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REFORMING THE SENTENCING REGIME FOR THE MOST SERIOUS CRIMES OF CONCERN: THE INTERNATIONAL CRIMINAL COURT THROUGH THE LENS OF THE LUBANGA TRIAL

INTRODUCTION

The International Criminal Court has never been more important than it is today; especially considering the upcoming trial of President Kenyatta of Kenya, charges against individuals who worked with Muammar Gaddafi, and a warrant of arrest for Joseph Kony of the Lords Resistance Army.¹ Governed by the Rome Statute, the International Criminal Court (“ICC” or “Court”) has become a true judicial force in the world and “is the first permanent, treaty based, international criminal court established to help end impunity for the perpetrators of the *most serious crimes* of concern to the international community.”² Established in 2002,³ the Court did not hear its first case until 2008 in the trial of Thomas Lubanga Dyilo (“Lubanga”), a Congolese warlord accused of the war crimes of conscripting and enlisting children under the age of fifteen and using them to actively participate in hostilities.⁴ On March 14, 2012, a guilty verdict was returned for Lubanga and consequently, on July 10, 2012, Lubanga was the first person ever sentenced by the ICC.⁵ The Lubanga trial granted the ICC the chance to set a strong precedent in its sentencing jurisprudence. However, instead of sending a clear message to other

1. *Situations and Cases*, INT’L CRIMINAL COURT, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx.

2. *About the Court*, INT’L CRIMINAL COURT, <http://www.icc-cpi.int/Menus/ICC/About+the+Court> (last visited Sept. 18, 2012) (emphasis added).

3. *Id.*

4. Marlise Simons, *International Court Begins First Trial*, N.Y. TIMES, Jan. 27, 2009, at A10; Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment Hearing, 12 (Mar. 14, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1380068.pdf>.

5. *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Judgment Hearing, at 12.

grave offenders, the ICC sentenced Lubanga to only the minimum required by statute.⁶

International criminal tribunals have often been plagued by inconsistency and leniency in sentencing.⁷ With the ICC's first case and sentencing, a true legal lens has been provided to evaluate similar shortcomings of the Court's statutory sentencing guidelines. This Note explores the ICC's statutory sentencing guidelines in the wake of the *Lubanga* trial and argues that in its attempt to build from the tribulations of prior international tribunals, the ICC has unfortunately failed to consider penal theories and to set forth the appropriate penalty framework for those convicted of the most serious international crimes. Specifically, when mitigating factors that decrease the sentence require less proof than aggravating factors,⁸ the resulting sentence is increasingly lenient, especially because there are no mandatory minimums to counteract this effect. Hence, the ICC is wrongly governed by a thirty-year maximum sentence as opposed to mandatory minimum sentences, as it inadequately balances mitigating and aggravating factors, and ignores guidance from the complementary laws of the nations involved.

Part I provides background pertaining to the Rome Statute, the jurisdiction of the ICC, and the crimes committed by Lubanga. Part II provides a comparative overview of other international tribunals, the United States Federal Sentencing Guidelines, and the theories of punishment as applied in sev-

6. See Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute]. Article 78(3) states that the imprisonment sentence "shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment." *Id.* art. 78(3).

7. See Andrew N. Keller, *Punishment for Violations of International Criminal Law: An Analysis of Sentencing at the ICTY and ICTR*, 12 IND. INT'L & COMP. L. REV. 53, 57-74 (2001); Jennifer J. Clark, Note, *Zero to Life: Sentencing Appeals at the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 96 GEO. L.J. 1685, 1707 (2008); Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U.L. REV. 539, 554 (2005).

8. See Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Hearing to Deliver the Decision, 4 (July 10, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1440143.pdf>. As explored later in Part II, mitigating factors must be proved by a balancing of the probabilities, whereas aggravating factors must be proved beyond a reasonable doubt. *Id.*

eral domestic sentencing regimes. Part III applies the punishment theories to the ICC to analyze how the thirty-year maximum sentence, joint sentence limitations, and inadequate balance of mitigating and aggravating factors ultimately frustrate any potential penal justifications for the ICC's sentencing practices. Part IV considers the failure of the Rome Statute to include deference to domestic laws as an additional guiding mechanism. Finally, Part V recommends that the thirty-year maximum sentence should be abolished, mitigating and aggravating factors should require the same standard of proof, and deference should be given to the laws of the nation that was harmed by the crime.

I. BACKGROUND

A. Establishment and Purpose of the International Criminal Court

The ICC is seen as “the culmination of international efforts to replace impunity with accountability.”⁹ The establishment of an international criminal court had periodically been considered since the 1948 General Assembly meeting of the United Nations.¹⁰ Following World War II, the world witnessed the Nuremberg trials, the first attempt at international prosecution and criminal accountability for the crimes of the Holocaust.¹¹ However, it was not until the early 1990s that the International Criminal Tribunal for Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”) were

9. Anna Triponel & Stephen Pearson, *African States and the International Criminal Court: A Silent Revolution in International Criminal Law*, 12 J.L. & SOC. CHALLENGES 65, 66 (2010).

