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Robert D. Sloane

Institutions: Boston University

Published on: 01 Jul 2007 - Journal of International Criminal Justice (Oxford University Press)

Topics: Crimes against humanity, Substantive law, Genocide, Statute and Tribunal

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2006

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Robert Sloane

Boston University School of Law

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Robert Sloane, *Sentencing for the 'Crime of Crimes': The Evolving 'Common Law' of Sentencing of the International Criminal Tribunal for Rwanda*, 5 *Journal of International Criminal Justice* 713 (2006).

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Sentencing for the ‘Crime of Crimes’

The Evolving ‘Common Law’ of Sentencing of the International Criminal Tribunal for Rwanda

Robert D. Sloane*

Abstract

Absent much prescriptive guidance in its Statute or other positive law, the International Criminal Tribunal for Rwanda (ICTR) has been developing, in effect, a ‘common law’ of sentencing for the most serious international crimes: genocide and crimes against humanity. While it remains, as the Appeals Chamber has said, ‘premature to speak of an emerging “penal regime”, and the coherence in sentencing practice that this denotes’, this comment offers some preliminary reflections on the substantive law and process of sentencing as it has evolved through ICTR practice. Above all, the author argues, sentencing must, but has not yet, become an integral part of international criminal justice rather than, as it has historically been treated, an ‘afterthought’. The lack of sufficient attention to sentencing, evident procedurally in the ICTR’s abandonment of distinct sentencing hearings and the expedient of ‘transactional sentencing’, at times manifests itself in perfunctory sentencing analyses and jurisprudential confusion over the proper role of ostensible sentencing factors including ‘gravity of the offence’, ‘zeal’, ‘heinous means’, ‘prior good character’ and ‘voluntary commission’. Because of the inherent gravity of the crimes, the ICTR’s lack of adequate attention to sentencing has not, by and large, led it to impose quantitatively incorrect sentences. But qualitatively, neglect of sentencing inhibits the ‘common law’ evolution of a mature penal jurisprudence that can contribute to the long-term normative goals of international justice.

* Associate Professor of Law, Boston University School of Law. I acknowledge with gratitude the suggestions of Anthony J. Colangelo, Gerry Leonard, W. Michael Reisman, and Kenneth W. Simons; and the research assistance of Renan Beyati and Benjamin Brockman-Hawe. [rdsloane@bu.edu]

1. Introduction

How should we sentence the perpetrators of the most unambiguous case of genocide since the Holocaust?¹ To ask this question begs a host of others: that we know who ‘we’ is, presumably the elusive international community; that this community has the right, or perhaps the duty, to punish under these circumstances; that the criminal justice model can and should be applied to conduct implicating hundreds of thousands of perpetrators, perhaps as many as one-third of Rwanda’s adult population at the time;² and that jurists can meaningfully distinguish more from less culpable cases of the ‘crime of crimes’.³ But the Security Council implicitly, for all practical purposes, presumed affirmative answers to these questions, when it established the International Criminal Tribunal for Rwanda (ICTR or Tribunal) and invested it with a Statute with mandatory, if skeletal, sentencing provisions.⁴ For more than a decade now, the ICTR has therefore struggled, with scant precedential guidance,⁵ to determine appropriate and just sentences for unconscionable acts that strain our moral intuitions and often lie, in the Tribunal’s words, ‘beyond human comprehension’.⁶

The scale⁷ and inherently abhorrent nature of the crimes of conviction renders such familiar sentencing concepts as gradation, proportionality and aggravating and mitigating circumstances difficult to apprehend. Yet the Statute offers the Tribunal little sentencing guidance. It limits penalties to incarceration, thereby implicitly excluding capital punishment; includes a *renvoi* to Rwandan practice; requires consideration of ‘the gravity of the offence’ and ‘the individual circumstances of the convicted person’; and

- 1 P. Gourevitch, *We wish to inform you that tomorrow we will be killed with our families* (New York: Farrar Straus and Giroux, 1998), 170.
- 2 W.A. Schabas, ‘Genocide Trials and Gacaca Courts’, 3 *Journal of International Criminal Justice* (JICJ) (2005) 879–895, at 881–882.
- 3 Several scholars question these assumptions. With particular reference to Rwanda, see J.E. Alvarez, ‘Crimes of State/Crimes of Hate: Lessons From Rwanda’, 24 *Yale Journal of International Law* (1999) 365–483. For the author’s views, see R.D. Sloane, ‘The Expressive Capacity of International Punishment’, 43 *Stanford Journal of International Law* (2007) 39–94. See also, I. Tallgren, ‘The Sensibility and Sense of International Criminal Law’, 13 *European Journal of International Law* (2002) 561–595.
- 4 SC Res. 955, 8 November 1994 (establishing the Tribunal and its Statute). For a history of the circumstances culminating in the Statute’s adoption, see P. Akhavan, ‘The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment’, 90 *American Journal of International Law* (1996) 501–510.
- 5 See W.A. Schabas, ‘International Sentencing: From Leipzig (1923) to Arusha (1996)’, in M.C. Bassiouni (ed.), *International Criminal Law*, Vol. III (2nd edn., New York: Transnational Publishers, 1999), 171–193, at 171 (emphasizing that ‘[i]nternational law has rarely accorded more than summary consideration to the issue of sentencing’).
- 6 Judgment, *Kayishema and Ruzindana* (ICTR-95-1), Trial Chamber, 21 May 1999, § 9.
- 7 The genocide literally decimated Rwanda’s population. Gourevitch, *supra* note 1, at 3. No fewer than 500,000, and by some accounts as many as 800,000, Tutsi and moderate Hutu were slaughtered during a period of about 100 days. See A. Des Forges, *Leave None to Tell the Story: Genocide in Rwanda* (New York: Human Rights Watch, 1999), 16; I. Carlsson, ‘The UN Inadequacies’, 4 *JICJ* (2005) 837–846, at 841.

authorizes restitution.⁸ The Rules of Procedure and Evidence (RPE of 'the Rules') augment this framework in abstract and relatively uninformative terms. They instruct the Tribunal to consider aggravating and mitigating factors, but with few exceptions, do not specify which factors might so qualify.⁹ Absent prescriptive guidance, the ICTR has thus been developing, in effect, a 'common law' of sentencing for genocide and crimes against humanity.¹⁰ While a more structured positive framework may well be appropriate for the ICC and for hybrid courts, which generally should hew more closely to a national penal jurisprudence, the drafters of the ICTR Statute were probably wise (assuming they did it deliberately) to leave the details of sentencing to be worked out judicially. Absent any real precedent on sentencing for genocide and crimes against humanity, judges immersed in the morally and factually Byzantine details of concrete cases arising out of the Rwandan genocide and civil war were (and remain) far better situated to the task than diplomats and others acting in legislative fora.

On 21 July 2000, the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) remarked that it would be 'premature to speak of an emerging "penal regime", and the coherence in sentencing practice that this denotes'.¹¹ Despite scores of sentences delivered since then,¹² this remark continues to apply with equal, if not greater, force to the sentencing practices of the ICTR, which, as of early 2006, had issued

8 Art. 23 ICTRSt.

9 Rule 101 ICTR RPE. Rules 101(B)(ii) and (iv) specify, respectively, 'substantial cooperation with the Prosecutor' and 'the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served' as mitigating factors, while Rule 101(B)(iii) refers the Tribunal to '[t]he general practice regarding prison sentences in the courts of Rwanda', including, presumably, aggravating and mitigating factors customarily considered by those courts. Art. 6(4) of the Statute also authorizes the Tribunal to consider 'superior orders' in mitigation.

10 The Statute adopts the modern — and by now almost surely the customary — definition of crimes against humanity, which no longer requires a nexus to armed conflict. Art. 3 ICTRSt.; compare Art. 7 ICCSt. (no nexus requirement); see also, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, *Tadić* (IT-94-1), Appeals Chamber, 2 October 1995, §§ 140–141. This has proved significant, for while the civil war and the genocide raged simultaneously, many atrocities could not have been readily connected, at least not in a 'direct', legally sufficient way, to the interim regime's armed conflict with the RPF; hence the ICTR has acquitted several defendants of war crimes for want of adequate proof of their connection to the interim government's forces, but convicted them of crimes against humanity. E.g. Judgment, *Kayishema and Ruzindana* (ICTR-95-1), Trial Chamber, 21 May 1999, §§ 600–624; Judgment and Sentence, *Rutaganda* (ICTR-96-3), Trial Chamber, 6 December 1999, §§ 442–443 (acquitting Rutaganda of war crimes despite his authority over the *Interahamwe* and rejecting an 'ipso facto' legally sufficient link between the genocide and the armed conflict).

