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Proposed Sentencing Guidelines for the International Criminal Court

DANIEL B. PICKARD*

I. INTRODUCTION

The concept of a permanent International Criminal Court (ICC), once only an intellectual exercise for academics, now borders on reality. After years of debate, the international community has agreed to draft a constitutive charter.¹ The United States, once an adamant opponent of an ICC, participated in drafting a proposed treaty for the tribunal's creation.² Many books and law review articles also examine the creation of such a court and ad hoc experiments are currently underway in the former Yugoslavia and Rwanda.³

There is an area intimately connected with the international tribunal that current literature has neglected. Although there are numerous commentaries proposing the types of crimes the tribunal should be competent to try,⁴ legal literature fails to address

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1. See Daniel B. Pickard, *Security Council Resolution 808: A Step Toward a Permanent International Court for the Prosecution of International Crimes and Human Rights Violations*, 25 GOLDEN GATE U.L. REV. 435, 447 (1995).

2. *Id.* at 466.

3. See Pickard, *supra* note 1.

4. See, e.g., Michael P. Scharf, *Getting Serious about an International Criminal Court*, 6 PACE INT'L L. REV. 103 (1994); Jelena Pejic, *What is an International Criminal Court? As Negotiations on the Establishment of an ICC Start, the Debate Heats Up*, 23 HUM. RTS. 16 (1996).

sentencing guidelines under which the ICC would operate.

This Article proposes ICC sentencing guidelines. The guidelines provide sentences specific to those crimes likely to be within the ICC's jurisdiction: genocide, crimes against humanity, and war crimes. These suggested guidelines reflect the experience of previous international criminal tribunals as well as the domestic laws of nations that represent the major legal systems of the world. This Article hopes to contribute to the development of an effective and just international criminal justice system.

This Article does not suggest a rigid sentencing philosophy. It also does not engage in an esoteric examination of sentencing theories. Rather, it simply suggests a model for creating guidelines for an effective international criminal tribunal.

Part Two of the Article reviews sentencing principles, briefly surveys historical international criminal sentencing law, and introduces the crimes the ICC will most likely address. Part Three describes the analytical model and details the proposed sentencing guidelines for genocide, crimes against humanity, and war crimes. This section also cites relevant portions of the domestic laws used.

II. BACKGROUND

A. General Sentencing Principles

This section briefly describes the major schools of thought in sentencing theory and highlights some concerns of the different legal systems. Due to the comparative nature of this Article and the general scope of the analysis, a basic understanding of punishment theories is appropriate.

Sentencing can be broadly defined as the punishment of individuals found guilty of criminal behavior.⁵ In common law countries, the judiciary has tremendous discretionary power over sentencing issues.⁶ This discretion has traditionally been confined only by broad statutory provisions, the most significant of which cover maximum penalties and available dispositions.⁷ Within these wide boundaries, the judiciary has generally enjoyed the

5. See AUSTIN LOVEGROVE, JUDICIAL DECISION MAKING, SENTENCING POLICY, AND NUMERICAL GUIDANCE 1 (1989).

6. See *id.*

7. See *id.*

freedom to formulate and administer sentencing policy.⁸ To determine an appropriate sentence in an individualized case, “judges have traditionally considered the harm caused by the offense, the offender’s culpability and rehabilitation prospects, and whether justice required the exercise of mercy.”⁹

Sentencing theory incorporates several different schools of thought. Both common and civil law countries follow, to some extent, four main punishment theories: (1) retribution;¹⁰ (2) deterrence;¹¹ (3) social defense;¹² and (4) rehabilitation.¹³

Retribution embodies the concept of “an eye for an eye [and] a tooth for tooth;”¹⁴ i.e., punishment should be proportionate to the crime.¹⁵ One critic noted, “the primary justification of punishment is always to be found in the fact that an offense has been committed which deserves punishment, not in any future advantage to be gained by its infliction.”¹⁶ The retributive theory emphasizes that “punishment should primarily view the offender rather than society at large; that the gravity of the offense should [generally] dictate the extent of the sanction; [and, most importantly], that the offender must suffer [for the choice to do wrong].”¹⁷

Deterrence theorists do not focus on the punishment of a present crime. Rather, they believe that the purpose of punishment is to prevent future crimes by creating a fear of punishment in potential criminals.¹⁸ The threat of punishment should inhibit potential criminals and, therefore, protect society.¹⁹

Retribution and deterrence represent the two most traditional and widely recognized theories of punishment.²⁰ A retributive theorist believes that punishment for a crime is inherently good in

8. *See id.*

9. *Id.*

10. *See* CONTEMPORARY PUNISHMENT, VIEWS, EXPLANATIONS AND JUSTIFICATIONS 39 (Rudolph J. Gerber & Patrick D. McAnany eds., 1972).

11. *See id.* at 98.

12. *See id.* at 129.

13. *See id.* at 175.

14. *Id.* at 39.

15. *See id.*

16. *Id.* (internal quotation marks omitted).

17. *Id.*

18. *See id.* at 93.

19. *See id.*

20. *See id.* at 94.

and of itself because wrongful acts should be penalized. A deterrence theorist, however, argues that punishment is a necessary evil justified by its role in preventing future crimes.²¹

The social defense theory, a relatively modern punishment theory, holds that criminals "are to be punished to protect society."²² The social defense theorist views the criminal as a danger to society as a whole,²³ whereas the deterrence theorist focuses on the individual criminal and how that individual balances the risks of being punished against the benefits resulting from the crime.²⁴ Social defense theory, instead concentrates on benefits to the community that result from restraining dangerous individuals.²⁵

Rehabilitation focuses on restoring the offender to social health. Unlike the social defense's group orientation, rehabilitation targets the good of the individual rather than the good of society.²⁶ Accordingly, punishment is not necessarily the primary tool used.²⁷

Each of these four theories include numerous subgroups. These theories also evolve in the numerous legal systems that are based on them. For example, Scandinavian countries, historically strict adherents to the rehabilitative model, have experienced significant sentencing reform in the past two decades.²⁸ An interna-

21. See *id.* at 94-95.

22. *Id.* at 129.

23. See *id.*

24. See *id.*

25. See *id.* at 130.

26. See *id.*

27. See *id.*

28. See Tappio Lapi-Seppälä, *Penal Policy and Sentencing Theory in Finland*, in CRIMINAL POLICY AND SENTENCING IN TRANSITION 3, 3 (1992).

Starting in the mid 70's the Finnish criminal justice system has been reformed in a "neoclassical spirit." Instead of individualization and rehabilitation, the emphasis has been on legal security and the principles of proportionality, predictability and equality. These ideas and principles received most manifest expression in the reform of sentencing provisions in 1976 (Chapter 6 in the Finnish penal code).

This change did not restrict itself to Scandinavia. Since the first sentencing reforms in the 1970's, following the "Decline of the Rehabilitative Ideal" there has been a growing international interest in the problems of sentencing. The United States adopted the sentencing guideline system at the Federal level in 1987, the same year that the Canadian Sentencing Commission published its extensive and interesting report. International co-operation is also expanding. The Nordic Criminal Law Committee has outlined a common approach to the principles and the process of sentencing in Scandinavia, and the Council of Europe has set a select committee of experts to examine the possibilities of a

tional sentencing structure, therefore, must take into account the dynamic nature of these theories.

Emerging legal and societal developments in the former Soviet Block should also be considered when attempting to establish international criminal sentencing guidelines that represent the different national legal systems of the world. Many of the old Soviet satellite countries are actively drafting new criminal codes and sentencing procedures.²⁹ As many nations abandon their Marxist-based legal systems, they struggle to define a penal philosophy that represents their new national identity.³⁰ A comprehensive inter-

common approach in this field and to look for means to reduce unwarranted disparity of sentences.

