justice.⁵⁷

Article 24 (1) of the ICTR statute dictates that in determining the terms of imprisonment the practices of State prisons can be taken into consideration. Article 24(2) states that “In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.” The term used is “should” which implies a mandate of the statute and responds effectively to sanctity of human rights. Article 22 and Article 23 of ICTR statute also provided for identical provisions which formed a common ground for both the statutes. It is to be observed that the general practice of Rwandan prisons impose death penalty and there have been several cases of punishing genocidal criminals with death sentences and thereby implying a different criminal justice mechanism in punishing war criminals. The problem lies herein. If a genocidal criminal is tried at a national court then he cannot be convicted for death penalty in the tribunal even if he deserves the death punishment.⁵⁸ Article 26 of the ICTR Statute stipulates that: “Imprisonment shall be served in Rwanda or any of the States on a list of States which have indicated to the Security Council their willingness to accept convicted persons, as designated by the International Tribunal for Rwanda” whereas Article 27 of the ICTY statute states that “Imprisonment shall be served in a State designated by the International Tribunal from a list of States which have indicated to the Security Council their willingness to accept convicted persons. Such imprisonment shall be in accordance with the applicable law of the State concerned, subject to the

⁵⁵Gerhard Werle, *Principles of International Criminal Law* (2nd edn, 2009).

⁵⁶Austin Lovegrove, *Judicial Decision Making, Sentencing Policy and Numerical Guidance* (1, Springer-Verlag 1989).

⁵⁷*ibid.*

⁵⁸Mohamed Shahabuddeen, *International Criminal Justice At The Yugoslav Tribunal: A Judge's Recollection* (Oxford University Press 2012).

supervision of the International Tribunal.” It is to be noted here that ICTY detainees are at present being tried in several States like Germany, Finland and Norway. This leads us to the fact that the sentencing policy with respect to imprisonment in a particular State jurisdiction is not delineated in a perfect manner and gives imprisoning a wider ambit.

However, we have to take into account the rules of evidence and procedure to understand the technical dimension of working of the Statute. Rule 101 of the ICTY is important as it gives guidance in determining the punishment dimension and scope. It is as follows:

“(A) A convicted person may be sentenced to imprisonment for a term up to and including the remainder of his life.

(B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24(2) of the Statute, as well as such factors as:

- (i) Any aggravating circumstances;*
- (ii) Any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction;*
- (iii) The general practice regarding prison sentences in the courts of the former Yugoslavia;*
- (iv) The extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served, as referred to in Article 10(3) of the Statute.*

(C) The Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently.

(D) The sentence shall be pronounced in public and in the presence of the convicted person, subject to Sub-rule 102(B).

(E) Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending his surrender to the Tribunal or pending trial or appeal.”⁵⁹

Rule 101 of the ICTR Rules essentially is identical, although it adds the following provision to the text set out above: 101 (C) the Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently.⁶⁰ Rule 87(C) of the ICTY Rules explicitly provides that if the Trial Chamber finds the accused guilty on one or more charges contained in the indictment, it shall impose a sentence in respect of each finding of guilt and indicate whether such sentences shall be served consecutively or concurrently, unless it decides to exercise its power to impose a single sentence reflecting the totality of the criminal conduct of the accused.⁶¹ The pronouncement of guilt

⁵⁹ICTY statute, Rule 101.

⁶⁰Austin Lovegrove, *Judicial Decision Making, Sentencing Policy and Numerical Guidance* (1, Springer-Verlag 1989).

⁶¹*Prosecutor v Kunarac et al* ICTY Case No IT -96-23 and IT -96-23/ 1 “Foca” 337.

