Part B: Issues, Institutions, and Personalities

thereby effectively restricting that discretion considerably, and with disparate reasons (Milošević, AC, Decision of 1 November 2004; Šešelj, AC, Decision of 20 October 2006; Decision on Appeal against Trial Chamber’s Decision (No. 2) on Assignment of Counsel, Šešelj (IT-03-67-AR73.4), AC, 8 December 2006).

The ICTY AC also upheld the right to self-representation on appeal, essentially on the basis of the fact that the ICTYST is silent on the opportunity to restrict this right at that stage of the proceedings (Krajanić, AC, Decision of 11 May 2007, §§ 10–13).

Appointment of counsel to an accused who has chosen self-representation also raises practical problems. The ICTY AC in Milošević had articulated no formal preliminary requirement for such an appointment, but the ICTY AC has subsequently stated that when a Chamber decides to restrict the right to self-representation, it must issue a specific warning to the accused that the disruption being caused could lead to the restriction (Šešelj, AC, Decision of 20 October 2006, §§ 26, 52). In this way, the accused is put on notice and is afforded the opportunity to cease the disruption. Considering the rationale for such a warning, this measure appears superfluous when an accused is engaging in intentionally obstructive behaviour and is obviously aware of the consequences of his acts. Equally questionable are the ICTY AC suggestions in its decisions in Šešelj (20 October 2006, § 52 and 8 December 2006, §§ 27–30) that such a warning creates a sort of ‘clean slate’ for the accused—after which the TC may not immediately thereafter restrict the right in question, but must instead wait for additional behaviour, sufficiently disruptive on its own.

Finally, international tribunals have also resorted to the appointment of amici curiae and standby counsel who are allowed differing degrees of participation in the proceedings. Standby counsel, in particular, appear in court with the accused and provide legal advice without actually presenting the case, but can be called to take over the case if the accused loses the pro se status. Thus, unless the Chamber restricts the accused’s pro se status and despite what the ICTY AC suggested in Šešelj (8 December 2006), the appointment of standby counsel does not appear to infringe upon the right to self-representation. EDITORIAL COMMITTEE.


Sentencing Perhaps because of the intuitive sense that no sentence, even death, can truly ‘fit’ unconscionable crimes like genocide, ICTY had until recently paid scant attention to sentencing. ‘It may well be essential to hang Göring’, wrote H. Arendt, ‘but it is totally inadequate. That is, this guilt, in contrast to all criminal guilt, oversteps and shatters any and all legal systems’ (letter to Karl Jaspers, in L. Kohler and H. Saner (eds), H. Arendt-K. Jaspers, Correspondence 1926–1969 (New York: Harcourt Brace Jovanovich, 1992), § 54). The IMT and IMTFE Charters simply authorized ‘death or such other punishment as shall be determined […] to be just’ (Art. 27 IMT Charter; Art. 16 IMTFE Charter). After World War II the death sentence remained the presumptive penalty for serious ICL crimes; and judgments seldom included any sentencing analysis.

With the post-cold war resurgence of ICL, its sentencing law has become more sophisticated. The ad hoc tribunals have opined, albeit inconsistently, on the conventional functions of punishment in national law: deterrence, rehabilitation, retribution, and expressivism. General deterrence and retribution, the latter often conceived in expressivist terms (Aleksovski (IT-95-14-1-A), AC, 24 March 2000, § 185; Judgment, Blaškić (IT-95-14-T), TC, 3 March 2000, §§ 761–64), have received primary emphasis (Judgment, Đerđić (IT-02-61-A), AC, 20 July 2005, § 136; Judgment, Rutaganda (ICTR-96-3-T), TC, 6 December 1999, § 456), while individual deterrence and rehabilitation have been marginalized (SJ, Babić (IT-03-72-S), TC, 29 June 2004, § 45; Judgment, Kunarac (IT-96-23-T&IT-96-23/1-T), TC, 22 February 2001, § 840; Judgment, Kordić and Čerkez (IT-95-14/2-A), AC, 17 December 2004, § 1079). Sentencing judgments refer frequently to the broader, architectural goals of ICL, e.g. restoring international peace and security, ending impunity, and promoting ethnic or national reconciliation. It remains unclear, however, what role these factors do or should play in the sentencing process as distinct from the general justification for the social institution of punishment in ICL.