11 Judgment and Sentence, *Furundžija* (IT-95-17/1), Appeals Chamber, 21 July 2000, § 237.

12 By 2004, the ICTR and ICTY had together issued almost 70 sentences. M. Drumbl, 'Collective Violence and Individual Punishment: The Criminality of Mass Atrocity', 99 *Northwestern University Law Review* (2005) 539–610, at 556.

27 sentences,¹³ seven of which remained on appeal.¹⁴ Nonetheless, with a view to the ultimate need for the international criminal justice system to develop a coherent, relatively uniform, sentencing regime, this comment offers some preliminary reflections on the ICTR's sentencing jurisprudence. Even at this comparatively early stage in the resurgence and evolution of international criminal law that followed the end of the Cold War, several patterns have emerged that merit appraisal — for the practices of the ICTY, the ICTR and hybrid tribunals will undoubtedly and significantly influence those of the permanent International Criminal Court (ICC), which, as of this writing, had recently obtained custody and confirmed the charges instituted against its first indictee, the Congolese national Thomas Lubanga Dyilo.¹⁵

2. Beyond Sentencing as an 'Afterthought'

Of the 27 convicted persons sentenced as of April 2007, 12 had been sentenced to life imprisonment; two to a term of 35 years; five to 25 years; two to 15 years; two to 6 years; and the others to terms of 7, 10, 12, 27 and 45 years, respectively. Of course, this kind of quantitative compilation tells us little about the ICTR's practices. To understand how the Tribunal has tried to reach 'appropriate' sentences for abhorrent crimes that defy the moral imagination requires analysis of its written reasons for judgment. Regrettably, this is itself an area in which the sentencing practices of the Tribunal could stand improvement. Too often, that portion of the judgment explaining the sentence appears to be little more than an 'afterthought'¹⁶ to the hundreds of paragraphs devoted not only to essential legal analysis and factual findings, but to lengthy descriptions of the general background to the genocide and needlessly detailed summaries of each side's arguments. The few paragraphs devoted to sentencing analysis tend to be highly formulaic, even perfunctory.

In general, they recite the crimes of conviction; emphasize their gravity; list, without elaboration, the conventional goals of punishment; set out the relevant portions of the Statute and Rules; reference Rwandan law to confirm that it has been 'duly considered'; note the duty to individualize sentences, taking account of aggravating and mitigating circumstances; list those circumstances; and then pronounce the sentence, often offering no more by way of analysis

13 Virtually all of these sentences have been for genocide or crimes against humanity. As of April 2007, the ICTR had only sentenced two defendants for war crimes. Judgment and Sentence, *Ntagerura, Bagambiki, and Imanishimwe* (ICTR-99-46), Trial Chamber, 25 February 2004, § 826; Judgment, *Rutaganda* (ICTR-96-3-A), Appeals Chamber 26 May 2003, § 584.

14 ICTR, Status of Cases, available online at <http://65.18.216.88/default.htm> (visited 27 March 2006).

15 *Constitution of Trial Chamber I*, Press Release ICC-CPI-20070307-210-En, 7 March 2007; *First Arrest for the International Criminal Court*, Press Release ICC-CPI-20060302-125-En, 17 March 2006.

16 Schabas, *supra* note 5, at 171.

(particularly where, as is frequently the case, the sentence is life imprisonment) than a variant of this conclusory statement: 'Having reviewed both mitigating and aggravating circumstances, the Chamber finds that the aggravating circumstances outweigh the mitigating circumstances in the Accused's case.'¹⁷

Sometimes, perhaps, this suffices. Crimes committed by elites for whom there is little or nothing to be said in mitigation and much to be said in aggravation undoubtedly should be punished by the most severe penalty authorized by the Statute, life incarceration, and the 'why' may seem intuitive or self-evident. Consider Mikaeli Muhimana. As *conseiller* of the Gishyita commune, he 'occupied a position of influence in the community'.¹⁸ Rather than use his position to prevent harm, he participated zealously in attacks on Tutsis seeking refuge in his commune's churches and hospitals, raping and killing, among others, a 15 year-old-girl.¹⁹ The Tribunal emphasized an abhorrent 'incident where the Accused used a machete to cut [a] pregnant woman...from her breasts down to her genitals and remove her baby, who cried for some time before dying. After disembowelling the woman, the assailants accompanying Muhimana cut off her arms and stuck sharpened sticks into them.'²⁰ Finding no mitigation, the Trial Chamber sentenced Muhimana to three concurrent life terms.²¹

Yet however horrible the crime, however self-evident it may seem that anything less than life incarceration would be an insult to the victims and a mockery of the international criminal justice system,²² the absence of much in the way of substantive analysis impedes the development of a sentencing jurisprudence, which, in the long term, will be indispensable to that system. For this reason, it is unfortunate that several Trial Chambers have adopted, and the Appeals Chamber has embraced, the practice of 'transactional' or 'global' sentencing: imposing one sentence for multiple crimes that belong to the same criminal 'transaction'.²³ While perhaps expedient, this practice, as the

17 Judgment and Sentence, *Niyitegeka* (ICTR-96-14), Trial Chamber, 16 May 2003, §500; see also, e.g. Judgment and Sentence, *Musema* (ICTR-96-13), Trial Chamber, 27 January 2000, §1008; Judgment and Sentence, *Rutaganda* (ICTR-96-3), Trial Chamber, 6 December 1999, §473; compare Judgment and Sentence, *Simba* (ICTR-01-76), Trial Chamber, 13 December 2005, §443 ('In the Chamber's view, after weighing the gravity of the crime and the circumstances of the Accused, limited mitigation is warranted').

18 Judgment and Sentence, *Muhimana* (ICTR-95-1B), Trial Chamber, 28 April 2005, §604.

19 *Ibid.*, §§604–607.

20 *Ibid.*, §612.

21 *Ibid.*, §618.

22 Hannah Arendt, expressing a sentiment equally applicable to most crimes committed during the Rwandan genocide, wrote that '[i]t may well be essential to hang Göring, but it is totally inadequate. That is, this guilt, in contrast to all criminal guilt, oversteps and shatters any and all legal systems.' G.J. Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (New Jersey: Princeton University Press, 2000), 13.

23 E.g. Judgment and Sentence, *Niyitegeka* (ICTR-96-14), Trial Chamber, 16 May 2003, §483; see Judgment, *Kambanda* (ICTR-97-23), Appeals Chamber, 19 October 2000, §§100–113 (affirming the Trial Chamber's discretion to impose a single sentence for all convictions 'where the crimes ascribed to the accused, regardless of their characterization, form part of a single set of crimes committed in a given geographic region during a specific time period').

Trial Chamber in *Imanishimwe* said, ‘makes it difficult to determine the range of sentences for each specific crime’.²⁴

Greater use of comparative analysis would likewise contribute to the development of a fair, uniform, and coherent penal jurisprudence. The Tribunal has consistently — and, I think, correctly — rejected the argument that a defendant merits a lower sentence because others convicted of similar crimes under *allegedly* similar circumstances received lower sentences. In *Musema*, for instance, the defendant, who had been convicted after a trial of genocide and two counts of crimes against humanity (extermination and rape), argued that his life sentence should be reduced as manifestly disproportionate to that of Serushago, who had been convicted following a guilty plea of genocide and three counts of crimes against humanity (extermination, murder and torture) but received a 15-year sentence.²⁵ The Appeals Chamber cited the *Delalić and others* case (also known as ‘*Čelebići* case’) for the general proposition that comparisons offer “‘limited assistance,”’ for ‘while “two accused convicted of similar crimes under similar circumstances should not in practice receive very different sentences, often the differences are more significant than the similarities, and the mitigating and aggravating factors dictate different results”’.²⁶ It then rejected as ‘superficial’ the bases of comparison asserted by *Musema* and distinguished his culpability from Serushago’s based on a variety of aggravating and mitigating factors.²⁷

Though seldom, at least so far,²⁸ availing to defendants, comparative analysis enriches the penal jurisprudence. It compels the Tribunal to explain and justify, which of the infinite number and variety of individual circumstances may be relevant to sentencing, when and why. The truism that no two cases can be deemed precisely alike and the ‘over-riding obligation’ of the Trial Chambers ‘to tailor a penalty to fit the individual circumstances of the accused’, therefore should not become reasons to avoid

24 Judgment and Sentence, *Ntagerura, Bagambiki, and Imanishimwe* (ICTR-99-46), Trial Chamber, 25 February 2004, §812.

25 Judgment, *Musema* (ICTR-96-13), Appeals Chamber, 16 November 2001, §385.

26 *Ibid.*, §387 (quoting Judgment, *Delalić and others* (IT-96-21), Appeals Chamber, 20 February 2001, §719); see also Judgment, *Kamuhanda* (ICTR-99-54), Appeals Chamber, 19 September 2005, §§361–362.