Although the techniques differ according to the legal traditions of each jurisdiction, all these reforms tend to have one common goal: more efficient control and guidance for judges in their sentencing decisions. Since unwarranted disparity in sentencing is a problem in every jurisdiction that sets high value on legal security and equality before justice, experiences from the efforts to reduce this disparity could be expected to be of interest even to countries with different legal traditions.

Id. at 3-5 (citations omitted).

29. See Rait Maruste, *Criminal Policy, Criminality and Criminal Law Reforms in Estonia*, in *CRIMINAL POLICY AND SENTENCING IN TRANSITION* 107, 109 (1992).

In accordance with the strategic aim to restore the Estonian Republic, a commission has been set up to reestablish an independent Penal Code for Estonia. The commission works from the Estonian Parliament and it consists of 15 members. At the first meeting of the commission it was decided, that the drafting of the Code will take place independently of All Union Foundations. A sub-group of the commission is made up of lawyers and scientists from the Law Faculty of Tartu University who prepare the working text for the entire commission. Preliminary texts for further discussions have already been drafted. These texts include proposals for the repeal of the death penalty, a distinction between the "socialist" (state) and private property, a fundamental reorganization of the sanctions system, the introduction of limited responsibility, immunity of witnesses, the mitigation of sanctions, etc.

Id. at 109-10.

30. See Jolanta Jakubowska-Hara, *Leading Directives of Punishment in the Light of the Polish Penal Code*, in *CRIMINAL POLICY AND SENTENCING IN TRANSITION* 135, 135 (1992).

The very basic issues concerning the meaning and the purpose of penalty in a given legal system have been for ages at the centre of discussion among philosophers and theoreticians of law. These considerations led in the 19th century to the elaboration of two basic theories of penalty: the absolute or retributive (connected with the just deserts) theory, and the utilitarian or utilitarian theory.

This traditional division, in its clinical form, has been the subject of a number of objections, especially when evaluated against the background of contemporary legal knowledge.

Currently, most authors tend to support a so-called "mixed theories," which combine the elements of just requit with elements of prevention. This standpoint has also been accepted by the Polish Penal Code.

national sentencing code must incorporate these evolving systems.

The examination of previous international tribunals will touch upon the application and relevance of these theories. In order to be accepted by the international community, the application of the sentences handed down by the ICC must incorporate these theories.

B. Historical Developments in International Criminal Law and Sentencing

It is necessary to understand developments in international criminal sentencing law over the past fifty years before progressing to the issues of proposed crimes. This understanding will be achieved by briefly describing developments at Nuremberg, the contributions of the Yugoslavian and Rwandan tribunals, and more recent proposals regarding the ICC. This Article suggests that criminal sentencing concerns, in these unique circumstances, have been practically non-existent, and overwhelmingly left to the discretion of judges.

1. Nuremberg

The war crimes tribunals that occurred in Nuremberg, Germany and Tokyo, Japan, after World War II, were the genesis of the modern international criminal court movement.³¹ In the face of Nazi atrocities, leaders from the United States and the United Kingdom informed Germany that offenders would be tried and punished for violations of international law.³² Similar actions were undertaken in Tokyo. During the Nuremberg and Tokyo War Crimes Trials, certain egregious crimes were treated as offenses under international law.³³ Although much has been written about the Nuremberg trials, the lack of sentencing structure of the trials has received little commentary.

The London Charter of August 8, 1945 established the International Military Tribunals for the trial of major war criminals at Nuremberg and Tokyo.³⁴ The Charter for the Nuremberg International Military Tribunal defined the following acts as crimes for which individual responsibility could be found within its jurisdic-

Id. at 135.

31. See Pickard, *supra* note 1, at 448.

32. See *id.*

33. See *id.*

34. See *id.* at 449.

tion: (1) crimes against peace;³⁵ (2) war crimes;³⁶ and (3) crimes against humanity.³⁷ While substantive and inchoate crimes³⁸ were relatively well defined, sentencing issues received minimal attention. The key sentencing provision in the Nuremberg Charter was Article 27 which stated, “[t]he Tribunal shall have the right to impose upon a Defendant conviction, death or such other punishment as shall be deemed by it to be just.”³⁹ Article 28 of the charter allowed the Tribunal to deprive a convicted person of any property the convict had stolen.⁴⁰ Article 29 provided that the German Control Council could reduce, but not increase, the severity of sentences.⁴¹

The Nuremberg tribunals’ sentencing guidelines consisted only of those few, very vague words in Article 27: “as shall be deemed by it to be just,”⁴² which provided the Nuremberg and Tokyo judges had nearly unfettered sentencing discretion. In accordance with this discretion, the judges deemed “just” nineteen hangings out of forty-seven convictions for international crimes against humanity.⁴³ Nuremberg, thus, offers little sentencing guidance for the current ICC proposal. Moreover, it demonstrates the danger resulting from inattention to sentencing guidelines. This

35. Crimes against peace included such acts as: planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreement of assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing. Charter of International Military Tribunal, art. 6, 59 Stat. 1544, 1547, 82 U.N.T.S. 279.

36. War crimes were defined as violations of the laws or customs of war. Such violations shall include but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.” *Id.* art. 6(b).

37. Crimes against humanity were defined as “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or [p]ersecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.” *Id.* art. 6(c).

38. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit crimes against peace, crimes against humanity or war crimes were held responsible for all acts performed by any persons in execution of such plan. *Id.* art. 6.

39. *Id.* art. 27.

40. *See id.* art. 28.

41. *See id.* art. 29.

42. *See id.* art. 27.

43. *See Pickard, supra* note 1, at 450.

lack of sentencing guidelines is completely inadequate for the ICC's current proposal and for today's more complex due process issues.

In addition, the Nuremberg tribunals raised difficult questions regarding punishment theories.⁴⁴ These questions focus on the retroactive application of law to try, convict, and hang individuals for the murder of millions of helpless civilians.⁴⁵ The rehabilitative model is inapplicable because execution is not reform.⁴⁶ Similarly, the deterrence model does not appear appropriate because punishment for violating retroactive laws cannot deter future offenses.⁴⁷ Thus, the early international criminal tribunals seemed to rely on the retribution and/or social defense punishment theories.

2. The Yugoslavian and Rwandan Tribunals

a. Constitutional Documents of the Ad Hoc Tribunals

The Security Council of the United Nations created the International Tribunal for the former Yugoslavia, acting under Chapter VII of the U.N. Charter.⁴⁸ The Statute of the International Tribunal listed four major crimes over which the court had jurisdiction: (1) grave breaches of the Geneva Conventions of 1949; (2) violations of the laws or customs of war; (3) genocide; and (4) crimes against humanity.⁴⁹ These crimes, as defined in the Yugoslavian Tribunal, will likely be incorporated into the ICC.

Grave breaches of the Geneva Convention are defined as:

- (a) willful killing;
- (b) torture or inhuman treatment, including biological experiments;
- (c) willfully causing great suffering or serious injury to body or health;
- (d) extensive destruction and appropriation of property, not

44. See MICHAEL DAVIS, *TO MAKE THE PUNISHMENT FIT THE CRIME* 3 (1992).

45. See *id.*

46. See *id.*

47. See *id.*

48. See generally Pickard, *supra* note 1.

49. *Statute of the International Tribunal: Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR 48th Sess., Annex, arts. 2-5, U.N. Doc. S/25704 (1993) [hereinafter *Statute of the International Tribunal*].

justified by military necessity and carried out unlawfully and wantonly;

(e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power;

(f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial;

(g) unlawful deportation or transfer or unlawful confinement of a civilian;

(h) taking civilians as hostages.⁵⁰

The Tribunal for the former Yugoslavia defined violations of the laws or customs of war as:

(a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;

(b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings;

(d) seizure of, destruction or willful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science;

(e) plunder of public or private property.⁵¹

The Statute defined genocide as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group:

(a) killing members of the group;

(b) causing serious bodily or mental harm to members of the group;

(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) imposing measures intended to prevent births within the group;

(e) forcibly transferring children of the group to another group.⁵²

50. *Id.* art. 2.

