Punishing international crimes in South Africa

by

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Abstract

Even though numerous individuals have been sentenced for committing some of the most heinous crimes known to mankind, there still does not exist clear guidelines as to the process which should be followed by courts that are in the process of determining an appropriate sentence for individuals guilty of committing international crimes. The aim of this study was to establish how South African courts should approach the sentencing of individuals guilty of committing international crimes as South Africa has not as yet had to sentence an individual guilty of committing an international crime. It is, however, significantly clear that South African courts must follow Section 51 of the *Implementation of the Rome Statute of the International Criminal Court Act* 27 of 2002 and impose a sentence of imprisonment for life except if substantial and compelling circumstance exist which justifies a departure from this standard. In the establishment of substantial and compelling circumstances the South African courts will definitely revert to the jurisprudence of the international criminal courts and tribunals and that of South African criminal courts as well. This study is comprised of a literature review consisting of international legal instruments, legislation, electronic sources, text books, academic journals and South African, as well as international case law.

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LIST OF ABBREVIATIONS

CLA Act	Criminal Law Amendment Act 105 of 1997
Genocide Convention	Convention for the Prevention and Punishment of the Crime of Genocide (1951) 78 UNTS 277
ICC	International Criminal Court
ICC Act	Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002
ICC RPE	International Criminal Court Rules of Procedure and Evidence
ICTR	International Criminal Tribunal for Rwanda
ICTR RPE	International Criminal Tribunal for Rwanda Rules of Procedure and Evidence
ICTR Statute	Statute of the International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICTY RPE	International Criminal Tribunal for the Former Yugoslavia Rules of Procedure and Evidence
ICTY Statute	Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Socialist Federal Republic of Yugoslavia since 1991
ILC	International Law Commission
ILC Statute	Statute of the International Law Commission
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
IMT Nuremberg	International Military Tribunal for Nuremberg
Rome Conference	United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court
Rome Statute	Rome Statute of the International Criminal Court A/CONF 183/9 2002

SCSL	Special Court for Sierra Leone
SCSL Statute	Special Court for Sierra Leone Statute
UN	United Nations
USSR	Union of Soviet Socialist Republics
General Assembly	United Nations General Assembly
RPE	Rules of Procedure and Evidence
Security Council	United Nations Security Council

Chapter 1

Introduction

1.1 Problem statement

The International Criminal Court (hereafter ICC) is considered to be one of the most important international institutions since the creation of the United Nations. The coming into force of the *Rome Statute of the International Criminal Court* (hereafter the Rome Statute)[1] on 1 July 2002 has brought about an entirely new era in the protection of fundamental human rights.[2] The Rome Statute established a system of individual criminal liability for those guilty of committing the most heinous criminal acts in contravention of humanitarian laws. The ICC is a permanent institution that aims to prevent impunity, and to punish individuals who have committed the most serious of crimes against the international community.[3]

South Africa is a party to the Rome Statute and has implemented the provisions of the Rome Statute with the adoption of the *Implementation of the Rome Statute of the International Criminal Court Act* (hereafter the ICC Act).[4] The ICC Act was implemented to enable South Africa to conform to its international obligations in terms of the Rome Statute.[5] According to Kulundu[6] this legislation puts South Africa in a strong position in the fight against international crime.

The ICC Act provides for some of the issues that arise as a result of South Africa's obligations towards the punishment of international crimes. In terms of section 2 of the ICC Act any competent South African court presiding over any matter arising from the application of the Act must consider and, where appropriate, may apply conventional

1 *Rome Statute of the International Criminal Court* UN Doc. A/CONF 183/9 2002.
2 Schabas *An Introduction to the International Criminal Court* 20.
3 Du Plessis "Africa and the International Criminal Court" 1.
4 *Implementation of the Rome Statute of the International Criminal Court Act* 27 of 2002.
5 Preamble ICC Act.
6 Kulundu *South Africa and the International Criminal Court* 64.

international law, and in particular the Rome Statute, customary international law, and comparable foreign law.[7] The Act furthermore provides for the penal jurisdiction of South African courts over the crimes provided for in the Rome Statute.[8] The Act provides that any person, who commits a crime provided for therein, is guilty of an offence and is liable upon conviction to a fine or imprisonment for life, or such imprisonment without the option of a fine, or both a fine and such imprisonment.[9] The question arises as to what factors a South African court should consider when imposing a sentence upon an individual convicted of an international crime provided for in the Rome Statute.

The International Criminal Tribunal for the Former Yugoslavia (hereafter ICTY) and the International Criminal Tribunal for Rwanda (hereafter ICTR) have underlined the importance of sentencing as a discretionary responsibility.[10] In order for any court to impose adequate and fair sentences, the court must also be consistent with the passing of sentences in cases that are in some form or another similar to each other. This must, however, be determined on a case-by-case basis as was also reaffirmed by the Special Court for Sierra Leone (hereafter SCSL), which is a "hybrid system" that contains features relating to domestic, as well as international sentencing systems and is the first of its kind.[11] The ICTY Appeals Chamber has confirmed that before previously decided cases may be used as guidance, these decisions must relate to the same offence and the circumstances of the cases have to be significantly similar.[12]

It has been found that courts that make use of sentencing guidelines are more predictable in their sentencing practices.[13] This is also thought to reduce discrimination during the sentencing of offences that are alike and it increases the transparency in sentencing.[14] Unfortunately a single set of international guidelines to assist judges in the

7 S 2 ICC Act.
8 S 4 ICC Act.
9 S 4 ICC Act.
10 Cryer *et al An Introduction to International Criminal Law and Procedure* 396.
11 *Prosecutor v Taylor* SCSL-03-01-T 10.
12 *Prosecutor v Delalic* ICTY 1998 IT-96-21-A 719-720.
13 Ostorm *et al* 2008 http://www. ncsconline.org.
14 Ostorm *et al* 2008 http://www. ncsconline.org.

process of considering appropriate sentences for those convicted of international crimes does not exist. The ICTY Appeals Chamber, for instance, has on numerous occasions refused to provide a list of definite sentencing guidelines.[15]

To date no sentences have been passed by any South African court for the crimes provided for in the Rome Statute.[16] The ICC has, however, handed down its first guilty verdict in the case of *Prosecutor v Lubanga* ICC-01/04-01/06-1729.[17] The accused was found guilty as a co-perpetrator in the commission of war crimes. The ICC sentenced Thomas Lubanga to imprisonment for a term of 15 years. It is, however, still too early to establish with a great sense of certainty which approach the ICC will adopt in the process of sentencing and how South African courts will approach the same. Even though a single set of sentencing principles does not exist, it nonetheless seems very likely that South Africa, as well as the ICC will adopt the general approach to sentencing that had been followed by the ICTY and the ICTR.[18]

1.2 Research question

This dissertation aims to answer the following research question: In what manner should South African courts approach the sentencing of individuals convicted of international crimes?

1.3 Purpose of the study

The primary focus of this study is to establish how South African courts should approach the sentencing of individuals convicted of international crimes. In order to answer the abovementioned primary research question, the following related questions will be addressed:

15 Cryer *et al An Introduction to International Criminal Law and Procedure* 396.
16 ICC 2012 http://www.icc-cpi.int.
17 ICC 2012 http://www.icc-cpi.int.
18 Hoel 2009 *Monash University Law Review* 270. See hereunder chapter 4.

(a) What is the nature of the crimes that are subject to the international criminal law sentencing regime?[19]

(b) What purposes of punishment and factors are considered by international criminal courts and tribunals in the sentencing process?[20]

(c) What is the sentencing framework for international crimes in South Africa?[21]

1.4 Research methodology

This study will comprise of a literature review consisting of international legal instruments, legislation, electronic sources, text books, academic journals and South African, as well as international case law.

1.5 Layout

Besides this introductory chapter this dissertation comprises four more chapters.

Chapter 2 sets out the theoretical background of this study. In this chapter the concept of "international crimes" is explained and the core international crimes are discussed. Furthermore, an overview is provided of the historical aspects relating to the establishment of the ICTY, the ICTR, the SCSL and the ICC. Finally, South Africa's adoption of the *Implementation of the Rome Statute of the International Criminal Court Act* 27 of 2002 is explained.

Chapter 3 considers some of the main problems judges face when they have to determine sentences for international criminals. The sentencing practices of the International Military Tribunal for Nuremberg (hereafter IMT Nuremberg) and the International Military Tribunal for the Far East (hereafter IMTFE) are analysed. The sentencing purposes, the penalties that may be imposed and the factors that are

19 See Chapter 2.
20 See Chapter 3.
21 See Chapter 4.

considered in the sentencing process at the ICTY, the ICTR, the SCSL and the ICC are discussed.

Chapter 4 describes the sentencing framework for international crimes in South Africa.

Chapter 5 entails a summary of the conclusions drawn in the previous chapters, as well as recommendations with regard to South Africa's position in respect of the answering of the main research question.

Chapter 2

Theoretical Foundations

2.1 Introduction

Norwegian Judge Eric Mose[22] stated that:

> … over the span of a single decade, international criminal tribunals went from being a vague idea to an active reality, and have grown into institutions existing in their own right. Henceforth, the international community's main concern should be to hold alleged perpetrators of human rights abuses individually responsible for their actions, in cases where States are loath to punish such violations, or where they simply cannot do so. International tribunals are establishing practice and contribute to a culture of refusing impunity for human rights violations.

In this chapter the meaning of "an international crime" is firstly considered and then those crimes that are seen as the core crimes by the international community are identified. Secondly, a broad historical overview of the establishment of the most well-known international criminal courts is given. Thirdly, basic overviews of the functioning of these courts are given. Finally, a short overview will be given regarding the *Implementation of the Rome Statute of the International Criminal Court Act* 27 of 2002 in South Africa.

2.2 International crimes

2.2.1 Defining the term "international crimes"

International criminal justice is considered to be both a simple and a complicated concept.[23] It is simple in that there are certain crimes that are recognised as international crimes and which may be prosecuted as such. It is complex as a result of

22 As quoted by Nsanzuwera in Nsanzuwera 2005 *Journal of International Criminal Justice* 945.
23 Brownlie *Public International Law* 587.

the role that is played by national, as well as international courts in the enforcement of international criminal law.[24] There does not seem to be a generally accepted definition in the international community of the concept "international crimes" and as yet, there has not been any attempt by the international community to define the term "international crime".[25] The statutes of the three most prominent current international criminal tribunals, namely the ICC, the ICTY and the ICTR also do not provide a general definition for an international crime.[26] This may be due to the fact that each international crime has its own origins, whether in a rule in customary law or in an international convention or treaty, or in a combination between the two.[27]

Trainin[28] suggests that an international crime is:

> … an infringement of the connection between States and peoples, a connection, which constitutes the basis of relations between countries and countries. International crime is directed towards the worsening, the rendering acute, the rupture of those connections … International crime, consequently, must be defined as an infringement of the foundations of international communion.

Aust[29] describes international crimes as crimes that have "an international aspect or dimension". Aust[30] further states that international crimes include:

> … crimes covered by treaties, which impose obligations on state parties to criminalise the activities concerned and to prosecute or extradite suspected offenders. The crimes are ones that the international community has considered as sufficiently serious in effect to internationally warrant a particular form of international cooperation.

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24 Brownlie *Public International Law* 587.
25 De Than and Shorts *International Criminal Law* 13.
26 *Rome Statute; Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Socialist Federal Republic of Yugoslavia since* 1991, UN Doc. S/Res/827, Annex, 1993 (hereafter ICTY Statute); and *Statute of the International Criminal Tribunal for Rwanda,* UN Doc. S/Res/955, Annex, 1994 (hereafter ICTR Statute).
27 De Than and Shorts *International Criminal Law* 13.
28 Trianin *Hitlerite responsibility under criminal law* 32.
29 Aust *Handbook of International Law* 263, 269.
30 Aust *Handbook of International Law* 269.

Duhaime[31] states that international crimes are:

> Crimes, which affect the peace or safety of more than one state or which are so reprehensible in nature as to justify the intervention of international agencies in the investigation and prosecution thereof.

De Than and Shorts[32] are of the opinion that an international crime is:

> … an act, which the international community recognises as not only a violation of ordinary State criminal law but one which is so serious that it must be regarded as a matter for international concern ...

Another possible definition for international crimes is that of Cryer[33] who states that an international crime:

> … may also be defined as an offence, which is created by international law itself, without requiring the intervention of domestic law. In the case of such crimes, international law imposes criminal responsibility directly on individuals.

According to De Than and Shorts[34] the reason for the lack of a definition is that a crime is considered to be an international crime only when the crime can be prosecuted by an international criminal tribunal, whether *ad hoc* or permanent.

Although there is no commonly accepted definition in the international community for the concept of "international crimes", there do seem to be two definite similarities to most of the abovementioned definitions. In most of the definitions there is a reference to cooperation between the international community, as well as an element of seriousness relating to the crime.

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31 Duhaime Date Unknown http://www.duhaime.org.

32 De Than and Shorts *International Criminal Law* 13.

33 Cryer *et al An Introduction to International Criminal Law and Procedure* 5.

34 De Than and Shorts *International Criminal Law* 13. Fears do, however, exist that this sort of a definition may exclude some crimes, which are considered to be some of the oldest international crimes. See in this regard 2.2.2 hereunder. Also see Kohn Date Unknown http://www.jcpa.org.

2.2.2 Core international crimes

The process of creating a list of international crimes has been prominent since World War II. On 21 November 1947 the International Law Commission (hereafter ILC) was established by the United Nations General Assembly (hereafter General Assembly).[35] The purpose of the ILC was the codification and development of public international law.[36]

In 1947 the ILC was instructed by the General Assembly to formulate principles of international law, which were recognised in the Nuremberg Charter, as well as those international principles recognised in the judgements of the Nuremberg Tribunal.[37] Furthermore, the General Assembly instructed the ILC to prepare a draft code of offences that have been committed against the peace and security of mankind.[38] As a result the ILC formulated seven such principles.[39] Principle VI provides for three categories of crimes that are punishable under international law and provides a definition for each crime.[40] The three categories are crimes against humanity, war crimes and crimes against the peace.[41]

The list of international crimes has been rapidly expanding since World War II and there still exists some disagreement regarding the precise contents of the growing list of international crimes.[42] Nataraja[43] compiled a list of 24 crimes that are recognised by the international community as international crimes. The list consists of war crimes; unlawful use of weapons, torture, force against internationally protected persons, attacks upon commercial vessels, theft of nuclear materials, unlawful human experimentation, crimes

35 The ILC was established in accordance with the *Statute of the International Law Commission General Assembly Resolution* 174(II) A/CN.4/4 and Corr.1 (hereafter ILC Statute).
36 A 1 ILC Statute.
37 *United Nations General Assembly Resolution* 177(II), UN Doc. A/Res/177(II) (1947) para. 111-112.
38 *United Nations General Assembly Resolution* 177(II), UN Doc. A/Res/177(II) (1947) para 111-112.
39 *Yearbook of the International Law Commission* 1950 (Vol II) 376, 377**.**
40 *Yearbook of the International Law Commission* 1950 (Vol II) 376, 377.
41 International Committee of the Red Cross 2005 http://www.icrc.org.
42 De Than and Shorts *International Criminal Law* 13.
43 Nataraja (ed) *International Crime and Justice* (Cambridge University Press New York 2011) xxvi.

against humanity, piracy, aggression, genocide, destruction and/or theft of national treasures, interference with submarine cables, falsification and counterfeiting, bribery of foreign public officials, taking of civilian hostages, drug offences, slavery and related crimes, hijacking and sabotage of aircrafts, mercenarism, apartheid, international traffic in obscene publications and environmental pollution.

Regardless of the abovementioned list, the Rome Statute provides for only a few core crimes, namely genocide, crimes against humanity, the crime of aggression and war crimes.[44] According to the Rome Statute these crimes are:

> … the most serious crimes of concern to the international community as a whole.[45]

Each of these crimes will now be briefly discussed.

2.2.2.1 Genocide

The notion of genocide essentially originated during the midst of World War II in reaction to the crimes committed against the Jews and Romani people by Nazi Germany.[46] Genocide has nonetheless been practised for centuries.[47] In 1946 the General Assembly adopted a resolution in which the crime of genocide was declared an international crime.[48] In 1948, in an effort to distinguish genocide from traditional crimes, the United Nations adopted the *Convention on the Prevention and Punishment of the Crime of Genocide* (hereafter Genocide Convention), which defined genocide in detail.[49] The Genocide Convention defines genocide as:[50]

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44 A 5 Rome Statute.
45 A 5 Rome Statute.
46 Mettraux *International Crimes and the Ad Hoc Tribunals* 193-199; Schabas *An Introduction to the International Criminal Court* 7, 193; and Aust *Handbook of International Law* 263, 269-270.
47 Power S 2000 http://www.pbs.org.
48 *Nuremberg Rules, in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, 82 U.N.T.S. 279, 8 August 1945 (available at http://www1.umn.edu); and *United Nations General Assembly Resolution* 96(1) UN Doc. A/64/Add.1 (1946).
49 *United Nations Convention on the Prevention and Punishment of the Crime of Genocide* U.N.T.S. No 1021, vol. 78 (1951), p. 277. The Genocide Convention was adopted by the *United Nations General Assembly Resolution* 260(III)(B) UN Doc. A/Res/260(III)(B) (1948).
50 A 2 Genocide Convention.

> … any of the following acts committed with the intent to destroy, in whole or in part, a national, ethical, racial, religious group, as such:
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.

The psychological element relating to genocide requires a double intent.[51] On the one hand, for an individual to commit the genocide such an individual must have had the intent to commit the crime. Apart from the mere intent to commit genocide the individual must, on the other hand, also have had the specific intent to destroy a group of people in part or in whole.[52] There is no quantitative measure to establish how great the number people must be against whom the destruction was aimed, for example relating to the Srebrenica genocide, the intent to destroy was aimed only against a small group of battle-aged Bosnian men who were living in Srebrenica.[53]

As of 2012, 142 countries have adopted the Genocide Convention.[54] The definition of genocide in the Convention has also been adopted in the Statutes of the ICC, the ICTY and the ICTR.[55]

2.2.2.2 Crimes against humanity

The second group of international crimes provided for in the Rome Statute is crimes against humanity.[56] Crimes against humanity are concerned with crimes committed against life and liberty on a grave scale, and are seen as combined violations against the most basic of human rights.[57] The term “crimes against humanity” was first mentioned in a diplomatic note in 1915 regarding the mass killings of the Armenians

51 TRIAL 2011 http://www.trial-ch.org.
52 A 2 Genocide Convention.
53 TRIAL 2011 http://www.trial-ch.org.
54 A full list of parties to the Genocide Convention is available at http://www.treaties.un.org.
55 A 6 Rome Statute; a 4 ICTY Statute; and a 2 ICTR Statute.
56 A 7 Rome Statute.
57 Aust *Handbook of International Law* 271.

within the Ottoman Empire.[58] The term was nonetheless further developed together with the concept of genocide, primarily within the context of World War II. Crimes against humanity was, however, included and defined in article 6(c) of the 1945 Nuremberg Charter, whereas genocide was not.[59]

Crimes against humanity were linked to war crimes and crimes against the peace in the Nuremberg Charter.[60] The Charter definition for crimes against humanity included the requirement that the prohibited acts must have been committed in connection with war crimes or crimes against peace.[61] The Nuremberg Charter's condition that a link with war crimes or crimes against the peace had to be made was first softened by the ICTY Statute, which provides that crimes against humanity can be committed during an international or an internal armed conflict and by adding some other crimes, such as imprisonment, torture and rape directed against any civilian population.[62] The link effectively disappeared after one of the most well-known rulings by the ICTY. In *Prosecutor v Tadić* ICTY IT-94-1-AR72[63] the Appeals Chamber stated that:

> It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. … customary international law may not require a connection between crimes against humanity and any conflict at all.

This principle set out in the *Prosecutor v Tadić* ICTY IT-94-1-AR72[64] was ultimately followed in the ICTR Statute and the Rome Statute.[65] These Statutes replaced the link with war crimes and crimes against peace with the concept of "a widespread and

58 TRIAL 2011 http://www.trial-ch.org.
59 A 6(c) 1945 Nuremburg Charter.
60 Aust *Handbook of International Law* 270.
61 A 6(c) 1945 Nuremburg Charter. With this is meant that one of the requirements for crimes against humanity is that it had to be committed while in the process of committing either war crimes or crimes against the peace. Also see UN Department of Public Information 1998 http://www.un.org and Frulli 2001 *European Journal of International Law* 333.
62 A 5 ICTY Statute.
63 *Prosecutor v Tadić* ICTY IT-94-1-AR72 141. Also see Dugard 1998 *International Review of the Red Cross* 1-7 and Schabas "Customary Law or 'Judge-Made' Law" 77-102.
64 *Prosecutor v Tadić* ICTY IT-94-1-AR72.
65 A 3 ICTR Statute and a 7 Rome Statute.

systematic attack directed at any civilian population".[66] The Rome Statute defines crimes against humanity as:

> … any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
> (a) Murder;
> (b) Extermination;
> (c) Enslavement;
> (d) Deportation or forcible transfer of population;
> (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
> (f) Torture;
> (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
> (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
> (i) Enforced disappearance of persons;
> (j) The crime of apartheid;
> (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.[67]

The Rome Statute went even further than the ICTR and added that crimes against humanity had to be:

> … committed pursuant to or in furtherance of a State or organizational policy to commit such attack.[68]

2.2.2.3 War crimes

The third group of international crimes listed in the Rome Statute is war crimes.[69] War crimes are concerned with serious violations of the laws and customs of war and its

66 A 3 ICTR Statute and a 7(1) Rome Statute.
67 A 7 Rome Statute.
68 A 7(2)(a) Rome Statute.
69 A 8 Rome Statute.

origin is found in over a century's development of international humanitarian law.[70] International humanitarian law has developed from ages of warfare and only applies in times of armed conflict, whether internal or international in nature.[71] War crimes may be committed by militants, as well as by civilians against other militants or civilians.[72]

War crimes were prosecuted for the first time in reaction to the events that took place during World War II, after the establishment of the International Military Tribunals for Nuremberg and Tokyo.[73] After the trials held at Nuremberg and Tokyo a few cases were also prosecuted in national courts but it was not until the creation of the ICTY, the ICTR and later the ICC that war crimes were again effectively addressed by the international community.[74] The norms that regulate war crimes are the four Geneva Conventions of 1949 and their two Additional Protocols of 1977.[75]

The Rome Statute defines war crimes as:

(a)	Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
(i)	Wilful killing;
(ii)	Torture or inhuman treatment, including biological experiments;
(iii)	Wilfully causing great suffering, or serious injury to body or health;
(iv)	Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
(v)	Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
(vi)	Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
(vii)	Unlawful deportation or transfer or unlawful confinement;

70 Bantekas and Nash *International Criminal Law* 351; Knoops *The Law of International Criminal Tribunals* 40; and Rowe "War Crimes" 203-230.

71 International humanitarian law does not cover all internal conflicts and tensions, such as isolated acts of violence. See ICRC 2004 http://www.icrc.org and Knoops *The Law of International Criminal Tribunals* 40.

72 TRIAL 2011 http://www.trial-ch.org.

73 TRIAL 2011 http://www.trial-ch.org. Also see par 2.3.2 below.

74 TRIAL 2011 http://www.trial-ch.org.

75 Knoops *The Law of International Criminal Tribunals* 40 and Rowe "War Crimes" 203-230.

(viii) Taking of hostages.[76]

2.2.2.4 The crime of aggression

The final crime listed in the Rome Statute is the crime of aggression.[77] The development of the crime of aggression can be dated back to the Medieval Ages where wars were characterised as just or unjust and were known as wars of conquest.[78] At the end of World War I the League of Nations was established in order "to ensure that war never broke out again". This led to the 1919 *Treaty of Versailles*, which called for the prosecution of Kaiser Wilhelm II for the waging of an unjust war.[79] Kaiser Wilhelm II was, however, never prosecuted but this nonetheless paved the way for the creation of the Kellogg-Briand Pact in 1928, which was used to formally reject the use of war as a national policy instrument.[80]

This rejection of aggression created the basis of the London Charter of 1945, which established the International Military Tribunals for Nuremberg and Tokyo. Thus aggression was already in contravention of international law before World War II but it was first regarded as an international crime in the Charter of the International Military Tribunal at Nuremberg.[81] The Nuremberg Charter defined aggression as a crime against peace.[82]

In 1974 the UN General Assembly defined the crime of aggression in a resolution.[83] The resolution was designed to create a guideline for the Security Council when it exercises

76 A 8(2) Rome Statute.
77 A 5 Rome Statute.
78 Anon 2011 http://www.jrank.org.
79 Anon 2011 http://www.jrank.org.
80 See the preamble of the Kellogg-Briand Pact and Anon 2011 http://www.jrank.org.
81 TRIAL 2011 http://www.trial-ch.org and Anon 2011 http://www.jrank.org.
82 A 6(a) Charter of the International Military Tribunal at Nuremberg.
83 *United Nations General Assembly Resolution* 3314, UN Doc. A/Res/3314 (1947); United Nations 2008 http://www.untreaty.un.org; and TRIAL 2011 http://www.trial-ch.org.

certain powers in terms of the United Nations Charter.[84] This definition of aggression reads:

> … the use of force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.[85]

Article 5(2) of the Rome Statute provides that the ICC would only be able to exercise its jurisdiction over the crime of aggression once a provision that defines the crime and amends the Rome Statute is adopted.[86] Seven years after the coming into force of the Rome Statute in 2003, a Review Conference was held in Kampala, Uganda from 30 May 2010 to 11 June 2010 with the purpose of adopting amendments to the Rome Statute by the Assembly of State Parties and especially to establish a definition for the crime of aggression.[87] The definition implemented at Kampala defined the crime of aggression as:

> … the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.[88]

The amendments made to the Rome Statute at the Review Conference will effectively come into force after they have been ratified by at least 30 State Parties.[89] The implementation of amendments made regarding the crime of aggression will only be reviewed in 2017.[90] The majority of the State Parties must then once again approve the

84 Van der Vyver 2011 *National Security and Armed Conflict Law Review* 1-3. The Security Council used its Chapter XII powers in order to counteract any form of threat against the peace, any form of breach of the peace and to effectively counteract the crime of aggression.
85 A 1 *United Nations General Assembly Resolution* 3314, UN Doc. A/Res/3314 (1947).
86 This must be done in accordance with a 121 and a 123 Rome Statute.
87 Review Conference of the Rome Statute held at Kampala, Uganda, 30 May 2010 to 11 June 2010. See in this regard http://www.iccnow.org.
88 Review Conference of the Rome Statute held at Kampala, Uganda, 30 May 2010 to 11 June 2010.
89 Van der Vyver 2011 *National Security and Armed Conflict Law Review* 1-3.
90 Van der Vyver 2011 *National Security and Armed Conflict Law Review* 1-3.

implementation of the amendments to the crime of aggression before it may come into force.[91]

2.3 International Criminal Courts

2.3.1 A historical overview

2.3.1.1 Early developments

The global community has over the last 500 years sought various different ways to address the most grievous of crimes of concern to the international community as a whole.[92] Some authors suggest that there is evidence that a tribunal had held individuals responsible for war crimes in ancient Greece and that there are similar examples from ancient Japan, China and India.[93] The first *ad hoc* tribunal was created in 1474 by towns from Alsace, Germany, Austria and Switzerland, and was situated in Breisach.[94] This tribunal presided over the case of Governor Peter de Hagenbach who stood accused of having committed various crimes during his occupation of the town of Breisach, including rape, murder, perjury and other crimes against the laws of God and man.[95]

After the establishment of the *ad hoc* tribunal at Breisach, almost four centuries had passed before the second serious call for an international criminal tribunal was made. During the Paris Peace Conference of 1919 the drafters of the Treaty of Versailles envisaged an *ad hoc* international court to try the Kaiser and German war criminals of

91 Van der Vyver 2011 *National Security and Armed Conflict Law Review* 1-3.
92 Jamison 1995 *Denver Journal of International Law and Policy* 419.
93 McCormack "From Sun Tzu to the Sixth Committee" 31-63; Bassiouni *Crimes Against Humanity in International Criminal Law* 517; and Schabas *An Introduction to the International Criminal Court* 1.
94 McGoldrick "Criminal Trials Before International Tribunals" 11-46; Hall "The First Proposal for a Permanent International Criminal Court" 57; and McCormack "From Sun Tzu to the Sixth Committee" 31-63.
95 McGoldrick "Criminal Trials Before International Tribunals" 11-46; Hall "The First Proposal for a Permanent International Criminal Court" 57; and McCormack "From Sun Tzu to the Sixth Committee" 31-63.