27 *Ibid.*, §§388–390. Similarly, in *Serushago* itself, the Appeals Chamber found the defendant’s effort to compare his sentence (15 years) to that of Drazen Erdemović (5 years), on the grounds that both had confessed and pled guilty, unpersuasive, largely because Erdemović had acted under duress, namely, a direct threat to his life if he refused to participate in a massacre of Bosnian Muslims. Reasons for Judgment, *Serushago* (ICTR-98-39), Appeals Chamber, 6 April 2000, §27. By contrast, in *Ntakirutimana*, the Trial Chamber found comparative analysis relevant to reaching an appropriate sentence for Gérard, but not Elizaphan, Ntakirutimana. Judgment and Sentence, *Ntakirutimana and Ntakirutimana* (ICTR-96-10 & ICTR-96-17), Trial Chamber, 21 February 2003, §§914–916 (drawing guidance from the circumstances of and sentences imposed on Kayishema, Musema, and Ruzindana); see also Judgment, *Kayishema and Ruzindana* (ICTR-95-1), Trial Chamber, 21 May 1999, §26 (comparing the culpability of the two defendants relative to one another).

28 As a genuine jurisprudence of sentencing by international tribunals develops, the potential for successful challenges based on comparison will presumably increase.

comparative analysis.²⁹ Even where it will not, in the Tribunal's view, ultimately affect a defendant's sentence, engaging in the exercise may well pay long-term dividends. Not only does it offer guidance in future cases, it helps to work out incrementally, by the 'common law' method, the contours of *unwarranted* disparity — a concept indispensable to the fair and coherent sentencing regime to which international tribunals like the ICTR should aspire.

3. A 'Common Law' of Sentencing for Genocide and Crimes Against Humanity

Notwithstanding these reflections and the imperative to move beyond sentencing as a mere 'afterthought', the ICTR has not, of course, neglected its sentencing mandate; it has done a far better job than its predecessors in this regard.³⁰ Four components of the ICTR's construction of its statutory mandate and consequent evolution of a 'common law' of sentencing merit particular examination: (i) the *renvoi* to Rwandan law but simultaneous exclusion of capital punishment, which Rwandan law authorizes; (ii) the dual sentencing metrics established by the Statute, 'gravity' and 'individual circumstances'; (iii) aggravating and mitigating circumstances, which, with few exceptions, neither the Statute nor the Rules specify; and (iv) appellate review.

A. Recourse to the Rwandan Practice

Article 23 of the ICTR Statute limits penalties to incarceration, thereby implicitly excluding the death penalty, and instructs the Trial Chambers 'to have recourse to the general practice regarding *prison* sentences in the courts of Rwanda'.³¹ This exclusion, despite Rwanda's intense opposition to it during the Security Council debates culminating in establishment of the Tribunal,³² leads to an oft-noted and, to many minds, perverse disparity: the elites who orchestrated the genocide escape a potential death sentence and get to serve their sentences in facilities that conform to modern international human rights standards, while the (presumably less culpable) rank and

29 Judgment, *Kamuhanda* (ICTR-99-54), Appeals Chamber, 19 September 2005, §361 (internal quotation marks omitted); Judgment and Sentence, *Simba* (ICTR-01-76), Trial Chamber, 13 December 2005, §432 (acknowledging that the 'sentences of like individuals in like cases should be comparable' but noting that 'any given case contains a multitude of variables, ranging from the number and type of crimes committed to the personal circumstances of the individual') (internal quotation marks omitted).

30 See A.M. Danner, 'Constructing a Hierarchy of Crimes in International Criminal Law Sentencing', 87 *Virginia Law Review* (2001) 415–501, at 418 ('The judgments from the Nuremberg and Tokyo Tribunals span thousands of pages, but their sentences were given in terse one-line declarations, with little or no explanation of the bases for the distinctions between the various sentences imposed on the defendants.'). See also Schabas, *supra* note 5, at 172–174.

31 Art. 23(1) ICTRSt. (emphasis added).

32 See UN SCOR, 49th Sess., 3453d mtg., UN Doc. S/PV.3453, at 16.

file languish for years in overcrowded jails, awaiting trial in Rwanda's severely backlogged national system — only to then face death or imprisonment in Rwandan prisons that fall far short of those standards.³³

In practice, this criticism has turned out to be somewhat over-stated. Post-genocide Rwanda, faced with the insuperable task of trying hundreds of thousands of suspects in a state with, at the time, no functioning judicial system and no more than a handful of lawyers, adopted Organic Law No. 08/96.³⁴ This law authorizes the death penalty only for the most culpable 'Category 1' offenders, architects of the genocide and those responsible for particularly awful or systematic murders; offenders in the remaining three categories, in exchange for a plea, receive substantial sentence reductions.³⁵ The Organic Law's four-tier system (and its continuation in the subsequent *gacaca* experiment), however imperfect, substantially obviates the worry that low-level offenders will routinely be sentenced to death.³⁶ Furthermore, while ICTR convicts may be held in prisons that compare favourably to those of Rwanda, the hyperbolic critique that they would therefore end up serving their sentences in lavish prisons is inaccurate. Bilateral treaties entered into by the Tribunal authorize the incarceration of convicted offenders in Swaziland, France, Italy, Sweden, Mali and Benin, but the Tribunal has expressed a preference that defendants be incarcerated, where possible, in African states. Many are serving their sentences in Mali, which reportedly suffers from poor prison conditions.³⁷ Finally, and most significantly,

33 See e.g. W.A. Schabas, 'Sentencing By International Tribunals: A Human Rights Approach', 7 *Duke Journal of Comparative and International Law* (1997) 461–517, at 478, 508; M.H. Morris, 'The Trials of Concurrent Jurisdiction: The Case of Rwanda', 7 *Duke Journal of Comparative and International Law* (1997) 349–374, at 363–364.

34 Organic Law No. 08/96 of 30 August 1996 on the Organisation of Prosecutions for Offences Constituting the Crime of Genocide or Crimes against Humanity committed since 1 October 1990, J.O., 1996, Year 35, No. 17, at 14.

35 See Schabas, *supra* note 2, at 885. In fact, for this reason, offenders prosecuted by the ICTR who would otherwise fall within Categories 2 or 3 — those responsible for 'intentional homicide or of serious assault against the person causing death' or for 'other serious assaults [not causing death]', respectively — probably receive higher sentences than they would were they prosecuted by national courts. The Rwandan law stipulates a term of between 7 and 15 years, depending on the circumstances, for Category 2 offenders, and a term of shorter duration for Category 3 offenders. Judgment and Sentence, *Ruggiu* (ICTR-97-32), Trial Chamber, 1 June 2000, §§ 28–30.

36 The *gacaca* courts, established in 2001, lack jurisdiction over Category 1 offenders. Schabas, *supra* note 2 at 893; see also *ibid.*, at 895 (observing that despite the death penalty's authorization for Category 1 offenders, in practice, no execution has been carried out since April 1998).

37 See US Department of State, *Country Reports on Human Rights Practices: Mali* (Washington, D.C.: US Government Printing Office, 2006), §1(c). From one perspective, as critics say, it is perverse that the most culpable elites may escape capital punishment and the egregious prison conditions to which other, less culpable, defendants may be exposed. But it would surely be equally if not more perverse deliberately to sentence offenders convicted by the ICTR to substandard prison conditions to remedy this disparity. Any such practice would undermine the international criminal justice system's global legitimacy and normative goals, including its synergy with international human rights law and that law's aspiration to establish universal minimum standards for humane incarceration.

the Tribunal has reduced the disparity that matters most: many elites who bear the greatest responsibility for the genocide would almost certainly have escaped apprehension, trial, and punishment altogether absent the ICTR.³⁸

Relative to incarceration, the effects of the *renvoi* to Rwandan practice have also been negligible. The Rwandan Penal Code prescribes death for crimes comparable to those within the ICTR's jurisdiction but instructs that, absent the imposition of a life sentence, which it authorizes for the most serious crimes, including murder, the maximum punishment shall be 20 years' imprisonment (or 30 in the case of concurrent offences).³⁹ Given the inherent gravity of genocide and crimes against humanity, however, this framework, even were it applied stringently, would rarely limit the Tribunal's discretion; and the Appeals Chamber established early in its jurisprudence that while the ICTR Trial Chambers must consider Rwandan practice, it does not bind them.⁴⁰ A review of ICTR sentences to date suggests that Rwandan law seldom plays more than a perfunctory role in sentencing. Typically, the Trial Chambers invoke it to confirm the propriety of a sentence determined otherwise.⁴¹

The Tribunal routinely cites Rwandan Organic Law No. 8/96 in support of its own decisions.⁴² This is not objectionable, and indeed, may well be prudent, for it would presumably tend to reduce perceived disparity between sentences

38 E. Mose, 'Main Achievements of the ICTR', 3 *JICJ* (2005) 920–943, at 932 (emphasizing that '[m]ost of the more than 60 accused persons, who fled Rwanda in 1994, would not have been brought to justice had it not been for the Tribunal's investigations, insistence upon their arrest and subsequent requests for transfer to Arusha,' and furthermore, that '[t]he fact that the accused will receive a fair trial by an independent Tribunal has facilitated and, in many instances, probably been a condition of transfer to Arusha' given the extradition standards of many states).