51. *Id.* art. 3.

52. *Id.* art. 4.

The Statute also stated that punishable acts included: genocide; conspiracy to commit genocide; direct and public incitement to commit genocide; attempt to commit genocide; and complicity in genocide.⁵³

Crimes against humanity were acts committed in armed conflict, whether international or internal in character, directed against any civilian population.⁵⁴ They include: (1) murder; (2) extermination; (3) enslavement; (4) deportation; (5) imprisonment; (6) torture; (7) rape; (8) persecutions on political, racial and religious grounds; and (9) other inhumane acts.⁵⁵

Article 24 of the Statute listed the penalties that the Tribunal could establish and stated that the maximum punishment was life imprisonment.⁵⁶ In determining the terms of imprisonment, the Trial Chambers could look to the general practice regarding prison sentences in the courts of the former Yugoslavia.⁵⁷ Furthermore, in imposing the sentences, the Trial Chambers were to take into account the gravity of the offense and the individual circumstances of the convicted person.⁵⁸ Despite the attempt to define the crimes within the Tribunal's jurisdiction, the instruments that created the Tribunal or its procedural and substantive rules lack any numerical sentencing guidelines or provisions.

The Statute for the International Tribunal for Rwanda also lists genocide and crimes against humanity as punishable offenses.⁵⁹ The Rwandan Statute provides this Tribunal with the power to prosecute violations of Article 3 common to the Geneva Conventions and of Additional Protocol II.⁶⁰ The violations include, but are not limited to:

- (a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
- (b) Collective punishments;
- (c) Taking of hostages;

53. *See id.*

54. *See id.*

55. *See id.* art. 5.

56. *See id.* art. 24.

57. *See id.*

58. *See id.*

59. *See Statute of the International Tribunal for Rwanda*, S.C. Res. 995, U.N. SCOR, 3453rd mtg., Annex, art. 2, U.N. Doc. S/RES/955 (1994).

60. *See id.* art. 4.

- (d) Acts of terrorism;
- (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
- (f) Pillage;
- (g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples;
- (h) Threats to commit any of the foregoing acts.⁶¹

The Rwandan Tribunal also does not provide useful guidance regarding punishment for those who appear before it. Article 23 of the Rwandan Statute establishes the same basic sentencing prohibitions and guidelines found in the Statute for the former Yugoslavia.⁶²

While the Rules of Procedure and Evidence for the International Tribunal for the former Yugoslavia slightly clarify its sentencing procedures,⁶³ the Rules fail to establish concrete guidelines. Rule 100 creates a pre-sentencing procedure where the prosecution and defense may submit any relevant information that may assist the Trial Chamber in determining an appropriate sentence.⁶⁴

The Trial Chamber possesses wide sentencing discretion; evidenced by Rule 101 authorizing imprisonment for a term up to, and including the remainder of the defendant's life.⁶⁵ Furthermore, the Trial Chamber can take into account factors previously mentioned in Article 24 of the Yugoslavian Statute, as well as any aggravating circumstances, mitigating factors, general practices regarding prison sentences in the former Yugoslavian courts, and the extent to which the convicted person has already served a sentence for the same act in any state.⁶⁶

Finally, the Trial Chamber must also indicate whether multi-

61. *Id.*

62. Compare *id.* art. 23, with *Statute of the International Tribunal*, *supra* note 49, arts. 2-5.

63. See generally *Rules of Procedure and Evidence*, U.N. Doc. IT/32/Rev.6, (1995).

64. See *id.* rule 100.

65. See *id.* rule 101.

66. See *id.*

ple sentences shall be served consecutively or concurrently and whether to extend credit for any period of detainment pending surrender to the Tribunal or pending trial or appeal.⁶⁷ The Rules also cover the status of the convicted person, the place of imprisonment, the supervision of imprisonment, and the restitution of property.⁶⁸ Nonetheless, there are no provisions which provide sentencing guidelines for the various crimes listed.

b. The Conviction of Drazen Erdemovic

On November 29, 1996, an international court handed down the first sentence for a crime against humanity since the Nuremberg and Tokyo trials.⁶⁹ Many critics considered the sentence grossly disproportionate to the confessed crimes.

The defendant in the case was Drazen Erdemovic, a Croat serving with Bosnian Serb forces. Erdemovic confessed to personally killing between 10 and 100 civilians and to participating in 1,200 murders in over 5 hours.⁷⁰ In accordance with the rules of the Tribunal, the prosecutor submitted a brief regarding Erdemovic's sentencing.⁷¹ The brief initially stated that in determining an appropriate sentence for a convicted individual, the Trial Chamber must consider, *inter alia*, the gravity of the offense, the individual circumstances of the convicted person, any aggravating circumstances, any mitigating factors, and the general practice regarding prison sentences in the former Yugoslavia.⁷²

The prosecutor's brief highlighted the seriousness of the offenses and argued that the defendant's role in those offenses were aggravating circumstances.⁷³ Mitigating factors included obeying superior orders, duress, the defendant's intention to surrender to the tribunal, his confession and prompt guilty plea, his ongoing co-

67. *See id.*

68. *See id.* rules 102-05.

69. *See* Charles Trueheart, *Balkan War Crimes Court Imposes First Sentence; Hague Gives Croat Foot Soldier 10 Years*, WASH. POST, Nov. 30, 1996, at A13.

70. *See The International Criminal Tribunal Hands Down its First Sentence: 10 Years of Imprisonment for Drazen Erdemovic*, 1996 U.N. Press Release, U.N. Doc. GA/AB/3125 [hereinafter *International Criminal Tribunal*].

71. *See generally* Prosecutor's Brief on Aggravating and Mitigating Factors re: Drazen Erdemovic, *Prosecutor v. Erdemovic*, Sentencing Judgment of Trial Chamber 1 for International Tribunal, Case No. IT-96-22-T (Nov. 29, 1996) [hereinafter *Prosecutor's Brief*].

72. *See id.* at 2.

73. *See id.*

operation with the prosecutor's office, and his expression of remorse for his criminal conduct.⁷⁴

The prosecutor noted that many national jurisdictions used the concept of superior orders as a mitigating circumstance.⁷⁵ He cited both German and U.S. Military Codes with reference to superior orders and found that the success of this "defense" depended on several requirements.⁷⁶ It was the prosecutor's position that the accused must first be subordinately ranked within the military structure.⁷⁷ Second, the defendant must demonstrate ignorance of the illegality of the order.⁷⁸ Finally, the degree of military discipline in practice should be considered.⁷⁹ Although Article 7(4) of the Yugoslavian Statute allows the claim of superior orders to be considered in mitigation of punishment, the prosecutor stated that the orders to execute civilians were *prima facie* illegal.⁸⁰ The brief continued, however, to note that the defendant's low rank suggested greater pressure on him.⁸¹

Another mitigating factor considered by the prosecutor involved certain "common principles of duress."⁸² First, duress requires a threat of imminent danger posed by another person.⁸³ Next, the accused must not have been able to escape or otherwise avert the danger without committing the criminal offense.⁸⁴ Third, the defendant's choice to commit the crime must have been one that any reasonable person under similar circumstances would have chosen.⁸⁵ Finally, an accused forfeits the right to claim duress if he knowingly placed himself in a situation in which he could foreseeably commit a criminal offense.⁸⁶

The prosecutor also noted that in certain civil law countries, duress is a complete defense.⁸⁷ In common law countries, how-

74. *See id.* at 3-7.