10. *Establishment of an International Criminal Court*, U.N. TREATY COLLECTION, <http://legal.un.org/icc/general/overview.htm> (last visited Oct. 29, 2013). Following the Holocaust, genocide was a dominant international concern. *Id.* This concern led many states to adopt the Convention on the Prevention and Punishment on the Crime of Genocide. *Id.* Additionally, the General Assembly issued a resolution stating that “[r]ecognizing that at all periods of history genocide has inflicted great losses on humanity; and being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required.” *Id.*

11. Andrew Dubinsky, Note, *An Examination of International Sentencing Guidelines and a Proposal for Amendments to the International Criminal Court's Sentencing Structure*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 609, 617–18 (2007).

created to deal with the mass genocides of these respective regions.¹² The international attention that was rendered by these tribunals, and the realization that mass atrocities continued throughout the world, finally fueled the creation of the ICC.¹³

In 1998, the General Assembly convened in Rome, Italy for over a month “to finalize and adopt a convention on the establishment of” the ICC.¹⁴ The statute establishing and governing the ICC, entitled the Rome Statute, went into effect on July 1, 2002 after ratification by the necessary sixty states.¹⁵ The ICC was seen as the “missing link in the international legal system.”¹⁶ Unlike the International Court of Justice at The Hague, which handles civil cases between states, the ICC would deal with individual criminal liability as an “enforcement mechanism” against human rights violations that often go unpunished.¹⁷

B. Bringing Perpetrators of International Crimes before the ICC: The Rome Statute, Jurisdiction, and Sentencing Guidelines

The Rome Statute is divided into thirteen parts ranging from the establishment of the Court and its jurisdiction, to the investigation, trial, penalties, appeals, and enforcement of the Court.¹⁸ The thirteen parts, in total, contain the 128 articles

12. *Id.* at 610–13.

13. *Establishment of an International Criminal Court*, *supra* note 10.

14. *Id.*

15. Alicia Mazurek, Note, *Prosecutor v. Thomas Lubanga Dyilo: The International Criminal Court as It Brings Its First Case to Trial*, 86 U. DET. MERCY L. REV. 535, 536 (2009).

16. *Establishment of an International Criminal Court*, *supra* note 10.

17. *Id.* Another key difference between the International Court of Justice (“ICJ”) and the International Criminal Court (“ICC” or “Court”) is the compulsory nature of the courts. See M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 IND. INT’L & COMP. L. REV. 1, 14 (1991). Since the ICJ only hears civil disputes between states, and never between individuals of different states, there are unique political sensitivities that arise. *Id.* This is why the ICJ provides member states “the choice of compulsory or voluntary submission to jurisdiction.” *Id.* However, since the ICC has jurisdiction over individuals, political sensitivities are of a “much lesser nature.” *Id.*

18. Rome Statute, *supra* note 6. The statute is specifically divided as follows: Establishment of the Court; Jurisdiction, Admissibility and Applicable Law; General Principles of Criminal Law; Composition and Administration of the Court; Investigation and Prosecution; The Trial; Penalties; Appeal and

that govern the ICC.¹⁹ Article 3 establishes the seat of the Court at The Hague in the Netherlands, and later Article 62 sets forth the seat of the Court as the place of trial, unless otherwise decided.²⁰

The Rome Statute establishes the structure of the ICC through the judicial divisions, the Presidency, the Office of the Prosecutor, and the Registry.²¹ There are currently eighteen judges who are divided amongst the three judicial divisions of Pre-trial, Trial, and Appeals.²² Three judges are elected to make up the presidency and are responsible for the proper administration of the Court.²³ The Office of the Prosecutor acts as an independent and separate organ of the Court and is “responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court.”²⁴ Finally, the Registry handles administrative and “non-judicial aspects” of the ICC.²⁵ Other “semi-autonomous offices . . . fall under the Registry for administrative purposes,” including the Office of Public Counsel for Victims, and the Office of Public Counsel for Defense.²⁶

1. Jurisdiction

The Rome Statute sets forth crimes within the jurisdiction of the Court, as well as how individual criminal acts may fall within the jurisdiction of the Court.²⁷ The most serious crimes of concern to the international community are defined in Arti-

Revision; International Cooperation and Judicial Assistance; Enforcement; Assembly of States Parties; Financing; and Final Clauses. *Id.*

19. Rome Statute, *supra* note 6.

20. *Id.* art. 3, 62.

21. *Id.* art. 34.

22. *Id.* art. 39; *Structure of the Court*, INT’L CRIMINAL COURT, http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/Pages/structure%20of%20the%20court.aspx (last visited Dec. 18, 2012).

23. Rome Statute, *supra* note 6, art. 38; *Structure of the Court*, *supra* note 22.

24. Rome Statute, *supra* note 6, art. 15; *Structure of the Court*, *supra* note 22.

25. Rome Statute, *supra* note 6, art. 43; *Structure of the Court*, *supra* note 22.

26. *Structure of the Court*, *supra* note 22.