World War I.[96] The provisions of the Treaty of Versailles pertaining to an international criminal court were never put into practice and some prosecutions for war crimes were undertaken by Germany itself between 1921 and 1923 in Leipzig.[97] The Leipzig proceedings were not effective and were characterised by prejudice towards the defendants, questionable acquittals and light sentences.[98]

In 1937 at the *Convention for the Creation of an International Criminal Court* the creation of an international criminal court to try terrorists was negotiated.[99] However, this Convention was never supported by States and thus never came into force.[100]

The first effective leap forward in establishing an international criminal tribunal came a few years later at the end of World War II.[101] Because of the atrocities committed by the Axis powers during the war the Allies issued the *Declaration of Moscow* in 1943, which promised punishment for Axis war criminals.[102] In order to try the Axis war crimes the Allies established the Nuremberg and the Tokyo tribunals.[103] The tribunals were created by the *Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal*

96 After the war the Treaty of Versailles was presented to the German leaders to sign on 7 May 1919. Germany was seen as the chief instigator of the conflict and the Allied Forces imposed severe treaty obligations upon the defeated Germany. See Coalition for the International Criminal Court 2008 http://www.iccnow.org and United States Holocaust Memorial Museum Date Unknown http://www.ushmm.org.

97 Cryer *et al An Introduction to International Criminal Law and Procedure* 92.

98 Kress 2008 *Washington and Lee Law School Law Journal* 40.

99 Hudson 1938 *American Journal of International Law* 549.

100 Williamson *Terrorism, war and international law* 50; Schabas *An Introduction the International Criminal Court* 5; and Çakmak 2008 USAK *Review of International Law and Politics* 137-139.

101 Cryer *et al An Introduction to International Criminal Law and Procedure* 92.

102 The Allied forces that signed the London Agreement that led to the creation of the tribunals consisted of France, the United Kingdom, the United States of America and the Union of Soviet Socialist Republics. The Axis powers were formed out of the alliance between Germany, Italy and Japan during World War II. See in this regard McCormack "From Sun Tzu to the Sixth Committee" 31-63. These tribunals are known as the International Military Tribunals.

103 Coalition for the International Criminal Court 2008 http://www.iccnow.org; McGoldrick "Criminal Trials Before International Tribunals" 11-46; and McCormack "From Sun Tzu to the Sixth Committee" 31-63. These tribunals are known as the International Military Tribunals.

(hereafter London Agreement) that was signed on 8 August 1945 by the four Allied parties.[104]

Another leap ahead came during 1948 when the General Assembly adopted the Genocide Convention.[105] The Convention was very important because not only did it characterise the crime of genocide as a "crime under international law"[106] but it also stated that a person charged with genocide:

> … shall be tried by a competent tribunal of the State in the territory of which the act was committed or by such international penal tribunal as may have jurisdiction…[107]

After the Genocide Convention the General Assembly mandated the ILC in 1948 to establish whether there was desirability and a possibility to create an international criminal court to try genocide cases.[108] The ILC reported in 1950 that the creation of an international criminal court was both desirable and possible.[109] The ILC was requested to create a draft statute for an international criminal court.[110] The ILC provided the General Assembly with such a draft statute in 1951 and again in 1953 with a revised draft statute.[111] Unfortunately the process of considering the revised draft statute provided by the ILC was postponed and later abandoned. This was due to the fact that

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104 *Agreement for the Prosecution and Punishment of Mayor War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal Annex*, (1951) 82 UNTS 279 (available at http://www.unhcr.org).

105 *Convention on the Prevention and Punishment of the Crime of Genocide* U.N.T.S. No 1021 (1951) as adopted by *United Nations General Assembly Resolution* 260(III)(B), UN Doc. A/Res/260(III)(B) (1948); *Report of the Committee on International Criminal Jurisdiction*, UN Doc.UNGAOR A/264; and Coalition for the International Criminal Court 2008 http://www.iccnow.org.

106 A 1 *Convention on the Prevention and Punishment of the Crime of Genocide* U.N.T.S. No 1021 (1951) as adopted by *United Nations General Assembly Resolution* 260(III)(B), UN Doc. A/Res/260(III)(B) (1948).

107 A 6 *Convention on the Prevention and Punishment of the Crime of Genocide* U.N.T.S. No 1021 (1951) as adopted by *United Nations General Assembly Resolution* 260(III)(B), UN Doc. A/Res/260(III)(B) (1948).

108 Coalition for the International Criminal Court 2008 http://www.iccnow.org.

109 *Report of the International Law Commission on the Work of its second session*, UNGAOR, 5th Sess. Supp. No. 12 para 140, UN Doc. A/1316 (1950). Reproduced in McCormack "From Sun Tzu to the Sixth Committee" 31-63.

110 Baros 2003 *Hertfordshire Law Journal* 58.

111 Baros 2003 *Hertfordshire Law Journal* 58.

an agreement could not be reached by the State Parties with regard to a definition for the crime of aggression, as well as the content of an International Code of Crimes.[112] The process of achieving agreement between States was further made difficult because of the Cold War, which was raging between the United States and the Soviet Union.[113] The idea for the establishment of a permanent international criminal court did not receive the necessary and valuable international support it needed and attention was rather focused on the development and improvement of inter-State cooperation in prosecuting crimes at a national level by means of treaties.[114]

It was not until June 1989, when 16 Caribbean and Latin American States, which were led by Trinidad and Tobago, were motivated to combat drug trafficking and to secure an effective prosecution system for drug trafficking that the idea of establishing an international criminal court was rejuvenated.[115] Trinidad and Tobago revived an existing proposal for the establishment of an international criminal court and requested the General Assembly to ask the ILC to resume its work on the establishment of an international criminal court.[116] The ILC acted swiftly on the General Assembly's request to create a proposal statute and produced a final text in 1994.[117] The ILC presented its final draft statute for an international criminal court to the General Assembly in 1994.[118] In order to consider the draft statute the General Assembly created an *ad hoc* committee that met twice in 1995.[119] A year later after the consideration of the *ad hoc* committee's report and with enough international support, the General Assembly

112 Baros 2003 *Hertfordshire Law Journal* 58.

113 The Cold War between the United States of America and the Union of Soviet Socialistic Republics, dominated international affairs between 1945 and 1960. Knoops *The Law of International Criminal Tribunals* 7; McGoldrick "Criminal Trials Before International Tribunals" 11-46; McCormack "From Sun Tzu to the Sixth Committee" 31-63; Coalition for the International Criminal Court 2008 http://www.iccnow.org; and Baros 2003 *Hertfordshire Law Journal* 58.

114 Examples of these treaties are extradition treaties, legal assistance from one State to another and prosecution treaties. See in this regard Cryer *et al An Introduction to International Criminal Law and Procedure* 120.

115 Cryer *et al An Introduction to International Criminal Law and Procedure* 120.

116 Cryer *et al An Introduction to International Criminal Law and Procedure* 120 and Coalition for the International Criminal Court 2008 http://www.iccnow.org.

117 *Report of the International Law Commission on the work of its forty-sixth session*, UNGAOR, 49th session Suppl. No. 10, A/49/10 (1994) and Bassiouni *The Statute of the International Criminal Court* 657. Also see Cryer *et al An Introduction to International Criminal Law and Procedure* 120.

118 Coalition for the International Criminal Court 2008 http://www.iccnow.org.

119 *Ad Hoc* Committee on the Establishment of an International Criminal Court.

created the Preparatory Committee on the Establishment of the ICC.[120] The purpose of the Committee was to prepare a consolidated draft text for an international criminal court and they met six times between 1996 and 1998.[121] In 1998, based on the draft of the Committee, the General Assembly called once more for a conference to finalise and adopt a convention on the establishment of an international criminal court.[122]

On 15 June 1998, the *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court* (hereafter Rome Conference) started in Rome, Italy. During the Rome Conference 160 countries and more than 200 non-governmental organisations took part in the negotiations. At the end of the Rome Conference 120 nations voted in favour of the adoption of the Rome Statute.[123] The Rome Statute was adopted by the majority of States that attended the Rome Conference.[124] In this regard Katz[125] states:

> This reflects the fact that international, regional and national communities are of the view that individuals who commit the crimes of genocide, war crimes and crimes against humanity should be prosecuted for their conduct, and impunity for those crimes should be avoided.

2.3.2 International Military Tribunals post-World War II

2.3.2.1 Introduction

120 Convened by *United Nations General Assembly Resolution* UN Doc. A/Res/46 (1995) and reaffirmed its mandate in *United Nations General Assembly Resolution* 160, UN Doc. A/Res/160 (1997) and *United Nations General Assembly Resolution* 207, UN Doc. A/Res/207 (1996). Its reports may be found in UNGAOR A/51/22 and in the conference records at UN Doc. A/CONF.183/13 (Vol.III) 5.

121 Coalition for the International Criminal Court 2008 http://www.iccnow.org and McGoldrick "Criminal Trials Before International Tribunals" 11-46.

122 Coalition for the International Criminal Court 2008 http://www.iccnow.org.

123 *Rome Statute of the International Criminal Court* UN Doc. A/CONF 183/9 2002, Cryer *et al An Introduction to International Criminal Law and Procedure* 120 and Coalition for the International Criminal Court 2008 http://www.iccnow.org.

124 Du Plessis "Africa and the International Criminal Court" 2. The Rome Conference was organised in order to secure an agreement on the treaty for the establishment of a permanent international criminal court.

125 Katz *African Security Review* 25-27; Du Plessis "Africa and the International Criminal Court" 2; and Katz *An Act of Transformation* 25.

The end of World War II presented the Allied forces with a historic opportunity to create the first international precedents concerning the prosecution of international war criminals.[126] The United Nations appointed a commission to investigate war crimes and this set the stage for the post-war prosecutions.[127] Accordingly the law and procedure created by the International Military Tribunals (hereafter IMTs) represented the first appearance of international criminal law and procedure in the international community.[128]

2.3.2.2 The IMT Nuremberg

In 1943, after some debate the Allies created the IMT Nuremberg with the Declaration of Moscow in order to fulfil their promise to punish the Axis war criminals for the crimes they had committed during World War II.[129] The IMT Nuremberg formally came into being by means of the London Agreement of 8 August 1945 and was signed by the governments of Great Britain, the United States of America, France and the Union of Soviet Socialist Republics (hereafter USSR).[130]

On 10 October 1945 the IMT Nuremberg served 24 indictments on Nazi leaders.[131] The indictments contained four main charges, namely crimes against the peace, dealt with by the UK, war crimes and crimes against humanity, which were both split between France and the USSR, and conspiracy to commit crimes relating to the aforementioned

126 Cassette 2000 *African Security Review* 25.

127 Levy 1943 *American Political Science Review* 1056. The *United Nations Commission for the Investigation of War Crimes* was established and the representatives were the Allies. The commission was chaired by Sir Cecil Hurst of the United Nations.

128 Bantekas and Nash *International Criminal Law* 325.

129 United States Holocaust Memorial Museum Date Unknown http://www.ushmm.org; Cryer *et al An Introduction to International Criminal Law and Procedure* 92 and Kochavi *Prelude to Nuremburg 224*. The debate that took place was because some political leaders wanted immediate executions instead of trials, but the Allies decided to create an IMT to hold the necessary trials instead of the immediate executions.

130 United States Holocaust Memorial Museum Date Unknown http://www.ushmm.org; Draft Convention for the Establishment of a United Nations War Crimes Court, United Nations War Crimes Commission Doc. C.50(1), 30 September 1944 and Schabas *An Introduction to the International Criminal Court* 5. The London Agreement's text was mainly based upon the 1937 *Convention for the Prevention and Punishment of Terrorism* as well as work carried out by the *London International Assembly* during the early years of World War II.

131 Cryer *et al An Introduction to International Criminal Law and Procedure* 93.

charges.[132] The Nuremberg trials started in November 1945.[133] The trials were concluded a year later with the acquittal of three defendants and the conviction of nineteen of the defendants. Three of the accused died before the trials against them could be completed. The Tribunal sentenced twelve defendants to death and seven defendants to periods of imprisonment varying between ten years and life.[134]

2.3.2.3 The International Military Tribunal For the Far East

The IMTFE was established by a proclamation by General Douglas McArthur of the United States of America on 19 January 1946.[135] According to article 5 of the IMTFE's Charter the tribunal applied international law exclusively.[136]

The IMTFE convened for the first time on 29 April 1946.[137] The indictment contained 55 counts and charged 28 accused with crimes against peace, war crimes and crimes against humanity.[138] The trials took place over a period of two and a half years.[139] The majority judgement of the trials was announced in November 1948.[140] Of the 28 accused three were acquitted and the 25 remaining defendants were all found guilty.

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132 McGoldrick "Criminal Trials Before International Tribunals" 11-46; United States Holocaust Memorial Museum Date Unknown http://www.ushmm.org and Cryer *et al An Introduction to International Criminal Law and Procedure* 93. Also see A 6 The *Charter of the International Military Tribunal* annexed to the *Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis and Establishing the Charter of the International Military Tribunal Annex* (1951) 82 UNTS 279 (hereafter referred to as the IMT Nuremberg Charter).

133 Cryer *et al An Introduction to International Criminal Law and Procedure* 94. The trials were also known as the Trials of the Major War Criminals.

134 Cryer *et al An Introduction to International Criminal Law and Procedure* 94 and Schabas *An Introduction to the International Criminal Court* 6.

135 *International Military Tribunal for the Far East, Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo*, 19 January 1946. General Douglas McArthur was the Supreme Commander of the Allied States. See in this regard Cryer *et al An Introduction to International Criminal Law and Procedure* 96.

136 Zahar and Sluiter *International Criminal Law* 6 and *Charter of the International Military Tribunal for the Far East*, 19 January 1946, T.I.A.S. No. 1589 (amended 26 April 1946) (hereafter IMTFE Charter).

137 Kajimoto 2000 http://www.nankingatrocities.net.

138 Bantekas and Nash *International Criminal Law* 335. The charges were made for acts that took place during the period from 1 January 1928 to 2 September 1945.

139 Kajimoto 2000 http://www.nankingatrocities.net. During the trials testimony from 419 witnesses was heard and 4 336 exhibits of evidence including depositions and affidavits from 779 other individuals were admitted.

140 Cryer *et al An Introduction to International Criminal Law and Procedure* 97.

Seven defendants were sentenced to death, one to twenty years imprisonment, one to seven years imprisonment and the rest of the defendants received life terms.[141]

The procedural and substantive laws of the IMTFE were very similar to that of the IMT Nuremberg.[142] It has, however, been suggested that because General McArthur exercised substantial influence on the trials of the IMTFE it never enjoyed the attention and precedential authority of the IMT Nuremberg.[143]

2.3.2.4 Contributions made by the IMTs

The three most significant contributions made by the IMTs to the international criminal law were that the concepts of genocide and crimes against humanity arose from the trials, the Nuremberg Principles were established and its firm statement of individual responsibility for international crimes was issued.[144]

The IMTs of Nuremberg and Tokyo left an exceptional legacy in the creation of norms of international customary law and international criminal law.[145] These contributions were made in spite of substantial criticism against their legality and legitimacy and were of the utmost importance to the development of the *ad hoc* international tribunals as well as the ICC.[146]

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141 Cryer *et al An Introduction to International Criminal Law and Procedure* 97 and Bantekas and Nash *International Criminal Law* 335.

142 Bantekas and Nash *International Criminal Law* 335.

143 General McArthur's influence in the trails of the IMTFE was in order to ensure that the proceedings did not threaten the success of the occupation of the Allied forces in Japan. See Bantekas and Nash *International Criminal Law* 335.

144 McGoldrick "Criminal Trials Before International Tribunals" 11-46; Fox 1993 *The World Today* 194; McCormack "From Sun Tzu to the Sixth Committee" 31-63 and International Military Tribunal *Trials of the Major War Criminals* 223. For the Nuremberg Principles see footnote 36.

145 Clark "Nuremburg and Tokyo" 171-187.

146 Some of the criticisms leveled against the IMTs were that the IMTs were created to fulfill victor's justice, they were created *ad hoc* for World War II and they were furthermore created *ex post facto* with retroactive jurisdiction over the crimes committed during World War II. See McCormack "From Sun Tzu to the Sixth Committee" 31-63 and McGoldrick "Criminal Trials Before International Tribunals" 11-46.

2.3.3 The ICTY and ICTR

2.3.3.1 Introduction

Up to the early 1990's it seemed unlikely that descendants of the IMT Nuremberg and the IMTFE would soon be realised.[147] The UN, however, responded to two conflicts in the 1990's and revived the idea of international criminal tribunals.[148] The events that took place in the former Yugoslavia and in Rwanda compelled the United Nations Security Council (hereafter Security Council) to create two tribunals to address the violations that were being committed.[149]

The Security Council created the ICTY in 1993 and it created the ICTR in 1994.[150] Some critics have suggested that the ICTY had found its creation in the frustration of the United Nations that had failed miserably in the exhaustion of all other measures to put an end to an inconceivable ruthless war.[151] Regarding the ICTR, critics have also stated that it might have found its creation in the absolute guilt of the United Nations for having done nothing but wait for the Rwandese people to murder over half a million of their own countrymen within the space of a hundred days.[152]

The continuing violations of human rights in the regions of the former Yugoslavia and Rwanda forced the Security Council to express its grave concern at the continuation of widespread and flagrant violations of humanitarian law within the respective

147 Zahar and Sluiter *International Criminal Law* 6 and Cryer *et al An Introduction to International Criminal Law and Procedure* 102.

148 Zahar and Sluiter *International Criminal Law* 6 and Cryer *et al An Introduction to International Criminal Law and Procedure* 102. The Yugoslav wars of dissolution of 1991 and the Rwandan genocide of 1994.

149 Schabas *An Introduction to the International Criminal Court* 10. The Commission of Experts identified various war crimes and crimes against humanity that had been committed and were subsequently continuing.

150 The ICTY was established by the *United Nations Security Council Resolution* 827, UN Doc. S/Res/827 (1993) and the ICTR was established by the *United Nations Security Council Resolution* 955, UN Doc. S/Res/955 (1994).

151 Arbour 1999 *Washington University Journal of Law and Policy* 15.

152 Arbour 1999 *Washington University Journal of Law and Policy* 15-16.

countries.[153] The Security Council furthermore described the situation as "a threat to international peace and security".[154] The Security Council was determined to put an end to these gross violations of human rights and to bring peace and stability to the region by punishing those that were responsible for committing the violations.[155]

2.3.3.2 The ICTY[156]

Political developments led the country of Yugoslavia to break up due to a number of armed conflicts, which started in 1991.[157] The conflicts, marked by atrocities and committed by all sides to the conflict, were characterised by the practice of ethnic cleansing and sexual offences most of which were directed against civilians.[158] Before the conflict was finally brought to an end in December 1995, the Security Council had begun taking steps to prosecute those crimes committed during the conflicts.[159] The establishment of an international *ad hoc* tribunal was, however, slow in the making.[160] Only in 1992 at the inception of the international conferences held in London and Geneva did the idea of the establishment of an international tribunal begin to circulate.[161] Probably the most important point of the discussions at the conference was the ethical responsibility that fell upon the international society to put an end to the

153 *United Nations Security Council Resolution* 827, UN Doc. S/Res/827 (1993), *United Nations Security Council Resolution* 955, UN Doc. S/Res/955 (1994), *United Nations Security Council Resolution* 808, UN Doc. S/Res/808 (1993). Also see Bantekas and Nash *International Criminal Law* 339 and Nelaeva 2011 *Romanian Journal of European Affairs* 105.

154 Bantekas and *Nash International Criminal Law* 339 and *United Nations Security Council Resolution* 808, UN Doc. S/Res/808 (1993)**.**

155 Mettraux *International Crimes and the Ad Hoc Tribunals* 3.

156 As stated above the ICTY had been established by the UNSC, which was acting under Chapter VII of the *Charter of the United Nations* 1945 1 UNTS XVI. The ICTY shall function in accordance with the provisions of the present statute as adopted on 25 May 1993 by Resolution 827. International Criminal Tribunal for the Former Yugoslavia 2011 http://www.icty.org.

157 Cryer *et al An Introduction to International Criminal Law and Procedure* 102.

158 Cryer *et al An Introduction to International Criminal Law and Procedure* 102, Roper and Barria *Designing Criminal Tribunals* 20 and Nelaeva 2011 *Romanian Journal of European Affairs* 101. Various estimates state that the death toll in Bosnian and Croatian conflicts ranged from 100 000 to 200 000 and over two million people became refugees in the period from 1992 to 1995. Pictures taken of the concentration camps within Bosnia had evoked past memories of the Holocaust and it caused a public outcry. This led to demands that something had to be done.

159 Cryer *et al An Introduction to International Criminal Law and Procedure* 102.

160 Nelaeva 2011 *Romanian Journal of European Affairs* 101.

161 London Conference on Yugoslavia 27 August 1992, Geneva Conference on Yugoslavia 16 December 1992. Nelaeva 2011 *Romanian Journal of European Affairs* 101.

conflicts and to stop the atrocities that were being committed in the former Yugoslavia.[162] After the conferences a Commission of Experts was established.[163] The Commission was entrusted with the investigation into the human rights abuses that were being committed during the conflicts in Yugoslavia.[164] The Commission faced numerous difficulties but nonetheless the reports submitted by the Commission and the considerable evidence gathered played a very important role during the process of establishing the ICTY.[165]

In reaction to the reports submitted by the Commission, the Security Council ordered the Secretary General to examine if there was any basis in law for the establishment of an international criminal tribunal and if the Secretary General found such a basis, to formulate a suitable statute for the establishment of a criminal tribunal.[166] In his report the Secretary General stated that there was a basis for the establishment of an international criminal tribunal and as a result formulated a draft statute.[167] The draft statute was prepared by a UN Office of Legal Affairs working group.[168] The Security Council adopted the draft statute unanimously in the Security Council's Resolution 827 of 25 May 1993.[169] The Security Council took the extraordinary step of setting up an

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162 Nelaeva 2011 *Romanian Journal of European Affairs* 101.

163 The United Nations Commission of Experts was established under the *United Nations Security Council Resolution 780,* UN Doc. S/Res/780 (1992). Also see Cryer *et al An Introduction to International Criminal Law and Procedure* 103, Nelaeva 2011 *Romanian Journal of European Affairs* 105 and Bassiouni 2000 *International Law Review* 213-231.

164 Bantekas and Nash *International Criminal Law* 339 and Nelaeva 2011 *Romanian Journal of European Affairs* 105.

165 Nelaeva 2011 *Romanian Journal of European Affairs* 105 and Cryer *et al An Introduction to International Criminal Law and Procedure* 102. These difficulties included the lack of qualified experts and insufficient funding.

166 Bantekas and Nash *International Criminal Law* 339. Also see *United Nations Security Council Resolution* 808, UN Doc. S/Res/808 (1993).

167 *Report of the Secretary General pursuant to Security Council Resolution* 808 (1993) UN Doc S/25704 (1993) para 2 reprinted in 32 ILM (1993) 1159. See Bantekas and Nash *International Criminal Law* 339 and Schabas *An Introduction to the International Criminal Court* 11. The Secretary General formulated the statute on the basis that it would only apply to the parts of international law that were beyond any doubt part of customary international law.

168 The working group compiled the draft statute by collecting states' suggestions and proposals from Non-Governmental Organisations. See in this regard Nelaeva 2011 *Romanian Journal of European Affairs* 105 and Cryer *et al An Introduction to International Criminal Law and Procedure* 102.

169 The Security Council Resolution 827 of 25 May 1993 clearly set out the aims for the establishment of the ICTY. The aims set out were that the ICTY could help put an end to the situation that was taking place in the Former Yugoslavia and that the ICTY could take the

international criminal tribunal in accordance with Chapter VII of the Charter of the United Nations of 1945.[170] Chapter VII allows the Security Council to react to any threats to the peace, breaches of the peace or any acts of aggression.[171] The ICTY Statute was drafted to provide the tribunal with the necessary jurisdiction and authority to prosecute and judge breaches of the Geneva Conventions of 1949, crimes against humanity, violations of the laws or customs of war and genocide in the territory of the former Yugoslavia.[172]

The establishment of the Commission of Experts and the ICTY represented a historic breakthrough and an important event in world politics for the United Nations, as well as for the role of the Security Council.[173] The ICTY is seen as the first international court for the prosecution of war crimes by way of international criminal law after the IMT Nuremberg and IMTFE.[174]

Prior to the creation of the ICTY the Security Council had never created a criminal court in order to assist it in the maintenance of international peace and security.[175] To date the ICTY has reached various achievements. These achievements include the provision of justice to the victims of the crimes, the implementation of individual criminal responsibility by indicting a head of state and other leaders, the promotion of reconciliation within the country, giving victims a voice by letting the victims participate

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effective measures that were needed, to effectively bring to justice the persons who were responsible for the crimes committed during the conflicts and by achieving this the ICTY could contribute to the restoration and maintenance of peace in the former Yugoslavia. See *United Nations Security Council Resolution* 827, UN Doc. S/Res/827 (1993) and Cryer *et al An Introduction to International Criminal Law and Procedure* 103.