75. *See id.* at 2.

76. *See id.* at 3.

77. *See id.*

78. *See id.*

79. *See id.*

80. *See id.*

81. *See id.*

82. *Id.*

83. *See id.*

84. *See id.*

85. *See id.*

86. *See id.* at 3-4.

87. *See id.* at 4.

ever, duress is not a defense but may be considered a mitigating factor at sentencing.⁸⁸ Although Mr. Erdemovic did not claim duress as a defense, the prosecutor suggested that it be considered as a factor to mitigate his sentence.⁸⁹

The prosecutor informed the tribunal as to which mitigating factors were recognized in both common law and civil law jurisdictions. These mitigating factors include surrendering to the authorities, confessing guilt, accepting responsibility, expressing remorse and contrition.⁹⁰ Cooperation with the authorities is also a strong factor to be considered in order to encourage others to cooperate.⁹¹

Following consideration of the prosecutor's brief of Erdemovic's case, the tribunal issued a summary of its judgment.⁹² The Justices reasoned that the superior orders doctrine—the only case contemplated in the statute—does not absolve the accused. At most, the doctrine mitigates the sentence if the tribunal deems it consistent with justice.⁹³

The tribunal looked for guidance on how the Nuremberg Tribunal distinguished between exculpatory duress which justified the crime, and duress which mitigated the sentence.⁹⁴ The justices concluded that justification on account of moral duress and necessity pursuant to an order from a superior would be allowed on a restricted basis.⁹⁵ If invoked, the acts would have to meet very rigorous criteria and be appreciated *in concreto*.⁹⁶ Moreover, the accused must have been placed in a situation beyond individual control.⁹⁷ The tribunal, exercising its "unfettered discretion," found the evidence did not fully exculpate the defendant.⁹⁸

The Trial Chamber stated that it was forced to address the scale of penalties that apply when an accused is found guilty of a crime against humanity, the principles governing sentencing, and

88. *See id.*

89. *See id.*

90. *See id.* at 4-5.

91. *See id.* at 5.

92. *See International Criminal Tribunal, supra* note 70.

93. *See* Prosecutor's Brief, *supra* note 71, at 2.

94. *See id.*

95. *See id.*

96. *See id.*

97. *See id.*

98. *See id.*

the actual enforcement of the sentence.⁹⁹ The justices admitted that the Yugoslavian Statute, the Report of the Secretary-General, and the Tribunal's Rules did not elaborate on the objectives sought by imposing such a sentence.¹⁰⁰ Accordingly, to identify them, the justices focused on the object of the International Tribunal itself.¹⁰¹ To this end, the tribunal recognized the objectives of the Security Council as: deterrence, reprobation, retribution, and collective reconciliation. All these goals aimed at restoring international peace and security in the former Yugoslavia.¹⁰² Other considerations included the declaration of the signatories of the London Charter indicating that the penalties were aimed at general deterrence and retribution.¹⁰³ The court therefore concluded that concepts of deterrence and retribution were the primary objectives of sentencing.¹⁰⁴ Furthermore, it insisted that reprobation was an appropriate purpose of punishment for a crime against humanity and the "stigmatization of the underlying criminal conduct."¹⁰⁵

As stated above, Erdemovic participated in the murder of 1200 unarmed civilians over a five hour period and was personally responsible for the murder of 10 to 100 people. Due to the mitigating circumstances in his case, including his low military rank, his willingness to cooperate with the tribunal, and his remorse,¹⁰⁶ Erdemovic was sentenced to only ten years imprisonment.¹⁰⁷

The Yugoslavian and the Rwandan Tribunals were not helpful in establishing specific sentencing guidelines for the proposed ICC. They did, however, espouse general sentencing principles, including a resistance against capital punishment. In addition, the factors identified by these tribunals to demonstrate mitigation and aggravation proved helpful. For further assistance in establishing suggested ICC sentencing guidelines, it is useful to examine the Court's draft statute and criminal code.

99. *See id.*

100. *See id.* at 4.

101. *See id.*

102. *See id.* at 5.

103. *See id.*

104. *See id.*

105. *Id.*

106. *See id.* at 9.

107. *See Truehart, supra* note 69.

3. Proposals for the ICC and an International Criminal Code

The United States actively participated in U.N. efforts to create a treaty proposal for the establishment of an ICC. The Draft Statute, however, provides little guidance for creating a solid sentencing and penalties structure.

The Draft Statute states that in the event of a conviction, the Trial Chamber shall hold a further proceeding to hear any evidence relevant to sentencing. This second proceeding allows the prosecutor and the defense to make submissions and to consider the appropriate sentence.¹⁰⁸ In reaching its decision, the Trial Chamber takes into account such factors as the gravity of the crime and the convict's individual circumstances.¹⁰⁹

Article 47 describes the applicable penalties. The ICC would have the authority to impose one or more of the following: a term of life imprisonment, imprisonment for a specified number of years, or a fine.¹¹⁰ The Draft Statute indicates the relevant factors in determining the length of a sentence. The ICC should look to the laws of: (1) the State of which the convicted person is a national; (2) the State where the crimes were committed; and (3) the State which had custody of and jurisdiction over the accused.¹¹¹ This represents the extent of the sentencing guidelines in the Draft Statute. As previously suggested, however, a basic structure of sentencing procedures reflecting all the major legal systems of the world is needed to avoid disparate punishment and to further establish a solid framework for international criminal law. For international criminal law to be valid it needs sentencing uniformity.

C. Proposed Crimes Under the ICC

The Draft Statute for an International Criminal Court states in Article 20 that the Court has jurisdiction over the following crimes: (1) genocide; (2) the crime of aggression; (3) serious violations of the laws and customs applicable in armed conflict; (4) crimes against humanity; and (5) crimes established under or pursuant to the treaty provisions listed in the Annex¹¹² that constitute

108. See *Draft Statute for an International Criminal Court: Report of the International Law on the Work of its Forty-sixth Session*, art. 46, U.N. Doc. A/49/355 (1994) [hereinafter *Draft Statute*].

109. See *id.*

110. See *id.* art. 47.

111. See *id.*

112. The Annex includes: (1) grave breaches of the Geneva Conventions; (2) unlawful

exceptionally serious crimes of international concern.¹¹³

The author currently proposes narrowly tailoring the proposed sentencing guidelines for those crimes which will likely be accepted by the potential contracting parties. Many nations support a conservative approach to the selection of crimes by initially limiting the Court's jurisdiction to genocide, war crimes and crimes against humanity. These nations advocate some type of mechanism that enables the State parties to include additional crimes at a later stage.¹¹⁴ Although some nations argue strongly for an expansive list of substantive crimes, many delegations have emphasized the importance of limiting the Court's subject matter jurisdiction to the most serious crimes concerning the entire international community.¹¹⁵

It is generally agreed that genocide will be included within the Court's jurisdiction.¹¹⁶ As to aggression, previously referred to as crimes against peace, several states strongly oppose its inclusion due to the difficulty in defining the crime and the potential sacrifice of the Court to political motivations.¹¹⁷ Crimes against humanity and war crimes, while also encountering debate as to their exact definitions, are generally regarded as meeting the criteria for inclusion.¹¹⁸ Many view the treaty-based crimes listed in the annex to be of lesser magnitude, inclusion of which could trivialize the court's stature.¹¹⁹

seizure of aircraft as per the Hague Convention; (3) crimes defined by Article 1 of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; (4) apartheid; (5) crimes Against Internationally-protected Persons; (6) hostage taking; (7) the Crime of Torture; (8) crimes defined by Article 3 of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; and (9) crimes involving illicit traffic in narcotic drugs and psychotropic substances. *See id.* at 30, 31.