or innocence of the accused is not held on a separate trial and is collectively resolved in the sentencing phase itself. The decision not to proceed in two separate proceedings might also have been related to an effort to save time and money both of which are sensitive issues for the Tribunals.⁶² The Rome Statute of the ICC, on the other hand, appears to favor a separate sentencing hearing.⁶³ ICC also has the power to punish through imprisonment. The ICC will be able to sentence a convict to up to thirty years imprisonment, with a possibility of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.⁶⁴ Along with such penal measure the ICC may also forfeit any property or assets which are derived from the unswervingly or circuitously from the crime and have authority to order for any form of monetary fine. Fines and forfeitures may be placed in a Trust Fund established by the Court for the benefit of victims and their families.⁶⁵ Therefore it is observed that ICC has an inclination to achieve the objectives of restorative justice which the statutes of ad-hoc tribunals fail to appreciate. Sentences at the ICTY range from 5 to 46 years imprisonment.⁶⁶ Sentences at the ICTR range from 12 years to life imprisonment.⁶⁷

III. JUSTIFYING THE SENTENCING POLICIES THROUGH PREDICTION OF A SENTENCING PATTERN

The main question of deliberation revolves over the fact whether the sentencing decision has a particular pattern? Is the sentencing limited in accordance with the statute? However, the crime committed cannot fully control the sentencing policies in war crimes. The facts and circumstances have to be taken into account for deciding upon the sentencing of the accused. If we carefully observe the sentencing decisions of ICTR and ICTY we will note that ICTR decisions are more severe because they involve a high number of genocide counts and convictions. According to Allison Marston Danner in his thesis on constructing a Hierarchy of Crimes in International Criminal Law Sentencing⁶⁸ and importing a cue from the sentencing practices of the Tribunals sentencing judges have consistently viewed genocide as the crime of crimes.⁶⁹ Whereas the ICTY has issued a maximum sentence of 46 years to a genocide convict (General Radislav Krstic), the ICTR repeatedly has issued life sentences (at times multiple life sentences) to such detainees (for example, Jean Kambanda, Alfred Musema and Jean-Paul Akayesu).⁷⁰

⁶² Andrew N Keller, 'Punishment for Violations of International Criminal Law: An Analysis of Sentencing at the ICTY and ICTR' [2001] 12 Ind Int'l and Comp L Rev 53, 68.

⁶³ Rome Statute of the International Criminal Court, UN Doc A/CONF 183/9 (July 17, 1998), art 76.

⁶⁴ *ibid* art 77(1).

⁶⁵ *ibid* art 79.

⁶⁶ Austin Lovegrove, *Judicial Decision Making, Sentencing Policy and Numerical Guidance* (1, Springer-Verlag 1989).

⁶⁷ *ibid*.

⁶⁸ [2001] 87 Va L Rev 415, 491.

⁶⁹ *Prosecutor v Krstic* ICTY Case No IT -98-33, § 700; *Prosecutor v Kambanda* ICTR Case No. ICTR-97-23 §§ 14± 19.

⁷⁰ Austin Lovegrove, *Judicial Decision Making, Sentencing Policy and Numerical Guidance* (1, Springer-Verlag 1989).

The reason why conviction or charging under genocide draws higher punishment is because the death toll is highest in such a case. The mutilation of bodies along with rampant murder when backed by the sanction of the State creates havoc and imposing of heaviest punishments is justified.⁷¹ The idea of daunting the principal responsibility upon the perpetrators of crime is thereby a valid proposition. Statements that genocide is the crime of crimes deserving of the heaviest punishment are frequent in the Trial Chambers, the entities charged with principal responsibility for sentencing.⁷² However, the Appeals Chambers, despite opportunity to make Statements that genocide formally should be sentenced more severely than other crimes, generally have refrained from doing so explicitly, choosing instead to examine whether the facts of a given case justify the penalty imposed.⁷³ Sentencing for the crimes of genocide may vary from jurisdiction to jurisdiction depending upon the precise conditions of the “crime” along with the “criminal”. The tribunals have repeatedly convicted individuals for genocide in a systematic pattern than they have done for convictions under crimes against humanity. Because of the inherent inconsistency within tribunal sentencing ICTY has prosecuted a broader range of individuals in the command hierarchy. It has held that there is no presumptive distinction between war crimes and crimes against humanity with respect to their seriousness or the severity of the punishment they should attract.⁷⁴ Judge Cassese dissented, disagreeing that the added constituent of a crime against humanity- “knowledge that the criminal conduct is part of a widespread or systematic practice”⁷⁵ validates treating it more sternly than a similar act charged as a war crime. In practice, crimes against humanity attract higher punishments than war crimes as the ambit of crimes against humanity is wider and broader along with being more horrific and humiliating in nature. The ICC continues the practice of the ICTY and ICTR Statutes, in that it authorizes identical maximum sentences for genocide, war crimes, and crimes against humanity.⁷⁶