170 Chapter VII of the *Charter of the United Nations* is available at http://www.un.org. Also see Mettraux *International Crimes and the Ad Hoc Tribunals* 3.

171 United Nations Date Unknown http://www.un.org.

172 This was in accordance with a 1 and a 8 ICTY Statute. Also see Nelaeva 2011 *Romanian Journal of European Affairs* 105, Cryer *et al An Introduction to International Criminal Law and Procedure* 103 and Mettraux *International Crimes and the Ad Hoc Tribunals* 3.

173 Mettraux *International Crimes and the Ad Hoc Tribunals* 3, Nelaeva 2011 *Romanian Journal of European Affairs* 105-106, Bantekas and Nash *International Criminal Law* 339 and ICTY Date Unknown http: //www.icty.org.

174 Kamardi *The Shaping of Procedural Rules by the ICTY in View of the Right to Fair Trial* 399 and Nelaeva 2011 *Romanian Journal of European Affairs* 105-106.

175 Zahar and Sluiter *International Criminal Law* 6.

in the process, the establishment of a historic account of the facts of the conflicts, strengthening the rule of law and contributing to the development of international law.[176]

At the time of writing this dissertation, the ICTY has two cases in the pre-trial stage, eight cases on trial and five cases on appeal. The ICTY has sentenced 83 defendants, imposing life sentences on four defendants and terms of imprisonment on 79 defendants. The ICTY has also acquitted 13 defendants.[177]

2.3.3.3 The ICTR

Rwanda had suffered from racial unrest for the greater part of the past century.[178] The conflict that enveloped Rwanda started in October 1990 and ended in July 1994.[179] The conflict started when the Rwandese Patriotic Army and the Ugandan Army (better known as the National Resistance Army), in a joint effort, invaded Rwanda in October 1990.[180] The four years of fighting were characterised by significant losses on both sides of the conflict and the fighting escalated toward the 1994 Rwandan Genocide.[181] The Rwandan Genocide that took place over just a few months was considered to be on a scale not witnessed in the space of half a century; many times over and beyond those atrocities perpetrated in the former Yugoslavia and was marked by gross violations of humanitarian law.[182]

The Security Council created another international criminal tribunal (situated in Arusha, Tanzania) to prosecute those persons responsible for genocide and gross violations of

176 International Criminal Tribunal for the Former Yugoslavia 2011 http://www.icty.org.
177 International Criminal Tribunal for the Former Yugoslavia 2011 http://www.icty.org.
178 Burchfield 2005 http://www.nyulawglobal.org.
179 Philot 1995 http://www.inshuti.org and Burchfield 2005 http://www.nyulawglobal.org.
180 Philot 1995 http://www.inshuti.org and Burchfield 2005 http://www.nyulawglobal.org.
181 Philot 1995 http://www.inshuti.org.
182 The Rwandan Genocide lasted for 100 days from April to June 1994. See in this regard Burchfield 2005 http://www.nyulawglobal.org, Bantekas and Nash *International Criminal Law* 440, Mettraux *International Crimes and the Ad Hoc Tribunals* 3-4 and Philot 1995 http://www.inshuti.org.

humanitarian law in Rwanda in 1994.[183] The Security Council had in effect, treated the creation of the ICTR as they did the creation of the ICTY.[184] The Security Council set up a Commission of Experts for Rwanda and the Commission initially simply suggested that the ICTY's jurisdiction should be expanded so as to include the crimes that were committed in Rwanda during the conflict.[185] This solution was rejected and the ICTR was established.[186]

The Security Council therefore established the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Serious Violations Committed in the Territory of Neighbouring States between 1 January 1994 and 31 December 1994 (the ICTR) by adopting Security Council Resolution 955 of 8 November 1994 and, as in the case of the ICTY, in accordance with Chapter VII of the Charter of the United Nations.[187] The war crimes provisions in the ICTR Statute, unlike those in the ICTY Statute, reflect that the Rwandan Genocide took place within an internal armed conflict situation.[188]

The ICTR Statute is in essence similar to the ICTY Statute.[189] Apart from both being secondary organs to the Security Council and both sharing an almost identical statute,

183 *United Nations Security Council Resolution* 955, UN Doc. S/RES/955 (1994) and Mettraux *International Crimes and the Ad Hoc Tribunals* 4.

184 Cryer *et al An Introduction to International Criminal Law and Procedure* 112.

185 International Criminal Court for Rwanda Date Unknown http://www.ictr.org; Mettraux *International Crimes and the Ad Hoc Tribunals* 4. The Commission of Experts for Rwanda reported to the Security Council that there was a threat to the international security and peace. The Commission of Experts for Rwanda was established according to the *United Nations Security Council Resolution* 935, UN Doc. S/RES/935 (1994). Furthermore see Bantekas and Nash *International Criminal Law* 440 and Akhavan *American Journal of International Law* 502.

186 Mettraux *International Crimes and the Ad Hoc Tribunals* 4 and Bantekas and Nash *International Criminal Law* 440. The reason for the failed expansion of the ICTY's jurisdiction to also incorporate the crimes committed in Rwanda is because of the fact that a number of States were afraid that this may lead to the creation of an international criminal tribunal.

187 Schabas *An Introduction to the International Criminal Court* 11 and Mettraux *International Crimes and the Ad Hoc Tribunals* 4.

188 Schabas *An Introduction to the International Criminal Court* 11.

189 Mettraux *International Crimes and the Ad Hoc Tribunals* 4, Schabas *An Introduction to the International Criminal Court* 11 and Bantekas and *Nash International Criminal Law* 440.

the ICTR and the ICTY are unified in various other manners as well. For example the judges that make up the Appeals Chamber for both the ICTY and the ICTR are the same and until September 2003 both the tribunals had a common Prosecutor.[190] The goal behind the common factors between the ICTR and the ICTY was to develop a logical legal system that would be balanced.[191]

To date the ICTR has one case awaiting trial, 5 cases in progress, 52 completed cases, and 18 cases pending appeal.[192] The ICTR acquitted 10 of the accused, withdrew charges against two of the accused, passed 13 life sentences, and passed sentences of imprisonment varying between 9 months and 45 years.[193] The rulings given by the ICTR and ICTY ultimately fed the debates on the creation of an international criminal court.[194]

2.3.4 The Special Court for Sierra Leone

2.3.4.1 Establishing the Special Court for Sierra Leone

Since March 1991 until January 2002, the small West African country of Sierra Leone was plagued by armed conflict.[195] The civil war that stretched over a period of 11 years was characterized by massive and widespread violence, severe brutality against the civilian population and serious violations of international humanitarian law and human rights.[196] After the war an estimated 500 000 people were killed and hundreds of thousands were displaced from their communities and livelihoods.[197]

190 Bantekas and Nash *International Criminal Law* 440 and Cryer *et al An Introduction to International Criminal Law and Procedure* 113.
191 Bantekas and Nash *International Criminal Law* 440.
192 ICRC Date Unknown http://www.unictr.org.
193 ICRC 2012 http://www.unictr.org
194 Schabas *An Introduction to the International Criminal Court* 12.
195 Winter "The Special Court for Sierra Leone" 102-121 and Da Silva "The hybrid experience of the Special Court for Sierra Leone" 232-258.
196 Da Silva "The hybrid experience of the Special Court for Sierra Leone" 232-258 and Jones and Powles *International Criminal Practice* 18.
197 Winter "The Special Court for Sierra Leone" 102-121.

With the sheer gravity of the crimes committed during the conflicts in mind, the Government of Sierra Leone and the international community determined that those individuals that were most responsible for the crimes should be held accountable.[198] With its return into power in 1999, the government of Sierra Leone therefore requested the United Nations to establish a credible court to try the worst offenders.[199] It was hoped by the Sierra Leonean Government that the assistance from the international community in the establishment of an international tribunal would be a powerful tool in order to neutralise the rebel forces and to stabilise the country.[200]

In reaction to the request by the Sierra Leonean Government, the United Nations adopted Resolution 1315, which authorised the United Nations Secretary General to enter into negotiations to establish a court.[201] The United Nations also used Resolution 1315 to reiterate that the still unstable situation in Sierra Leone continued to constitute a threat to international peace and security.[202] Resolution 1315 furthermore was used by the United Nations to recognise that an effective and credible justice system would help to end impunity in the country and contribute to the process of national reconciliation and the restoration and maintenance of peace.[203] After negotiations were completed 17 months later, the United Nations concluded a bilateral agreement with the Sierra Leonean Government in order to establish the Special Court for Sierra Leone (hereafter SCSL) on 16 January 2002 and to provide a legal framework for the Court.[204] The SCSL finds its seat in Freetown, Sierra Leone, which is a significant departure from the ICTY and the ICTR, both of which found their seats to be situated in other countries than were the conflicts had taken place.[205]

198 Da Silva "The hybrid experience of the Special Court for Sierra Leone" 232-258.
199 Winter "The Special Court for Sierra Leone" 102-121.
200 Cole 2001 *African Human Rights Law Journal* 107.
201 *United Nations Security Council Resolution* 1315, UN Doc. S/Res/1315 (2000).
202 Preamble *United Nations Security Council Resolution* 1315, UN Doc. S/Res/1315 (2000).
203 Preamble *United Nations Security Council Resolution* 1315, UN Doc. S/Res/1315 (2000).
204 *Agreement between the Government of Sierra Leone and the United Nations on the Establishment of a Special Court for Sierra Leone, Annex to the Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone* (hereafter SCSL Statute), UN Doc. S/2000/915 (4 October 2000). Also see Winter "The Special Court for Sierra Leone" 102-121.
205 Winter "The Special Court for Sierra Leone" 102-121.

2.3.4.2 A "Hybrid" Tribunal

The SCSL is unlike any other court in the world. The creation of a new criminal court by means of a bilateral agreement between a State and the United Nations rather than under Chapter VII of the United Nations Charter and the auspices of the Security Council laid the foundation for the SCSL's characterisation as a "hybrid legal institution".[206] The SCSL consists of international law, as well as national law capabilities and its staff is selected through national and international consultative processes and includes national, as well as international members.[207] The hybrid model was used to establish the SCSL because of growing scepticism in the international community towards the ICTY and the ICTR, which had been criticised for high costs, failure to establish a broader impact and lengthy trials.[208] The hybrid model was to reduce its budget, to effectively minimize its scope and to streamline its operations in order to reduce the length of trials.[209]

The SCSL's hybrid status was in effect given to the court because its jurisdiction covered international crimes, as well as national crimes.[210] The SCSL had the jurisdiction to prosecute individuals who carried the greatest responsibility for the commission of serious violations of international humanitarian law and Sierra Leonean law, which were committed in the territory of Sierra Leone since 30 November 1996.[211] The violations of international humanitarian law mainly included crimes against humanity and violations of article 3 common to the Geneva Conventions of 12 August 1949 and of Additional Protocol II thereto of 8 June 1977.[212] Regarding crimes against humanity the SCSL's Statute largely corresponds with article 5 of the ICTY Statute,

206 Da Silva "The hybrid experience of the Special Court for Sierra Leone" 232-258.
207 Winter "The Special Court for Sierra Leone" 102-121.
208 See in this regard the *Report of the Expert Group to Conduct a Review of the Effective Operations and Functioning of the International Tribunals for the Former Yugoslavia and Rwanda*, UN Doc. A/54/634 (22 November 1999).
209 Da Silva "The hybrid experience of the Special Court for Sierra Leone" 232-258.
210 Winter "The Special Court for Sierra Leone" 102-121.
211 A 1 SCSL Statute. Individual criminal responsibility is dealt with in A 6 SCSL Statute.
212 A 2 SCSL Statute and A 3 SCSL Statute.

article 3 of the ICTR Statute and article 7 of the Rome Statute. As for violations of article 3 of the Geneva Conventions, this corresponds with article 4 of the ICTR Statute.

The crimes under Sierra Leonean Law represented the main difference between the SCSL and the *ad hoc* tribunals.[213] The SCSL deals with specific crimes (whereas the *ad hoc* tribunals do not) under Sierra Leonean law such as contraventions of the *Offences relating to the abuse of girls under the Prevention of Cruelty to Children Act*, 1926, which included the abuse of girls under the age of 13 years or the abduction of a girl for immoral purposes.[214] However, the SCSL's jurisdiction over certain crimes under Sierra Leonean law had proven to be only a mere issue for academic interest.[215] This was because the Prosecutor did not bring any charges against any individual who had been indicted under those laws.[216]

The SCSL also had jurisdiction over other serious violations of international humanitarian law, which included:

> a. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
> b. Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
> c. Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.[217]

The SCSL issued indictments against 13 accused individuals.[218] Three of the accused had died before proceedings could be finalised against them and the remaining accused's cases were combined into four main cases.[219] Three of the four cases have

213 A 5 SCSL Statute.
214 A 5(a)(i-iii) SCSL Statute.
215 Winter "The Special Court for Sierra Leone" 102-121.
216 Winter "The Special Court for Sierra Leone" 102-121.
217 A 4 SCSL Statute.
218 Special Court for Sierra Leone 2012 http://www.sc-sl.org.
219 Winter "The Special Court for Sierra Leone" 102-121.

been completed and the accused were sentenced to terms of imprisonment varying from 15 to 50 years.[220] The SCSL is in the process of finalizing its last case and this would mean that the SCSL will become the first international court to have completed its proceedings post-World War II. It is expected that the court will pass its final sentence at the end of 2012.[221]

2.3.5 The ICC

The ICC is the first permanent, treaty-based, independent international criminal court and was created with the objective of contributing to the ending of the impunity of the perpetrators of the most serious crimes against the international community.[222] The ICC is not part of the United Nations system, thereby ensuring its independence and is seated at The Hague in the Netherlands.[223] The ICC has lead in a new era in the protection of human rights and has been dubbed by Schabas[224] as:

> … arguably the most significant international organization to be created since the United Nations.

The international community reached a historical milestone on 17 July 1998 when 120 States had adopted the Rome Statute as the legal basis for the establishment of the ICC.[225] The ICC does not have jurisdiction over any crimes that were committed before the Rome Statute came into force and may thus only try crimes that were committed after 1 July 2002.[226] There are three basic ways for the ICC to preside over a case:

> (a) A State Party to the Rome Conference refers a case to the Court;
> (b) The UN Security Council acting under Chapter VII of the UN Charter requests the Prosecutor to initiate an investigation;

220 Special Court for Sierra Leone 2012 http://www.sc-sl.org.
221 Special Court for Sierra Leone 2012 http://www.sc-sl.org.
222 The International Criminal Court 2011 http://www.icc-cpi.int.
223 The International Criminal Court 2011 http://www.icc-cpi.int.
224 Schabas *An Introduction to the International Criminal Court* 20.
225 The International Criminal Court 2011 http://www.icc-cpi.int.
226 Nuremberg Human Rights Centre 2006 http://www.iccnow.org.

(c) The Prosecutor initiates an investigation at his/her own initiative on the basis of information he or she has received.[227]

The ICC is, however, a court of last resort and it will not act upon any case if such a case is already being investigated by a country's national prosecuting authority.[228] The ICC will, on the other hand, act on such a case if it is established that the proceedings implemented against an accused are not genuine, for example, when the proceedings were only implemented to protect such an accused from criminal responsibility.[229]

Section 86 of the Rome Statute provides that there is a general duty that is bestowed upon all State Parties to cooperate fully with the ICC during the investigation and the process of prosecuting international crimes.[230] Section 87(7) of the Act, on the other hand, states that the failure of a State Party to cooperate with the ICC may lead thereto that the State may be referred to the Assembly of State Parties or whereas the Security Council had referred the matter to the ICC, to the Security Council.[231] When the two articles are read together it seems that they provide therefore that State Parties are under the obligation to investigate and prosecute international crimes at a national level.[232] Thus under the principle of complementarity, only when States are unable or unwilling to prosecute, may the ICC intervene.[233]

To date the ICC has 15 cases on trial.[234] The ICC delivered its first judgement, pursuant to Article 74 of the Rome Statute, in *Prosecutor v Lubanga* ICC-01/04-01/06-1729.[235] The Trial Chamber found the accused guilty as a co-perpetrator in relation to the charges of the conscription and enlisting of children under the age of 15 years and

227 A 13 Rome Statute.
228 The International Criminal Court 2011 http://www.icc-cpi.int.
229 The International Criminal Court 2011 http://www.icc-cpi.int.
230 S 86 ICC Act.
231 S 87(7) ICC Act.
232 Stone "Implementation of the Rome Statute in South Africa" 310
233 Stone "Implementation of the Rome Statute in South Africa" 310.
234 The International Criminal Court 2012 http://www.icc-cpi.int.
235 *Prosecutor v Lubanga ICC-01/04-01/06-1729*.

using these children to participate actively in the hostilities.[236] On 10 July 2012 the ICC sentenced Lubanga[237] to imprisonment for a term of 15 years.

2.4 The implementation of the Rome Statute in South Africa

2.4.1 The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002

South Africa has been an outspoken supporter of the ICC and on 17 July 1998 South Africa signed and ratified the Rome Statute and thus became a State Party thereto.[238] Days after the Rome Statute came into force the South African legislature passed the *Implementation of the Rome Statute of the International Criminal Court Act* 27 of 2002.[239] The enactment of the ICC Act is a major step towards the country's fulfilment of its complementarity obligations in terms of the Rome Statute.[240] The objectives of the ICC Act are:

> To provide for a framework to ensure the effective implementation of the Rome Statute of the International Criminal Court in South Africa; to ensure that South Africa conforms with its obligations set out in the Statute: to provide for the crime of genocide, crimes against humanity and war crimes; to provide for the prosecution in South African courts of persons accused of having committed the said crimes in South Africa and beyond the borders of South Africa in certain circumstances; to provide for the arrest of persons accused of having committed the said crimes and their surrender to the said Court in certain circumstances; to provide for cooperation by South Africa with the said Court; and to provide for matters connected therewith.[241]

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236 *Prosecutor v Lubanga ICC-01/04-01/06-1729* 1. Also see in this regard a 8(2)(e)(vii) and 25(3)(a) of the Rome Statute.

237 *Prosecutor v Lubanga ICC-01/04-01/06-2901*.

238 Du Plessis "Africa and the International Criminal Court" 2 and Du Plessis 2007 *Journal of International Criminal Justice* 460-461.

239 Du Plessis "Africa and the International Criminal Court" 2; Kulundu South Africa and the International Criminal Court 91; Du Plessis 2007 *Journal of International Criminal Justice* 460-461; and Katz *African Security Review* 25-27.

240 Kulundu *South Africa and the International Criminal Court* 64 and Du Plessis 2007 *Journal of International Criminal Justice* 460-461.

241 Preamble ICC Act. Also see s 3 ICC Act.

Before the implementation of the ICC Act, South Africa had no municipal legislation criminalising international crimes.[242] However, with the implementation of the ICC Act a structure was created for the national prosecution of the crimes provided for in the Rome Statute.[243] According to Kulundu[244] South Africa has:

> … the political will to make a dent on the burgeoning menace that is international crime and to ensure that international criminals do not evade justice.

Section 4 of the ICC Act deals with the jurisdiction of South African courts with regard to the prosecution of international crimes.[245] Section 4(1) provides for the general principle of territoriality and states that any person who has committed a crime inside the borders of South Africa is guilty of an offence and liable to punishment thereof.[246] On the other hand section 4(3) provides for the principle of extra-territoriality and provides that:

> In order to secure the jurisdiction of a South African court … any person who commits a crime contemplated in subsection (1) outside the territory of the Republic, is deemed to have committed that crime in the territory of the Republic if –
> (a) that person is a South African citizen: or
> (b) that person is not a South African citizen but is ordinarily resident in the Republic; or
> (c) that person, after the commission of the crime, is present in the territory of the Republic; or
> (d) that person has committed the said crime against a South African citizen or against a person who is ordinarily resident in the Republic.[247]

With the structure and jurisdiction set in place for the prosecution of individuals accused of having committed international crimes it is clear that the ICC Act takes the principle of complementarity very seriously.[248] The preamble of the ICC Act provides that South

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242 Du Plessis 2007 *Journal of International Criminal Justice* 460-461 and Kulundu *South Africa and the International Criminal Court* 64.
243 Du Plessis 2007 *Journal of International Criminal Justice* 460.
244 Kulundu *South Africa and the International Criminal Court* 64.
245 S 4 ICC Act. Also see Stone "Implementation of the Rome Statute in South Africa" 311.
246 S 4(1) ICC Act.
247 S 4(3) ICC Act. The international community has recognised the concept of "extra-territoriality" for a long time. For example in *SS Lotus, France v Turkey* Judgment No. 9, 1927, P.C.I.J. Series A, No. 10 at 20, it was stated that many countries recognise the concept of extra-territoriality. In essence extra-territoriality is the recognition of the applicability of a country's laws outside its own territory.
248 Du Plessis 2007 *Journal of International Criminal Justice* 461.

Africa is committed to the bringing to justice of individuals who have committed atrocities and to do so in accordance with South Africa's domestic laws where possible.[249] Section 3(d) of the Act furthermore emphasises the importance of complementarity by stating that the national prosecuting authority of South Africa must prosecute and South African High Courts must pass judgement upon international crimes.[250]

Section 5 of the ICC Act sets out the circumstances under which prosecutions may be instituted by a South African court.[251] The Act provides that prosecution may only be instituted against an individual accused of committing an international crime with the consent of the National Director.[252] The Act also states that prosecution may not institute retroactively.[253] Furthermore, the National Director of Public Prosecutions must give recognition to the fact that South Africa has the jurisdiction and responsibility to prosecute accused individuals under the concept of complementarity during the process of deciding to institute prosecution.[254] The South African High Court designated for the prosecution of an accused individual is designated by the Cabinet member who is responsible for the administration of justice.[255] This is done in consultation with the Chief Justice of South Africa after consultation with the National Director of Public Prosecutions.[256] When the National Director refuses to prosecute an accused individual, he or she must provide the full reasons for the decision and present them to the Central Authority.[257] The Central Authority must then in turn forward the decision, as well as the full reasons to the Registrar of the ICC.[258] A decision by the National Director not to

249 Preamble ICC Act.
250 S 3(d) ICC Act.
251 S 5 ICC Act.
252 S 5(1) ICC Act.
253 S 5(2) ICC Act.
254 S 5(3) ICC Act.
255 S 5(4) ICC Act.
256 S 5(4) ICC Act.
257 S 5(5) ICC Act. The Central Authority is the Director-General: Justice and Constitutional Development.
258 S 5(5) ICC Act.

prosecute an accused does not mean that such an accused may not be prosecuted by the ICC itself.[259]

2.5 Summary

The reason for the establishment of the ICC is to end the impunity of those individuals who are guilty of committing the most heinous of crimes against the international community. There still is no generally accepted definition for the term “international crimes”. A few core international crimes are, however, firmly established and they are genocide, crimes against humanity, war crimes and the crime of aggression. The development of definitions for these crimes has stretched over decades as well, and the punishment thereof primarily started taking place after World War II. The IMTs and later on the ICTY, the ICTR and the SCSL have made numerous contributions to the establishment of a sound footing for the ICC in the battle against international crimes. South Africa has also taken up the call of the international community against the impunity of the individuals who are guilty of international crimes and has adopted the provisions of the Rome Statute into its domestic legislation in order to conform to the country’s international obligations under the Rome Statute. In the following Chapter the approach of international courts in sentencing individuals convicted of international crimes will be considered.

259 S 5(6) ICC Act.

Chapter 3

Sentencing at the International Courts

3.1 Introduction

It seems fitting to begin this Chapter with a statement by Schabas[260] regarding the sentencing of individuals by any court:

> … once the truth is determined and guilt or innocence pronounced, the court's work is not completed. It must also render an individualized sentence, one that fits the crime.

D'Ascoli[261] defines "sentencing" as:

> … the process of punishing individuals found guilty of a criminal behaviour which violated the law and offended the protected values of a given community.

International criminal justice exists to bring those guilty of committing international crimes to justice.[262] The assurance that a sentence will be passed upon an individual guilty of committing a crime is one of the remedies to ensure compliance with international law.[263]

The process of sentencing those who have been found guilty of committing crimes against international law and its principles must serve a multitude of purposes and must take into account a considerable number of factors pertaining to the crimes committed. Although the importance of the process of international sentencing has been established it is unmistakable that this area of international law is still developing.[264] When international sentencing practices are compared to domestic sentencing practices

260 Schabas 1997 *Duke Journal of Comparative and International Law* 500.
261 D'Ascoli *Sentencing in International Criminal Law* 9.
262 Ohlin "Towards a Unique Theory" 373.
263 Tomuschat 1995 *Israel Yearbook on Human Rights* 41.
264 Cengage 2005 http://www.eNotes.com.

it shows that many aspects regarding the international sentencing process are not regulated.[265] This shortcoming may stem from the fact that international criminal law lacks a codified and coherent sentencing system.[266]

In this chapter the aim is firstly to describe the problems faced by judges during the process of sentencing those found guilty of committing international crimes. Secondly the purposes of sentencing for international crimes will be discussed. The third aspect in this chapter deals with the mitigating and aggravating factors that are taken into account by international criminal tribunals when deciding upon an appropriate sentence.

3.2 Problems facing judges during the process of determining an appropriate sentence

The role of a judge, within the context of international law, is seen as that of an interpreter of the fundamental principles and values of the international community.[267] Judge Kaufman[268] stated that he believed the most demanding facet of sitting as a judge in a criminal court was by far the process of sentencing and that:

> In no other judicial function is the judge more alone; no other act of his carries greater potentialities for good and evil than the determination of how society will treat its transgressors.

The process of sentencing individuals who have been found guilty of committing an international crime is an inherently difficult undertaking and this may be attributed to numerous reasons.[269] One of the most prominent reasons may be because the IMT Nuremberg and the IMTFE offered no real sentencing guidance upon passing sentence at their respective trials.[270] Over the last 60 years there have been some significant developments in international law for the purpose of prosecuting individuals guilty of

265 D'Ascoli *Sentencing in International Criminal Law* 1.
266 D'Ascoli *Sentencing in International Criminal Law* 1.
267 D'Ascoli *Sentencing in International Criminal Law* 43.
268 Kaufman 1960 *The Atlantic Monthly* 1.
269 Drumbl and Gallant 2002 *Federal Sentencing Reporter* 140.
270 D'Ascoli *Sentencing in International Criminal Law* 1.

committing crimes against the international community.[271] Notwithstanding these developments, the development of a set of sentencing guidelines regarding international crimes has been slow in the making.[272] A further complication regarding sentencing at international level is the fact that the Statutes of the ICTY, the ICTR, the SCSL and the ICC contain only a few guidelines pertaining to sentencing.[273]

The enormous task that judges are faced with when sentencing an international criminal is made even more difficult, since certain associations are immediately made by the international community with regard to the context of international crimes, for example the outrages of World War II.[274] Justice Robert H. Jackson[275] made a very prominent statement regarding the crimes committed during World War II during his opening address in Nuremberg stating that:

> What makes this inquest significant is that these prisoners represent a sinister influence that will lurk in the world long after their bodies have returned to dust.