39 Judgment and Sentence, *Semanza* (ICTR-97-20), Trial Chamber, 15 May 2003, §561.

40 Judgment and Sentence, *Kambanda* (ICTR-97-23), Trial Chamber, 4 September 1998, §23; see also Judgment, *Semanza* (ICTR-97-20), Appeals Chamber, 20 May 2005, §§345, 376–378; Reasons for Judgment, *Serushago* (ICTR-98-39), Appeals Chamber, 6 April 2000, §30.

41 E.g. Judgment, *Kayishema and Ruzindana* (ICTR-95-1), Trial Chamber, 21 May 1999, §7; see also Judgment and Sentence, *Kambanda* (ICTR-97-23), Trial Chamber, 4 September 1998, §18 (affirming that 'Rwanda, like all States which have incorporated crimes against humanity or genocide in their domestic legislation, has envisaged the most severe penalties in the criminal legislation for these crimes'); see also *ibid.*, §§24–25. *Kambanda*, however, may be one of the few cases in which Rwandan law arguably *did* affect the defendant's sentence. While Rule 101(B)(ii) of the Rules authorizes mitigation for substantial cooperation, including a guilty plea, *Kambanda* received a life sentence nonetheless — in part, surely, because of the gravity of his crimes but perhaps also because under the Rwandan Organic Law, 'Category I' offenders, such as *Kambanda*, 'cannot benefit from a reduction of sentences even after a guilty plea'. *Ibid.*, §37.

42 S. Beresford, 'Unshackling the Paper Tiger — The Sentencing Practices of the Ad Hoc Criminal Tribunals for the Former Yugoslavia and Rwanda', 1 *International Criminal Law Review* (2001) 33–90, at 48–49; see e.g. Judgment and Sentence, *Kambanda* (ICTR-97-23), Trial Chamber, 4 September 1998, §§27, 37; Judgment and Sentence, *Ruggiu* (ICTR-97-32), Trial Chamber, 1 June 2000, §§28–31.

imposed by the ICTR and Rwandan courts. Yet it is questionable whether the *renvoi* to Rwandan practice prescribed by the Statute, which the drafters included out of a conservative regard for the principle of legality (*nulla poena sine lege*), should apply prospectively to laws enacted by Rwanda after the ICTR's creation. But again, even if theoretically questionable, the *renvoi* makes little practical difference. No defendant could argue that pre-1994 Rwandan law prescribed a less severe penalty for his conduct than that imposed by the Tribunal.

B. Sentencing Metrics: Gravity and Individual Circumstances

Article 23(2) of the ICTR Statute sets out two principal, but not exhaustive,⁴³ sentencing metrics: 'gravity of the offence' and 'individual circumstances of the convicted person'. The latter effectively means, or overlaps almost entirely with, aggravating and mitigating circumstances under Rule 101. At times, the Tribunal describes certain sentencing facts under the heading 'individual circumstances', but these serve no independent function in the determination of sentence except in so far as the Tribunal finds them to be aggravating or mitigating.⁴⁴ 'Gravity', by contrast, does — at least in theory.

The Tribunal emphasizes gravity as its sentencing lodestar, 'the litmus test for the appropriate sentence'.⁴⁵ In practice, however, it remains unclear how much actual work the concept of gravity does in the determination of sentence. Every act of genocide and virtually every act prosecuted under the rubric of crimes against humanity (extermination, rape, murder, torture) is extremely grave. Trial Chambers duly and invariably reiterate this at the outset of their sentencing analyses. But the idea that 'gravity of the offence' functions as one of two principal determinants of the sentence, still less the 'litmus test', seems to be a fiction. It does little more, in the vast majority of cases, than establish a high baseline. The adjustments to and individualization of the sentence virtually all take place at the level of 'individual circumstances'.

From one perspective, then, the real role of 'gravity of the offence' is minimal or largely rhetorical. From another, however, it emerges as a frequent source of jurisprudential confusion — for several reasons: First, sometimes it appears to overlap with an element of the substantive crime. In *Kambanda*, for example,

43 The Trial Chambers enjoy 'unfettered discretion' to individualize the penalty in view of the totality of the circumstances. Judgment, *Kayishema and Ruzindana* (ICTR-95-1), Trial Chamber, 21 May 1999, §§ 3–4.

44 *Ibid.*, §§ 10–23.

45 Judgment, *Akayesu* (ICTR-96-4), Appeals Chamber, 1 June 2001, § 413 (internal quotation marks omitted); see also Judgment and Sentence, *Kamuhanda* (ICTR-95-54), Trial Chamber, 22 January 2004, § 765 (emphasizing that 'the penalty must first and foremost be commensurate to the gravity of the offence'); Judgment and Sentence, *Kajelijeli* (ICTR-98-44), Trial Chamber, 1 December 2003, § 963 (same).

the Trial Chamber, speaking of genocide and crimes against humanity, stressed the gravity of these crimes as an aggravating circumstance: 'The magnitude of the crimes, involving the killing of an estimated 500,000 civilians in Rwanda, in a short span of 100 days, constitutes an aggravating fact.'⁴⁶ But as the Trial Chamber in *Semanza* observed, because 'the number of victims is an element of extermination as a crime against humanity,' it may be considered only 'in assessing the gravity of the offence'; it should not then be double-counted 'as an aggravating factor in sentencing'.⁴⁷

This observation points to a second, more general, problem. *Kambanda* and virtually every ICTR sentencing decision manifest an unfortunate tendency to conflate gravity as a statutory sentencing metric with gravity as an aggravating circumstance, without clarifying the difference, if any, between them — or explaining whether and why gravity should be considered twice in determining a convicted person's sentence.⁴⁸ Several Trial Chambers have acknowledged this difficulty, emphasizing that given the inherent gravity of '[a]ll of the crimes in the Statute,' it does not suffice to cite the 'abstract gravity' of the crime at the sentencing stage; rather, the Tribunal should 'take into account the particular circumstances of the case, as well as the form and degree of the participation of the Accused'.⁴⁹ But that is simply to say that sentencing factors *other than* gravity must be considered, namely, 'the individual circumstances of the convicted person'; it does not help to define the independent role of gravity, as distinct from other factors, in the determination of sentence. In fact, 'gravity' is not one concept but many. The Tribunal cites it for different purposes and in different contexts, which the label 'gravity' tends to conflate and confuse, obscuring its proper role and limits in determining sentences for the inherently grave crimes of genocide and crimes against humanity.

One critical question that invites clarification, for example, is whether 'gravity of the offence' should be construed to focus the sentencing court's attention on the culpability of the actor or the consequences of his conduct (the harm it causes), or both. If 'gravity of the offence' means something like 'magnitude of the harm,' as some cases suggest,⁵⁰ then genocide, crimes

46 Judgment and Sentence, *Kambanda* (ICTR-97-23), Trial Chamber, 4 September 1998, §42.

47 Judgment and Sentence, *Semanza* (ICTR-97-20), Trial Chamber, 15 May 2003, §571. By contrast, 'the number of victims may be an aggravating factor in relation to genocide, a crime with no numeric minimum of victims'. *Ibid*.

48 E.g. Judgment and Sentence, *Gacumbitsi* (ICTR-01-64), Trial Chamber, 17 June 2004, §344. In fact, at least one Trial Chamber, following the ICTY, has held expressly that 'a particular circumstance shall not be retained as aggravating if it is included as an element of the crime in consideration'. Judgment and Sentence, *Ntakirutimana and Ntakirutimana* (ICTR-96-10 & ICTR-96-17), Trial Chamber, 21 February 2003, §893.

49 Judgment and Sentence, *Semanza* (ICTR-97-20), Trial Chamber, 15 May 2003, §571; see also Judgment and Sentence, *Kajelijeli* (ICTR-98-44), Trial Chamber, 1 December 2003, §953.