113. *See id.* art. 20; *see also*, *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 50th Sess., Supp. No. 22, at 11, U.N. Doc. A/50/22 (1995) [hereinafter *Committee Report*].

114. *See Committee Report*, *supra* note 113, at 11.

115. *See id.*

116. *See id.* at 12.

117. *See id.* at 13.

118. *See id.* at 16.

119. *See id.* at 17.

III. DESCRIPTION OF THE ANALYTIC APPROACH AND METHOD FOR CONSTRUCTING THE PROPOSED SENTENCING GUIDELINES

The three crimes likely to be included in the ICC's jurisdiction are: genocide; crimes against humanity; and war crimes. These crimes, therefore, will be examined below.

The suggested guidelines are based upon a global representative study. Although this is an ambitious attempt for such a large area of study, several nations appear to reflect the major legal systems of the world as well as geographical and geopolitical realities. A concerted effort to ensure both consistency of data and regional representation is important. Thus, this comparative study examines the domestic law of twelve different legal systems: (1) the permanent members of the United Nations Security Council;¹²⁰ (2) one nation from Western Europe; (3) two nations from Asia; and (4) one nation each from South America, Eastern Europe, Africa and the Middle East.

The suggested guidelines are the arithmetic mean¹²¹ of sentences that would be imposed in the legal systems listed above. For example, the crime of genocide (or its closest counterpart) will be found in the laws of the represented countries. The minimum and maximum ranges will be averaged to provide a model sentencing guideline for the ICC.

The death penalty will be incorporated as a life sentence when found in domestic legislation.¹²² If the majority of nations authorize a life sentence for a particular crime, a life sentence becomes the proposed maximum for the ICC. When a life sentence is not the majority view as to either a minimum or maximum punishment, it will be treated as a prison term of fifty years. Sentence ranges for the enumerated crimes will be given in whole years. Sentences will, therefore, be rounded down when computed to be less than one-half of a year, and rounded up in the alternative. If a

120. The permanent members of the U.N. Security council are the United States, United Kingdom, France, China, and Russia. See U.N. CHARTER art. 23, para. 1.

121. A mean, or arithmetic average, is a statistical description of a set of scores. Simply put, the mean is the sum of all the scores divided by the total number of scores. See GEOFFREY R. LOFTUS & ELIZABETH F. LOFTUS, *ESSENCE OF STATISTICS* 84 (1982). In this study, the mean minimum sentence will be found by adding all the minimum sentences, and then by dividing by the total number of minimum sentences. The same process will be used for the maximum sentences.

122. This is due to the fact there is no international consensus on whether or not to accept the death penalty.

specific international crime is not found within a represented country's domestic laws, a section of the penal code will be selected which most closely approximates the substance of the international crime.

Three sentencing ranges will be proposed for the crime of genocide. The three sentencing ranges include genocide resulting in death, genocide not resulting in death, and a combination of attempted genocide and conspiracy to commit genocide.

Similarly, crimes against humanity and war crimes have been categorized into those resulting in murder, torture, rape, and forced abduction.

A. Laws Relative to Genocide

1. Laws of Different Countries

a. United States

The United States implemented 18 U.S.C.A. § 1091(a) to define the crime of genocide.

Whoever, whether in time of peace or in time of war, in a circumstance described in subsection (d) and with the specific intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such:

- (1) kills members of that group;
- (2) causes serious bodily injury to members of that group;
- (3) causes the permanent impairment of the mental faculties of members of the group, through drugs, torture, or similar techniques;
- (4) subjects the group to conditions of life that are intended to cause the physical destruction of the group in whole or in part;
- (5) imposes measures intended to prevent births within the group; or
- (6) transfers by force children of the group to another group; or attempts to do so, shall be punished as provided in subsection (b).¹²³

Section 1091(b) of Title 18 establishes that the punishment for

123. See 18 U.S.C.A. § 1091(a) (West Supp. 1997).

genocide resulting in death is capital punishment or life imprisonment, or a fine of not more than \$1,000,000 or both.¹²⁴ In any other case, the punishment for genocide not resulting in death is a fine of not more than \$1,000,000 or imprisonment for not more than twenty years, or both.¹²⁵ Anyone responsible for publicly inciting genocide shall be fined not more than \$500,000 or imprisoned for not more than five years, or both.¹²⁶

b. United Kingdom

The United Kingdom adopted the following Genocide Act:¹²⁷

(1) A person commits an offence of genocide if he commits any act falling within the definition of "genocide" in Article II of the Genocide Convention as set out in the Schedule to this act.

(2) A person guilty of an offence of genocide shall on conviction on indictment—

(a) if the offence consists of the killing of any person, be sentenced to imprisonment for life;

(b) in any other case, be liable to imprisonment for a term not exceeding fourteen years.¹²⁸

c. France

The crimes of genocide, attempted genocide and conspiracy to commit genocide are found in the French Penal Code at Article 211-1.¹²⁹

124. *See id.* § 1091(b).

125. *See id.*

126. *See id.* § 1091(c).

127. *See* Genocide Act, 1969, ch. 12, § 1 (Eng.).

128. *Id.*

129. *See* C. PÉN. [C. PÉN.] art. 211-1 (Fr.).

Constitue un génocide le fait, en exécution d'un plan concerté tendant à la destruction totale ou partielle d'un groupe national, ethnique, racial ou religieux, ou d'un groupe déterminé à partir de tout autre critère arbitraire, de commettre ou de faire commettre, à l'encontre de membres de ce groupe, l'un des actes suivants: attente volontaire à la vie; atteinte grave à l'intégrité physique ou psychique; soumission à es conditions d'existence de nature à entraîner la destruction totale ou partielle du groupe; mesures visant à entraver les naissances; transfert forcé d'enfants.

Le génocide est puni de la réclusion criminelle à perpétuité.

Id.

d. China

The Criminal Code of the People's Republic of China does not mention genocide. The crime of murder in Article 132 of the Criminal Code is the most analogous to genocide.¹³⁰

A person who intentionally kills another shall be sentenced to either the death penalty, life imprisonment or a fixed term imprisonment for not less than ten years, or under extenuating circumstances, to a fixed term imprisonment for not less than three years and nor more than ten years.¹³¹

This study uses Article 134 of the Chinese Criminal Code¹³² to compute a sentence for genocide not resulting in death. It reads:

A person who intentionally inflicts bodily injury upon another shall be sentenced to either fixed-term imprisonment for not more than three years or detention.

A person who commits a crime prescribed in the preceding paragraph and inflicts serious bodily injury upon another shall be sentenced to fixed-term imprisonment for not less than three years nor more than seven years¹³³

The Criminal Code does not establish specific sentencing for inchoate crimes. It is, therefore, not incorporated into the guideline for attempted genocide.¹³⁴

e. Russia

The Russian Criminal Code imparts differing degrees of punishment for genocide including the death penalty, a life sentence, or a term of twelve to twenty years imprisonment.¹³⁵ Consequently, the arithmetic mean analysis uses the life sentence for genocide which results in death and the term of years for genocide not resulting in death. The punishment for attempting a crime cannot exceed three-fourths of the maximum term of the substan-

130. See PENAL CODE [PEN. C.] art. 132 (P.R.C.).

131. See *id.*

132. See *id.* art. 134

133. *Id.*

134. Article 20 of the Chinese Criminal Code states in part "punishment for an attempted offender may be lighter than that for an accomplished offender or may be mitigated." See *id.* art. 20.