This statement carried through the decades because the crimes that were committed were so intimately entangled with the events that took place for the duration of World War II that they remained almost impossible to link to circumstances other than to those of the war.[276] The task and responsibility of sentencing individuals convicted of crimes against humanity, war crimes, genocide and aggression is a complicated undertaking.[277] It would truly be a difficult endeavour to identify crimes more difficult to sentence other than these atrocious crimes.[278]

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271 These developments include the establishment that certain defenses are rendered unavailable, for example superior orders, the development of definitions for genocide, crimes against humanity, war crimes and the crimes of aggression and the principle of command responsibility.
272 Holá, Smeulders and Bijleveld 2011 *Journal of International Criminal Justice* 411.
273 D'Ascoli *Sentencing in International Criminal Law* 2.
274 Mettraux *International Crimes and the Ad Hoc Tribunals* 193.
275 Linder 2011 http://www.law2.umkc.edu. Justice Robert H. Jackson was the Chief Prosecutor during the Nuremberg trials for the United States of America.
276 Mettraux *International Crimes and the Ad Hoc Tribunals* 193.
277 Drumbl and Gallant 2002 *Federal Sentencing Reporter* 140.
278 Mettraux *International Crimes and the Ad Hoc Tribunals* 343.

Judges are furthermore also expected to balance the sentence that is to be passed upon the guilty with elements, such as the greatness of the harm caused, the immense suffering by the victims of the crime committed and the public's expectation that an appropriate sentence will be passed.[279] The process of balancing the public's expectation that justice is to be served with the sentence complicates the sentencing process even further, and this is even more so in cases where sentences do not satisfy the wider community's virtues and opinions, especially when the international community is involved.[280]

3.3 Sentencing at the IMT Nuremberg and the IMTFE

Numerous people had expected that the Nuremberg and Tokyo trials would simply be a set of formalities that paved the way for the mere announcement of predetermined guilt.[281] On the contrary, the opposite is believed to have come true about the trials. Justice Robert Jackson[282] stated that the Allied Nations' decision to voluntarily surrender their captives to the IMTs in order for the IMTs to bestow a judgement upon them was one of the "most significant tributes ever paid to reason." Furthermore, the integrity with which the trials at Nuremberg and Tokyo took place, together with the determination of the fates of Nazi and Japanese leaders by means of evaluating their actions, contributed to the acceptance of their sentences by the German and Japanese public.[283]

The main penalties that could be imposed by the IMTs upon a conviction were death or another punishment as determined by the IMTs to be fair.[284] The IMT Nuremberg Charter also provided that the Tribunal could apart from the main sentences, also

279 Mettraux *International Crimes and the Ad Hoc Tribunals* 343.
280 Hoel 2009 *Monash University Law Review* 265.
281 Meron 2006 *American Journal of International Law* 552.
282 Nuremberg Human Rights Centre 2006 http://www.iccnow.org.
283 Meron 2006 *American Journal of International Law* 552.
284 A 27 IMT Nuremberg Charter and a 16 IMTFE Charter.

deprive the convicted individual of any stolen property and order such property to be delivered to the Control Council for Germany.[285]

Unfortunately the IMTs' Charters did not provide for any sentencing guidelines, which reflected the sentencing process that was to be used during trials.[286] Apart from the lack of sentencing guidelines, the IMTs also had no practice in holding hearings specifically aimed at addressing matters concerning the sentence.[287] Even though the judgments of the IMT Nuremberg and the IMTFE extended to thousands of pages, their sentences were given in short single sentence declarations with little or no explanation for their findings.[288] The sentences that were passed by the IMT and the IMTFE had nonetheless shown that retribution and general deterrence had played a significant role and there was extensive use of the death penalty.[289]

Regarding the purpose of punishment, Justice Robert Jackson[290] made a very comprehensive statement:

> Punishment of war criminals should be motivated primarily by its deterrent effect, by impetus which it gives to improved standards of international conduct and, if the theory of punishment is broad enough, by the implicit condemnation of ruthlessness and unlawful force as instruments of attaining national ends. The satisfaction of instincts of revenge and retribution for the sake of retribution are obviously the least sound basis of punishment. If punishment is to lead to progress, it must be carried out in a manner which world opinion will regard as progressive and as consistent with the fundamental morality of the Allied case.

In neither the IMT Nuremberg nor the IMTFE trials did any of the defendants who had received the death penalty commit crimes against peace only.[291] All of the defendants

285 A 28 IMT Nuremberg Charter.
286 Drumbl and Gallant 2002 *Federal Sentencing Reporter* 140.
287 Schabas 1997 *Duke Journal of Comparative and International Law* 461.
288 Danner *Virginia Law Review* 418.
289 Schabas 1997 *Duke Journal of Comparative and International Law* 500, D'Ascoli *Sentencing in International Criminal Law* 33 and Munlo "Enforcement of Sentences in ICTR" 1.
290 Bassiouni *Crimes Against Humanity in International Criminal Law* 14.
291 Clark "Nuremberg and Tokyo" 171-187.

that were executed were convicted of crimes against humanity or war crimes.[292] In this regard Clark[293] states that:

> … if giving the death penalty signifies something about the gravity of the offences, it was not waging aggressive war that weighed most heavily with the Tribunal(s).

Because of the sheer horror and magnitude of the crimes committed, the IMT Nuremberg and the IMTFE had refrained from addressing any sort of aggravating circumstances during the trials, because discussing such aggravating circumstances would have seemed pointless.[294] The IMT Nuremberg and the IMTFE did, however, address mitigating factors and it seems that the Tribunals would assume that a guilty verdict without any mitigating factors would be the justification for the death penalty.[295] The IMT Nuremberg also stated regarding mitigating factors that:[296]

> … it must be observed, however, that mitigation of punishment does not in any case of the word reduce the degree of the crime. It is more a matter of grace than of defence.

Some authors consider that, because of the void left by the IMTs regarding sentencing guidelines, the establishment and functioning of the ICTR and the ICTY with regard to its sentencing process, remain at the forefront of developing and practicing sentencing guidelines for international crimes.[297] Authors even consider the principles regarding

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292 Clark "Nuremberg and Tokyo" 171-187.

293 For a summary of the sentences handed down by the IMT Nuremberg and the IMTFE see United States Holocaust Memorial Museum http://www.ushmm.org Clancey http://www.ibiblio.org; and Clark "Nuremburg and Tokyo" 171-187.

294 Schabas 1997 *Duke Journal of Comparative and International Law* 483. Also see *United States v Alstötter* United States Military Tribunal Nuremberg (the *Justice* case) para 1156.

295 The IMT made a statement regarding relevant mitigating factors in the case of *United States v List* United States Military Tribunal Nuremberg (the *Hostages* case) para 757, 1317. The Tribunal stated that: 'The degree of mitigation depends upon many factors including the nature of the crime, the age and experience of the person to whom it applies, the motives for the criminal act, the circumstances under which the crime was committed, and the provocation, if any, that contributed to its commission.' The IMT Nuremberg was the only IMT that mentioned mitigating circumstance in its Charter. The IMT Nuremberg Charter stated that the official position of the defendants would not be considered as a mitigating factor. See in this regard a 7 Nuremberg Charter. Also see Schabas 1997 *Duke Journal of Comparative and International Law* 461.

296 *United States v List* United Military Tribunal Nuremberg (the *Hostages* case) para 757, 1317.

297 Drumbl and Gallant 2002 *Federal Sentencing Reporter* 140, 143.

sentences, which have and will be passed by the ICTY and the ICTR, as one of the most important legacies that will be left for international law and international relations and the development thereof thus far.[298] While both the Statutes, as well as the rules of procedure and evidence (hereafter RPE) of the ICTY and the ICTR provide broad powers to the *ad hoc* Tribunals, little guidance is given with regard to the sentencing process.[299]

3.4 Sentencing at the ICTY, the ICTR, the SCSL and the ICC

3.4.1 The purposes of sentencing

The purpose of punishment is unquestionably a very important element of any criminal legal system and criminal law theorists have long debated the purpose of imposing punishment.[300] D'Ascoli[301] suggests that the purpose of sentencing determines the character, effectiveness, and the severity of sentences, as well as the process of their enforcement. Since the establishment of the ICTY, the ICTR and the SCSL, the judges of these tribunals have been passing judgements for the international crimes of genocide, war crimes and crimes against humanity.[302] The sentences of the *ad hoc* Tribunals and the SCSL have, however, been passed with only a withered framework of international sentencing procedures.[303] With the ICC also starting to contribute to the clarification of the sentencing process at international level for the most egregious of crimes, it is hoped that a clearly established framework will soon emerge.

The objectives of sentencing at international level, however, remained murky at best and in a sense relatively similar to the objectives of sentencing at domestic level.[304] The

298 Meernik and King 2003 *Leiden Journal of International Law* 717 and Sloane 2007 *Journal of International Criminal Justice* 733-734.
299 Meernik and King 2003 *Leiden Journal of International Law* 719.
300 Danner *Virginia Law Review* 419 and Sootak 2000 *Juridica International* 68.
301 D'Ascoli *Sentencing in International Criminal Law* 33.
302 Ohlin "Towards a Unique Theory" 375. Regarding the SCSL see Murungu "Prosecution and Punishment" 97-118.
303 Ohlin "Towards a Unique Theory" 375.
304 Dinokopila "Sentencing practices of the Special Court for Sierra Leone" 118-144.

reason for the lack of clear sentencing purposes may in part be because international criminal law treaties do not in general include any detailed sentencing provisions.[305] The Statutes and the RPEs of the ICTY, the ICTR, the SCSL and the ICC also remain largely silent on the subject of sentencing purposes.[306] The fact that there is an absence of any noteworthy provisions relating to the penal process of the ICC in its founding document, undermines the ICC as a legitimate mechanism used to effectively deliver democratic principles of justice.[307]

Because of this lack of guidance, international criminal tribunals and courts seem to examine sentencing purposes with reference to precedents found in international, as well as national laws.[308] In the classical criminal law theory the purposes for sentencing are deterrence, rehabilitation, retribution and the protection of the public.[309] Bassiouni[310] has suggested that the main aims of sentencing at international level should be the maintenance of international peace and security and the preservation of the world order. Many other authors have nonetheless suggested that sentencing purposes can be divided into three main "theories of punishment" namely, retribution (absolute theory), utilitarianism (relative theory) and the combined theory.[311] It is very important to distinguish the concept of the "theories of punishment" from the concept of the

305 Bassiouni and Manikas *The Law of the International Criminal Tribunal for the Former Yugoslavia* 701.

306 D'Ascoli *Sentencing in International Criminal Law* 273. It can be stated that the failure of the ICTY, the ICTR and the ICC to effectively establish which purposes and principles should serve as characteristic elements of a sentence, constitutes a significant shortcoming in international law. Henham 2003 *The International and Comparative Law Quarterly* 85. Also see Schabas 1997 *Duke Journal of Comparative and International Law* 461-463. Regarding the SCSL see Murungu "Prosecution and Punishment" 119-143 and Dinokopila "Sentencing practices of the Special Court for Sierra Leone" 118-144.

307 Henham 2003 *The International and Comparative Law Quarterly* 86. According to Henham the fact that the expression 'democratic' is used in the ICC's founding document, deliberately implies the need for principles that protect and sustain freedom against incursions from state or interstate power.

308 D'Ascoli 2007 http://www.juragentium.unifi.it.

309 Schabas 1997 *Duke Journal of Comparative and International Law* 498 and D'Ascoli *Sentencing in International Criminal Law* 63.

310 Bassiouni *Introduction to International Criminal Law* 680.

311 Yacoubian 1998 *World Affairs* 48, Cengage 2005 http://www.eNotes.com, Henham 2007 *Journal of International Criminal Justice* 1 and Snyman *Strafreg* 13.

"purposes of punishment".[312] A theory aims to illustrate the beginning of the entity that is being theorised about, while a purpose aims to illustrate the result thereof.[313]

The theories of punishment are very important regarding the sentencing process.[314] This is because the goal that is to be achieved by these theories is not just to justify the punishment of a guilty individual in general, but also to give an answer to the question as to what the nature and extent of the sentence should be.[315] There are a few differences between the absolute and relative theories. According to the absolute theory punishment is the just desserts for the guilty and there is only one sentencing purpose of punishment that forms part of the absolute theory namely, retribution.[316] The relative theory, acknowledges punishment only as a means to achieve different purposes and the sentencing purposes of the relative theory are deterrence, rehabilitation and prevention.[317] The combined theory combines the relative theory with the absolute theory and this produces a theory that aims to find a balance between the relative and the absolute theories.[318]

The desire for retribution may be justifiable within a moral context and Henham[319] suggests that this is because of an existing need "to re-assert the fundamental virtues of humanity as represented by the international community and democratic principles of justice." The purpose of retribution was originally described as the notion of "just desserts" or "an eye for an eye."[320] Kant[321] links the purpose of retribution with the principle of equality and suggests that when a person commits a crime, he offsets the balance of equality and therefore deserves punishment in order to balance the scale again. There has, however, been some significant development regarding retribution as

312 Terblanche *Guide to sentencing in South Africa* 171.
313 Terblanche *Guide to sentencing in South Africa* 171.
314 Snyman *Strafreg* 13.
315 Snyman *Strafreg* 13.
316 Snyman *Strafreg* 13.
317 Snyman *Strafreg* 13.
318 Terblanche *Guide to sentencing in South Africa* 174.
319 The morality of retribution is, however, questionable without some sort of rationale to explain how the harm caused by the criminal act should be used to in order to determine the severity of the sentence. See in this regard Henham 2003 *The International and Comparative Law Quarterly* 86.
320 Cengage 2005 http://www.eNotes.com.
321 Kant "Justice and Punishment" 102-106.

may be seen in the statement made by Keating[322] while the Security Council was still developing the ICTR Statute:

> We do not believe that the following principle of 'an eye for an eye' is the path to establishing a civilized society, no matter how horrendous the crimes the individuals concerned may have committed.

In the modern view of retribution the concept of proportionality is fundamental and sentences should be proportionate to the seriousness of the offences.[323] In other words, this concept of sentencing suggests that the most serious sentences should be reserved for the most serious of offences.[324]

Utilitarianism can be described as the inclusion of attempts at incapacitation and deterrence. Murtagh[325] states that utilitarianism is:

> … the moral theory that holds that the rightness or wrongness of an action is determined by the balance of good over evil that is produced by that action.

The sentence that is passed should therefore produce the greatest balance of good over evil compared to any other available sentencing options.[326]

The Resolutions of the Security Council establishing the United Nations *ad hoc* Tribunals and the SCSL did refer to some guidelines regarding sentencing in their aims for the establishment of the *ad hoc* Tribunals and the SCSL. The Resolutions included the purposes of national reconciliation, retribution, restoration of peace and

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322 *The Situation Concerning Rwanda: Establishment of an International Tribunal for the Prosecution of Persons Responsible for Violations of International Humanitarian Law in the Territory of Rwanda and Rwandan Citizens Responsible for Such Violations Committed in the Territory of Neighbouring States* UN Doc. S/PV.3453 (1994) 5. Colin Keating was the Ambassador for New Zealand to the UN between 1993 and 1996. He also served on the Security Council between 1993 and 1994. In 1994 during the Rwandan Genocide he acted as the Security Council's President.

323 Von Hirsch and Ashworth *Proportionate Sentencing* 251.

324 Yacoubian 1998 *World Affairs* 48.

325 Murtagh 2010 http://www.iep.utm.edu.

326 Available options are, for example, the public denouncement of the individual or simply not taking action against the individual. In this regard see Murtagh 2010 http://www.iep.utm.edu.

deterrence.[327] The ICTY confirmed these purposes in *Prosecutor v Erdemović* where the ICTY's Trial Chamber stated with reference to UN Security Council Resolution 827 that the main purposes of sentencing for the ICTY were deterrence, reprobation, retribution and reconciliation.[328] The SCSL found in *Prosecutor v Brima et al* that the main sentencing purposes in international law are deterrence, retribution and rehabilitation.[329] The preamble of the Rome Statute also reveals some purposes of sentencing, namely the maintenance of peace, security and well-being of the world, retribution, the prevention of impunity and deterrence.[330]

Unfortunately there has not, as yet, been any attempt by the international tribunals or courts to define and explain the content of these purposes.[331] This may be because when sentences are passed at national level within any State, one could expect uniformity regarding moral and philosophical approaches towards sentencing, because of the specific characteristics of that national dominion.[332] This sense of uniformity towards moral and philosophical approaches towards sentencing is lacking at international level because the Trial and Appeals Chambers of international tribunals and courts must consist of judges from different nationalities.[333]

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327 *United Nations Security Council Resolution* 827, UN Doc. S/Res/827, *United Nations Security Council Resolution* 955, UN Doc. S/Res/955 and *United Nations Security Council Resolution* 1315, UN Doc. S/Res/1315 (2000). The Resolutions of the ICTY as well as the ICTR were almost similar regarding the aims of the establishment of the Tribunals but Resolution 827 that established the ICTY did not mention national reconciliation. Also see D'Ascoli *Sentencing in International Criminal Law* 34.

328 *Prosecutor v Erdemović* ICTY IT-96-22-T 58.

329 *Prosecutor v Brima et al* SCSL-2004-16-T 14.

330 Preamble of the Rome Statute paragraphs 3-5 and 9. The fact that the Rome Statute remains silent on the subject of sentencing purposes may be because of the lack of any sort of substantive debate on the subject of sentencing purposes at the Rome Conference in 1998. See in this regard Henham 2003 *The International and Comparative Law Quarterly* 85 and Schabas *An Introduction to the International Criminal Court* 140. Furthermore see *Prosecutor v Lubanga* ICC-01/04-01/06 16.

331 D'Ascoli 2007 http://www.juragentium.unifi.it and Henham 2003 *The International and Comparative Law Quarterly* 87.

332 *Report of the International Law Commission on the Work of its forty-third session,* UN Doc. A/46/10 (1991) para 67.

333 A 11(1) ICTR Statute, a 12(1) ICTY Statute and a 36(7) Rome Statute.

Henham[334] suggests that there are only two main purposes of sentencing in the *ad hoc* Tribunals, namely retribution and deterrence. The jurisprudence of the *ad hoc* Tribunals describes retribution as the punishment of an individual guilty of committing a crime within the jurisdiction of the Tribunals.[335] Retribution is, however, not interpreted as pure revenge, but rather as a means to reaffirm the fundamental values of humanity as interpreted by the international community and the democratic principles of justice.[336] On the other hand, deterrence also includes the general deterrence of future violations of international humanitarian law.[337]

Another purpose of sentencing which is also mentioned continuously by the Tribunals' Chambers, is the effective combatting of exemption from judgement or in other words

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334 Henham 2003 *The International and Comparative Law Quarterly* 87-88. Also see *Prosecutor v Tadić* ICTY IT-94-1-Tbis-R117 7-9, *Prosecutor v Kambanda* ICTR-97-23-S 58-59, D'Ascoli *Sentencing in International Criminal Law* 135-137, Mettraux *International Crimes and the Ad Hoc Tribunals* 345 and D'Ascoli 2007 http://www.juragentium.unifi.it.

335 Mettraux *International Crimes and the Ad Hoc Tribunals* 345.

336 *Prosecutor v Aleksovski* ICTY IT-95-14/1-A 185. This was reaffirmed in the case of *Prosecutor v Oric* ICTY IT-03-68-T 719, in 2006, where the Trial Chamber stated that: 'According to the jurisprudence of the Tribunal, retribution is not to be understood as fulfilling a desire for revenge but as duly expressing the outrage of the international community at these crimes. It is meant to reflect a fair and balanced approach to the exaction of punishment for wrongdoing. This means that the penalty must be appropriate to the wrongdoing; in other words, the punishment must fit the crime.' Regarding the ICTR see *Prosecutor v Delalic* ICTY IT-96-21 T 1231, where it was stated that the pure desire for revenge or vengeance is against the principles of the international community and the democratic principles of justice. In *Prosecutor v Popović* ICTY IT-05-88-T 2128, the ICTY Trial Chamber stated that 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 just and appropriate punishment, and nothing more.' The SCSL also reaffirmed this approach in *Prosecutor v Brima et al* SCSL-2004-16-T 16, where the Trial Chamber stated that retribution should be understood as to not 'fulfilling the desire for revenge but rather as duly expressing the outrage of the national and international community at these crimes, and that it is to reflect a fair and balanced approach to punishment for wrongdoing'.

337 Mettraux *International Crimes and the Ad Hoc Tribunals* 345. See also *Prosecutor v Todorović* ICTY IT-95-9/1-T 30 where the Trial Chamber stated that the penalties that are imposed by the ICTY must in general, have a sufficient deterrent value. Also see *Prosecutor v Musema* ICTR-96-13-T 986. The Trial Chambers often do distinguish between general deterrence and special deterrence. General deterrence is considered to be the aim of deterring other individuals from committing similar offences through the means of punishment. Special deterrence is the aim of deterring the individual defendant from re-offending. This distinction is, however, seen as of little concern to the Tribunals as stated in *Prosecutor v Kunurac* ICTY IT-96-23-T 839. Regarding the distinction between general and special deterrence also see D'Ascoli *Sentencing in International Criminal Law* 136.

the fight against impunity.[338] The ICTR Trial Chamber stated in *Prosecutor v Serushago*[339] that the goal of the Tribunal was to:

> … prosecute and punish the perpetrators of the atrocities in Rwanda in such a way as to put an end to impunity…

The Trial Chamber added that:[340]

> … the international community shall not tolerate the serious violations of international humanitarian law and human rights.

Another sentencing purpose identified by the *ad hoc* Tribunals and the SCSL is that of rehabilitation.[341] The primary objectives of rehabilitation are firstly to effectively reintegrate the defendant into society after a certain period of prison time has been served and secondly to shape the level and content of the sentence in such a way so as to achieve a rehabilitative effect on the defendant.[342] Schabas[343] states that rehabilitation is of great significance relating to the topic of sentencing human rights violations where social reconstruction and reconciliation are of paramount importance. Chirwa[344] also states that rehabilitation should be aimed at reintegrating back into

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338 *Prosecutor v Erdemović* ICTY IT-96-22-T 58. The Resolutions creating the *ad hoc* Tribunals were also prominent in stating that they were determined to punish those who have committed crimes within the Tribunals' jurisdiction. *United Nations Security Council Resolution* 827, UN Doc. S/Res/827 (1993) and *United Nations Security Council Resolution* 955, UN Doc. S/Res/955 (1994).

339 *Prosecutor v Serushago* ICTR-98-39-S 19-20. The ICTY also confirmed this in *Prosecutor v Stakić* ICTY IT-97-24-T 899, where the Trial Chamber stated that the ICTY was created in order to counteract impunity. The Chambers of the Tribunals also regularly linked the purpose of battling impunity with the sentencing purposes of deterrence and retribution. In *Prosecutor v Serushago* ICTR-98-39-S 19-20, the Trial Chamber said that penalties imposed must have a retributive and deterrent effect in order to show that the international community would not tolerate the impunity of those who committed such crimes. Also see *Prosecutor v Erdemović* ICTY IT-96-22-T 64-65, *Prosecutor v Kambanda* ICTR-97-23-S 28, *Prosecutor v Aleksovski* ICTY IT-95-14/1-A 185 and *Prosecutor v Nikolić* ICTY IT-94-2-S 82.

340 Related to the fight against impunity is the purpose of public reprobation and stigmatisation of international crimes. In *Prosecutor v Erdemović* ICTY IT-96-22-T 65, the Trial Chamber stated: "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."

341 *Prosecutor v Erdemović* ICTY IT-96-22-T 21, *Prosecutor v Tadić* ICTY IT-94-1-Tbis-R117 61, *Prosecutor v Brima et al* SCSL-2004-16-T 14 and *Prosecutor v Sesay et al* SCSL-04-15-T 13.

342 D'Ascoli *Sentencing in International Criminal Law* 69.

343 Schabas 1997 *Duke Journal of Comparative and International Law* 503.

344 Chirwa 2004 *South African Journal of Criminal Justice* 202.

society those individuals who had played a minor role in the commission of the crimes. Regardless of these viewpoints by Schabas and Chirwa, it seems that other authors do not consider the purpose of rehabilitation to carry significant weight as a sentencing purpose.[345] In some cases the *ad hoc* Tribunals considered rehabilitation as an important goal for sentencing and in other cases they stated that rehabilitation should not carry undue weight as a sentencing purpose.[346] The approach of the *ad hoc* Tribunals does therefore not reflect any form of uniformity concerning the purpose of rehabilitation.

In the case of the SCSL, the Trial Chamber had noted in *Prosecutor v Brima et al* that rehabilitation as a sentencing purpose cannot be considered as a predominant sentencing consideration at international level.[347] This is because the sentencing purposes at international level differ from those at of national level.[348] The Trial Chamber of the SCSL pointed out in *Prosecutor v Sesay et al* and *Prosecutor v Fofana and Kondewa* that even though rehabilitation was considered by the court as an important element in the sentencing procedure, it was considered to be of greater importance at national level than at international level.[349] Unfortunately the Trial Chamber had failed to give any reason for this conclusion.[350] An answer may, however, be found in a statement made by the ICTY Trial Chamber in *Prosecutor v Kunarac*:[351]

345 Meernik 2011 *Social Science Quarterly* 593, Henham 2003 *The International and Comparative Law Quarterly* 89 and D'Ascoli *Sentencing in International Criminal Law* 69, 138-139.

346 In *Prosecutor v Galić* ICTY IT-98-29-T 757, the Trial Chamber stated that the rehabilitation should be considered as a sentencing purpose and also cited *Prosecutor v Blaškić* ICTY IT-95-14-T 779-780 and *Prosecutor v Kvočka* ICTY IT-98-30/1-T 704, to confirm this. Furthermore in this regard see the following cases: *Prosecutor v Serushago* ICTR-98-39-S 39, *Prosecutor v Elizaphan and Ntakirutimana* ICTR-96-10/96-17-T 887 and *Prosecutor v Kunarac* ICTY IT-96-23-T 844. In the *Prosecutor v Kunarac* ICTY IT-96-23-T 844, the Trial Chamber made the encompassing statement that: 'The Trial Chamber fully supports rehabilitative programs, if any, in which the accused may participate while serving their sentences. But that is an entirely different matter to saying that rehabilitation remains a significant sentencing objective.' This was also confirmed in the following cases: *Prosecutor v Milošević* ICTY IT-02-54-R77.4 987, *Prosecutor v Popović* ICTY IT-05-88-T 2130 and *Prosecutor v Nahimana* ICTR-99-52-A 1056-1057.