50 E.g. Judgment and Sentence, *Kambanda* (ICTR-97-23), Trial Chamber, 4 September 1998, §42; cf. Judgment and Sentence, *Simba* (ICTR-01-76), Trial Chamber, 13 December 2005, §440 (number of victims as an aggravating circumstance).

against humanity, and violations of Common Article 3 should be deemed equally grave if they cause death or serious harm to an equal number of victims, or if they result in roughly comparable suffering — and sentences for these crimes, all other factors being held constant, should not be hierarchically graduated. But if gravity means culpability in a sense other or more than a consequentialist one, then the *dolus specialis* of genocide — to destroy, in whole or in part, a national, ethnic, racial or religious group, as such — matters a great deal for purposes of assessing ‘gravity’ as it bears on sentencing for the ‘crime of crimes’.⁵¹ Equally, it would ‘no doubt’ be true, as the *Kambanda* decision stated, that ‘violations of Article 3 common to the Geneva Conventions and of the Additional Protocol II thereto’ should be deemed ‘lesser crimes than genocide or crimes against humanity’.⁵² But unlike the ICTY, which has decisively rejected the idea of a hierarchy of crimes,⁵³ the ICTR’s pronouncements on this issue remain in some tension with one another.⁵⁴

The ICTR has also had less of an opportunity than the ICTY to focus on gradation in sentencing. Unlike the ICTY, which began with the cases of low-ranking offenders like Tadić and Erdemović, from the outset the ICTR has focused almost exclusively on the most senior, culpable defendants, the architects, leaders and orchestrators. Hence, in theory, the ICTR embraces the related principles that (i) sentences should be graduated to reflect distinctions between the elite and the rank and file;⁵⁵ and (ii) a life sentence ‘should be reserved for the most serious offenders’.⁵⁶ In practice, as noted, almost half of those convicted to date have been sentenced to a term of life, and most of the remainder to terms of 25 years or more.

C. Aggravating and Mitigating Circumstances

Under Rule 101(B), the Tribunal must consider, in determining sentence, aggravating and mitigating circumstances, as well as Rwandan practice and credit for time served elsewhere. The only such circumstance specified by the

51 Judgment, *Kayishema and Ruzindana* (ICTR-95-1), Trial Chamber, 21 May 1999, §9.

52 Judgment and Sentence, *Kambanda* (ICTR-97-23), Trial Chamber, 4 September 1998, §14.

53 Judgment, *Tadić* (IT-94-1), Appeals Chamber, 26 January 2000, §69; but see *ibid.*, (Separate Opinion of Judge Cassese) (advocating the hierarchical view); see generally Danner, *supra* note 30 (urging adoption of the hierarchical view).

54 Compare Judgment and Sentence, *Kambanda* (ICTR-97-23), Trial Chamber, 4 September 1998, §14, with Judgment, *Kayishema and Ruzindana* (ICTR-95-1), Appeals Chamber, 1 June 2001, §367 (stating that ‘there is no hierarchy of crimes under the Statute’); see also Judgment and Sentence, *Rutaganda* (ICTR-96-3), Trial Chamber, 6 December 1999, §450 (genocide and crimes against humanity equally ‘shocking to the collective conscience’).

55 Judgment, *Ntakirutimana* (ICTR-96-10 & ICTR-96-17), Appeals Chamber, 21 February 2003, §884; Judgment, *Musema* (ICTR-96-13), Appeals Chamber, 16 November 2001, §383.

56 Judgment and Sentence, *Semanza* (ICTR-97-20), Trial Chamber, 15 May 2003, §559.

Rules, however, is 'substantial cooperation with the Prosecutor'.⁵⁷ The Statute itself also provides that superior orders, while not exculpatory, 'may be considered in mitigation of punishment'.⁵⁸ Otherwise, the Tribunal enjoys unfettered discretion to decide what circumstances qualify as aggravating or mitigating.⁵⁹ Factors considered by the ICTY and the ICTR include, in aggravation, 'leadership (superior) position of the accused, terrorizing victims, sadism, cruelty and humiliation, espousal of ethnic and religious discrimination and the number of victims'; and in mitigation, 'superior orders, necessity, duress, voluntary intoxication, automatism, insanity and self-defence,' as well as 'a guilty plea and acceptance of responsibility, remorse, voluntary surrender to the tribunal(s), substantial cooperation with the prosecutor, post-conflict conduct, previous good character, benevolent attitude toward the victims, and age.'⁶⁰ I will focus here on those factors that emerge as the most significant or troubling in the ICTR's practice.

At the outset, two points bear emphasis: First, because of the very high baseline established by the gravity of the crimes of conviction (genocide and most forms of crimes against humanity), it can be difficult to determine the actual effect, if any, of certain aggravating factors. Often, the accused, an architect or other elite who bears substantial responsibility for the genocide, seems all but certain to receive a life sentence even in the absence of aggravating factors; hence the Appeals Chamber seldom disturbs the sentence despite reversing or otherwise faulting the Trial Chamber's findings relevant to sentencing. In *Kajelijeli*, for example, the Appeals Chamber both (i) overturned the Trial Chamber's factual finding and, partly on this basis, disagreed with its legal conclusion that Kajelijeli deserved no credit at all for helping his wife to shelter several endangered Tutsis;⁶¹ and (ii) vacated Kajelijeli's convictions, in so far as they were based on superior responsibility, for genocide and crimes against humanity (extermination).⁶² But it held that

57 Rule 101(B)(ii) ICTR RPE; Judgment, *Kajelijeli* (ICTR-98-44), Appeals Chamber, 23 May 2005, § 294 (emphasizing that 'a Trial Chamber is *required* to take into account any mitigating circumstances in determining sentence'). Art. 23(1) of the Statute uses the mandatory 'shall' to instruct the Trial Chambers to limit penalties to imprisonment and take into account Rwandan practice regarding prison sentences, but employs the more discretionary term 'should' in reference to the Art. 23(2) metrics: 'gravity of the offence' and 'individual circumstances of the convicted person'. If this distinction ever had significance, Rule 101 eliminates it, for it mandates that the Tribunal 'shall take into account' the metrics that Art. 23(2) says it 'should take into account'.

58 Art. 6(4) ICTRSt.

59 Judgment, *Kajelijeli* (ICTR-98-44), Appeals Chamber, 23 May 2005, § 294. Even conduct that preceded the Tribunal's temporal jurisdiction — for example, saving the lives of Tutsis before 1994 — may validly be taken into account at sentencing. *Ibid.*, § 298.

60 M.C. Bassiouni, *An Introduction to International Criminal Law* (New York: Transnational Publishers, Inc., 2003), 327–328 (footnotes and internal quotation marks omitted); see also Beresford, *supra* note 42, at 53–82 (surveying penal jurisprudence of the ad hoc tribunals for Rwanda and Yugoslavia); Drumbl, *supra* note 12, at 561–566 (surveying aggravating and mitigating factors cited by international and hybrid criminal courts).

61 Judgment, *Kajelijeli* (ICTR-98-44), Appeals Chamber, 23 May 2005, § 310.

62 *Ibid.*, § 316.

neither of these errors called for reduction of Kajelijeli's sentence given the gravity of his crimes.⁶³ Similarly, despite finding errors that required revisions of the verdicts of both Gérard and Elizaphan Ntakirutimana, the Appeals Chamber affirmed their sentences.⁶⁴ The actual effect of mitigating factors cited by the Tribunal, therefore tends to be easier to ascertain.

Second, with respect to sentencing, the Tribunal has adopted a burden of proof favourable to the defence: the Prosecution must prove aggravating circumstances beyond a reasonable doubt; the defence need only establish mitigating circumstances by a preponderance of the evidence.⁶⁵ Again, this makes it easier to discern the actual effect of mitigating factors.

1. Aggravating Circumstances

Without question, the paramount aggravating circumstance emphasized by the Tribunal is the convicted person's abuse of his political, military or socioeconomic status and consequent betrayal of the trust of the victims, to whom he owed a moral or legal duty. The Chambers characterize this circumstance in different ways, but the basic idea is clear: 'In determining the appropriate sentence, a distinction is to be made between the individuals who allowed themselves to be drawn into a maelstrom of violence, even reluctantly, and those who initiated or aggravated it, and thereby more substantially contributed to the overall harm.'⁶⁶ Where the ICTR finds, as it often does, that the defendant abused and manipulated his elite status and authority — and the associated trust of the general populace — 'this abuse of power and betrayal of . . . high office constitutes the most significant aggravating factor'.⁶⁷ Consider, for example, the Tribunal's remarks in sentencing Eliezer Niyitegeka: As a 'well-known and influential figure' in Kibuye, he 'abused the trust placed in him by the population,' and 'instead of promoting peace and reconciliation in his capacity as Minister of Information, he turned to violence,' directly participating in (and influencing others to participate in) massacres, and acting as a leader who gave orders to the perpetrators.⁶⁸ This aggravating

63 See *ibid.*, §§311, 319. The Appeals Chamber did, however, reduce Kajelijeli's sentence from two life sentences plus a term of 15 years to a single term of 45 years based on his unlawful detention in Benin, which, it held, violated his rights to be notified promptly of the charges and to enjoy a speedy first appearance. *Ibid.*, §§323–324.

