

Annexe B8 Publique : Copie des références doctrinales

**MEMOIRE D'APPEL DE LA DEFENSE DE M. FIDELE BABALA WANDU
CONTRE LA SENTENCE PRONONCEE PAR LA CHAMBRE DE PREMIERE
INSTANCE VII (ICC-01/05-01/13-2123-Corr)**

STUDIES IN INTERNATIONAL & COMPARATIVE CRIMINAL LAW

sentencing
in international
criminal law

*the UN ad hoc tribunals and
future perspectives for the ICC*

SILVIA D'ASCOLI

Sentencing in International Criminal Law

The UN ad hoc Tribunals and Future Perspectives for the ICC

Silvia D'Ascoli



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PUBLISHING

OXFORD AND PORTLAND, OREGON
2011

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Published in the United Kingdom by Hart Publishing Ltd
16C Worcester Place, Oxford, OX1 2JW
Telephone: +44 (0)1865 517530
Fax: +44 (0)1865 510710
E-mail: mail@hartpub.co.uk
Website: <http://www.hartpub.co.uk>

Published in North America (US and Canada) by
Hart Publishing
c/o International Specialized Book Services
920 NE 58th Avenue, Suite 300
Portland, OR 97213-3786
USA
Tel: +1 503 287 3093 or toll-free: (1) 800 944 6190
Fax: +1 503 280 8832
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British Library Cataloguing in Publication Data
Data Available

ISBN: 978-1-84946-116-0

Typeset by Columns Design XML Ltd, Reading
Printed and bound in Great Britain by
TJ International Ltd, Padstow, Cornwall

Sentencing Law and Practice

matters.² In any case, Rule 101(A) of the RPE specifies that a convicted person may be sentenced to imprisonment for a term up to and including 'the remainder of the convicted person's life'.³

The Security Council, in approving the ICTY and ICTR Statutes, specified that penalties were to be limited to imprisonment, expressly excluding the possibility of imposing the death penalty.⁴

In the Statutes and in the RPE there is no other indication regarding penalties: no specific ranges for the crimes falling under the jurisdiction of the ad hoc Tribunals, no differentiation between the various crimes. Thus, in theory, for genocide, crimes against humanity and war crimes the penalties are all equal and consist of a maximum sentence of life imprisonment.

A controversial point is whether—notwithstanding the formulation of Article 24—the ICTY can in effect impose life imprisonment given that judges should have recourse to the sentencing practice of the countries of the former Yugoslavia where, at the relevant times when crimes were committed, life imprisonment did not always exist. The crucial point is whether life imprisonment can be considered the functional equivalent of death penalty, which in some cases still existed in the former Yugoslavia, or whether this equivalence should be excluded, based on the reasoning that life imprisonment can even be a worse penalty than death or equal to that. The same situation does not arise before the ICTR given that life imprisonment was provided for in Rwanda in 1994. These aspects will be analysed in more detail later.

B. Gravity of the Offence, Aggravating and Mitigating Circumstances

Article 24, paragraph 2, ICTY Statute and Article 23, paragraph 2, ICTR Statute provide that, in imposing sentences, the Trial Chamber 'should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person'.

² It is known that the RPE were adopted by judges of the two Tribunals pursuant to Arts 15 ICTY St and 14 ICTR St which empower judges to adopt such rules 'for the conduct of the pre-trial phase of the proceedings, trials and appeals, the admission of evidence, the protection of victims and witnesses and other appropriate matters'.

³ The expression 'imprisonment for the remainder of his life' was in one instance interpreted by the ICTR (*Prosecutor v Kayishema and Ruzindana*, Case No ICTR-95-1-T, Trial Judgment, 21 May 1999, para 31 'Sentence') as distinct from life imprisonment and simply implying that the accused should stay in prison until the end of his days.

⁴ This proves the influence of human rights law and the contribution it made to the debate on penalties. See eg, the *Second Optional Protocol to the International Covenant on Civil and Political Rights* seeking abolition of the death penalty worldwide. The significant influence of human rights law on the regime of penalties in international justice is also visible throughout the jurisprudence of the ad hoc Tribunals: eg in the *Erdemović* case, an ICTY Trial Chamber observed that the penalty imposed as well as the enforcement of such penalty must always conform to the minimum principles of humanity and dignity established by human rights law, and made reference to the relevant provisions of human rights instruments (*Prosecutor v Erdemović*, Case No IT-96-22-T, Trial Judgment, 29 November 1996, paras 74–75).