347 *Prosecutor v Brima et al* SCSL-2004-16-T 17.

348 *Prosecutor v Brima et al* SCSL-2004-16-T 17.

349 *Prosecutor v Sesay et al* SCSL-04-15-T 16 and *Prosecutor v Fofana and Kondewa* SCSL-04-14-T 28.

350 Dinokopila "Sentencing practices of the Special Court for Sierra Leone" 118-144.

351 *Prosecutor v Kunarac* ICTY IT-96-23-T 844.

> … national rehabilitative programmes, if any, depends on the states in which convicted persons will serve their sentences, not on the International Tribunal. Experience the world over has shown that it is a controversial proposition that imprisonment alone – which is the only penalty that a Trial Chamber may impose – can have a rehabilitative effect on a convicted person. The Trial Chamber is therefore not convinced that rehabilitation is a significant relevant objective of this jurisdiction.

It would therefore seem that rehabilitation cannot be regarded as a significant sentencing purpose at international level.[352] The reason for this is that individuals who are sentenced at international level are considered to be those who bear the greatest responsibility for the commission of international crimes.[353] In this light rehabilitation as a sentencing purpose at international level remains an ideal.[354] However, it must be kept in mind that international criminal law forms part of a larger framework of international human rights protection. A good example of this is the manner in which the SCSL treats juvenile offenders.[355] Article 7 of the SCSL's Statute provides for the rehabilitation and reintegration of any child who comes before the court.[356] Article 7 of the SCSL's Statute provides that the SCSL may not exert its jurisdiction over children below the age of 15 years at the time of the commission of the offence.[357] If, however, a child between the ages of 15 and 18, at the time of the commission of the offence, is brought before the court, the SCSL could:

> … order any of the following: care guidance and supervision orders, community service orders, counselling, foster care, correctional, education and vocational training programmes, approved schools and as appropriate, any programmes of disarmament, demobilisation and reintegration or programmes of child protection agencies.[358]

Some other purposes the *ad hoc* Tribunals have taken into account are reconciliation, protection of the society, restoration of peace, and stigmatisation and public reprobation

352 Dinokopila "Sentencing practices of the Special Court for Sierra Leone" 118-144.
353 Dinokopila "Sentencing practices of the Special Court for Sierra Leone" 118-144.
354 Dinokopila "Sentencing practices of the Special Court for Sierra Leone" 118-144.
355 Dinokopila "Sentencing practices of the Special Court for Sierra Leone" 118-144.
356 A 7 SCSL Statute.
357 A 7 SCSL Statute.
358 A 7(2) SCSL Statute.

of international crimes.[359] With regard to atrocities committed in the former Yugoslavia and Rwanda, Zolo[360] states that the process of providing justice was meant to contribute to the process of reconciling the peoples involved during the duration of the devastating wars. The ICTY Trial Chamber in *Prosecutor v Erdemovic*[361] stated that another purpose for sentencing is the discovery of the truth regarding atrocities that have been committed. This was an important cornerstone in the realisation of the purpose of reconciliation and this would also contribute to the effective establishment of the rule of law, which is another important sentencing purpose within the Tribunals.[362]

The importance of the sentencing purpose for the firm establishment of the rule of law was especially recognised by the ICTY Trial Chamber in *Prosecutor v Deronjić* [363] where the Chamber stated that:

> 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.

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359 This is not an exhaustive list of purposes and other purposes may also be included. Regarding the purposes of sentencing see D'Ascoli 2007 http://www.juragentium.unifi.it and Mettraux *International Crimes and the Ad Hoc Tribunals* 343-346. Cases relating to the purposes mentioned are: *Prosecutor v Erdemović* ICTY IT-96-22-T 21,65, *Prosecutor v Elizaphan and Ntakirutimana* ICTR-96-10/96-17-T 881-882, *Prosecutor v Blaškić* ICTY IT-95-14-A 678, *Prosecutor v Kayishema and Ruzindana* ICTR-95-1-T 389-390, *Prosecutor v Kunarac* ICTY IT-96-23-T 836, *Prosecutor v Tadić* ICTY IT-94-1-Tbis-R117 7, *Prosecutor v Barayawiza* ICTR-99-52-T 1095, *Prosecutor v Nzabirinda* ICTR-2001-77-T 49 and *Prosecutor v Rutaganda* ICTR-96-3-T 455.

360 Zolo 2004 *Journal of International Criminal Justice* 730. The Trial Chambers of the Tribunals also stated that reconciliation is an important sentencing purpose. In *Prosecutor v Nikolić* ICTY IT-02-60/1-S 93, the Trial Chamber stated that: 'the process of coming face-to-face with the statement of the victims, if not the victims themselves, can inspire – if not reawaken – tolerance and understanding of "the other", thereby making it less likely that if given an opportunity to act in a discriminatory manner again, an accused would do so. Reconciliation and peace would thereby be promoted.' Also see *Prosecutor v Erdemović* ICTY IT-96-22-T 21 and *Prosecutor v Kamuhanda* ICTR-99-54A-T 754.

361 *Prosecutor v Erdemović* ICTY IT-96-22-T 21 and *Prosecutor v Kambanda* ICTR-97-23-S 26, 28.

362 *Prosecutor v Erdemović*, ICTY IT-96-22-T 21. Also see *Prosecutor v Kambanda*, ICTR-97-23-S 26, 28.

363 *Prosecutor v Deronjić* ICTY IT-02-61-S 149.

The theories regarding the sentencing purposes of social defence and the incapacitation of the accused mainly entail that criminals are to be punished in order to protect society.[364] By concentrating on the benefits to the community as a result of the incarceration of offenders, it establishes the reduction or elimination of the risk that members of society might become victims of crimes.[365]

One of the most important purposes of any international criminal tribunal should be the development of unprejudiced criteria for the judgement and sentencing of individuals accused of international crimes.[366] According to D'Ascoli[367] the *ad hoc* Tribunals have failed to deal with their sentencing purposes in a consistent manner. This is reflected in the majority of the cases that the *ad hoc* Tribunals have heard and where the *ad hoc* Tribunals had only used general references regarding the purpose of sentencing.[368] The *ad hoc* Tribunals have also failed in the exploration and development of any sort of definition for sentencing purposes or any consistent theory thereto.[369] The Tribunals' judges nonetheless seem to have succeeded in effectively reaching the aims that were enshrined within the Security Council's Resolutions that were used to create the Tribunals.[370] The same could also be said of the SCSL because the sentencing purposes adopted by the SCSL do not differ greatly from those adopted by the *ad hoc* Tribunals.[371]

3.4.2 Prescribed Penalties

When the spectrum of penalties that may be imposed by the ICTY, the ICTR, the SCSL and the ICC are compared to the spectrum of penalties available to the courts at national level, it is clear that neither the death penalty nor any other form of corporeal

364 D'Ascoli *Sentencing in International Criminal Law* 69.
365 D'Ascoli *Sentencing in International Criminal Law* 69. Also see *Prosecutor v Blaškić* ICTY IT-95-14-T 678 and *Prosecutor v Ntakirutimana* ICTR-96-10 881-882.
366 Meernik 2003 *Journal of Conflict Resolution* 140.
367 D'Ascoli 2007 http://www.juragentium.unifi.it.
368 D'Ascoli 2007 http://www.juragentium.unifi.it.
369 D'Ascoli 2007 http://www.juragentium.unifi.it.
370 D'Ascoli 2007 http://www.juragentium.unifi.it.
371 Dinokopila "Sentencing practices of the Special Court for Sierra Leone" 118-144.

punishment is available to the ICTY, the ICTR, the SCSL and the ICC.[372] The development of international human rights has played a major role in the procurement of the abolishment of the death penalty and corporeal punishment at the international sentencing level.[373] These penalties are considered compatible with the concept of cruel, inhuman, and degrading punishment.[374] This has played a key part in the United Nations' decision that these penalties should by all means necessary, be excluded from the Statutes and RPE's of the ICTY, the ICTR, the SCSL and the ICC, and this represented an enormous leap forward since the IMTs where the death penalty was a common feature.[375]

The Statutes of both *ad hoc* Tribunals state that the penalties that may be imposed by the Tribunals are limited to imprisonment.[376] The language of the two Statutes regarding the penalty provisions is almost identical.[377] The Statutes furthermore state that the Tribunals, in addition to a term of imprisonment, "may order the return of any property and proceeds" to their rightful owners that may have been acquired by means of criminal conduct, including by means of duress.[378]

372 Cengage 2005 http://www.eNotes.com.

373 A 5 *Universal Declaration of Human Rights General Assembly Resolution* 214A (III), UN Doc. A /810 (1948), a 7 *International Covenant on Civil and Political Rights*, GA Res. 2200A (XXI), 21 UN GAOR Supp. (No.16) at 52, UN Doc. A/6316 (1966), a 2 *European Convention of Human Rights* U.N.T.S. 221 and a 5 *African Charter of Human and Peoples' Rights*, O.A.U. Doc.CAB/LEG/67/3 Rev. 5.

374 Schabas 1997 *Duke Journal of Comparative and International Law* 505. A good example of the application of the basic human rights to the penal process came in July 1989. In the case of *Soering v UK*, Series A, No. 161; Application No. 14038/88 105, the European Court of Human Rights stated that for a convicted individual to languish in prison while awaiting execution as the appeals process winds down, was an inhumane and degrading punishment and referred to this sort of punishment as the death row phenomenon. The court furthermore stated that this was in violation of the *European Convention on Human Rights* U.N.T.S. 221. Also see the case of *S v Makwanyane* 1995 3 SA 391 (CC).

375 Cengage 2005 http://www.eNotes.com and Schabas 1997 *Duke Journal of Comparative and International Law* 505.

376 A 24 ICTY Statute and a 23 ICTR Statute.

377 A 24 ICTY Statute and a 23 ICTR Statute.

378 A 24(3) ICTY Statute and a 23(3) ICTR Statute.

Rules 100-106 of both the RPEs of the Tribunals relate to penalties.[379] The RPEs of the Tribunals, however, only provide a little further guidance with regard to penalty provisions for the Tribunals. Rule 101 of the RPEs provides that the Tribunals may pass a sentence of imprisonment with a term of up to and including a life sentence.[380] Rule 101 also provides that the Tribunals must take into account mitigating and aggravating circumstances, as well as time already served when deciding upon a sentence.[381]

With regard to the SCSL the penalties that may be imposed are outlined by article 19 of the SCSL's Statute and Rule 101 of the SCSL's RPE and they do not differ much from those of the *ad hoc* Tribunals. The Statute and RPE of the SCSL also limits the penalties that may be imposed by the Chambers of the SCSL to a term of imprisonment.[382] This is not, however, applicable to juvenile offenders whose penalties are outlined in article 7 of the SCSL Statute.[383] In addition to a term of imprisonment, the SCSL may also order the forfeiture of the property, proceeds and any assets that may have been acquired unlawfully or by any criminal conduct and their return to their rightful owners to the State of Sierra Leone.[384] Rule 101 of the SCSL's RPE also states that the Chambers must take into account any mitigating and aggravating factors, as well as any time already served by the accused while in detention.[385]

With regard to the ICC the penalties that may be imposed are also limited to a term of imprisonment. The Rome Statute provides that a term of imprisonment may be imposed "for a number of years, which may not exceed a maximum of 30 years."[386] The ICC

379 As with the Statutes of the Tribunals the RPEs of both the Tribunals use almost identical language. See in this regard *International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence* UN Doc. IT/32/Rev.7 (1996), (hereafter ICTY RPE) and *International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence* UN Doc. ITR/3/Rev.1 (1995), (hereafter ICTR RPE).

380 It should be noted that there is no minimum sentence that any of the Tribunals must adhere to, and this further contributes to the fact that the judges of the Tribunals are vested with a broad discretion in determining an appropriate penalty.

381 Rule 101 ICTY RPE and rule 101 ICTR RPE.

382 A 19 SCSL Statute and rule 101 SCSL RPE.

383 A 19(1) SCSL Statute and rule 101(a) SCSL RPE.

384 A 19(3) SCSL Statute.

385 Rule 101 SCSL RPE.

386 A 77(1)(a) Rome Statute.

may, however, pronounce a life term of imprisonment if it is justified.[387] In addition to a term of imprisonment the ICC is also able to order the payment of a fine "under the criteria provided for in the Rules of Procedure and Evidence."[388] The RPE of the ICC determines that a fine may be issued if the Court decides that imprisonment alone is not a sufficient penalty.[389] In addition to imprisonment the Court may order a forfeiture of proceeds, property and assets.[390] The forfeiture may only be ordered of the proceeds, property and assets, which were derived directly or indirectly from the crime that was committed.[391] Lastly, the Rome Statute provides that the court must deduct time spent in detention, if there was any, in accordance with an order of the court.[392] In addition the court may deduct time otherwise spent in detention in connection with conduct underlying the crimes committed.[393]

3.4.3 Factors considered in the sentencing process in the ICTY and ICTR

3.4.3.1 Introduction

The quest to establish a single set of factors that may influence a sentence, which is to be passed by a court, upon an individual who has been found guilty of committing a crime can be traced back to the twelfth century.[394] Sentences that were passed during those times were considered to be typically harsh and rigid.[395] This is believed to have forced legal scholars to have more appreciation for the need of instruments that permitted a justification for the adjustment of a sentence according to the different cases before the court.[396] It is within these evolving sentencing processes that the inclusion of

387 A 77(1)(b) Rome Statute.
388 A 77(2)(b) Rome Statute.
389 Rule 146 *International Criminal Court Rules of Procedure and Evidence* UN Doc. PCNICC/2000/1/Add.1(2000) (hereafter ICC RPE).
390 A 77(2)(b) Rome Statute.
391 A 77(2)(b) Rome Statute.
392 A 78(2) Rome Statute.
393 A 78(2) Rome Statute.
394 D'Ascoli *Sentencing in International Criminal Law* 42.
395 D'Ascoli *Sentencing in International Criminal Law* 42.
396 D'Ascoli *Sentencing in International Criminal Law* 42.

certain factors during sentencing deliberations found its initial creation and later on led to the effective development of sentencing factors.[397] The development of factors that must be taken into account when sentencing is considered is a difficult task at international level because the massive scale and atrocious nature of the crimes render concepts that are familiar in domestic criminal law difficult to fathom at international level.[398]

According to Holá *et al*[399] the main factors that are taken into account at sentencing at the ICTY and the ICTR are: the category of the crimes committed, the type of underlying offences, the scale of the criminal acts, individual liability, mitigating and aggravating circumstances and the rank of the accused within the overall command structure. De Roca and Rassi[400] state that the factors that may be taken into account by the ICTY and the ICTR can be divided into two groups, namely objective factors and subjective factors. The objective factors relate to the gravity of the offence, while the subjective factors relate to the individual circumstances of the accused.[401]

The Statutes and RPEs of the two *ad hoc* Tribunals provide only broad outlines of the factors that are to be taken into account when deliberating upon the sentence.[402] Firstly, both Statutes provide that in the determination of an applicable sentence the Tribunals should have "recourse to the general practice regarding prison sentences" in their respective countries' national criminal courts.[403] Secondly, the Statutes provide that the Tribunals must take into account "factors such as the gravity of the offence, as well as the individual circumstances" of the individual found guilty before the Tribunals.[404] The

397 D'Ascoli *Sentencing in International Criminal Law* 42.
398 Sloane 2007 *Journal of International Criminal Justice* 714.
399 Holá, Smeulders and Bijleveld 2011 *Journal of International Criminal Justice* 412.
400 De Roca and Rassi 2008 *Stanford Journal of International Law* 9.
401 Holá, Smeulders and Bijleveld 2011 *Journal of International Criminal Justice* 415-420.
402 Meernik and King 2003 *Leiden Journal of International Law* 719.
403 A 24(1) ICTY Statute and a 23(1) ICTR Statute. With regard to the statement that the Tribunals should have recourse to the national sentencing procedures both Tribunals have stated on numerous occasions that the sentencing practices of the two countries were merely an aid in the process of determining an appropriate sentence and that this was not binding in any way on the Tribunals. See for example *Prosecutor v Kunarac* ICTY IT-96-23-T 829 and *Prosecutor v Kambanda* ICTR 97-23-S 22-23.
404 A 24(2) ICTY Statute and a 23(2) ICTR Statute.

RPEs of the Tribunals merely state that the Tribunals must take into account factors, such as aggravating circumstances, mitigating circumstances (which includes the measure of cooperation of the accused with the Office of the Prosecutor, before and after conviction) and the general practice of the courts of the respective countries.[405]

The Trial Chambers of the ICTY and ICTR both made important remarks relating to the factors set out in the RPEs and Statutes of the Tribunals. In the case of the *Prosecutor v Kayishema and Ruzindana*[406] the Trial Chamber stated that the ICTR enjoys an 'unfettered discretion' in order to impose a sentence while taking into account the totality of the circumstances. In *Prosecutor v Erdemovic*[407] it was held that the ICTY is not limited to the factors set out in the Statute or the RPE and that the Statute and RPE do not require that the Tribunal take into account all the factors set out therein. The Trial Chambers' discretion in determining a sentence is, however, not without limitation.[408] The overarching goal with sentencing is to ensure that the sentence reflects the totality of the crime for which the accused has been found guilty and the accused's overall individual criminal accountability.[409] Specific factors considered by the courts will now be discussed.

3.4.3.2 The gravity of the offence

Even though the judges of the Tribunals are left to establish which factors to take into account on a case-by-case basis, it appears that both the ICTY and the ICTR are of the opinion that the primary factor that must be taken into account is the gravity of the offence committed.[410] The Tribunals have on numerous occasions referred to the gravity of the crime as:

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405 Rule 101 ICTY RPE and Rule 101 ICTR RPE.
406 *Prosecutor v Kayishema and Ruzindana* ICTR-95-1-T 3-4.
407 *Prosecutor v Erdemović* ICTY IT-96-22-T 43.
408 Sayers 2003 *Leiden Journal of International Law* 755.
409 In *Prosecutor v Delalić* ICTY IT-96-21-A 430 the ICTY Appeals Chamber stated that this could be achieved: '… through either the imposition of one sentence in respect of all the offences, or several sentences ordered to run concurrently, consecutively or both. The decision as to how this should be achieved lies within the discretion of the Trial Chamber.'
410 *Prosecutor v Delalić* ICTY IT-96-21-A 731, *Prosecutor v Blaškić* ICTY IT-95-14-A 683, *Prosecutor v Kupreškić* ICTY IT-95-16-T 852, *Prosecutor v Delelić* ICTY 1998 IT-96-21 1225,

> … by far the most appropriate consideration, which may be regarded as the litmus test for the appropriate sentence…[411]

Although the Statutes of the Tribunals contain the general instruction that the Tribunals must take into account the gravity of the crime, they fail to define what is meant by the term and judges are left to evaluate it using their own discretion.[412] It is suggested by different authors that the gravity of the crime can be determined *in abstracto* and *in concreto*.[413] Gravity *in abstracto* is based on an analysis of the objective and subjective elements of the crimes, whilst gravity *in concreto* is based on the harm inflicted and the culpability of the accused.[414]

In most cases before the Tribunals the notion of the gravity of the crime has been interpreted as incorporating three main aspects: the role the accused played in committing the crime (in other words the form and degree of participation by the accused), the circumstances of the individual case before the Tribunal, and the crimes for which the accused has been convicted.[415] Some authors suggest that the gravity of the crime incorporates the following factors: the category of the crimes, the type of underlying offences relating to the category of the crimes, the scale of the crimes committed, the mode of individual criminal liability, the rank of the accused and aggravating circumstances relating to the crimes committed.[416]

Prosecutor v Krnojelac ICTY IT-97-25-T 522, *Natelić and Martinović* ICTY IT-98-34-T 718, *Prosecutor v Elizaphan and Ntakirutimana* ICTR-96-10/96-17-T 883, *Prosecutor v Kambanda* ICTR-97-23-S 42 and *Prosecutor v Kajelijeli* ICTR-98-44A-T 946.

411 *Prosecutor v Delalić* ICTY IT-96-21-T 1225.

412 Holá, Smeulders and Bijleveld 2011 *Journal of International Criminal Justice* 414. The Chambers of the Tribunals sometimes highlight the importance of establishing the gravity of the crime within each individual case. In *Prosecutor v Česić* ICTY IT-95-10/1 32 the Trial Chamber stated that in the determination of the gravity of a crime, consideration should be given to the particular circumstances of each case, as well as the degree of participation of the accused in the crimes committed.

413 Holá, Smeulders and Bijleveld 2011 *Journal of International Criminal Justice* 414, Cryer *et al An introduction to International Criminal Law and Procedure* 89, Henham and Behrens (ed) *The criminal law of genocide* 249 and Carcano 2002 *The International and Comparative Law Quarterly* 589.

414 Holá, Smeulders and Bijleveld 2011 *Journal of International Criminal Justice* 414.

415 *Prosecutor v Milutinović* ICTY IT-05-87 1147.

416 Holá, Smeulders and Bijleveld 2011 *Journal of International Criminal Justice* 415.

The fact that the crimes falling within the jurisdiction of international tribunals are inherently serious does not mean that they cannot be aggravated further by the acts of the accused in relation to the commission thereof.[417] To some extent it seems almost inessential to identify additional aggravating circumstances to crimes that find their existence in conflicts that spawn some of the most brutal, widespread and violent atrocities known to mankind.[418] It is, however, clear that Tribunals recognise the fact that there are many different types of aggravating circumstances and that these circumstances must be established on a case-by-case basis.[419]

When the prosecution relies on particular aggravating factors, which merit an increased sentence, the standards applicable are more stringent than those relating to mitigating factors.[420] The prosecution is required to prove the existence of the aggravating factor beyond a reasonable doubt and only the circumstances, which are directly related to the commission of the crimes and to the accused while he was in the process of committing the crimes, are considered.[421]

It appears, however, that some of the considerations under the concept of the "gravity of the crime" overlap with those under the concept of gravity as an "aggravating circumstance."[422] It created some uncertainty in the ICTR as to whether the considerations taken into account during the determination of the gravity of the offence, as a statutory sentencing principle, may be used in establishing gravity as an aggravating circumstance.[423] Sloane[424] suggests that from the case law of the Tribunals it seems that from one perspective the role of the gravity of the offence is "minimal or

417 Mettraux *International Crimes and the Ad Hoc Tribunals* 350.
418 Meernik and King 2003 *Leiden Journal of International Law* 739.
419 Meernik and King 2003 *Leiden Journal of International Law* 740.
420 Sayers 2003 *Leiden Journal of International Law* 761 and Holá, Smeulders and Bijleveld 2011 *Journal of International Criminal Justice* 419.
421 In *Prosecutor v Kunarac* ICTY IT-96-23-T 847, the Trial Chamber stated that 'The Trial Chamber underlines its view that fairness requires the Prosecutor to prove aggravating circumstances beyond a reasonable doubt, and that the defense needs to prove mitigating circumstances only on balance of probabilities.'
422 Sloane 2007 *Journal of International Criminal Justice* 722.
423 Sloane 2007 *Journal of International Criminal Justice* 722.
424 Sloane 2007 *Journal of International Criminal Justice* 722.

largely rhetoric" and from another perspective the concept "emerges as a frequent source of jurisprudential confusion."

Sloane explains this statement with reference to two cases. In *Prosecutor v Kambanda*[425] the ICTR Trial Chamber, whilst discussing crimes against humanity and genocide, stated that the atrocious nature of the crimes and the prohibition thereof, attach an inherent gravity thereto and the estimated murder of over 500 000 civilians, constituted further aggravating circumstances. In *Prosecutor v Semanza*[426] the ICTR Trial Chamber, on the other hand, stated that the number of victims forms part of an element of crimes against humanity namely, extermination. This meant that it should be included in the assessment of the gravity of the crime and should not form part of the concept of aggravating circumstances, thus not counting it twice in determining an appropriate sentence.[427]

The confusion regarding which factor should be under which heading is moreover problematic because the ICTR's Chambers "conflate gravity as a statutory sentencing metric with gravity as an aggravating circumstance."[428] This is problematic because the Tribunal does not attempt to differentiate between the two concepts clearly nor does it elaborate further on why, and/-or whether the concept of gravity should be considered twice in determining an appropriate sentence.[429]

The ICTY's approach regarding this problem differed from that of the ICTR's. According to the ICTY the factors that are taken into account during the evaluation of the gravity of the crime must not be reconsidered in the process of determining aggravating circumstances and *vice versa*.[430] In *Prosecutor v Lukić and Lukić*[431] the ICTY Trial Chamber stated that:

425 *Prosecutor v Kambanda* ICTR-97-23-S 42.
426 *Prosecutor v Semanza* ICTR-97-20-T 571.
427 *Prosecutor v Semanza* ICTR-97-20-T 571.
428 Sloane 2007 *Journal of International Criminal Justice* 723.
429 See, for example, *Prosecutor v Semanza* ICTR-97-20-T 555 and *Prosecutor v Gacumbitsi* ICTR-01-64-T 344.
430 Holá, Smeulders and Bijleveld 2011 *Journal of International Criminal Justice* 420.

> … factors taken into account in evaluating the gravity of a crime may not be reconsidered as separate aggravating circumstances and *vice versa*, as to do so would be to detrimentally influence the (accused's) sentence twice.

In some of its latest jurisprudence the ICTR also seems to be moving in this direction. In *Prosecutor v Kanyarukiga*[432] the ICTR Trial Chamber stated:

> … any particular circumstance that is included as an element of the offence for which the Accused was convicted cannot also be considered as an aggravating factor.

Even though some case law exists to support the prevention of the double accrediting of gravity as an aggravating circumstance, as well as a statutory sentencing principle, there do not exist any clear guidelines as to which factors are to be considered relevant for the establishment of aggravating circumstances and which factors should be used in the process of establishing a statutory sentencing principle.[433]

3.4.3.3 The category of the crimes (incorporating the gravity of the crime)

The categories of the crimes refer to the different crimes within the jurisdiction of the two *ad hoc* Tribunals, namely war crimes, crimes against humanity and genocide.[434] The question that arises is whether there exists some sort of hierarchy of crimes and whether this hierarchy, if existent, entails that those crimes should accordingly be met with different degrees of punishment and ranges of penalties.[435] It is generally accepted by the Tribunals that the punishment should fit the crime.[436]

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431 *Prosecutor v Lukić and Lukić* ICTY IT-98-32/1-T 1050. In *Prosecutor v Milutinović* ICTY IT-05-87-T 1149 the Trial Chamber also stated that: 'Factors taken into consideration as aspects of the gravity of the crime cannot additionally be taken into account as separate aggravating circumstances, and *vice versa*. Likewise, elements of a crime should not be reviewed a first time as a constitutive element and a second time as an aggravating circumstance.'