64 See Judgment, *Ntakirutimana and Ntakirutimana* (ICTR-96-10 & ICTR-96-17), Appeals Chamber, 13 December 2004, §§554–570.

65 Judgment, *Kajelijeli* (ICTR-98-44), Appeals Chamber, 23 May 2005, §294; Judgment and Sentence, *Niyitegeka* (ICTR-96-14), Trial Chamber, 16 May 2003, §488.

66 Judgment and Sentence, *Krstić* (IT-98-33), Trial Chamber, 2 August 2001, § 711; see also Judgment, *Musema* (ICTR-96-13), Appeals Chamber, 16 November 2001, §383 (agreeing with the ICTY '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').

67 Judgment, *Kayishema and Ruzindana* (ICTR-95-1), Trial Chamber, 21 May 1999, §15.

68 Judgment and Sentence, *Niyitegeka* (ICTR-96-14), Trial Chamber, 16 May 2003, §499.

circumstance extends not only to political and military⁶⁹ leaders but to persons who enjoyed high socioeconomic or professional status, such as Gérard Ntakirutimana (physician) and Alfred Musema (director of the Gisovu Tea Factory).⁷⁰ Countless other examples could be cited, but to convey the significance of this aggravating factor, it suffices to note that, in one formulation or another (superior responsibility, high office, abuse of trust, leadership, architect or organizer and so forth), it is difficult to locate a sentence in which it has not been cited as an aggravating circumstance.⁷¹

Another prominent aggravating factor is the 'enthusiasm' or 'zeal' of the perpetrator.⁷² (Conversely, reluctant participation in the offence may be a mitigating factor.⁷³) Despite its intuitive appeal, it is questionable whether this factor reflects the expressive judgments that sentencing does and should encode.⁷⁴ Rank-and-file perpetrators may act with horrifying zeal in the midst of an incited, perhaps drug- or alcohol-facilitated, killing frenzy. The elites who incited the attacks may view atrocities with less emotion, instrumentally, as a calculated means to reprehensible ends like greed or political power. Of course, that may simply counsel using other aggravating factors to enhance the latter's penalties, rather than eliminating 'zeal' as a relevant factor. But it is worth bearing in mind that zeal is not always, or even in most instances, more culpable than emotionless orchestration of the crimes of conviction by elites, who at times may well prefer to remain aloof from the actual atrocities. The Trial Chamber in *Nahimana* wrote of the defendant, a former, renowned history professor at the National University of Rwanda: 'Without a firearm, machete or any physical weapon, he caused the death of thousands of innocent civilians.'⁷⁵

69 Judgment and Sentence, *Ntagerura, Bagambiki, and Imanishimwe* (ICTR-99-46), Trial Chamber, 25 February 2004, §818.

70 Judgment and Sentence, *Ntakirutimana and Ntakirutimana* (ICTR-96-10 & ICTR-96-17), Trial Chamber, 21 February 2003, §910; Judgment and Sentence, *Musema* (ICTR-96-13), Trial Chamber, 27 January 2000, §§999, 1002–1004.

71 It played no role — indeed, the absence of authority functioned as a mitigating factor — in *Ruggiu*, a case involving a Belgian social worker and radio employee whom the Tribunal said had fallen victim to the manipulation of senior figures. Judgment and Sentence, *Ruggiu* (ICTR-97-32), Trial Chamber, 1 June 2000, §§61, 75–76.

72 Judgment, *Kayishema and Ruzindana* (ICTR-95-1), Appeals Chamber, 1 June 2001, §361; Judgment and Sentence, *Niyitegeka* (ICTR-96-14), Trial Chamber, 16 May 2003, §499(iv); Judgment and Sentence, *Ntakirutimana and Ntakirutimana* (ICTR-96-10 & ICTR-96-17), Trial Chamber, 21 February 2003, §912.

73 Judgment and Sentence, *Krstić* (IT-98-33), Trial Chamber, 2 August 2001, §711 (suggesting that reluctant participation in the crimes may in some instances be considered as a mitigating circumstance); see also Judgment and Sentence, *Kamuhanda* (ICTR-99-54), Trial Chamber (Judge Maqutu's Dissent on the Sentence), 22 January 2004, §§10–11 (advocating mitigation because Kamuhanda only 'went along with the genocide out of opportunism and because his moral courage had deserted him', and hence he 'was probably reluctant to participate in the genocide').

74 Danner, *supra* note 30, at 419; see generally Sloane, *supra* note 3.

75 Judgment and Sentence, *Nahimana, Barayagwiza, and Ngeze* (ICTR-99-52), Trial Chamber, 3 December 2003, §1099.

Zeal frequently overlaps with the aggravating circumstance referred to as ‘heinous means’. It is difficult to identify an act of genocide or a crime against humanity that is not ‘heinous’. Particularly voyeuristic descriptions of the atrocities, however, seem to play a role — at times explicitly, at times tacitly — in sentencing. Ruzindana, who likely received a 25-year sentence rather than life imprisonment solely because the Tribunal tried him jointly with and compared him at sentencing to Kayishema, a former prefect, offers a particularly harrowing, but illustrative, example: the Chamber ‘recall[ed] the vicious nature of the murder of a sixteen-year old girl named Beatrice. Ruzindana ripped off her clothes and slowly cut off one of her breasts with a machete. When he finished, he cut off her other breast while mockingly telling her to look at the first one as it lay on the ground, and finally he tore open her stomach.’⁷⁶ At trial, far from expressing remorse, Ruzindana ‘smiled or laughed as survivors testified during trial,’⁷⁷ also an aggravating circumstance (i.e. post-genocide conduct of the accused) cited by the Tribunal in some cases.

Now, it may be unobjectionable and not particularly controversial to enhance a defendant’s sentence based on very ‘heinous means.’⁷⁸ But mindful of the inherent gravity of genocide and crimes against humanity, there may also be an element of arbitrariness to this aggravating circumstance. It is reminiscent of former US Supreme Court Justice Holmes’ visceral ‘puke test’ for determining whether a statute or other government conduct violates the Constitution.⁷⁹ This may work as well as any other proposed formula for policing the elusive boundaries of substantive due process in US constitutional law, but given the atrocious nature of the crimes tried by the ICTR and similar tribunals, this test may not be particularly helpful as a circumstance that purports to differentiate ‘ordinary’ genocidal rapes or murders from especially culpable ones.

One final aggravating circumstance that merits attention here — because it seems so fundamentally misguided — is ‘voluntary commission’. In *Serushago*, the Trial Chamber found the defendant’s ‘[v]oluntary participation’ to be an aggravating circumstance, by which it meant, in part, that he ‘committed the crimes knowingly’.⁸⁰ Another Chamber, relying on *Serushago*, said: ‘Both Kayishema and Ruzindana voluntarily committed and participated in the offences and this represents one aggravating circumstance.’⁸¹ Needless to say, had these defendants not acted voluntarily and knowingly, they could not be guilty of either genocide or crimes against humanity. Voluntary or knowing

76 Judgment, *Kayishema and Ruzindana* (ICTR-95-1), Trial Chamber, 27 May 1999, §18; compare Judgment and Sentence, *Muhimana* (ICTR-95-1), Trial Chamber, 28 April 2005, §§604–607.

77 Judgment, *Kayishema and Ruzindana* (ICTR-95-1), Trial Chamber, 27 May 1999, §17.

78 The adjective ‘heinous’ modifies the *manner* of the killing, not the crime itself. Judgment, *Kayishema and Ruzindana* (ICTR-95-1), Appeals Chamber, 1 June 2001, §350.

79 M. De Wolfe Howe, *Holmes-Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski 1916–1935* (Cambridge: Harvard University Press, 1953), 888.