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The RPE of the two Tribunals provide slightly more details and specify that, in determining the sentence, Trial Chambers shall take into account—besides the factors mentioned in Articles 24 ICTY and 23 ICTR—aggravating and mitigating circumstances, the general practice regarding prison sentences (respectively, in the courts of the former Yugoslavia and Rwanda), the extent to which for the same act the convicted person has already served penalties imposed by national courts.⁵ The list contained in Rule 101(B) is not exhaustive but is only intended to provide some guidance.⁶ It has been contended that such a vague reference to aggravating circumstances as that contained in Rule 101 is contrary to the principle of legality of penalties: similar factors concretely affect the determination of the sentence, and therefore amount to a penalty that is not specifically defined.⁷ This approach adopted in the RPE seems to confirm the limited scope that the *nulla poena sine lege* principle holds in international criminal law. It also creates problems at the sentencing stage, given that judges are not provided with any indication as to the circumstances to be taken into account, and as to the weight that should be attributed to them.

While judgments by the IMTs at Nuremberg and Tokyo (and the sentences pronounced by other national military Tribunals in the aftermath of the Second World War) did not address aggravating and mitigating circumstances in detail, on the other hand, in their practice the ad hoc Tribunals have referred to quite a wide range of both mitigating and aggravating factors.⁸ These factors are examined in depth and described in the following sections of this chapter.

By way of introduction, examples of aggravating circumstances include the number of victims and the extent of human suffering, physical or psychological consequences of the crime on victims, premeditation by the accused, the accused's willing or whole-hearted participation in the crime(s), the use of cruelty, sadism, humiliation, ethnic or religious discrimination, the means and methods used to commit the crimes, the role of the accused, the nature and extent of the accused's participation in the crime, the abuse and misuse of authority, political or military leadership. Personal motives for the commission of crime(s), such as vengeance, are also considered as aggravating factors. The participation of a hierarchical 'superior' in the commission of a crime is also seen

⁵ By Rule 101, Trial Chambers are also required to take into account any prior penalty already served for convictions by a national court relating to the same fact, and any period of time during which the accused has already been in custody for pre-trial detention or detention pending appeal.

⁶ Rule 101(B), by using the expression 'such factors as', does not intend to be exhaustive.

⁷ See S Zappalà, *Human Rights in International Criminal Proceedings* (Oxford, Oxford University Press, 2003) 201; Damien Scalia, 'Constat sur le respect du principe nulla poena sine lege par les tribunaux pénaux internationaux' (2006) 58 (1) *Revue internationale de droit comparé* 185–209, 199.

⁸ Nevertheless, it should be noted that—at the very beginning of its work—the ICTY in the *Erdemović* case, ignoring the specific and unambiguous reference to aggravating circumstances contained in Rule 101(B), ruled that 'when crimes against humanity are involved, the issue of the existence of any aggravating circumstances does not warrant consideration' (*Erdemović*, TJ, 29 November 1996, para 45). The practice changed later, however, and involved ample consideration of aggravating factors.

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as an aggravating factor and entails enhanced punishment of the person holding such position.⁹ Overall, the category of aggravating circumstances comprises various factors either related to the crime and its commission, to the accused and his/her behaviour, or to the victims.

Circumstances considered in mitigation by the Chambers of the ad hoc Tribunals often included also those elements rejected by the court as defence in a particular charge, such as superior orders, necessity, duress, insanity and self-defence. One of the few mitigating factors directly recognised by and inserted into the Statutes of the ad hoc Tribunals is the fact of having received an order from a hierarchical superior. Article 7.4 ICTY Statute (Article 6.4 ICTR Statute) thus provides:

The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires.

In the practice of the ad hoc Tribunals, mitigating circumstances include for instance: the accused's youth, remorse, admission of guilt, acts of assistance or benevolent attitude towards victims, personality traits, previous good character, family circumstances, poor health, absence of prior convictions, no personal participation in the crime(s), the timely entry of a guilty plea, voluntary surrender, good conduct while in detention, and co-operation with the Office of the Prosecutor. Co-operation with the Prosecutor by the convicted person before or after conviction is the only mitigating factor expressly mentioned by Rule 101(B). In order to be considered in mitigation, co-operation must be substantial.