432 *Prosecutor v Kanyarukiga* ICTR-2002-78-T 677. Also see *Prosecutor v Ndindabahizi* ICTR-01-71-A 137.

433 Holá, Smeulders and Bijleveld 2011 *Journal of International Criminal Justice* 420.

434 D'Ascoli *Sentencing in International Criminal Law* 39 and Holá, Smeulders and Bijleveld 2011 *Journal of International Criminal Justice* 415.

435 D'Ascoli *Sentencing in International Criminal Law* 39-43, Mettraux *International Crimes and the Ad Hoc Tribunals* 347-350, Danner *Virginia Law Review* 415-501, Drumbl and Gallant 2002

From the early approaches it is clear that the Trial Chambers did, to some extent, endorse the theory that some form of a hierarchy existed regarding international crimes.[437] Accordingly they considered genocide as the ultimate crime, followed by crimes against humanity, which were also considered horrific but not to the same extent as genocide, and finally war crimes, which were considered to be the least atrocious of the three crimes.[438]

In *Prosecutor v Serushago*[439] the ICTR even went so far as to state that genocide is considered to be the "crime of crimes". The reason for genocide having been considered as such may lie in the fact that for a person to have committed genocide that person must have had a specific mental state, namely the intent to destroy.[440] Under this methodology a murder committed with genocidal intent was considered to be more serious than a murder committed without a genocidal intent.[441] Another possibility for genocide having been considered as the "crime of crimes" may be because genocide involves the highest number of deaths.[442]

The second category of crimes within the perceived hierarchy was crimes against humanity. The reason for the Trial Chambers having considered crimes against humanity more serious than war crimes may lie in the difference between the contextual elements (*mens rea*) of the two respective crimes.[443] Frulli[444] explains that when the act

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Federal Sentencing Reporter 140-144, Sayers 2003 *Leiden Journal of International Law* 755-756, Sloane 2007 *Journal of International Criminal Justice* 722-724 and Clark 2008 *Georgetown Law Journal* 1697-1698.

436 This statement is supported by the Trial Chambers in *Prosecutor v Kajelijeli* ICTR-98-44A 953. The ICTR Trial Chamber stated that: "'the more heinous the crime, the higher the sentence that should be imposed upon its perpetrator."

437 Drumbl and Gallant 2002 *Federal Sentencing Reporter* 142 and Holá, Smeulders and Bijleveld 2011 *Journal of International Criminal Justice* 415.

438 *Prosecutor v Krstić* ICTY IT-98-33-T 700, *Prosecutor v Kambanda* ICTR-97-23-S 10-19, *Prosecutor v Rutaganda* ICTR-96-3-T 14,16 and *Prosecutor v Blaškić* ICTY IT-95-14-T 800-804.

439 *Prosecutor v Serushago* ICTR-98-39-T 15 and *Prosecutor v Blaškić* ICTY IT-95-14-T 800.

440 Mettraux *International Crimes and the Ad Hoc Tribunals* 348 and *Prosecutor v Krstić* ICTY IT-98-33-T 700.

441 Clark 2008 *Georgetown Law Journal* 1697.

442 Drumbl and Gallant 2002 *Federal Sentencing Reporter* 142.

443 Frulli 2001 *European Journal of International Law* 333.

444 Frulli 2001 *European Journal of International Law* 333.

of committing a murder in the context of war crimes is considered, it must be proved that the murder had been committed in the context of an armed conflict.[445] However, when the same act of committing a murder in relation to a crime against humanity is defined, it must have been committed in the context of a widespread and systematic attack and against any civilian population.[446] Murder as a war crime only consists of the mental intent to murder one or more individuals, whereas crimes against humanity not only require the mental intent to murder one or more individuals but also the knowledge that the murder is committed in correlation with a widespread and systematic attack against any civilian populace.[447] In *Prosecutor v Tadić*[448] the ICTY Appeals Chamber confirmed that crimes against humanity were of a more serious nature than war crimes because there is an element of knowledge regarding the commission of the crime as part of a systematic and widespread attack.

In the later jurisprudence of the Trial Chambers, however, it was held that no form of a pre-established hierarchy between the crimes exists.[449] The Appeal Chambers of the Tribunals also followed this approach and firmly rejected any form of hierarchy between the crimes by stating that there was no distinction between the crimes regarding their gravity.[450] The Appeals Chambers of both the *ad hoc* Tribunals went even further and stated that all crimes within its jurisdiction are considered to be in violation of international humanitarian law and to judge crimes based on merely the quantity of the loss of life would be reckless and each case should be judged on its merits.[451] In 2006 the Appeals Chamber of the ICTY reaffirmed this and held that the maximum sentence (life imprisonment) could be imposed for any of these crimes.[452]

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445 A 8 Rome Statute, a 2 ICTY Statute and a 4 ICTR Statute.
446 A 7 Rome Statute, a 5 ICTY Statute and a 6 ICTR Statute.
447 Frulli 2001 *European Journal of International Law* 333.
448 *Prosecutor v Tadić* ICTY IT-94-1-A 19. Also see *Prosecutor v Kambanda* ICTR-97-23-A 10-19 and *Prosecutor v Blaškić* ICTY IT-95-14-T 800.
449 *Prosecutor v Lukić and Lukić* ICTY IT-98-32/1-T 1050.
450 *Prosecutor v Tadić* ICTY IT-94-1-A 69 and *Prosecutor v Kayishema and Ruzindana* ICTR 95-1-A 367.
451 *Prosecutor v Furundžija* ICTY IT-95-17/1-A 246, *Prosecutor v Kayishema and Ruzindana* ICTR-95-1-A 367 and *Prosecutor v Krstić* ICTY IT-98-33-T 700.
452 *Prosecutor v Stakić* ICTY IT-97-24-A 375. Also see a 23(1) ICTR Statute and a 24(1) ICTY Statute.

3.4.3.4 Individual criminal liability

Probably one of the most fundamental assumptions that should be guiding international courts and tribunals is the assumption that individuals and not peoples must be held accountable for crimes that are committed against the international community.[453] By assigning blame to individuals, international courts and tribunals are more likely to ensure that the need for retaliation between the parties to the violence is lessened.[454] The mode of individual criminal liability reflects the manner in which the accused had participated in committing crimes.[455]

The Statutes of the ICTY and the ICTR state that a person who "planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime" is considered to be individually responsible for the criminal act.[456] It has been established in the case law of the *ad hoc* Tribunals that the form and degree of the accused's participation in the crimes (in other words the accused's individual participation) is one of the elements that aids in the determination of the gravity of the crime.[457] Various authors also agree that the mode of individual criminal responsibility (or otherwise the form and degree of participation) is one of the most important factors to take into account when deciding upon a sentence.[458]

453 Meernik 2003 *Journal of Conflict Resolution* 151.
454 Meernik 2003 *Journal of Conflict Resolution* 151.
455 Holá, Smeulders and Bijleveld 2011 *Journal of International Criminal Justice* 417.
456 A 7 ICTY Statute and a 6 ICTR Statute.
457 *Prosecutor v Milutinović* ICTY IT-05-87 1147.
458 Sayers 2003 *Leiden Journal of International Law* 761, Holá, Smeulders and Bijleveld 2011 *Journal of International Criminal Justice* 417, Sloane 2007 *Journal of International Criminal Justice* 726, Meernik 2003 *Journal of Conflict Resolution* 151, Meernik and King 2003 *Leiden Journal of International Law* 736 and Schabas 1997 *Duke Journal of Comparative and International Law* 490.

3.4.3.5 Superior criminal responsibility

The abuse of a superior position of authority (as well as that individual's influence) is regarded as the most commonly accepted aggravating circumstance.[459] In the case of *Prosecutor v Martić* ICTY[460] the ICTY Appeals Chamber concluded that:

> … in principle, a person's guilt must be described as increasing in tandem with his position in the hierarchy: The higher in rank or further detached the mastermind is from the person who commits a crime with his own hands, the greater is the responsibility.

In *Prosecutor v Musema*[461] the ICTR Appeals Chamber agreed that superiors should receive heavier sentences and stated that:

> … the most senior members of the command structure, that is, the leaders and planners of a particular conflict, should bear heavier criminal responsibility than those lower down the scale, such as the foot soldiers carrying out the orders.

However, in *Prosecutor v Krstić*[462] the ICTY Trial Chamber held that a distinction must be made between the individuals who had contributed to the overall harm by playing a superior role (for example by initiating or aggravating the violence) during the conflicts and those individuals who had allowed themselves to be drawn into the conflict even if it was with reluctance. In circumstances where an individual is forced to participate in the crimes it may constitute a mitigating factor.[463] The Statutes of the Tribunals also make a distinction between superior, as well as other modes of individual criminal responsibility by providing that the official position of an accused does not relieve the accused from individual criminal responsibility.[464] The Statutes also provide that a superior is not

459 Holá, Smeulders and Bijleveld 2011 *Journal of International Criminal Justice* 435, Sayers 2003 *Leiden Journal of International Law* 761, *Prosecutor v Krstić* ICTY IT-98-33-T, *Prosecutor v Musema* ICTR-96-13-A and *Prosecutor v Niyitigeka* ICTR-96-14-T 499.

460 *Prosecution v Martić* ICTY IT-95-11-A 9.

461 *Prosecutor v Musema* ICTR-96-13-A 383. In *Prosecutor v Karadzic and Mladic* ICTY IT-95-5-R61 82 the court announced that the principle of superior criminal responsibility, not only applies to military commanders but also to civilians acting in a non-military capacity.

462 *Prosecutor v Krstić* ICTY IT-98-33-T 711.

463 *Prosecutor v Krstić* ICTY IT-98-33-T 711.

464 A 7(1) ICTY Statute and a 6(1) ICTR Statute.

relieved from criminal responsibility where the criminal act was performed by a subordinate, if such a superior had knowledge or any reason of knowing that the act was to be executed and did nothing to prevent such an act from taking place or to punish those who committed the act.[465]

If an accused occupies a superior position and actively participates in the commission of the crimes it furthermore serves as an aggravating factor.[466] It is important to note that direct participation as an aggravating circumstance is not only applicable to individuals in a superior position but also to individuals who do not occupy a superior position. In the case of *Prosecutor v Blaškić*[467] the ICTY noted that the active or direct participation in the commission of a crime is an aggravating circumstance, whereas in most of the cases the individual who had actually committed the crime, had committed it indirectly, and thus would be held accountable individually. Thus with regard to active and direct participation in a crime the court looks at, active and direct criminal participation that can be linked to a high-ranking position of command, the accused's role in the commission of the crimes, and the active participation of a superior in the commission of the crimes of his subordinates.[468]

In some of the *ad hoc* Tribunals' case law it is also stated that in a case where an individual is guilty of inciting others to participate in the commission of the crimes it also constitutes an aggravating circumstance. For example in *Prosecutor v Niyitigeka*[469] the accused who had occupied a superior and influential position, had also directly participated and influenced others to participate in massacres that took place in Rwanda during the conflicts, instead of promoting peace and reconciliation as he should have done. In *Prosecutor v Delalić*[470] the ICTY Appeals Chamber even went as far as to refer

465 A 7(3) ICTY Statute and a 6(3) ICTR Statute.
466 Sayers 2003 *Leiden Journal of International Law* 761. See, for example, *Prosecutor v Kupreškić* ICTY IT-95-16-T 451.
467 *Prosecutor v Blaškić* ICTY IT-95-14-A 790.
468 *Prosecutor v Blaškić* ICTY IT-95-14-A 686, *Prosecutor v Delalić* ICTY IT-96-21-A 763, 783 and *Prosecutor v Kunarac* ICTY IT-96-23-T 847.
469 *Prosecutor v Niyitigeka* ICTR-96-14-T 499. Also see *Prosecutor v Delalić* ICTY 1998 IT-96-21-A 736.
470 *Prosecutor v Delalić* ICTY 1998 IT-96-21-A 853.

the case back to the Trial Chamber, stating that the Trial Chamber should review the aggravating circumstances of the case in order to incorporate the fact that one of the accused had actively encouraged his subordinates to commit the crimes.

3.4.3.6 The state of mind of the accused while committing the crime

With regard to a person's state of mind, it is important that a distinction is made between criminal motives and intent.[471] Hessick[472] defines the concept of criminal intent (*mens rea*) as an individual's state of mind while he or she was committing the crime; in other words, did the accused commit the crime purposefully, knowingly or recklessly? With regard to motives, Hessick states that motives are considered to be the accused's reasons for committing the crime.[473] As for the relevance of motives to the sentencing process, he states that motives can be used to prove an accused's guilt or innocence.[474] Most importantly motives are considered a traditional consideration in the process of sentencing and may be used in distinguishing the blameworthiness of the accused individuals at the sentencing stage.[475] On the other hand, Schopp and Patry[476] state that the relevance of intent regarding the sentencing process is mainly that intent is used to address the criteria for the prosecution and sentencing of specific criminal offences.

A good example of the distinction between motive and intent can be found in the ICTY Appeals Chamber's decision *Prosecutor v Blaškić*.[477] Here the Appeals Chamber described the difference between the two concepts as follows:

> *Mens rea* is the mental state or degree of fault which the accused held at the relevant time. Motive is generally considered as that which causes a person to act.[478]

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471 *Prosecutor v Jelišić* ICTY IT-95-10-At 49, *Prosecutor v Kunarac* ICTY IT-96-23-A 103, 153, *Prosecutor v Krnojelac* ICTY IT-97-25-A 102 and *Prosecutor v Kayishema and Ruzindana* ICTR-95-1-A 161.
472 Hessick 2006 *Southern California Law Review* 94-95.
473 Hessick 2006 *Southern California Law Review* 95.
474 Hessick 2006 *Southern California Law Review* 89, 95.
475 Hessick 2006 *Southern California Law Review* 89, 96.
476 Schopp and Patry "The Guilty Mind and Criminal Sentencing" 631.
477 *Prosecutor v Blaškić* ICTY IT-95-14-A 694.

In *Prosecutor v Vasiljević*[479] the ICTY Trial Chamber noted that the state of mind is relevant to the sentencing process and that it should be implemented as either an element of a crime or as an aggravating circumstance. The actual state of mind of the accused while in the process of committing the crimes may in some way also be linked to a few other aggravating factors. The first aggravating circumstance that may be linked thereto is that of a discriminatory state of mind. In *Prosecutor v Kunarac*[480] the ICTY Trial Chamber noted that a discriminatory state of mind may be regarded as an aggravating circumstance in relation to crimes where such a state of mind does not form part of the crime as an element of the crime. The discriminatory state of mind can also be linked to the reprehensible motives behind the attacks.[481] Some of the motives that may be behind the commission of a crime may be to gain political or military power, to retain political or military power, in order to try to justify criminal actions or in order to obtain some form of moral pardon for any act coloured by an ethnic cause.[482]

3.4.3.7 The enthusiasm or zeal with which the crime was committed

The zeal or enthusiasm with which the accused had participated in the commission of the crimes, as well as premeditation, may also be regarded as aggravating.[483] The ICTY Trial Chamber in *Prosecutor v Krstić*[484] confirmed that premeditation and zeal should be counted as aggravating circumstances.

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478 *Prosecutor v Blaškić* ICTY IT-95-14-A 694.
479 *Prosecutor v Vasiljević* ICTY IT-98-32-T 278.
480 *Prosecutor v Kunarac* ICTY IT-96-23-T 867, *Prosecutor v Vasiljević* ICTY IT-98-32-T 278 and *Prosecutor v Vasiljević* ICTY IT-98-32-A 171-173. Also see *Prosecutor v Krstić* ICTY IT-98-33-T 711.
481 *Prosecutor v Vasiljević* ICTY IT-98-32-T 278.
482 *Prosecutor v Vasiljević* ICTY IT-98-32-T 278 and *Prosecutor v Plavšić* ICTY IT-00-39&40-I 121.
483 Mettraux *International Crimes and the Ad Hoc Tribunals* 351.
484 *Prosecutor v Krstić* ICTY IT-98-33-T 711. Also see in regard to the enthusiastic participation in the commission of the crimes the following cases: *Prosecutor v Vasiljević* ICTY IT-98-32-T 305 where the court stated that the accused was more than happy to be led in the commission of the crimes; *Prosecutor v Jelišić* ICTY IT-95-10-T 131 where the Trial Chamber stated that the accused enthusiastically forced his will upon the victims; *Prosecutor v Tadić* ICTY IT-94-1-Tbis-R117 20 where the Trial Chamber mentioned that the accused had a desire to contribute to the elimination of the non-Serbs and *Prosecutor v Ntakirutimana* ICTR-96-10/96-17-T 884 where the trial Chamber stated that the highest sentences should be reserved for those who had participated in the commission of the crimes with enthusiasm and with premeditation.

Zeal is also considered to overlap certain other aggravating circumstances, such as "heinous means" (the brutal or vicious manner in which the crimes were committed) and "voluntary commission."[485] Sentences of life imprisonment have also been pronounced upon some individuals who have been found guilty for committing crimes with an element of zeal.[486] The level of zeal may be influenced by an inciting superior, as well as perhaps drugs and alcohol, and may cause or lead to a killing frenzy.[487]

3.4.3.8 The voluntary commission of the crimes and "heinous means"

With regard to voluntary commission the Tribunals confirmed that it is regarded as an aggravating circumstance.[488] The ICTR also stated that when voluntary commission is used as an aggravating factor it also encompasses the fact that the accused had committed the crime knowingly.[489] By committing the crimes voluntarily and thus knowingly, the accused commits the crimes with some element of zeal.[490] Even though heinous means are difficult to identify outside of the overall concept of the crimes of genocide, war crimes and crimes against humanity, they do seem to play some role in sentencing, especially when vulgar acts were committed.[491] For example in *Prosecutor v Kayishema and Ruzindana*[492] the ICTR Trial Chamber recounted an act committed by the accused during the Rwandan Genocide. The court stated that two victims provided a horrific account of how Ruzindana murdered a sixteen year old girl by first cutting off both of her breasts with a machete, and mocking the victim while doing so, before he finally killed her by tearing open her stomach with his machete.

485 Sloane 2007 *Journal of International Criminal Justice* 728.
486 See for example *Prosecutor v Bagosora* ICTR-98-41-T 2270 and *Prosecutor v Kanyarukiga* ICTR-2002-78-T 684.
487 Sloane 2007 *Journal of International Criminal Justice* 727.
488 See, for example, *Prosecutor v Serushago* ICTR-98-39-T 13.
489 *Prosecutor v Serushago* ICTR-98-39-T 13.
490 *Prosecutor v Kayishema and Ruzindana* ICTR-95-1-A 351 and 354.
491 See, for example, *Prosecutor v Furundžija* ICTY IT-95-17/1-T.
492 *Prosecutor v Kayishema and Ruzindana* ICTR-95-1-T 470

3.4.3.9 Other aggravating factors

Holá *et al*[493] has listed some of the most commonly accepted aggravating circumstances that have been accepted by both the ICTY and the ICTR. The aggravating circumstances include: the vulnerability of the victims, any form of extra suffering of the victims, the number of victims, the brutality of the attack, the duration of the attack, the education of the accused, and the orchestration of the attacks. Other aggravating circumstances that should be mentioned are the age of the victims, the status of the victims, the effects of the crimes on them and those who survived the attacks, and whether the victims were taunted or psychologically abused before being murdered, and the lack of any form of remorse.[494]

In *Prosecutor v Kunarac*[495] the Trial Chamber noted the ages of some of the victims that had fallen victim to some of the crimes of the accused and the court reaffirmed that the age of the victims played a role in determining aggravating circumstances. In *Prosecutor v Kunarac*[496] the ICTY Trial Chamber stated that the scale of the number of victims constituted an aggravating circumstance. The Trial Chamber also noted that the great number of assailants in one of the crimes was also seen as an aggravating circumstance.

In *Prosecutor v Blaškić*[497] the ICTY Appeals Chamber discussed the effect of the crimes on the victims, as well as on others, as an aggravating circumstance and in *Prosecutor v Kunarac*[498] the ICTY Trial Chamber found that the consequences of the crimes were always relevant as an aggravating factor to those who were directly touched by the crimes. This is not only limited to the physical suffering of the victims but also includes

493 Holá, Smeulders and Bijleveld 2011 *Journal of International Criminal Justice* 435.
494 Mettraux *International Crimes and the Ad Hoc Tribunals* 351, Holá, Smeulders and Bijleveld 2011 *Journal of International Criminal Justice* 435 and Sayers 2003 *Leiden Journal of International Law* 762.
495 *Prosecutor v Kunarac* ICTY IT-96-23-T 864. Also see in this regard *Prosecutor v Blaškić* ICTY IT-95-14-A 686 and *Prosecutor v Kunarac* ICTY IT-96-23-T 866.
496 *Prosecutor v Kunarac* ICTY IT-96-23-T 866.
497 *Prosecutor v Blaškić* ICTY IT-95-14-A 683.
498 *Prosecutor v Kunarac* ICTY IT-96-23-T 867.

their psychological and emotional suffering, as well as that of their relatives. In *Prosecutor v Kunarac*[499] the ICTY Appeals Chamber held that even when no blood relatives are touched by the crimes, the victim could have established relationships with others and they could also be touched by the crimes. In *Prosecutor v Kunarac*[500] the ICTY Trial Chamber held that the fact that the attacks by the accused took place over a period of two months also constituted an aggravating factor.

3.4.3.10 The individual circumstances of the accused

Regardless of the inherent gravity of the crimes listed in the Rome Statute, in principle any crime should be subjected to mitigating factors.[501] This is done by either taking into account the circumstances of each act or by taking into account the individual circumstances of each accused individual.[502] The ICTR Trial Chamber stated in *Prosecutor v Kambanda*[503] that even though mitigation may reduce the sentence of an accused it does not diminish the severity of the crime committed.

As with aggravating circumstances the Statutes and RPEs of the *ad hoc* Tribunals remain largely mute on the subject of mitigating factors. This provides the judges of the *ad hoc* Tribunals with an almost unfettered discretion as to which circumstances to take into account in mitigation.[504] The jurisprudence of the *ad hoc* Tribunals shows that judges take many factors into account in this regard.[505] The jurisprudence also reflects the weight of each factor, as well as the standard of evidence needed to support the mitigating factor.[506] The Trial Chambers and the Appeals Chamber of the ICTY even found that the judges of the ICTY must determine the effect of mitigating factors on the severity of the sentence.[507] In order to prove the existence of any mitigating

499 *Prosecutor v Kunarac* ICTY IT-96-23-T 260.
500 *Prosecutor v Kunarac* ICTY IT-96-23-T 865, 866 and *Prosecutor v Blaškić* ICTY IT-95-14-A 686.
501 Mettraux *International Crimes and the Ad Hoc Tribunals* 351.
502 Mettraux *International Crimes and the Ad Hoc Tribunals* 351.
503 *Prosecutor v Kambanda* ICTR-97-23-T 56.
504 Sloane 2007 *Journal of International Criminal Justice* 725.
505 Meernik and King 2003 *Leiden Journal of International Law* 742.
506 Meernik and King 2003 *Leiden Journal of International Law* 742.
507 Meernik and King 2003 *Leiden Journal of International Law* 742. Also see *Prosecutor v Kupreškić* ICTY IT-95-16-A 430.

circumstances the defence must gratify the standard of the balance of probabilities.[508] This means that the defence needn't prove the existence of mitigating factors beyond a reasonable doubt as the prosecution must in the case of aggravating circumstance.[509]

Mitigating circumstances can be divided into three main categories, namely clemency, pragmatic circumstances, and moral and rehabilitative circumstances.[510] A clemency circumstance involves judgements regarding the correctness or usefulness of sentences and includes mitigating factors, such as frailty of health and old age.[511] Pragmatic circumstances involve the recognition of a court's limited resources and this contributes to incentives (for example, reduced sentences) to the accused, which in turn expedites the court's work.[512] Pragmatic circumstances thus include guilty pleas, substantial cooperation with the Prosecutor and voluntary surrender.[513] With regard to moral and rehabilitative circumstances, these circumstances are in effect very similar to clemency circumstances and include sympathy, remorse, good character, prior crimes, and rehabilitative potential.[514]

It is, however, impossible to give an exhaustive list of factors that are taken into account when the court decides upon factors which constitute mitigating circumstances.[515] It should nonetheless be mentioned that with the inherent severity of each crime, it seems that pragmatic circumstances have been considered as the most important in terms of mitigating potential.[516] A very good example of this is the case of *Prosecutor v Serushago*.[517]

508 *Prosecutor v Kunarac* ICTY IT-96-23-T 846-847. See 3.4.4.2 above as well as 3.4.5.4 hereunder.
509 *Prosecutor v Kunarac* ICTY IT-96-23-T 846-847.
510 Sloane 2007 *Journal of International Criminal Justice* 729.
511 Sloane 2007 *Journal of International Criminal Justice* 729.
512 Sloane 2007 *Journal of International Criminal Justice* 729.
513 Sloane 2007 *Journal of International Criminal Justice* 729.
514 Sloane 2007 *Journal of International Criminal Justice* 729.
515 Sayers 2003 *Leiden Journal of International Law* 764.
516 Sloane 2007 *Journal of International Criminal Justice* 729.
517 *Prosecutor v Serushago*, ICTR-98-39-S.

The accused was charged with genocide and crimes against humanity, which included murder, rape, extermination and torture.[518] He pleaded guilty to four of the five counts.[519] Ordinarily the crimes would have carried a prison term of up to and including life imprisonment.[520] In mitigation of the sentence the ICTR took into account the accused's cooperation (substantial and on-going) with the Prosecutor, the fact that the accused cooperated with the ICTR even before he was arrested, which enabled the Tribunal to make several arrests pertaining to high-ranking individuals and the accused's commitment to testify as a witness for the Prosecution in other trials.[521] Furthermore, the Tribunal took into account the fact that the accused had voluntarily surrendered, knowing that his surrender meant his indictment and he pleaded guilty as well.[522] The Tribunal also noted that the accused had held a *de facto* position of authority because of his social background, as well as his family ties.[523] Despite this he had assisted some of the Tutsis during the war, as well as many others who had feared for their lives.[524] The Tribunal also took note of the accused's family obligations, noting that the accused was the father of six and was only 37 years of age, which showed rehabilitative potential.[525] The accused had also expressed his remorse openly and at length towards the public, asking forgiveness from the victims of his crimes and from the

518 *Prosecutor v Serushago* ICTR-98-39-S 4.

519 *Prosecutor v Serushago* ICTR-98-39-S 4.