The ICTY and ICTR Statutes offer only vague positive guidance. Each contains a skeletal provision vesting the tribunals with discretion to impose
a term of imprisonment based on ‘such factors as the gravity of the offence and the individual circumstances of the convicted person; a reference to the practice of the former Yugoslavia and Rwanda, respectively; and a provision for restitution (Art. 24 ICTYSt.; Art. 23 ICTRSt.). Both statutes implicitly prohibit capital punishment, reflecting the confluence of ICL and contemporary human rights law. The RPEs augment this minimal framework in abstract terms, providing for consideration of aggravating and mitigating circumstances, without, however, specifying which factors, other than cooperation with the prosecution, might qualify (Rule 101 ICTY RPE; Rule 101 ICTY RPE).

Gradually, however, an increasingly nuanced body of international sentencing law has evolved through the case law. The ICTR has described the gravity of the crime as ‘the litmus test for the appropriate sentence’ (Judgment, Akayesu (ICTR-96-4-A), AC, 23 November 2001, § 413), but because all ICL crimes tend to be very grave, it is unclear how much guidance this metric offers (Judgment, Semanza (ICTR-97-20-T), TC, 15 May 2003, § 571). The TCs have an ‘overriding obligation’ (Akayesu, AJ, § 407) and ‘unfettered discretion’ (Judgment, Kayishema and Ruzindana (ICTR-95-1-T), TC, 21 May 1999, §§ 3–4) to individualize sentences in view of the totality of the circumstances, including aggravating and mitigating factors such as abuse of trust, superior or subordinate status of the accused, heinous means, superior orders, rehabilitative potential, duress, necessity, remorse, character, age, health, and many others. As the AC has endorsed transactional sentencing—imposing a single sentence for multiple crimes that belong to the same criminal ‘transaction’ (Judgment, Kambanda (ICTR-97-23-A), AC, 19 October 2000, §§ 100–113)—it can be ‘difficult to determine the range of sentences for each specific crime’ (Judgment, Ntagerura, Bagambiki, Imanishimwe (ICTR-99-46-T), TC, 25 February 2004, §812). But ‘the final sentence imposed…should reflect the totality of the culpable conduct’, meaning ‘the gravity of the offences and the culpability of the offender so that it is both just and appropriate’ (Judgment, Delalić and others (IT-96-21-A), AC, 20 February 2001, § 429).

Sentences imposed by the ad hoc tribunals have ranged from as few as five years, based on duress, sincere remorse, and rehabilitative potential (e.g. SJ, Erdemović (IT-96-22-Tbis), TC, 5 March 1998), to life imprisonment for most génocidaires and elites responsible for orchestrating serious atrocities (e.g. SJ, Kambanda (ICTR-97-23-S), TC, 4 September 1998). While some jurists continue to dissent from the view, both ad hoc tribunals have now rejected the idea of a ‘hierarchy of crimes’ in sentencing, whereby, all other factors being equal, genocide should be punished more severely than crimes against humanity, which should be punished more severely than war crimes (Judgment, Tadić (IT-94-1-A and IT-94-1-Abis), AC, 26 January 2000, AJ, § 69; Judgment, Kayishema and Ruzindana (ICTR-95-1-A), AC, 1 June 2001, § 367). Furthermore, somewhat surprisingly, ‘the current case law of the Tribunal does not evidence a discernible pattern of the Tribunal imposing sentences on subordinates that differ greatly from those imposed on their superiors’ (Judgment, Krstić (IT-98-33-T), TC, 2 August 2001, § 709). The AC may ‘affirm, reverse or revise’ decisions of the TCs (Art. 24 ICTRSt.; Art. 25, ICTYSt.), but it will only revise a sentence if the TC commits ‘discernable error’, and the appellant bears the burden to prove not only the error but ‘that [it] resulted in a miscarriage of justice’ (Judgment, Semanza (ICTR-97-20-A), AC, 20 May 2005, § 312; Judgment, Serushago (ICTR-98-39-A), AC, 6 April 2000, § 22).

The ICCSt. establishes a framework similar to that of the ad hoc tribunals, although it arguably reflects progression insofar as it enumerates a (non-exhaustive) list of potential aggravating and mitigating factors (Rule 145 ICC RPE) and, procedurally, contemplates a distinct sentencing phase (Art. 76), which the ad hoc tribunals abandoned early on as a matter of expedience. While it remains ‘premature to speak of an emerging “penal regime”, and the coherence in sentencing practice that this denotes’ (Judgment, Furundžija (IT-95-171-A), AC, 21 July 2000, § 237), recent jurisprudence, together with the ICCSt.’s codification of a distinct sentencing phase (Art. 76), promises an increasingly principled and sophisticated body of international sentencing law.

Robert Sloane


Separate and Dissenting Opinions In respect of the question of whether the court should speak with one voice, there is a civil law, a common law and an international law perspective. In civil law systems the authority of a judgment prevails and rules out the expression of any minority view; the strict rules pertaining to confidentiality of deliberations