The weight to be given to aggravating and mitigating circumstances is again not mentioned nor specified by the Statutes of the ad hoc Tribunals; therefore judges are basically free to attribute to such factors the mitigating or aggravating weight they deem most opportune.¹⁰

⁹ Art 7, para 2, ICTY St (and correspondingly Art 6, para 2, ICTR St) expressly states that: 'The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.'

¹⁰ In the *Kupreškić* Appeal case, it was held that: 'The weight to be attached to mitigating circumstances lies within the discretion of a trial chamber, which is under no obligation to set out in detail each and every factor relied upon.' (*Prosecutor v Kupreškić et al*, Case No IT-95-16-A, Appeal Judgment, 23 October 2001, para 430). See also: *Prosecutor v Dragan Nikolić*, Case No IT-94-2-S, Sentencing Judgment, 18 December 2003, para 145: 'In determining sentence, the Trial Chamber is obliged to take into account any aggravating and mitigating circumstances, but the weight to be given to the aggravating and mitigating circumstances is within the discretion of the Trial Chamber.'

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As to the standard and burden of proof with respect to aggravating and mitigating factors, the burden of proof for aggravating factors is on the Prosecutor and the standard is that of 'beyond any reasonable doubt', while for mitigating circumstances the Defence needs to prove them only on the balance of probabilities.¹¹

C. General Practice Regarding Prison Sentences in the former Yugoslavia and Rwanda

As recalled above, the ICTY and ICTR Statutes specify that, in deciding upon the terms of imprisonment, Trial Chambers shall have recourse to the 'general practice regarding prison sentences' in the courts of the former Yugoslavia and Rwanda.

The interpretation of this provision by ICTY and ICTR Chambers will receive due attention in the following pages, whereas some preliminary observations of a general character are discussed here.

The 'general practice' provision appears to be a way of complying with the prohibition of retroactive punishment, thus assuring respect of the principle of legality. The underlying idea seemed to be that, if international tribunals were to be guided by the existing sentencing practice in the territories where the crimes took place, then the principle of *nulla poena sine lege* would not be offended. Articles 24 ICTY and 23 ICTR of the Statutes were thus inspired by the *nulla poena* principle, and this can clearly be seen in the *travaux préparatoires*, in some early drafts and State proposals regarding the ICTY Statute.¹² In particular, the

¹¹ See *Prosecutor v Kunarac et al*, Case No IT-96-23-T & IT-96-23/1-T, Trial Judgment, 22 February 2001, paras 846-847; *Prosecutor v Delalić et al*, Case No IT-96-21-A, Appeal Judgment, 20 February 2001, para 763: 'The Appeals Chamber agrees that only those matters which are proved beyond reasonable doubt against an accused may be [...] taken into account in aggravation of that sentence.'; *Dragan Nikolić*, SJ, 18 December 2003, para 145; *Prosecutor v Martić*, Case No IT-95-11-T, Trial Judgment, 12 June 2007, paras 495, 501. Similarly, see in the ICTR case law: *Prosecutor v Kajelijeli*, Case No ICTR-98-44A-A, Appeal Judgment, 23 May 2005, para 294; *Prosecutor v Serugendo*, Case No ICTR-2005-84-I, Sentencing Judgment, 12 June 2006, para 40; *Prosecutor v Nzabirinda*, Case No ICTR-2001-77-T, Trial Judgment, 23 February 2007, para 53.

¹² See, eg: *Letter Dated 16 February 1993 from the Permanent Representative of Italy to the United Nations Addressed to the Secretary-General*, UN SCOR, art 7, UN Doc S/25300; *Letter Dated 5 April 1993 from the Permanent Representative of the Russian Federation to the United Nations Addressed to the Secretary-General*, UN SCOR, art 22, UN Doc S/25537(1993); *Note Dated 30 April 1993 from the Permanent Representative of The Netherlands to the United Nations Addressed to the Secretary-General*, UN SCOR, art 5, UN Doc A/25716 (1993); *Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993)*, UN Doc S/25704, 3 May 1993, para 36.