520 *Prosecutor v Serushago* ICTR-98-39-S 12. The accused pleaded guilty to all charges except the charge of rape.

521 *Prosecutor v Serushago* ICTR-98-39-S 31-33. In *Prosecutor v Blaškić* ICTY IT-95-14-T 774 the ICTY Trial Chamber noted: '… the evaluation of the accused's co-operation depends on both the quantity and quality of the information he provides. Moreover, the Trial Chamber singles out for mention the spontaneity and selflessness of the co-operation, which must be lent without asking for something in return.' Also see *Prosecutor v Serushago* ICTR-98-39-T 31-33 and Meernik and King 2003 *Leiden Journal of International Law* 744.

522 *Prosecutor v Serushago* ICTR-98-39-S 34-35 and *Prosecutor v Vasilijević* ICTY IT-98-32-T 289. With regard to a guilty plea see *Prosecutor v Plavšić* ICTY IT-00-39&40-I 80 where the ICTY Trial Chamber stated that the acceptance of responsibility for the crimes that were committed will help in the promotion of reconciliation. Also see *Prosecutor v Kambanda* ICTR-97-23-T 52.

523 *Prosecutor v Serushago* ICTR-98-39-S 36-37. In relation to the authority an accused possesses it may also be relevant to mention the mitigating circumstance of superior orders pursuant to a 7(4) ICTY Statute and a 6(4) ICTR Statute. In the case of *Prosecutor v Mrdja* ICTY IT-02-59-S 65-67 the ICTY Trial Chamber noted that superior orders may in some cases be pleaded as a mitigating circumstance independently from duress and *vice versa*.

524 *Prosecutor v Serushago* ICTR-98-39-S 38, *Prosecutor v Niyitegeka* ICTR-96-14-T 494 and *Prosecutor v Kunarac* ICTY IT-96-23-A 362 and 408.

525 *Prosecutor v Serushago* ICTR-98-39-S 39, *Prosecutor v Mrdja* ICTY IT-02-59-S 91, *Prosecutor v Kunarac* ICTY IT-96-23-A 590, *Prosecutor v Erdemović* ICTY IT-96-22-A 16, *Prosecutor v Rutaganda* ICTR-96-3-T 472, *Prosecutor v Kordić* ICTY IT-95-14/2-T 845 and *Prosecutor v Sikirica* ICTY IT-95-8-S 184.

entire Rwanda and also supported national reconciliation in the entire Rwanda.[526] He therefore benefitted from every form of mitigation and with these exceptional circumstances he received a sentence of only 15 years imprisonment.[527]

Some of the other mitigating circumstances that were taken into account by the *ad hoc* Tribunals include, but are not limited to, the diminished mental responsibility of the accused, the good character of the accused, duress, the nature of the accused's participation in the commission of the crimes, and the place and conditions in which the accused will serve his or her prison term (for example if the prison term will be served far from his own country).[528]

3.4.4 Factors taken into account by the SCSL

3.4.4.1 Introduction

In essence the SCSL has taken into account four main factors when deciding upon an appropriate sentence.[529] These factors are included in the Statute and the RPE of the SCSL. The Statute of the SCSL provides that the SCSL must have recourse to the sentencing practices of the national courts of Sierra Leone, as well as the ICTR.[530] The Statute furthermore states that the SCSL must also take into account factors, such as the gravity of the offence and the individual circumstances of the convicted person.[531] The RPE of the SCSL also determines that the court must take into account factors, such as any aggravating circumstances and any mitigating circumstances.[532]

526 *Prosecutor v Serushago* ICTR-98-39-S 40. Also see *Prosecutor v Simić* ICTY IT-95-9/2-T 92, *Prosecutor v Tordović* ICTY IT-95-9/1-S 89-92 and *Prosecutor v Musema* ICTR-96-13-T 1005-1006.
527 *Prosecutor v Serushago*, ICTR-98-39-S.
528 Mettraux *International Crimes and the Ad Hoc Tribunals* 351-353 and Schabas 1997 *Duke Journal of Comparative and International Law* 483-498.
529 Dinokopila "Sentencing practices of the Special Court for Sierra Leone" 118-144.
530 A 19(1) SCSL Statute.
531 A 19(2) SCSL Statute.
532 Rule 101(B)(i-ii) SCSL RPE.

3.4.4.2 Gravity of the crime

As with the ICTY and the ICTR the SCSL has held in *Prosecutor v Brima et al* [533] that:

> … in determining an appropriate sentence, the gravity of the crime is the primary consideration or "litmus test'' with the gravity of the crime having to be individually assessed.

The Trial Chamber of the SCSL has, as in the cases of the ICTY and ICTR, subsequently also failed to elaborate as to what exactly is meant by the "gravity of the crime". The SCSL's Trial Chamber has, however, held that it may also take into consideration:

> the general nature of the underlying criminal conduct, the form and degree of participation of the accused or the specific role played by the accused in the commission of the offence, the degree of suffering, impact or consequences of the crime for the immediate victim in terms of physical, emotional and psychological effects, the effects of the crime on relatives of the immediate victims and/or the broader targeted group, the vulnerability of the victims, and the number of victims.[534]

It may also seem that these factors may overlap factors also regarded as aggravating factors as in the case of the ICTR's early jurisprudence. The Trial Chamber of the SCSL has, however, firmly held that any factor which is considered to be an element of an underlying offence may not be considered as an aggravating circumstance.[535]

3.4.4.3 Mitigating and aggravating factors

As with the mitigating and aggravating factors of the ICTY and ICTR, the mitigating and aggravating factors taken into account by the SCSL are not set out in the SCSL's Statute and RPE in great detail.[536] The SCSL Statute only makes specific reference to

533 *Prosecutor v Brima et al* SCSL-2004-16-T 18. This statement was also supported in the cases of *Prosecutor v Fofana and Kondewa* SCSL-04-14-T 32 and *Prosecutor v Sesay et al* SCSL-04-15-T 18.
534 *Prosecutor v Brima et al* SCSL-2004-16-T 20.
535 *Prosecutor v Fofana and Kondewa* SCSL-04-14-T 36.
536 See a 19(2) SCSL Statute and rule 101 SCSL RPE.

the gravity of the crimes, as well as the individual circumstances of the convicted individual.[537] As for the SCSL RPE, it only makes specific reference to the substantial cooperation with the Prosecutor by the convicted person as a mitigating factor and it states that the court must take into account the time already served by the accused while in detention during the trial.[538]

In the case of aggravating factors the Prosecutor must prove them beyond a reasonable doubt. The SCSL Trial Chamber also held in *Prosecutor v Fofana and Kondewa* that only those factors, which were directly related to the commission of the crimes and for which the convicted individual was charged with and convicted of, may be considered as aggravating factors.[539] Some of the aggravating factors that the Chambers of the SCSL had taken into account included premeditation and motive, the locations of the attack, the gravity of the crimes, the length and duration of the attacks, desire for revenge and the disregard for human life and dignity.[540] The abovementioned also corresponds with the practice of the ICTY and ICTR.[541]

In the case of mitigating factors the defence only has to prove the existence of mitigating factors on a balance of probabilities and this places a much lower burden of proof on the defence than what is required in comparison with aggravating factors.[542] Some of the mitigating factors that have been taken into account are remorse, individual circumstances, lack of prior convictions, the lack of formal education and the lack of formal training.[543] This also greatly corresponds with the process followed by the ICTY and ICTR.[544]

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537 A 19(2) SCSL Statute.
538 Rule 101(B)(ii) SCSL RPE and rule 101(D) SCSL RPE.
539 *Prosecutor v Fofana and Kondewa* SCSL-04-14-T 36.
540 *Prosecutor v Fofana and Kondewa* SCSL-04-14-T 37, *Prosecutor v Brima et al* SCSL-2004-16-T at 21 and *Prosecutor v Sesay et al* SCSL-04-15-T 25.
541 Dinokopila "Sentencing practices of the Special Court for Sierra Leone" 118-144.
542 *Prosecutor v Fofana and Kondewa* SCSL-04-14-T 38.
543 See for example *Prosecutor v Fofana and Kondewa* SCSL-04-14-T 40.
544 Dinokopila "Sentencing practices of the Special Court for Sierra Leone" 118-144.

3.4.4.4 Recourse to the national courts of Sierra Leone

In the case of *Prosecutor v Brima et al* the SCSL made a prominent decision regarding the recourse of the SCSL to the national courts of Sierra Leone's sentencing process.[545] The Trial Chamber stated that even though it was authorised to take into account the sentencing practices of the national courts of Sierra Leone that did not mean that the SCSL must take them into account.[546] The Prosecution for the SCSL also stated that there was no considerable guidance, which could be offered by the national courts of Sierra Leone because the crimes within the jurisdiction of the SCSL were not specifically addressed by Sierra Leonean Law.[547] The Sierra Leonean national sentencing practices only became relevant if the crimes that were committed were provided for under article 5 of the SCSL Statute. These offences relate to the domestic legislation of Sierra Leone.[548] Therefore the court held that it would be inappropriate to adopt any of the sentencing practices of the national court of Sierra Leone because none of the accused had been charged or convicted under any of the provisions of article 5 of the SCSL Statute.[549] Thus the sentencing practices of the national courts of Sierra Leone had little relevance in the determination of an appropriate sentence in the SCSL.[550]

As the SCSL is in the process of finalising its operations, the success of the court as a transitional justice system will be assessed with greater focus. According to Da Silva[551] the potential value of the SCSL:

> … stems from its ability to contextualise the application of transitional justice to the particular needs and circumstances of the population directly affected by the conflict.

545 *Prosecutor v Brima et al* SCSL-2004-16-T 26-33.
546 *Prosecutor v Brima et al* SCSL-2004-16-T 32.
547 *Prosecutor v Brima et al* SCSL-2004-16-T 27.
548 See in this regard a 5(a)(i-iii) SCSL Statute and a 5(b)(i-iii) SCSL Statute.
549 *Prosecutor v Brima et al* SCSL-2004-16-T 33.
550 Dinokopila "Sentencing practices of the Special Court for Sierra Leone" 118-144.
551 Da Silva "The hybrid experience of the Special Court for Sierra Leone" 232-258.

3.4.5 Sentencing at the ICC

3.4.5.1 Introduction

Article 23 of the Rome Statute refers to the *nulla poena sine lege* principle and provides that a convicted individual may only be punished in terms of the Rome Statute.[552] Article 76(1) provides that the court must take into account evidence presented and the submissions made in the course of the trial that are relevant to sentencing.[553] Furthermore, article 81(2)(a) provides that the Trial Chamber must ensure that the sentence must be in proportion to the crime that has been committed.[554]

The Rome Statute also provides that the Court must take into account the ICC RPE.[555] Rule 145 of the ICC RPE is the only rule that provides some guidance relevant to sentencing. It provides that the term of imprisonment or the fine imposed under article 77 of the Rome Statute must reflect the culpability of the convicted individual in its totality.[556] The Court must "balance all the relevant factors" relating to the crime committed, the individual circumstances of the convicted individual, as well as the mitigating and aggravating circumstances of the crime.[557]

3.4.5.2 Factors taken into account by the ICC

3.4.5.2.1 Recourse to other international criminal courts and tribunals

While in the process of taking the decisions of other international courts and tribunals into account, the ICC Trial Chamber held that the sentences of other international courts and tribunals are not part of the directly applicable law of the ICC, especially with regard

552 A 23 Rome Statute.
553 A 76(1) Rome Statute. Also see in relation hereto A 74(2) Rome Statute.
554 A 82(2)(a) Rome Statute.
555 A 78(1) Rome Statute.
556 Rule 145(1)(a) ICC RPE.
557 Rule 145(1)(b) ICC RPE.

to article 21 of the Rome Statute.[558] The Trial Chamber, however, stated that even though the decisions of the other international courts and tribunals do not form a direct part of the applicable laws of the ICC, they are nonetheless in a comparable position with regard to the sentencing process.[559]

Unfortunately the only sentences that could be taken into account by the ICC in *Prosecutor v Lubanga* were than of the SCSL.[560] This was because the SCSL is the only international criminal tribunal, which has convicted and sentenced individuals for the recruitment or use of child soldiers.[561] The SCSL has convicted seven individuals for using child soldiers in four cases.[562] Unfortunately the SCSL failed to address each count separately in the sentencing decision in two of the four cases.[563] According to the ICC Trial Chamber this has made it impossible for it to determine the overall effect that the use of child soldiers had in the SCSL's determination of sentences in this regard.[564]

3.4.5.2.2 Gravity of the crime

In *Prosecutor v Lubanga*[565] the Trial Chamber noted that the gravity of the crime, as set out in article 78(1) of the Rome Statute and Rule 145 of the ICC RPE, is one of the principle factors to be considered in the determination of an appropriate sentence. The sentence should also be in proportion to the crime and it must reflect the culpability of the convicted individual.[566]

During the process of establishing the gravity of the crime the Trial Chamber recognised that the crime of conscripting and enlisting children and using them to actively

558 *Prosecutor v Lubanga ICC-01/04-01/06-2901* 12.
559 *Prosecutor v Lubanga ICC-01/04-01/06-2901* 12.
560 *Prosecutor v Lubanga ICC-01/04-01/06-2901* 12.
561 *Prosecutor v Lubanga ICC-01/04-01/06-2901* 12.
562 *Prosecutor v Lubanga ICC-01/04-01/06-2901* 12.
563 *Prosecutor v Lubanga ICC-01/04-01/06-2901* 12.
564 *Prosecutor v Lubanga ICC-01/04-01/06-2901* 12.
565 *Prosecutor v Lubanga ICC-01/04-01/06-2901* 36.
566 *Prosecutor v Lubanga ICC-01/04-01/06-2901* 36. Also in relation there to see A 82(2)(a) Rome Statute and Rule 145(1)(a) ICC RPE.

participate in hostilities, exposed them to real danger as potential targets.[567] The fact that children are much more vulnerable means that they need to be afforded particular protection, more so than the general population.[568] The Trial Chamber furthermore stated that it had considered the gravity of the crime against the backdrop of the circumstances of the case.[569] These circumstances included the extent of the damage caused and in particular:

> … the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person.[570]

The Trial Chamber also noted that any factor that has been taken into account when the gravity of crime was assessed may not additionally be taken into account again while in the process of establishing aggravating circumstances and *vice versa*.[571]

3.4.5.2.3 Aggravating Circumstances

The Trial Chamber held in *Prosecutor v Lubanga* that aggravating circumstances needed to be proved beyond a reasonable doubt.[572] The Trial Chamber also stated that the Rome Statute and the ICC RPE do not provide any guidelines for the establishment thereof.[573] The Trial Chamber did, however, state that the establishment of any aggravating circumstance would have a significant influence in the determination of an appropriate sentence.[574]

The ICC RPE requires the court to take into account factors, such as any prior criminal convictions, the abuse of power or official capacity, whether the victims of the crime

567 *Prosecutor v Lubanga ICC-01/04-01/06-2901* 37.
568 *Prosecutor v Lubanga ICC-01/04-01/06-2901* 37.
569 *Prosecutor v Lubanga ICC-01/04-01/06-2901* 44.
570 *Prosecutor v Lubanga ICC-01/04-01/06-2901* 44.
571 *Prosecutor v Lubanga ICC-01/04-01/06-2901* 34.
572 *Prosecutor v Lubanga ICC-01/04-01/06-2901* 33.
573 *Prosecutor v Lubanga ICC-01/04-01/06-2901* 33.
574 *Prosecutor v Lubanga ICC-01/04-01/06-2901* 33.

were defenceless, whether the crime committed consisted of particular cruelty or multiple victims, whether the crime had been motivated by any discriminating grounds referred to in article 21(3) of the Rome Statute and any other circumstances that are considered to be similar to those mentioned.[575] Rule 145 advises the court to also take into account the following factors:

> …the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means deployed to execute the crime, the degree of participation of the convicted person, the degree of intent, the circumstances of manner, time and location, and the age, education, social and economic condition of the convicted person.[576]

With reference to the large- scale on which the crimes were committed and widespread nature of the crimes committed, the ICC Trial Chamber noted that it was established beyond a reasonable doubt that during the period of the hostilities the recruitment and enlisting of child soldiers had been a widespread occurrence.[577] As for the scale of the recruitment and enlistment of child soldiers the Trial Chamber stated that it was unable to establish beyond a reasonable doubt that the widespread occurrence of the recruitment and enlisting of child soldiers was on a large scale as well.[578]

The Trial Chamber stressed the importance that no circumstances, which had been used in the determination of the gravity of the crime may be used again in the establishment of aggravating circumstances.[579] The Trial Chamber had in this regard, however, found beyond a reasonable doubt that the convicted individual had participated in a common plan to build an army for the purpose of establishing and maintaining political, as well as military control over parts in the Congo.[580] The Trial Chamber also summarised the key factors regarding the convicted individual's

575 Rule 145(2)(b) ICC RPE. A 21(3) Rome Statute sets out certain areas on which could be discriminated against such as gender, age, race and national, ethnic or social region.
576 Rule 145(1)(c) ICC RPE.
577 *Prosecutor v Lubanga ICC-01/04-01/06-2901* 49.
578 *Prosecutor v Lubanga ICC-01/04-01/06-2901* 50.
579 *Prosecutor v Lubanga ICC-01/04-01/06-2901* 51.
580 *Prosecutor v Lubanga ICC-01/04-01/06-2901* 52.

participation and concluded that these factors provided an important foundation for the sentence to be passed by the Chamber:

> Thomas Lubanga was the President of the UPC/FPLC, and the evidence demonstrates that he was simultaneously the Commander-in-Chief of the army and its political leader. He exercised an overall coordinating role over the activities of the UPC/FLPC. He was informed, on a substantive and continuous basis, of the operation of the FPLC. He was involved in planning military operations, and he played a critical role in providing logistical support, including weapons, ammunition, food, uniforms, military rations and other general supplies for the FPLC troops. He was closely involved in making decisions on recruitment policy and he actively supported recruitment initiatives, for instance by giving speeches to the local population and the recruits. In his speech at the Rwampara camp, he encouraged children, including those under the age of 15 years, to join the army and to provide security for the populace once deployed in the field following their military training. Furthermore, he personally used children below the age of 15 amongst his bodyguards and he regularly saw guards of other UPC/FPLC members of staff who were below the age of 15. The Chamber has concluded that these contributions by Thomas Lubanga, taken together, were essential to a common plan that resulted in the conscription and enlistment of girls and boys below the age of 15 into the UPC/FPLC and their use to actively participate in hostilities.[581]

The Rome Statute does not list any factors that should be taken into account in relation to the individual circumstances of the convicted individual.[582] The ICC RPE does, however, provide that the court must take into account factors such as the age, social and economic condition of the convicted person and the level of education of the convicted person.[583] These factors were also mentioned by the Trial Chamber in *Prosecutor v Lubanga* and led the Trial Chamber to conclude that the convicted individual was a very intelligent and well-educated individual.[584] The Trial Chamber further noted that the convicted individual did in fact understand the seriousness of his crimes and that this level of awareness was a very relevant factor in the determination of an appropriate sentence.[585]

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581 *Prosecutor v Lubanga ICC-01/04-01/06-2901* 52-53.
582 A 78(1) Rome Statute.
583 Rule 145(b) ICC RPE.
584 *Prosecutor v Lubanga ICC-01/04-01/06-2901* 56.
585 *Prosecutor v Lubanga ICC-01/04-01/06-2901* 56.

3.4.5.2.4 Mitigating circumstances

In *Prosecutor v Lubanga* the Trial Chamber stated that the mitigating factors, which are to be taken into account are not limited to the facts and surrounding circumstances of the case.[586] The Trial Chamber particularly took into account Rule 145(2)(a)(ii) of the ICC RPE, which provides that the convicted individual's conduct after committing the crimes should be considered in the sentencing process.[587] The Trial Chamber further noted that the standard of proof that should be used was that any mitigating circumstance should be established on the balance of probabilities.[588]

Some of the first factors the Trial Chamber took into account in the establishment of mitigating factors in *Prosecutor v Lubanga* was necessity, peaceful motives and demobilization orders.[589] The Trial Chamber accepted that the convicted individual had hoped that peace would return to the Ituri once he had secured his objectives.[590] The Trial Chamber, however, also stated that this was only of limited relevance because the convicted individual had continued to recruit and enlist child soldiers during the time that was covered by the charges.[591]

The Trial Chamber furthermore took into account the convicted individual's cooperation with the ICC during the course of the trial.[592] The Trial Chamber specifically noted that the convicted individual was very respectful and cooperative throughout the course of the trial.[593] The Trial Chamber also took into account circumstances involving the convicted individual during the aftermath of the hostilities.[594] These circumstances were unfortunately not disclosed by the Trial Chamber when considering the appropriate sentence.[595]

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586 *Prosecutor v Lubanga ICC-01/04-01/06-2901* 34.
587 *Prosecutor v Lubanga ICC-01/04-01/06-2901* 34.
588 *Prosecutor v Lubanga ICC-01/04-01/06-2901* 34.
589 *Prosecutor v Lubanga ICC-01/04-01/06-2901* 87.
590 *Prosecutor v Lubanga ICC-01/04-01/06-2901* 87.
591 *Prosecutor v Lubanga ICC-01/04-01/06-2901* 87.
592 *Prosecutor v Lubanga ICC-01/04-01/06-2901* 98.
593 *Prosecutor v Lubanga ICC-01/04-01/06-2901* 98.
594 *Prosecutor v Lubanga ICC-01/04-01/06-2901* 98.
595 *Prosecutor v Lubanga ICC-01/04-01/06-2901* 98.

Lastly, the Trial Chamber took into account in mitigation the time already spent in detention by the convicted individual. In terms of article 78(2) of the Rome Statute the Trial Chamber must deduct time already spent on detention by the convicted individual in accordance with an order of the court. Article 78(2) of the Rome Statute also provides that the Trial Chamber may deduct any time, which has been spent in detention by the convicted individual in connection with the crime.

With the passing of its first sentence we are given some insight into how the ICC will approach the sentencing process in the future. Even though the ICC's sentence that was passed in *Prosecutor v Lubanga* focused on the enlisting and conscripting of children under the age of 15 years into armed forces and the use of them to participate in hostilities, certain valuable general principles may be derived therefrom in future.

3.5 Summary

The judges of international courts have always had a wide discretion regarding the imposition of sentences. There are nonetheless numerous challenges that judges face during this process of which the most prominent is probably the lack of international sentencing guidelines. The ICTY, the ICTR and the SCSL have, however, seemed to succeed in the development of some guidelines as well as the factors that can be taken into account in this regard. These guidelines, may be used by the ICC and national courts when they are to pass sentences because thus far the ICTY, the ICTR and the SCSL have been considered to be the frontrunners in the punishment of international crimes. From the case of *Prosecutor v Lubanga* it is unclear in which manner the ICC will approach the jurisprudence of other international courts and tribunals as it could only take into account the decisions made by the SCSL. Therefore we are still not able to derive from the jurisprudence of the ICC the extent of the recourse to other international courts and tribunals. We can, however, confirm that the procedural rules of the ICC are more detailed as to the factors that may be taken into account during the process of determining an appropriate sentence.

Chapter 4

The South African context

4.1 Introduction

Today South Africa is considered to be a leading African democracy with one of the world's most progressive constitutions.[596] South Africa has also been a central member in the African Union with regard to the promotion of international justice and the ending of impunity for the commission of international crimes.[597] Even though South Africa is well placed in the battle against international crime and has adopted the ICC Act to provide for the prosecution of individuals who have committed international crimes, no detailed provisions exist in the Act relating to the important aspect of sentencing these individuals upon conviction for their crimes. The ICC Act merely provides:

> Despite anything to the contrary in any other law of the Republic, any person who commits a crime, is guilty of an offence and is liable on conviction to a fine or imprisonment, including imprisonment for life, or such imprisonment without the option of a fine, or both a fine and such imprisonment.[598]

The legislature has, however, amended the *Criminal Law Amendment Act* 105 of 1997 in 2007 with the *Criminal Law (Sentencing Amendment) Act* 38 of 2007 to include the international crimes provided for in the ICC Act in the category of crimes that are subject to a so-called discretionary minimum sentence of life imprisonment.[599] In this Chapter the legislative framework for sentencing international crimes in South Africa will be considered. It has been pointed out that a South African court adjudicating any matter from the ICC Act may, where appropriate, *inter alia* apply the provisions of the Rome Statute.[600]

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596 Human Rights Watch 2010 http://www.hrw.org.
597 Human Rights Watch 2010 http://www.hrw.org.
598 S 4(1) ICC Act.
599 Part I of Schedule 2 *Criminal Law Amendment Act* 105 of 1997 was amended by the *Criminal Law (Sentencing) Amendment* Act 38 of 2007.
600 Terblanche *Sentencing in South Africa* 10.

4.2 Sentencing in South Africa

4.2.1 General principles

At the heart of the sentencing process in South Africa lies the Constitution.[601] The Bill of Rights in Chapter 2 of the Constitution also affects the sentencing process by providing basic principles and values that must be kept in mind throughout the process.[602] Some of the basic rights in the Bill of Rights have significantly changed the face of South African sentencing law, for example the right to life, the right to dignity, the right of equality before the law, and the right to protection against cruel and inhuman or degrading punishment.[603] These rights have, for instance led the way towards the abolishment of the death penalty and corporeal punishment in South Africa.[604]

The sentencing purposes considered by South African courts show clear similarities to the purposes at international level.[605] The South African courts also acknowledge the sentencing purposes of deterrence, prevention, rehabilitation and retribution.[606] As for the theories of punishment, Terblanche[607] supports the approach, which states that only two main theories of punishment exist, namely the retributive theory and the utilitarian theory. South African commentators, however, also add a third theory of punishment, namely restorative justice.[608]

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601 Terblanche *Sentencing in South Africa* 10.
602 Terblanche *Sentencing in South Africa* 10.
603 *S v Dzukuda* 2000 2 SARC 443 (CC) par [9-12].
604 See respectively *S v Makwanyane* 1995 3 SA 391 (CC) and *S v Williams* 1995 2 SARC 251 (CC).
605 See 3.4.1 above.
606 Terblanche *Sentencing in South Africa* 156. Also see, for example, the following cases where South African courts made reference to these sentencing purposes: *S v Chapman* 1997 3 SA 341 (SCA) 344J – 345D, *R v Swanepoel* 1945 AD 444 (A) 454-455, *S v Khumalo* 1984 3 SA 327 (A) 330D-E, *S v Whitehead* 1970 4 SA 424 (A) 436E-F and *S v Rabie* 1975 4 SA 855 (A) 862. Also see in this regard South African Law Commission *Report on sentencing* 3.1.1.
607 Terblanche *Sentencing in South Africa* 171.
608 See for example Terblanche *Sentencing in South Africa* 171 and Batley "Restorative justice in the South African context" 23-32.