135. See PENAL CODE [Pen. C.] art. 357 (Rus.).

tive offense.¹³⁶ Thus, the crimes of conspiracy to commit genocide and attempted genocide follow this formulation.

f. Germany

Section 220a of the German Criminal Code penalizes the crime of genocide and is modeled after Article II of the Genocide Convention.¹³⁷ The penalty for genocide is life imprisonment, the most severe penalty in German criminal law.¹³⁸ A lesser penalty of five to fifteen years of imprisonment is applicable for genocide not resulting in death.¹³⁹ Under this section, conspiracy to commit genocide is punishable by three to fifteen years imprisonment.¹⁴⁰

g. Japan

The Criminal Code of Japan does not include a provision on genocide, so the crime of intentional homicide is substituted. Article 268 of the Japanese Penal Code states, "A person who kills another shall be punished by death or imprisonment for life or not less than five years."¹⁴¹ The sentences for genocide not resulting in death, attempted genocide, and conspiracy to commit genocide incorporate the Japanese provision on attempted murder. "A person who makes preparations with intent to violate Article 268 [intentional homicide] shall be punished by imprisonment for five years or less: Provided, that punishment may be remitted in light of circumstances."¹⁴²

h. Argentina

The Argentine Criminal Code provision pertaining to murder is used for genocide.¹⁴³ "Anybody who kills another shall be punished by imprisonment or jailing from eight to twenty-five years, unless otherwise is prescribed in this Code."¹⁴⁴ The sentences for the crimes of genocide not resulting in death, conspiracy to commit genocide, and attempted genocide follow the Attempt provision in

136. *See id.* art. 66.3.

137. *See* PENAL CODE [PEN. C.] art. 220 (F.R.G.).

138. *See id.*

139. *See id.* art. 220(a)(2).

140. *See id.* art. 30.

141. PENAL CODE [PEN. C.] art. 268 (Japan).

142. *Id.* art. 272.

143. *See* PENAL CODE [PEN. C.] art. 79 (Arg.).

144. *Id.*

the Argentinean Criminal Code. The Attempt provision provides that the punishment for the perpetrator of an attempt shall be one-third to one-half of the substantive crime.¹⁴⁵ Due to their severity, crimes of conspiracy and attempt to commit genocide use the one-half measure.

i. Romania

Although there have been substantive changes to the Penal Code of the Romanian Socialist Republic, the crime of genocide remained in the new title and code. Article 357 of the Penal Code states:

Genocide . . . is punishable by death and total confiscation of property or by fifteen to twenty years imprisonment, prohibition of the exercise of certain rights, and partial confiscation of property.

If the act is committed during wartime, the penalty is death and total confiscation of property.

An agreement for the purpose of committing the offense of genocide is punishable by five to fifteen years' imprisonment, prohibition of the exercise of certain rights, and partial confiscation of property.¹⁴⁶

j. Nigeria

The sentence for genocide follows the Nigerian Criminal Code section for murder, which states, "culpable homicide shall be punished with death."¹⁴⁷ Genocide not resulting in death as well as conspiracy and attempt to commit genocide are all treated as abetment to murder under the Nigerian Criminal Code. Article 85 states that:

Whoever (a) abets an offense, (b) if the act abetted is committed in consequence of the abetment and (c) no express provision is made by the [Penal] Code or any other law for the time being in force, shall be punished with the punishment provided for the offense.¹⁴⁸

145. See *id.* arts. 42, 44.

146. See PENAL CODE [PEN. C] art. 357 (Rom.).

147. See PENAL CODE [PEN. C.] art. 221 (Nig.).

148. *Id.* art. 85.

k. Afghanistan/Turkey

Although the Afghani Criminal Code does not include a section for genocide, Article 395 provides that a murderer shall be sentenced to death under certain conditions.¹⁴⁹ Following this provision, the sentence for genocide resulting in death is the death penalty.

The Turkish Criminal Code provides that an offense which is punishable by life imprisonment (as genocide has been concluded to be) requires a minimum time served of ten to fifteen years.¹⁵⁰

l. India/Korea

The Indian Criminal Code establishes that whomever commits murder shall be executed or sentenced to life imprisonment.¹⁵¹ The Korean Criminal Code section on conspiracy to commit murder establishes sentences for genocide not resulting in death, attempted genocide, and conspiracy to commit genocide. It states, "A person who makes preparations or conspires with intent to commit [murder] shall be punished by penal servitude for not more than ten years."¹⁵²

149. See PENAL CODE [PEN. C.] art. 395 (Afg.).

150. See PENAL CODE [PEN. C.] art. 61 (Turk.).

151. See PENAL CODE [PEN. C.] § 302 (India).

152. See PENAL CODE [PEN. C.] art. 255 (S. Korea).

2. Genocide Resulting in Death

United States:	Death Penalty or Life Imprisonment
United Kingdom:	Life Imprisonment
China:	Ten Years to Life
France:	Life Imprisonment
Russia:	Death Penalty or Life Imprisonment
Germany:	Life Imprisonment
Japan:	Death Penalty or Five Years to Life Imprisonment
Argentina:	Eight to Twenty-Five Years
Romania:	Death Penalty or Fifteen to Twenty Years
Nigeria:	Death Penalty
Afghanistan:	Death Penalty
India:	Death Penalty or Life Imprisonment

Proposed sentence: An individual who commits the crime of genocide resulting in death shall be sentenced to life imprisonment.

3. Genocide Not Resulting In Death

United States:	Not More Than Twenty Years Imprisonment
United Kingdom:	Not More Than Fourteen Years Imprisonment
China:	Three to Seven Years Imprisonment
France:	Life Imprisonment
Russia:	Twelve to Twenty Years Imprisonment
Germany:	Five to Fifteen Years Imprisonment
Japan:	Not More Than Five Years Imprisonment
Argentina:	Four to Thirteen Years Imprisonment
Romania:	Fifteen to Twenty Years Imprisonment
Nigeria:	Death Penalty
Turkey:	Ten to Fifteen Years Imprisonment
Korea:	Not More Than Ten Years Imprisonment

Proposed sentence: An individual who commits the crime of genocide not resulting in death shall be sentenced for twelve to twenty years imprisonment.

4. Conspiracy and Attempt to Commit Genocide

United States:	Not More Than Twenty Years Imprisonment
United Kingdom:	Not More Than Fourteen Years Imprisonment
China:	Not Applicable
France:	Life Imprisonment
Russia:	Nine to Fifteen Years Imprisonment
Germany:	Three to Fifteen Years Imprisonment
Japan:	Not More Than Five Years Imprisonment
Argentina:	Four to Thirteen Years Imprisonment
Romania:	Five to Fifteen Years Imprisonment
Nigeria:	Death Penalty
Turkey:	Ten to Fifteen Years Imprisonment
Korea:	Not More Than Ten Years Imprisonment

Proposed sentence: An individual guilty of conspiracy to commit genocide, or attempt to commit genocide shall be imprisoned for twelve to twenty years.