Another similarity which can be found in the sentencing policy of ICTY and ICTR along with the common law countries is the provision of guilty plea. This is absent in western civil law countries for such grave offences. However, the Rwandan national courts have incorporated the guilty plea provision for accelerated dispensation of justice in cases of genocide. In *Serushagov. Prosecutor*,⁷⁷ a fifteen year single sentence for genocide and crimes against humanity was given following guilty plea coupled with cooperation with prosecutors and genuine remorse.

It is to be observed that there is no minimum sentencing to be meted to criminals and judges have the discretion to take into consideration all the various circumstances and mitigating factors in matters of conviction. A review of the case-law of the Tribunals reveals the consideration of a number of factors

⁷¹ Antonio Cassese, *International Criminal Law* (2nd edn, Oxford University Press 2008).

⁷² *Prosecutor v Serushago* Case No ICTR-98-39.

⁷³ *Prosecutor v Akayesu* Case No ICTR 96-4-A .

⁷⁴ *Prosecutor v Tadic* ICTY Case No IT -94-1.

⁷⁵ *ibid.*

⁷⁶ Austin Lovegrove, *Judicial Decision Making, Sentencing Policy and Numerical Guidance* (1, Springer-Verlag 1989).

⁷⁷ ICTR Case No 98-39-A.

in determining sentence, many of these being specific examples of the broad guidance provided by the Rules and Statutes.⁷⁸ Specific factors include, but are not limited to the position of an accused in the command structure (senior position with command authority as an aggravating factor, low-level position as a mitigating factor);⁷⁹ the accused's attitude toward the victims;⁸⁰ remorse and cooperation with the Tribunals;⁸¹ the sheer inhumanity of the crimes;⁸² and the youth of the accused (as a mitigating factor)⁸³ and of the victims (as an aggravating factor).⁸⁴

IV. CONCLUSION

The sentencing policies in cases of War Crimes are not demarcated and are quasi-flexible in their nature. A compelling need is established to form a more coherent and systematic sentencing policy. It is understood from the above discussion that no distinct pattern can be delineated when it comes to sentencing policies for war crimes and it is evident in many cases that national courts can provide comparatively for higher degree of sentences than Tribunals or International Criminal Court. One of the reasons for subversion of International Criminal obligations is the loosely structured approach of International Criminal Courts. Maybe, in matter of due time there would emerge a much more predictable pattern of sentencing in the Tribunals as well as International Criminal Court through amendments in the procedures of law. Since there is absence of any Stare Decisis principle among such courts prosecuting war crimes therefore any binding power of these ad-hoc tribunals is uncalled for. Judges have the discretion to deviate from the previous sentencing policies and set new guidelines. The National courts might take a cue from these international bodies and set down the required sentencing policies to prosecute human right violators and war criminals. Therefore, the need of the hour is not to predict any particular pattern but to prosecute the guilty and thereby achieve the idea of justice.

⁷⁸ Austin Lovegrove, *Judicial Decision Making, Sentencing Policy and Numerical Guidance* (1, Springer-Verlag 1989).

⁷⁹ *Prosecutor v Rutaganda* ICTR Case No ICTR-96-3; *Prosecutor v Delalic* ICTY Case No IT -96-21.

⁸⁰ *Prosecutor v Jelisec* ICTY Case No IT -95-10; *Prosecutor v Krnojelac* ICTY Case No IT -97-25.

⁸¹ *Prosecutor v Ruggiu* ICTR Case No ICTR-97-32; *Prosecutor v Todorovic* ICTY Case No IT -95-9/1 (July 31, 2001).

⁸² *Prosecutor v Erdemovic* ICTY Case No IT -96-22.

⁸³ *Prosecutor v Delalic* ICTY Case No IT -96-21.

⁸⁴ *Prosecutor v Kunarac et al* ICTY Case No IT -96-23 and IT -96-23/1.