There are a number of different definitions for the theory of restorative justice but all the definitions contain three basic principles.[609] Firstly, in the process of promoting justice, the government is considered responsible for the preservation of order in the community and the establishment of peace. Secondly, apart from the government the victims, offenders and communities affected should be part of the criminal justice process from the earliest point possible. Thirdly, the crime that has been committed is seen as something which causes pain and suffering and the criminal justice process should effectively seek to heal breaches, to redress imbalances and to restore relationships that may have been broken.[610] Restorative justice is concerned with the reconciliation and reintegration of offenders into the community and with addressing the needs and hurts of the victims and the communities that have been affected, as well as that of the offenders in order to ultimately heal all wrongs.[611]

In *Director of Public Prosecutions, KwaZulu-Natal v P*[612] the Supreme Court of Appeal stated that the court must take into account the traditional approach to sentencing which required it to consider the "triad", consisting of the crime, the offender, and the interests of society. The interests of the victim should also be brought into the equation.[613] Terblanche[614] states that the crime is the most important element to be taken into account and that no other factor has the same influence on the extent of the sentence.

Since the crime has great influence on the extent and the nature of the sentence, it should be dealt with in a realistic and adequate manner.[615] It is important that the sentence should fit the crime, in other words there should be proportionality between

609 Batley "Restorative justice in the South African context" 23-32.
610 Batley "Restorative justice in the South African context" 23-32 and Terblanche *Sentencing in South Africa* 175.
611 Batley "Restorative justice in the South African context" 23-32 and Department of Social Development (Western Cape Government) 2003 http://www.westerncape.gov.za. Examples of cases where restorative justice options were followed include *S v Maluleke* 2008 1 SACR 49 (T) and *Dikoko v Mokhatla* 2006 6 SA 235 (CC). Also see in this regard Cornell and Muvangua (eds) *uBuntu and the Law* (Fordham University Press 2011) and Skelton "Response from a restorative justice perspective" 20-21.
612 *Director of Public Prosecutions, Kwazulu-Natal v P* 2006 1 243 (SCA) 13. Also see *S v Zinn* 1969 2 SA 537 (A) 540G-H.
613 *S v Dyantyi* 2011 1 SACR 540 (EGG) 18.
614 Terblanche *Sentencing in South Africa* 147.
615 King *Sentencing* 39.

the severity of the crime and the sentence.[616] The approach followed by South African courts in determining the seriousness of the crime involves the balancing of the degree of harmfulness of the offence with the degree of culpability of the accused.[617]

The degree of culpability of the accused relates to the second element of the "triad", namely the criminal and the individualisation of the sentence.[618] This means that the court must, before deciding on an appropriate sentence, establish who the accused is and why the accused had committed the crime.[619] It is, however, very difficult to accurately establish beyond any doubt the individual circumstances of the accused because so many factors may be taken into account.[620] Courts have increasingly resorted to attempt to establish the culpability of the accused with a more objective view based on the facts of the case.[621] Under the subject of individual criminal responsibility or culpability the South African criminal law seeks to punish those who are blameworthy for the commission of the crime and the severity of the sentence will reflect the degree of blame that may be attributed to the accused.[622] The blameworthiness of the accused should for purposes of sentencing also include all relevant mitigating and aggravating circumstances, which may lead to the increase or lessening of the sentence.[623]

The third element of the "triad" deals with the interests of society. In *S v Mhlakaza*[624] the Supreme Court of Appeal stated that a sentence must give countenance to the law-abiding citizens' feelings regarding crimes committed in the community and that the

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616 King *Sentencing* 40 and Terblanche *Sentencing in South Africa* 147-148. Also see for example *S v Motlangamang* 1958 1 SA 626 (T).

617 Terblanche *Sentencing in South Africa* 148 and South African Law Commission *Sentencing Report*, para 3.1.4.

618 Terblanche *Sentencing in South Africa* 150.

619 King *Sentencing* 41. A good example of establishing who the accused is and why the accused committed the crime may be found in the crime of murder. Murder may not always be committed with the mere goal of ending a person's life. In cases of euthanasia murder is committed in order to end the suffering of a person who may, for example be terminally ill. Some of the cases, which relate to this subject are *S v Hartmann* 1975 3 SA 532 (C) 536F-537G and *S v Smorenburg* 1992 2 SACR 389 (C) 402.

620 Terblanche *Sentencing in South Africa* 150.

621 Terblanche *Sentencing in South Africa* 150.

622 Clarkson *Understanding Criminal Law* 17.

623 Terblanche *Sentencing in South Africa* 150. Mitigating and aggravating circumstances will be reviewed later on in this Chapter at 4.2.3.

624 *S v Mhlakaza* 1997 1 SACR 515 (SCA) 518b-c.

more heinous the crime that had been committed in the eyes of the community, the more severe the sentence must be. It is important, however, for the courts to sentence an accused with the interests of society and not the opinions of society in mind.[625] The best possible way to serve the interests of society is to pass a sentence, which provides the society with the best possible outcome.[626] In *S v Maki*[627] it was stated that the interests of society are best served by rehabilitating the accused and by aiming to deter other individuals from committing the same crime.

There has to be a balance between all the elements of the "triad".[628] However, it is very difficult for any court to reach a balance between these elements because in some cases, the heinous nature of the crime outweighs the other elements.[629] Terblanche[630] suggests that it would be much more efficient to follow the court's decision in *S v De Kock*[631] were it had been suggested that the elements of the "triad" should be considered in conjunction with each other and that each element should be given a certain weight separately, during the sentencing stage.

4.2.2 The Criminal Law Amendment Act 105 of 1997

South African courts have always had considerable freedom when it comes to sentencing.[632] The enactment of minimum sentences for certain crimes has, however, limited the wide sentencing discretion of the courts. A minimum sentence can be described as a sentence that consists of a downward lower limit of the sentence that is to be imposed and the court's options under minimum sentence legislation are limited.[633] The enactment of section 51 of the *Criminal Law Amendment Act* in 1997 has

625 *S v Mhlakaza* 1997 1 SACR 515 (SCA) 518e-f. In *S v O* 2003 2 SACR 147 (C) 157 the trial court was criticized for referring to the interests of the society on a regular basis while in essence, discussing the expectations of the society.
626 *S v Rabie* 1975 4 SA 855 (A) 862G.
627 *S v Maki* 1994 2 SACR 414 (E) 419h. Also see *S v Bezuidenhout* 1991 1 SACR 43 (A) 51d-e.
628 *S v Banda* 1991 2 SA 352 (B) 355A-B and *S v Kotze* 1994 2 SACR 214 (O) 226j.
629 *S v Vekueminina* 1993 1 SACR 561 (N) 568d-e and *S v M* 1998 1 SACR 162 (W)164d-e.
630 Terblanche *Sentencing in South Africa* 147.
631 *S v De Kock* 1997 2 SARC 171 (T) 197g-h.
632 Kruger *Suid-Afrikaanse Strafprosesreg* 724.
633 *S v De Montille* 1979 2 SA 1057 (R) 1058D.

changed and dominated South Africa's recent sentencing jurisprudence. The provisions of section 51 supersede the provisions of the ICC Act relating to sentencing. In *S v Thembalethu*[634] the Supreme Court of Appeal held that section 51(2) of the *Criminal Law Amendment Act* superseded all other laws on sentencing for offences listed in the Act. In this respect the court relied on section 51(2) of the Act, which provides that:

> Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court [including a High Court to which a matter has been referred under section 52(1) for sentence], shall [in respect of] sentence a person who has been convicted of an offence …[635]

Section 51(1) of the *Criminal Law Amendment Act* provides that a regional court or a High Court is obligated to sentence persons convicted of certain crimes to imprisonment for life.[636] This includes any offence referred to in the ICC Act.[637] These crimes are genocide, crimes against humanity and war crimes. If, however, the court is satisfied that substantial and compelling circumstances exist that justify the imposition of a lesser sentence, it must enter those circumstances on the record of the proceedings and must thereupon impose such a lesser sentence.[638]

4.2.2.1 Substantial and compelling circumstances

The enactment of the *Criminal Law Amendment Act* meant that it is no longer "business as usual" for courts.[639] The legislature has aimed at ensuring a severe, standardised and consistent response from the courts to the commission of serious crimes unless there are truly convincing reasons for a different response.[640] In *S v Luke*[641] the Western Cape High Court stated that what was meant with "business as usual" was that:

634 *S v Thembalethu* 2009 1 SARC 50 (SCA).
635 S 51(2) *Criminal Law Amendment Act* 105 of 1997.
636 S 51(1) *Criminal Law Amendment Act* 105 of 1997.
637 Part I or Part II of Schedule 2 *Criminal Law Amendment Act* 105 of 1997.
638 S 51(3) *Criminal Law Amendment Act* 105 of 1997.
639 *S v Malgas* 2001 1 SACR 469 (SCA) par [7].
640 *S v Malgas* 2001 1 SACR 469 (SCA) par [7].
641 *S v Luke* 2012Ohlin "Towards a Unique Theory" SACR 1610 (WCHC) par [17].

> … the traditional approach in cases such as Zinn and Rabie where the courts exercised an unfettered discretion in relation to sentence is now constrained by the terms of this legislation, provided of course that any sentence imposed must be just, and in accordance with the applicable constitutional principles.

In *Centre for Child Law v Minister for Justice and Constitutional Development*[642] the Constitutional Court ruled that the Constitution prohibited the minimum sentencing legislation to be applied to children aged younger than 18 years.

In *S v Malgas*[643] certain important principles were set out by the Supreme Court of Appeal with regard to the concept of "substantial and compelling circumstances". In *S v Malgas* it was held that section 51 of the *Criminal Law Amendment Act* has limited the discretion of the court to some extent but that it has not eliminated the court's discretion.[644] The courts are required to approach sentencing on the basis that the legislature had ordained life imprisonment as a sentence that was normally applicable for the listed crimes in the absence of substantial and compelling circumstances.[645] Therefore the listed crimes must elicit a severe, standardised and consistent penalty unless there are truly convincing reasons for a different response.[646] Court may not depart from the prescribed minimum sentences for flimsy reasons and speculative hypotheses favourable to the offender, sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded from the decisions of the court.[647] Section 51 has shifted the aim of sentencing toward the objective gravity of the crime and the need for sanctions against it. The legislature had furthermore deliberately left the discretion to depart from the prescribed sentences, on the basis of circumstances relating to any

642 *Centre for Child Law v Minister for Justice and Constitutional Development* 2009 2 SACR 477 (CC).
643 *S v Malgas* 2001 1 SACR 469 (SCA) par [25].
644 *S v Malgas* 2001 1 SACR 469 (SCA) par [25]. Also see in this regard Kruger *Suid-Afrikaanse Strafprosesreg* 743-744 and Isaacs *Mandatory minimum sentences* 41-42.
645 *S v Malgas* 2001 1 SACR 469 (SCA) par [25].
646 *S v Malgas* 2001 1 SACR 469 (SCA) par [25].
647 *S v Malgas* 2001 1 SACR 469 (SCA) par [25].

particular case, to the courts.[648] The court also stated that no factors are to be excluded during the process of making the decision other than those mentioned above.[649] All the factors which are taken into account must be measured against the concept of "substantial and compelling circumstances" and the cumulative impact of all the factors must justify a departure from the prescribed sentences before the courts may impose a lesser sentence.[650] The court may impose a lesser sentence if the circumstances of the case reflect that the prescribed sentence would be unjustified and disproportionate to the crime, the accused and the public's needs.[651]

The factors taken into account when deciding whether substantial and compelling circumstances exist are established on a case-by-case basis and it is impossible to list all of them here. The Supreme Court of Appeal has, however, recently stated that substantial and compelling circumstances must be weighed against the objective gravity of the offences, their prevalence in South Africa and the legitimate expectations of society that such crimes had to be seriously punished.[652] The court also made mention in *S v Roslee* that even though there is no *onus* resting on the accused to prove the presence of substantial and compelling circumstances, the accused must pertinently raise such circumstances if he wished to persuade the court to impose a lesser sentence.[653] In *S v Mvamvu* the court stated that it was important for any sentencing court to properly balance all factors relevant to sentencing against the benchmark provided by legislature in respect of all serious offences.[654] In *Director of Public Prosecutions, KwaZulu-Natal v Ngcobo* the court also reiterated that a departure from the prescribed minimum sentences by a court on the basis that an injustice would occur if such a minimum penalty was imposed, may be justified even though there had not been a shocking injustice.[655]

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648 *S v Malgas* 2001 1 SACR 469 (SCA) par [25].
649 *S v Malgas* 2001 1 SACR 469 (SCA) par [25].
650 *S v Malgas* 2001 1 SACR 469 (SCA) par [25].
651 *S v Malgas* 2001 1 SACR 469 (SCA) par [25].
652 *Director of Public Prosecutions, North Gauteng, Pretoria v Thusi* 2012 1 SACR 423 (SCA).
653 *S v Roslee* 2006 1 SACR 537 (SCA).
654 *S v Mvamu* 2005 1 SACR 54 (SCA).
655 *Director of Public Prosecutions, North Gauteng, Pretoria v Thusi* 2009 2 SACR 361 (SCA).

In the process of establishing whether substantial and compelling circumstances are applicable the Supreme Court of Appeal and Constitutional Court has taken into account, for example, the following circumstances. In *Director of Public Prosecutions, North Gauteng, Pretoria v Thusi* the court had taken into account factors, such as youthfulness and the prospects of rehabilitation.[656] In *S v Price* the court took into account that the accused had been a first offender, that he was a petty criminal, that he had played a lesser role in the commission of the crime and that the accused's culpability had been substantially lesser than that of his co-accused.[657] In *S v Sikhipha* the court had also taken into account that the accused was gainfully employed, that he had a wife and children and that he did not cause any serious physical injuries to the victim.[658]

4.2.3 Mitigating and aggravating circumstances in general

In *S v Malgas*[659] it was held that all factors traditionally taken into account in sentencing continue to play a role in the sentencing process in terms of the *Criminal Amendment Act* 105 of 1997. As with the ICTY, the ICTR, the SCSL and the ICC there is no closed list of mitigating and aggravating circumstances and it is left to the judges to make use of their own discretion regarding mitigating and aggravating circumstances on a case-by-case basis.[660] In the end a balance must also be found between the mitigating and the aggravating factors of each case and this is done by applying a certain weight to each factor.[661] It is, however, found in South African jurisprudence that the aggravating circumstances generally outweigh the mitigating factors, especially when the crime committed was of a very serious nature.[662]

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656 *Director of Public Prosecutions, North Gauteng, Pretoria v Thusi* 2012 1 SACR 423 (SCA). Also see, for example, *S v Mabuza* 2009 2 SACR 435 (SCA), *S v Roslee* 2006 1 SACR 537 (SCA), S *v Nkomo* 2007 2 SARC 198 (SCA) and *S v Matyityi* 2011 1 SACR 40 (SCA).

657 *S v Price* 2003 2 SACR 551 (SCA). Also see *S v Nkomo* 2007 2 SARC 198 (SCA) and *S v Sikhipha* 2006 2 SACR 439 (SCA).

658 *S v Sikhipha* 2006 2 SACR 439 (SCA).

659 *S v Malgas* 2001 1 SACR 469 (SCA).

660 Terblanche *Sentencing in South Africa* 185.

661 Terblanche *Sentencing in South Africa* 186.

662 See, for example, *S v Pietersen* 1994 2 SACR 434 (C), where only the age of the accused, as well as previous convictions were mentioned in mitigation; and *S v Andhee* 1996 1 SACR 419

Some of the main aggravating factors taken in to account by South African courts, which also correspond to the aggravating circumstances taken into account by the ICTY and the ICTR, are the seriousness of the crime, the planning of the crime, the motive behind the commission of the crime and the lack of remorse.[663] Some of the mitigating factors taken into account also correspond to those taken into account by the ICTY and the ICTR and are, for example, the age of the offender, the deterioration of the accused's health, the accused's family situation, a political motive, and the show of remorse.[664]

4.3 Summary

The traditional approach in South African courts towards sentencing incorporates three sentencing considerations, namely the crime, the offender and the society. Section 51 of the *Criminal Law Amendment Act* 105 of 1997 prescribes a minimum sentence of life imprisonment for the core international crimes. Section 51 of the Act supersedes even the ICC Act and has limited the discretion of the courts in South Africa to some extent. The courts are required to approach sentencing on the basis that the legislature had ordained life imprisonment as a sentence that was normally applicable for the listed crimes in the absence of substantial and compelling circumstances.

(A) were the Appeals Court only took note of the fact that the accused was a medical doctor, as well as that the accused was a first offender. Also see in this regard Terblanche *Sentencing in South Africa* 186.

663 See 3.4 above and Terblanche *Sentencing in South Africa* 186-191.

664 Terblanche *Sentencing in South Africa* 195-204. These mitigating factors have been discussed at length under 3.4.

Chapter 5

Conclusion: Revisiting the aims of the study

5.1 Addressing the secondary questions related to the research question

5.1.1 What is the nature of the crimes that are subject to international criminal law sentencing regime?

The research began with the search for a definition of “international crimes”. There is no generally accepted definition for the concept of “international crimes”. International crimes, however, all carry an inherent seriousness about them and some form of international cooperation is needed to punish the individuals guilty of committing international crimes. Four crimes were identified as being the core of international crimes. These crimes are genocide, war crimes, crimes against humanity and the crime of aggression. The definitions of each of these crimes were developed over decades and the international community is still in the process of finalising an acceptable definition for the crime of aggression. These crimes are considered by the international community to be the most heinous in nature and the sheer magnitude of them is difficult to fathom.

5.1.2 What purposes of punishment and factors are considered by international courts and tribunals in the sentencing process?

The international criminal courts’ and tribunals’ judges are given a wide discretion to enable them to pass an appropriate sentence upon those convicted of committing international crimes.

The main goal of the purposes of punishment is in essence to determine the character, effectiveness and severity of the sentence which is to be imposed, as well as the

enforcement of such a sentence. The purposes of punishment should also not be seen a mere justification of punishment but rather as giving an answer to the question as to what the nature and the extent of an appropriate sentence should be. Unfortunately there is still not a single framework that exists for the establishment of the purposes of punishment. However, international courts and tribunals seem to examine the precedents found in international, as well as national laws. The main purposes of punishment recognised by the international community for the sentencing of international crimes are the purposes of deterrence and retribution. Other purposes also exist but they seem to play a lesser role in the consideration of an appropriate sentence. Some of those purposes include rehabilitation, the protection of the public, the maintenance of international peace and security, the preservation of world order, the restoration of peace and the prevention of impunity.

As for the broad factors, which are taken into account, the development thereof stretches over centuries. The factors that are taken into account when deciding upon an appropriate sentence are determined on a case-by-case basis. The courts have at their disposal a largely unfettered discretion as to the establishment of relevant factors, which are to be taken into account. The factors that are taken into account at international level are also reflected in national court decisions and are far too many to mention here. However, these factors include recourse to national or international courts and tribunals, the gravity of the offence, aggravating factors, mitigating factors, the category of the crime, individual criminal responsibility, etc. The main factor, which is also considered as the litmus test by international courts and tribunals, is the gravity of the crime and in many instances it is regarded as the most appropriate consideration in the establishment of the best possible sentence.

5.1.3 What is the sentencing framework for international crimes in South Africa?

The *Criminal Law Amendment Act* 105 of 1997 provides for minimum sentences for certain crimes and furthermore supersedes all other laws pertaining to sentencing. It is no longer business as usual for the courts when it comes to sentencing a convicted

individual. The *Criminal Law Amendment Act* requires a severe, standardised and consistent response from the courts in the sentencing process. These minimum sentences may only be departed from when substantial and compelling circumstances exist, which justifies the departure therefrom. Courts may not depart from the prescribed sentences for flimsy reasons. The *Criminal Law Amendment Act* focuses on the objective gravity of the offence.

To determine whether substantial and compelling circumstances exist, the courts must take into account all relevant factors. The factors which are taken into account, are measured against the concept of "substantial and compelling circumstances". The cumulative impact of these factors must justify a departure from the prescribed minimum sentences. The courts may impose a lesser sentence if the circumstances of the case reflect that the prescribed sentence would be unjust and disproportionate to the crime, the accused and the public's needs.

5.2 Answering the main research question

5.2.1 In what manner should South African courts approach the sentencing of individuals convicted of international crimes?

In order to establish the approach South African courts should follow when sentencing individuals convicted of international crimes, there must be a reflection as to what the purpose of sentencing in South Africa is, as well as which factors South African courts consider during the sentence phase. South Africa is well placed in the battle against international crime by signing and rectifying the Rome Statute of the International Criminal Court and adopting the *Criminal Law Amendment Act* and the ICC Act to provide for the prosecution of individuals who have been convicted of the commission of international crimes.

In the past the courts in South Africa had an almost unfettered freedom when it came to sentencing. This position has, however, changed with the enactment of section 51 of

the *Criminal Law Amendment Act* 105 of 1997 which prescribes minimum sentences for certain crimes. These crimes include any offence referred to in the ICC Act, and means that the crime of genocide, crimes against humanity and war crimes are included. The Act changed and dominated South Africa's recent sentencing jurisprudence and limited the wide sentencing discretion of South African courts to some extent. The enactment of the *Criminal Law Amendment Act* and specifically section 51 thereof meant that it is no longer "business as usual" for the courts in South Africa.

The provisions of section 51 supersede the provisions of the ICC Act as well as any other laws relating to the sentencing of offences listed in the *Criminal Law Amendment Act*. Section 51(1) provides that persons convicted of international crimes provided for in the ICC Act must be sentenced to imprisonment for life. The *Criminal Law Amendment Act* is aimed at ensuring a severe, standardised and consistent response from the courts in response to serious crimes. However, if the court is satisfied that substantial and compelling circumstances do exist, which justifies the imposition of a lesser sentence, the court must thereupon impose such a lesser sentence. Section 51 has shifted the aim of sentencing toward the objective gravity of the crime and the need for sanctions against it.

In *S v Malgas* the Supreme Court of Appeal laid down important principles the courts must follow when they sentence individuals in terms of the Act. The Supreme Court of Appeal held that courts are obligated to impose the prescribed minimum sentence in the absence of substantial and compelling circumstances. The crimes listed in the Act must elicit a severe, standardised and consistent penalty unless there are truly substantial and compelling circumstances which justify a different response. The courts may not depart from the prescribed minimum sentences for flimsy reasons. The *Criminal Law Amendment Act* has furthermore left the discretion to depart from the prescribed sentences to the courts. In exercising this discretion courts must take into account all factors, relating to a particular case, during the process of making the decision. This means that all the factors which are taken into account must be measured against the concept of "substantial and compelling circumstances" and the cumulative impact of all

the factors must justify a departure from the prescribed sentences before a lesser sentence may be imposed. The factors taken into account when deciding whether substantial and compelling circumstances exist are established on a case-by-case basis.

As with the international criminal courts and tribunals, the purposes of punishment, must considered in determining an appropriate sentence. South African courts furthermore acknowledge, as with the international courts and tribunals, deterrence, prevention, rehabilitation and retribution are some of the main purposes of sentencing. Through the jurisprudence of the international courts and tribunals it is also clear that great value is placed on the maintenance of peace, security and the well-being of the world, as well as national reconciliation and the ending of impunity. These purposes have also been inscribed, albeit vaguely, in the statutes of the ICTY, the ICTR and the SCSL as well as the preamble of the Rome Statute.

There are also clear similarities between the broad sentencing factors taken into account by South African courts and factors taken into account by the international criminal courts and tribunals. South African courts traditionally consider the “triad” which consists of the crime, the offender and the interests of society. Recent case law suggests the interests of the victim of the crime should also be considered.

South African courts will also be guided by the jurisprudence of international criminal tribunals regarding factors taken into account during sentencing. In the jurisprudence of the international criminal courts and tribunals the factors taken into account in the determination of a sentence can be divided into two groups namely, the objective factors which relates to the gravity of the offence and the subjective factors which relates to the individual circumstances of the accused.

In South Arica the sentence should fit the crime and therefore there must be proportionality between the sentence and the severity of the crime. The traditional approach towards determining the seriousness of the crimes in South Africa involves

the adequate balancing of the degree of harmfulness of the crime with the degree of culpability of the accused. In international jurisprudence it the gravity of the crime is considered the most important consideration in the determination of a sentence. In the jurisprudence of the international criminal courts and tribunals there is a clear differentiation between the concepts of the “gravity of the crime” and gravity as an “aggravating circumstance”. In the early international jurisprudence this differentiation caused much confusion and it was only later on that the international criminal courts and tribunals clarified the difference between the two concepts. Accordingly the international criminal courts and tribunals stated that factors that are taken into account during the evaluation of the gravity of the crime must not be reconsidered in the process of determining aggravating circumstances and *vice versa*.

The second element of the “triad”, which relates to the offender, is also intertwined with the first, as the degree of culpability may impact on the evaluation of the seriousness of the crime as well as the circumstance of the offender. In respect of the culpability of the accused, the South African criminal law seeks to punish those who are blameworthy for the commission of the crime and the severity of the sentence must then reflect the degree of blame attributed to the accused. The blameworthiness of the accused should for purposes of sentencing also include all relevant mitigating and aggravating circumstances which may lead to the increase or lessening of the sentence. The international criminal courts and tribunals also place great value on the individual criminal responsibility of a convicted individual and from its jurisprudence it is seen that the more involved the individual was during the commission of the crimes, the more severe the punishment must be. Individual criminal responsibility is probably one of the most fundamental assumptions that guide international criminal courts and tribunals. By international criminal courts and tribunals assigning blame to individuals, it ensures that the need for retaliation between the parties to the violence is lessened. In determining the individual criminal responsibility of a convicted person the international courts and tribunals place great value on the individual’s degree of participation in committing the crimes.

The third element of the “triad” deals with the interests of society. In general this means that a sentence must give countenance to the law-abiding citizens’ feelings regarding crimes committed in the community. Traditionally the more heinous the crime that has been committed in the eyes of the community, the more severe the sentence must be. The international criminal courts and tribunals also place great value on the interests of the community and have taken steps in insuring that the community partakes in the trial to some extent and attempted to reconcile the peoples of countries as best as possible. The jurisprudence of the international criminal courts and tribunals reflects that the factors most likely to be taken into account when establishing the interests of the community are the community’s expectation that justice will be served, the consequences of the crimes on the community, the psychological and emotional suffering of the members of the community and the feelings of the community regarding the crimes that have been committed.

Lastly, there has to be a balance between all the elements of the “triad”. The elements of the “triad” should be considered in conjunction with each other and each element should be given a certain weight separately, during the sentencing stage.

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This serves to confirm that I, Isabella Johanna Swart, language edited the following dissertation in May 2012.

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