*B. Laws Relative to Crimes Against Humanity and War Crimes
Resulting in Death*

1. Laws of Different Countries

a. United States

There are no provisions in the United States Code for either the punishment of crimes against humanity or war crimes. Thus, the sentence for murder in the first degree, namely the death penalty or life imprisonment, was substituted for these crimes which result in death.¹⁵³

b. United Kingdom

The British penalty for murder, a life sentence, was used for the sentence of a war crime or crime against humanity resulting in death. The death penalty was abolished specifically by an Act of Parliament in 1965.¹⁵⁴ Consequently, a life sentence was incorporated for purposes of this study.

c. China

The Chinese Criminal Code provision for homicide, ten years to life, was used for war crimes or crimes against humanity resulting in death.¹⁵⁵

153. See 18 U.S.C.A. § 1111 (1984).

154. Abolition of Death Penalty Act, 1965 (Eng.).

155. See PEN. C. art. 132 (P.R.C.).

d. France

The French Penal Code has a specific provision for crimes against humanity, which includes murder. The French Code establishes the penalty as life imprisonment.¹⁵⁶

e. Russia

The Russian Criminal Code provision which penalizes murder was used for this section.¹⁵⁷

f. Japan

The Japanese Criminal Code provision pertaining to homicide was used for this section.¹⁵⁸

g. Germany

The German Code provision for penalizing murder was used as the sentencing guideline for war crimes and crimes against humanity resulting in death. The sentence for murder in Germany is life imprisonment.¹⁵⁹

h. Colombia

The Colombian Criminal Code Section for intentionally causing death, was used for this crime. Article 362 states that anyone who causes the death of another with the intent to kill shall be subject to penal servitude for eight to fourteen years.¹⁶⁰

156. C. PÉN art. 212-1 (Fr.). Specifically, the French provision for crimes against humanity states:

La deportation, la réduction en esclavage ou la pratique massive et systématique d'exécutions sommaires, d'enlèvements de personnes suivis de leur disparition, de la torture ou d'actes inhumains, inspirés par des motifs politiques, philosophiques, raciaux ou religieux et organisés en exécution d'un plan concerté é l'encontre d'un groupe de population civile sont punies de la réclusion criminelle à perpétuité.

Id.

157. See PEN. C. art. 105 (Russ.).

158. See PEN. C. art. 199 (Japan).

159. See PEN. C. § 211 (F.R.G.).

160. See PEN. C. art. 362 (Colom.).

i. Romania

The Romanian Criminal Code section covering murder was used for crimes against humanity or war crimes which result in death. It states that murder is punishable by ten to twenty years imprisonment.¹⁶¹

j. Nigeria

The section of the Nigerian Criminal Code penalizing murder was used for the sentencing guideline for this crime.¹⁶²

k. Afghanistan

The section of the Criminal Code of Afghanistan pertaining to murder was used for this crime.¹⁶³

l. India

The section of the Criminal Code of India pertaining to murder was used.¹⁶⁴

161. See PEN. C. art. 174 (Rom.).

162. See PEN. C. art. 221 (Nig.).

163. See PEN. C. art. 395 (Afg.).

164. See PEN. C. § 302 (India).

2. Crimes Against Humanity and War Crimes Resulting In Death

United States:	Death Penalty or Life Sentence
United Kingdom:	Life Imprisonment
China:	Ten Years To Life Imprisonment
France:	Life Imprisonment
Russia:	Six to Fifteen Years Imprisonment
Germany:	Life Imprisonment
Japan:	Three Years to Life Imprisonment or Death
Colombia:	Eight to Fourteen Years Imprisonment
Romania:	Ten to Twenty Years Imprisonment
Nigeria:	Death Penalty
Afghanistan:	Death Penalty
India:	Death Penalty or Life Imprisonment

Proposed sentence: An individual who commits a crime against humanity or a war crime resulting in death shall be sentenced to life imprisonment.

C. *Laws Relative To Torture As A Crime Against Humanity Or War Crime*

1. Laws of Different Countries

a. *United States*

Although the United States does not condemn torture as either a war crime or a crime against humanity, torture is specifically addressed in U.S. federal law.¹⁶⁵ It states:

Whoever outside the United States commits or attempts to commit torture shall be fined under this title or imprisoned not more than 20 years, or both, and if death results to any person from conduct prohibited by this subsection, shall be punished by death or imprisoned for any term of years or for life.¹⁶⁶

b. *The United Kingdom*

The crime of inflicting grievous bodily harm is used for the crime of torture. The law states, "whoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon another person . . . shall be liable to imprisonment for five years."¹⁶⁷

c. *China*

The Chinese Code Section relating to the intentional infliction of bodily harm on another was used for the crime of torture as well.¹⁶⁸

d. *France*

The French law on crimes against humanity specifically includes torture and accordingly is used for this crime.¹⁶⁹

165. See 18 U.S.C.A. § 2340A(a) (1996).

166. *Id.*

167. Offenses Against the Person Act 1861, 24 & 25 Vict., amended by Criminal Law Act, 1967, § 20 (Eng.).

168. See PEN. C. art. 134 (P.R.C.).

169. See C. PÉNAL art. 211-1 (Fr.).

e. Russia

The Russian Criminal Code includes torture as a specific offense punishable by up to three years imprisonment.¹⁷⁰ In addition, an aggravated torture offense provision was used for the proposed sentencing guidelines.¹⁷¹

f. Germany

Torture, if committed by an official in order to influence the conduct of a victim regarding criminal proceedings, may be punished by one to ten years of imprisonment under German law.¹⁷² Section 343 of the German Penal Code was utilized for this crime.

g. Japan

The section of the Japanese Penal Code regarding inflicting bodily injury on another was used for the crime of torture.¹⁷³ It states, “[a] person who inflicts a bodily injury upon another shall be punished with imprisonment at forced labor for not more than ten years or a fine of not more than five hundred yen or a minor fine.”¹⁷⁴

h. Argentina

Article 90 of the Argentine Criminal Code was the most analogous to torture, and thus used for this study. It states:

If permanent injury to the speech, to the health, or to any sense, organ, or member of the victim results, or if the life of the victim is placed in jeopardy, or if he is made incapable of engaging in his work for more than a month or if a permanent deformation of his face is caused, the punishment shall be by imprisonment or jailing from one to six years.¹⁷⁵

170. See PEN. C. art. 117 (Russ.).

171. See *id.*

172. See PEN. C. § 343 (F.R.G.).

173. See PEN. C. art. 204 (Japan).

174. *Id.*

175. PEN. C. art. 90 (Arg.).

i. Romania

The Romanian Criminal Code addresses offenses against peace and mankind in Article 358 of Title XI. Article 358 is entitled Inhuman Treatment. This article incorporates traditional war crime protections, and states that “[t]orturing, mutilating, or exterminating the persons mentioned . . . is punishable by death and total confiscation of property, or by fifteen to twenty years’ imprisonment”¹⁷⁶ As extermination is not contemplated by this crime, the lesser sentence is employed for purposes of the guidelines.

j. Uganda

Article 209 of the Ugandan Criminal Code states, “any person who, with intent to maim, disfigure or disable any person or to do some grievous harm to any person . . . unlawfully wounds or does any grievous harm . . . is liable to imprisonment for life.”¹⁷⁷

k. Turkey

Article 456 of the Turkish Penal Code was used for the crime of torture. It covers aggravated battery which “causes the victim to suffer a mental or bodily sickness.”¹⁷⁸

l. Korea

The Korean Criminal Code pertaining to aggravated bodily injury was used for the crime of torture.¹⁷⁹

176. PEN. C. art. 358 (Rom.).

177. PEN. C. art. 209 (Uganda).

178. PEN. C. art. 456 (Turk.).

179. See PEN. C. art. 258 (S. Korea).

2. Torture as a Crime Against Humanity or as a War Crime

United States:	Not More Than Twenty Years Imprisonment
United Kingdom:	Not More Than Five Years Imprisonment
China:	Three to Seven Years Imprisonment
France:	Life Imprisonment
Russia:	Three to Seven Years Imprisonment
Germany:	One to Ten Years Imprisonment
Japan:	Not More Than Ten Years Imprisonment
Argentina:	One to Six Years Imprisonment
Romania:	Fifteen to Twenty Years Imprisonment
Uganda:	Liable to Life Imprisonment
Turkey:	Five to Ten Years Imprisonment
Korea:	One to Ten Years Imprisonment

Proposed sentence: An individual who commits the crime of torture as a crime against humanity or a war crime shall be imprisoned for seven to seventeen years.