80 Sentence, *Serushago* (ICTR-98-39), Trial Chamber, 5 February 1999, §30.

81 Judgment, *Kayishema and Ruzindana* (ICTR-95-1), Trial Chamber, 21 May 1999, §13.

commission of the crimes manifestly is not an aggravating circumstance; it is a condition of liability, an element of the offence. Regrettably, the Appeals Chamber in *Kayishema and Ruzindana* chose to elide the issue on appeal, by characterizing the Trial Chamber's statement — unpersuasively — as a way of 'focusing, not simply on the fact that these acts were committed voluntarily, but also on the fact that they were committed with some element of zeal'.⁸² If that is indeed what the Trial Chamber meant, 'voluntary participation' was a particularly inartful and unfortunate way to express it; the Appeals Chamber should have taken the opportunity to clarify this issue in its decision.⁸³

2. Mitigating Circumstances

Mitigation, the Tribunal has said, relates only to sentencing and does not diminish the gravity of the offence.⁸⁴ The mitigating factors it considers fall into three categories: (i) pragmatic (voluntary surrender, guilty pleas and substantial cooperation); (ii) moral or rehabilitative (remorse, sympathy for the victims, rehabilitative potential, good character or prior acts) and (iii) clemency (old age and frail health). Pragmatic factors involve recognition of the ICTR's resource constraints; they offer incentives to defendants that tend to facilitate or expedite its work. In some cases, they may also reflect reduced culpability insofar as a guilty plea, for example, may indicate contrition. Moral and clemency factors, by contrast, involve judgments about the propriety or utility of punishment. Unsurprisingly, given the inherent gravity of the crimes, pragmatic factors prove the most significant in terms of their actual effect on the sentence.

With one exception, the Tribunal has sentenced every defendant who has not pled guilty to a term of at least 25 years. Neither guilty pleas alone nor mitigating factors more generally, however, account for the lower sentences imposed by the Tribunal, for example, those of Serushago (15 years), Ruggiu (12 years), Elizaphan Ntakirutimana (10 years) and Rutaganira (6 years). The latter three pled guilty to secondary or indirect forms of participation, which generally attract lower sentences than those imposed on principals.⁸⁵

82 Judgment, *Kayishema and Ruzindana* (ICTR-95-1), Appeals Chamber, 1 June 2001, §§ 351, 354.

83 In the same case, the Appeals Chamber chose not to consider Kayishema's claim that his repeated assertions of innocence and introduction of an alibi defence could not be deemed aggravating — for, the Chamber said, even if the Trial Chamber erred in this regard, that would not affect Kayishema's sentence. *Ibid.*, §§ 362–363. But, here too, the Appeals Chamber, in my view, should have taken the opportunity to clarify that, as a matter of due process, a defendant should not be affirmatively penalized for insisting on the presumption of innocence and his right to a trial, or for putting on a viable defence. (Of course, he might be penalized at sentencing for perjury nonetheless; and an assertion of innocence may well rule out certain mitigating factors, e.g. cooperation, acceptance of responsibility, remorse. But precision in the characterization of these circumstances is vital to due process.)

84 Judgment and Sentence, *Kambanda* (ICTR-97-23), Trial Chamber, 4 September 1998, § 56.

85 Judgment and Sentence, *Ntagerura, Bagambiki, and Imanishimwe* (ICTR-99-46), Trial Chamber, 25 February 2004, § 813; Judgment and Sentence, *Semanza* (ICTR), Trial Chamber, 15 May 2003, § 563.

Still, while it may be impossible precisely to quantify the value or role of mitigating circumstances, a brief review of two of these cases offers insight into the relative merits and limits of the Tribunal's approach.

Consider first Serushago, an *Interahamwe* leader in Gisenyi, who pled guilty as a principal to genocide and crimes against humanity for murder, extermination and torture⁸⁶ — crimes that would ordinarily be expected, in view of the Tribunal's practice in comparable cases, to carry a life sentence. But Serushago voluntarily surrendered before even being indicted, pled guilty and offered 'substantial and ongoing' cooperation to the Prosecution, which enabled several arrests and included his agreement to testify against others in the future.⁸⁷ At trial, he expressed remorse and contrition in a manner that the Tribunal found sincere. Combined with his relatively young age, 37, this suggested rehabilitative potential.⁸⁸ The Tribunal also found that Serushago assisted some Tutsis at risk during the genocide and that his political and family background, including strong ties between his father and deceased President Habyarimana, made it more understandable that Serushago would become involved with the *Interahamwe*.⁸⁹ Serushago, in short, benefited from virtually every mitigating factor considered by the Tribunal except for clemency factors such as old age or frail health. The Tribunal, finding 'exceptional circumstances in mitigation' sentenced him to only 15 years.⁹⁰

Genuine remorse and the potential for rehabilitation, which international human rights instruments consistently emphasize as the paramount purpose of punishment,⁹¹ should, I believe, be considered in appropriate cases — for example, that of Erdemović, who acted under duress and expressed clear and sincere remorse for his conduct.⁹² But *Serushago* may well be a lesson in the human limits to the Tribunal's ability to assess sincerity and genuine rehabilitative potential. Notwithstanding what can only be regarded as an exceptionally light sentence for genocide and crimes against humanity, Serushago appealed, arguing that the Trial Chamber failed to give due weight to mitigation.⁹³ It may, nonetheless, have been correct to give

86 Sentence, *Serushago* (ICTR-98-39), Trial Chamber, 5 February 1999, §§4–5, 25.

87 *Ibid.*, §§31–35.

88 *Ibid.*, §§39–41.

89 *Ibid.*, §§36–38.

90 *Ibid.*, §42.

91 International Covenant on Civil and Political Rights (ICCPR), 19 December 1966, Arts 6(2), 6(5)–(6), 10(3), 999 UNTS 171; see also Second Optional Protocol to the International Covenant on Civil and Political Rights, GA Res. 44/128, Annex, 44 UN GAOR Supp. (No. 49) at 207, UN Doc. A/44/49 (1989); American Convention on Human Rights, 22 November 1969, Arts 4(2)–(5), 5(6), 1114 UNTS 123; Standard Minimum Rules for the Treatment of Prisoners, Art. 58, UN Doc. A/CONF/611 (1957), Annex 1, ESC Res. 663C, 24 UN ESCOR Supp. No. 1, UN Doc. E/3048, amended by ESC Res. 2076, 62 UN ESCOR Supp. No. 1, at 35, UN Doc. E/5988 (1977); Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, 28 April 1983, Euro. T.S. No. 114.

92 Judgment and Sentence, *Erdemović* (IT-96-22), Trial Chamber, 5 March 1998.

93 Reasons for Judgment, *Serushago* (ICTR-98-39), Appeals Chamber, 5 February 1999, § 6. The Appeals Chamber rightly found this contention meritless and the comparison to *Erdemović* inapt. *Ibid.*, §§21–27.

Serushago a substantial sentence reduction (though probably not quite as substantial as he received). As a practical matter, pleas save the Tribunal much-needed resources, time and effort,⁹⁴ and offer indispensable incentives to future defendants to cooperate in the prosecution of others, particularly the most culpable architects and leaders bearing the greatest responsibility for large-scale human rights atrocities.⁹⁵ But in most cases, the Tribunal should dispense with the Pollyanna-ish view of pleas as indicators of sincere contrition and recognize that, as in the national context, they generally reflect rational calculation, not genuine moral conversion or repentance.⁹⁶

Ntakirutimana illustrates the Tribunal's emphasis, arguably misguided in that case, on clemency factors and prior good character or acts. Elizaphan Ntakirutimana, a senior pastor at the Mugonero Complex, betrayed his parishioners, some of whom had actively sought his help during the genocide, by ferrying *génocidaires* to their safe haven, pointing out Tutsi refugees attempting to flee, and encouraging and inciting the attackers to kill them. The Tribunal convicted him of genocide but sentenced him to only 10 years.⁹⁷ In mitigation, it found relevant that, before the genocide, Ntakirutimana had led an 'exemplary life as a church leader, a highly religious and tolerant person' and opined that he should therefore be viewed as 'essentially a person of good moral character until the events of April to July 1994 during which he was swept along with many Rwandans into criminal conduct'.⁹⁸ Furthermore, the Chamber noted his old age, 78, and frail health, which it deemed 'important mitigating circumstances'.⁹⁹

While a 10-year sentence for a 78-year-old man in poor health may well be the practical equivalent of a life sentence, the idea that Ntakirutimana's prior good character should be a mitigating circumstance is quite dubious. Unlike the thousands of poor, uneducated, rank-and-file *génocidaires* who were 'swept along . . . into criminal conduct', Ntakirutimana, by virtue of his status, education, and religious and moral leadership, could have and should have resisted the tide; his prior 'character' and 'exemplary life', that is, would seem to render him more, not less, culpable. Furthermore,

94 The Tribunal's severely limited resources prevent it from trying more than a tiny fraction of the thousands of perpetrators, and as a matter of policy, it focuses on those deemed the most culpable. See Morris, *supra* note 33.