D. Laws Relative to Rape as a Crime Against Humanity or War Crime

1. Laws of Different Countries

a. United States

The penalty as found in the United States Code for rape was used for this section.¹⁸⁰

b. The United Kingdom

Rape is punishable in the United Kingdom by life imprisonment.¹⁸¹

c. China

The Chinese Criminal Code section addressing rape was used.¹⁸²

d. France

Although the French provision addressing crimes against humanity does not specifically include rape, it does speak to inhumane treatment.¹⁸³ This provision, was used for this section.

e. Russia

The Russian Criminal Code section addressing rape establishes the penalty as three to six years imprisonment.¹⁸⁴ In addition, the Code includes another sentence for repeated rapes which was used for this study.¹⁸⁵

f. Germany

The German Criminal Code section addressing rape was used.¹⁸⁶

180. See 18 U.S.C.A. § 2242 (1997).

181. See The Criminal Justice and Public Order Act, 1994, § 142 (Eng.); Table of Offenses, pt. 1, sec. 37.

182. See PEN. C. art. 139 (P.R.C.).

183. See C. PEN. art. 212-1 (Fr.).

184. See PÉN. C. art. 131.1 (Russ.).

185. See *id.* art. 131.2.

186. See PEN. C. § 177 (F.R.G.).

g. Japan

The Japanese Criminal Code provision penalizing rape was used.¹⁸⁷

h. Colombia

The Colombian Criminal Code provision penalizing rape was used.¹⁸⁸

i. Poland

The Polish Criminal Code provision penalizing rape was used.¹⁸⁹

j. Uganda

The Ugandan Criminal Code provision penalizing rape was used.¹⁹⁰

k. Afghanistan

The Afghani Criminal Code provision penalizing rape was used.¹⁹¹

l. India

The Indian Criminal Code provision penalizing rape was used.¹⁹²

187. See PEN. C. art. 177 (Japan).

188. See PEN. C. art. 316 (Colom.).

189. See PEN. C. art. 168 (Pol.).

190. See PEN. C. art. 118 (Uganda).

191. See PEN. C. art. 429 (Afg.).

192. See PEN. C. art. 376 (India).

2. Rape as a Crime Against Humanity or as a War Crime

United States:	Not More Than Twenty Years Imprisonment
United Kingdom:	Life Imprisonment
China:	Three to Ten Years Imprisonment
France:	Life Imprisonment
Russia:	Four to Ten Years Imprisonment
Germany:	Two to Fifteen Years Imprisonment
Japan:	Not Less Than Two Years Imprisonment
Colombia:	Two to Eight Years Imprisonment
Poland:	Not Less Than Three Years Imprisonment
Uganda:	Liable to Death Penalty
Afghanistan:	Not More Than Seven Years Imprisonment
India:	Not More Than Ten Years Imprisonment

Proposed sentence: An individual who commits the crime of rape as a crime against humanity or a war crime, shall be imprisoned for ten to twenty-eight years.

E. Laws Relative to Crimes Against Humanity or War Crimes Not Resulting in Death, to Include Forced Abduction

1. Laws of Different Countries

a. United States

The United States Code pertaining to kidnapping was used for this section.¹⁹³

b. United Kingdom

The United Kingdom provision establishing the punishment for kidnapping was used.¹⁹⁴

c. France

The French Penal Code section addressing crimes against humanity also includes the forced abduction offense and was used for this section.¹⁹⁵

d. China

The Chinese Criminal Code establishes the following punishment for kidnapping: "Unlawful incarceration of a person or illegal deprivation of personal freedom by other means shall be strictly prohibited. A person who violates this prohibition shall be sentenced to either fixed-term imprisonment for not more than three years, detention or deprivation of political rights"¹⁹⁶

e. Russia

The Russian Code criminalizes the use of banned means and methods of warfare to include deportation.¹⁹⁷

f. Switzerland

Article 109 of the Swiss Military Penal Code states that whoever acts contrary to the provisions of any international agreement governing the law of war or the protection of persons and goods, or whoever acts in violation of any other recognized law or custom

193. See 18 U.S.C.A. § 1202. (West Supp. 1997)

194. See Family Law Reform Act, 1987, § 1 (Eng.).

195. See C. PÉN. art. 212-1 (Fr.).

196. See PÉN. C. art. 143 (P.R.C.).

197. See PÉN. C. art. 356.1 (Russ.).

of war shall be imprisoned for one to twenty years.¹⁹⁸

g. Japan

The punishment for kidnapping is found in Article 225 of the Japanese Penal Code.¹⁹⁹

h. Romania

Article 358 of the Romanian Code protects the "wounded or sick, members of the civilian health staff, Red Cross, or organizations similar to the latter, or castaways, war prisoners, or generally any person who has fallen to the enemy's power" from being deported, dislocated or deprived of freedom without legal foundation.²⁰⁰

i. Colombia

Article 293 of the Colombian Penal Code establishes the punishment for kidnapping.²⁰¹

j. Nigeria

Nigerian law establishes that, whoever kidnaps or abducts any person in order that such person may be killed or may be so disposed of as to be put in danger of being killed, shall be punished with imprisonment for a term which may extend to fourteen years and shall also be liable for a fine.²⁰²

k. Afghanistan

Article 422 of the Afghani Penal Code establishes the punishment for the crime of kidnapping.²⁰³

l. South Korea

The South Korean Penal Code contains the following provision: "A person who makes a false arrest or imprisonment of another, thereby treating him cruelly, shall be punished by penal servitude for not more than seven years."²⁰⁴

198. See MIL. PENAL CODE [M. PEN. C.] 109 (Switz.).

199. See PEN. C. art. 225 (Japan).

200. See PEN. C. 358 (Rom.).

201. See PEN. C. art. 293 (Colom.).

202. See PEN. C. § 274 (Nig.).

203. See PEN. C. art. 422 (Afg.).

204. PEN. C. art. 277 (S. Korea).

2. Crimes Against Humanity or War Crimes Not Resulting in Death Including Forced Abduction or Wrongful Imprisonment

United States:	Any Term of Years or Life Imprisonment
United Kingdom:	Not Exceeding Seven Years Imprisonment
China:	Not More Than Three Years Imprisonment
France:	Life Imprisonment
Russia:	Not More Than Twenty Years Imprisonment
Japan:	One to Ten Years Imprisonment
Switzerland:	One to Twenty Years Imprisonment
Colombia:	One to Seven Years Imprisonment
Romania:	Five to Fifteen Years Imprisonment
Nigeria:	May Extend to Fourteen Years Imprisonment
Afghanistan:	Three to Five Years Imprisonment
Korea:	Not More Than Seven Years Imprisonment

Proposed sentence: An individual who commits a crime against humanity or a war crime that includes forced abduction or wrongful imprisonment shall be imprisoned for one to seventeen years.

IV. CONCLUSION

The creation of an international criminal court is a unique opportunity to advance justice, prevent future acts of cruelty, and promote peace. The establishment of fair and consistent international criminal sentencing guidelines will be a significant contribution to these worthy goals.