95 This does not mean that a guilty plea must always warrant sentence reduction. Given the gravity of his crimes and the extent of his responsibility, the Tribunal, rightly in my view, sentenced Kambanda, prime minister of the interim regime, to life despite his plea. Judgment and Sentence, *Kambanda* (ICTR-97-23), Trial Chamber, 4 September 1998, §61.

96 This kind of judgment may have been more justified in *Ruggiu*. See Judgment and Sentence, *Ruggiu* (ICTR-97-32), Trial Chamber, 1 June 2000, §§53–55 (opining that Ruggiu's plea, beyond sparing the Tribunal 'time, effort, and resources', 'reflects his genuine awareness of guilt' and 'illustrates the beginning of repentance'); see also *ibid.*, §§69–72.

97 Judgment and Sentence, *Ntakirutimana and Ntakirutimana* (ICTR-96-10 & ICTR-96-17), Trial Chamber, 21 February 2003.

98 *Ibid.*, §895.

99 *Ibid.*, §898.

rather than acknowledge guilt and repent, as one would expect were his conduct during the genocide an aberration from genuine religious commitment, he fled to the United States and fought extradition.¹⁰⁰ A 10-year sentence, even if the practical equivalent of a life sentence, fails to 'duly express[] the outrage of the international community at [his] crimes.'¹⁰¹

D. *The Role of the Appeals Chamber*

Article 24(2) of the Statute authorizes the Appeals Chamber to 'affirm, reverse or revise' decisions of the Trial Chambers, including sentences. But because of the discretionary, fact-intensive nature of sentencing and the 'overriding obligation [of the Trial Chambers] to individualise a penalty to fit the individual circumstances of the accused and the gravity of the crime', the Appeals Chamber does not review sentences *de novo*.¹⁰² It will revise a sentence only if the Trial Chamber commits 'discernable error', on which the appellant bears the burden of proof.¹⁰³ While a Trial Chamber must consider all mitigating circumstances, 'whether a Trial Chamber gave due *weight* to any mitigating circumstances is a question of fact' to which the Appeals Chamber will defer.¹⁰⁴ Consequently, to justify a revised sentence, the appellant must establish not only error but 'that the error resulted in a miscarriage of justice'.¹⁰⁵

Hence, even where the Appeals Chamber has reversed convictions or found other errors in the Trial Chambers' judgments, it has, with only three exceptions, declined to disturb the actual sentences imposed,¹⁰⁶ and in only two of these cases — appeals by the Prosecution — did the revision reflect disagreement with the Trial Chamber's exercise of its sentencing discretion. In *Semanza*, for example, the Appeals Chamber concluded that the defendant 'ordered' genocide and crimes against humanity (extermination) rather than, as the Trial Chamber had found, merely aided and abetted their commission.¹⁰⁷ It therefore held a 15-year sentence for aiding and abetting incommensurate with Semanza's true culpability as a principal and raised that sentence

100 Judgment, *Ntakirutimana and Ntakirutimana* (ICTR-96-10 & ICTR-96-17), Appeals Chamber, 13 December 2004, §565; see *Ntakirutimana v. Reno*, 184 F.3d 419 (5th Cir. 1999).

101 Judgment, *Aleksovski* (IT-95-14/1), Appeals Chamber, 24 March 2000, §185.

102 Judgment, *Akayesu* (ICTR-96-4), Appeals Chamber, 1 June 2001, §§ 407–408; see also Judgment and Sentence, *Ruggiu* (ICTR-97-32), Appeals Chamber, 1 June 2000, §34 (emphasizing the Trial Chambers' 'unfettered discretion to evaluate the facts and attendant circumstances [and] to take into account any other factor that they deem pertinent').

103 Judgment, *Semanza* (ICTR-97-20), Appeals Chamber, 20 May 2005, §312.

104 Reasons for Judgment, *Serushago* (ICTR-98-39), Appeals Chamber, 6 April 2000, §22; see also Judgment, *Kambanda* (ICTR-97-23), Appeals Chamber, 19 October 2000, §124.

105 Reasons for Judgment, *Serushago* (ICTR-98-39), Appeals Chamber, 6 April 2000, §22.

106 E.g. Judgment, *Rutaganda* (ICTR-96-3), Appeals Chamber, 26 May 2003, §592 [no revision of Trial Chamber's sentence warranted despite over-turning of crimes against humanity (murder) count].

107 Judgment, *Semanza* (ICTR-97-20), Appeals Chamber, 20 May 2005, §388.

by 10 years.¹⁰⁸ By sharp contrast, in *Kajelijeli*, despite vacating one count of genocide and one count of crimes against humanity (extermination) and finding that the Trial Chamber erroneously failed to take into account a mitigating circumstance, the Appeals Chamber revised the Trial Chamber's sentence (from two life terms plus 15 years to a single fixed term of 45 years) only because of the violation of Kajelijeli's rights to be notified promptly of the charges and brought speedily before a judicial officer for an initial appearance.¹⁰⁹ The Appeals Chamber's reluctance to disturb sentences despite legal error thus often seems to reflect the limits of a life sentence to express proportional culpability in the context of a genocide; after correcting all the errors, a defendant may merit one life sentence rather than three, but absent a system of parole, there is, of course, no practical difference.

4. Conclusion

The ICTR, for better or worse, represents principally the interests and values of the amorphous international community rather than those of Rwanda, the victims of the genocide or any other local community. Its sentencing law and practices perforce reflect this fact; hence the exclusion of the death penalty despite Rwanda's objections.¹¹⁰ It therefore should, to quote former special rapporteur Doudou Thiam of the International Law Commission, strive 'to select penalties on which there is the broadest agreement and whose underlying principle is generally accepted by the international community'.¹¹¹ How well has it performed? The existing record, as this brief survey suggests, is mixed. The ICTR has appropriately sentenced the principal architects and orchestrators of the genocide to life imprisonment, while developing the beginnings of a 'common law' of sentencing for serious international crimes that will benefit future tribunals, not least the ICC. Yet its jurisprudence

108 *Ibid.*, § 389. This brought Semanza's total sentence to a term of 35 years in prison. See also *Gacumbitsi* (ICTR-2001-64), Appeals Chamber, 7 July 2006, § 205 (concluding that 'in light of the massive nature of the crimes and the Appellant's leading role in them, as well as the relative insignificance of the purported mitigating factors, the Trial Chamber ventured outside its scope of discretion by imposing a sentence of only thirty years imprisonment' and therefore, increasing Gacumbitsi's sentence of life imprisonment).

109 See Judgment, *Kajelijeli* (ICTR-98-44), Appeals Chamber, 1 December 2003, §§ 310–311, 316–319, 323–324. In *Barayagwiza*, the Trial Chamber similarly reduced the defendant's sentence (from a life term to 35 years' imprisonment) as the only means to implement the Appeals Chamber's earlier finding that Barayagwiza's speedy trial rights had been violated. Judgment and Sentence, *Nahimana, Barayagwiza, and Ngeze* (ICTR-99-52), Trial Chamber, 3 December 2003, § 1107.

110 See Alvarez, *supra* note 3, at 409–410 (emphasizing that the ICTR has privileged international goals 'over the desires of many of those who have been most immediately affected by the genocide').

111 Schabas, *supra* note 5, at 175–176 (internal quotation marks omitted).

suffers from the continuing tendency to regard the sentence as something of an ‘afterthought’.

In terms of procedure, the ICTR, like the ICTY, abandoned sentencing hearings early in its existence based on considerations of expedience and cost.¹¹² This is unfortunate, for the absence of a distinct sentencing phase, and the attention to sentencing it enables, impedes the growth of a mature jurisprudence — one of the most significant international values that ad hoc international criminal tribunals, given political and resource constraints, can realistically serve. Failure to hold a distinct sentencing hearing also inhibits the expressive value of sentencing, and, as a number of writers point out, threatens the due process rights of defendants at trial.¹¹³ Greater attention to the sentencing process would therefore, I believe, not only be feasible, but would meaningfully contribute to the ICTR’s mission and long-term significance as it strives to complete its work by 31 December 2010.¹¹⁴

112 S.D. Murphy, ‘Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia’, 93 *American Journal of International Law* (1999) 57–97, at 92.

113 W.A. Schabas, ‘Article 76: Sentencing’, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article* (Baden-Baden: Nomos, 1999), 981–982; Beresford, *supra* note 42, at 51–52.

114 See D.A. Mundis, ‘The Judicial Effects of the “Completion Strategies” on the Ad Hoc International Criminal Tribunals’, 99 *American Journal of International Law* (2005) 142–158, at 143 and n. 6; see also SC Res. 1534, 25 March 2004, § 3.