27. Rome Statute, *supra* note 6, arts. 12–13.

cle 5, which grants the Court jurisdiction over international disputes, including crimes of genocide, crimes against humanity, war crimes, and the crime of aggression.²⁸ However, even for individuals who committed these crimes, there are still several preconditions that must be satisfied before the ICC has jurisdiction over a case.

The first hurdle that must be overcome for jurisdiction is ratification of the Rome Statute.²⁹ Once a state ratifies the Rome Statute, it grants the ICC jurisdiction over two types of individuals: first, citizens of that state, and second, any noncitizen who commits an Article 5 crime within that state.³⁰ In effect, the ICC may have jurisdiction over citizens of nonmember states and this remains a controversial issue.³¹ One such controversy includes the United States, which has not ratified the Rome Statute, but has enacted legislation in an attempt to avoid jurisdiction of the ICC over its citizens who commit Article 5 crimes in other states.³²

The second hurdle that must be overcome for the ICC to exercise jurisdiction is the precondition of “complementarity.”³³ The principle of “complementarity” requires that states “utilize the Court only as a last resort, after first attempting to litigate ICC

28. Rome Statute, *supra* note 6, art. 5. The specific crime that Thomas Lubanga Dyilo is charged with is found in Article 8 where war crimes are defined. As defined in Article 8(2)(b)(xxvi), “war crimes” means “[o]ther serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: . . . [c]onscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.” *Id.* art. 8(2)(b)(xxvi).

29. Rome Statute, *supra* note 6, art. 12.

30. *See id.* art. 12–13; BARRY E. CARTER & ALLEN S. WEINER, INTERNATIONAL LAW 1141, 1145 (6th ed. 2011).

31. *See* CARTER & WEINER, *supra* note 30, at 1145–47.

32. *Id.* at 1142–45. In 2002, the U.S. Congress passed the American Service-Members’ Protection Act, “which barred the United States from cooperating with the ICC.” *Id.* at 1142. “The law also . . . authorized the President to use ‘all means necessary and appropriate to bring about the release’ of Americans held by or for the ICC.” *Id.* Other states have taken issue with these objections, finding them misconstrued and unnecessary because other procedural safeguards, such as the prerequisites to jurisdiction, remain in place. *Id.* at 1143.

33. Rome Statute, *supra* note 6, pmb. The preamble states, “the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.” *Id.*

crimes domestically in their local courts.”³⁴ It is *only after* the state is “unwilling or unable” to charge the individuals who violated Article 5 in their own domestic courts that the ICC may exercise jurisdiction over the case.³⁵

After the state is “unwilling or unable,” there are several ways that the ICC Prosecutor may become aware of and investigate a claim. First, a state party may refer a situation to the ICC Prosecutor.³⁶ Second, the Security Council of the United Nations may also choose to refer a situation to the ICC Prosecutor.³⁷ And third, the ICC Prosecutor may investigate on its own initiative based on any other information it has received.³⁸ Regardless of the means used to initiate an investigation, so long as the matter involves a potential defendant who is either a citizen of a state party, or committed the Article 5 crime in the territory of a state party, the ICC may accept the case.³⁹ Hence, with 122 state parties to the ICC, a necessary system has been established for referring situations to the ICC Prose-

34. Triponel & Pearson, *supra* note 9, at 67.

35. *Id.* A sham trial conducted by a state would not satisfy this requirement, and the state would be deemed unwilling or unable to prosecute the case. CARTER & WEINER, *supra* note 30, at 1143.

36. Rome Statute, *supra* note 6, art. 14. Also note that “situation” is the general terminology used for any matter that may result in a potential case. See Press Release, Office of the Prosecutor, Int’l Criminal Court, Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo (Apr. 19, 2004), available at http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/press%20releases/Pages/prosecutor%20receives%20referral%20of%20the%20situation%20in%20the%20democratic%20republic%20of%20congo.aspx. For example, in Lubanga’s case, the President of the DRC initially sent a letter to the Prosecutor of the ICC “referring to him the situation of crimes within the jurisdiction of the Court allegedly committed anywhere in the territory of the DRC since the entry into force of the Rome Statute.” *Id.* Hence, this falls within a state party referring the “situation” to the Prosecutor to further investigate and determine if one or more persons should be charged with such crimes. *Id.* In comparison, for the more recent “situation” involving the Republic of Kenya, the Prosecutor submitted a request to Kenya to begin an investigation on its own initiative. Situation in the Republic of Kenya, Case No. ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 4 (Mar. 31, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf>.

37. Rome Statute, *supra* note 6, art. 13.

38. *Id.* art. 15.

39. *Id.* art. 13–15.

culator where the state was “unable or unwilling” to investigate.⁴⁰

2. Sentencing Guidelines

Sentencing guidelines are contained in Part 7 of the Rome Statute, with applicable penalties and the determination of sentences addressed in Articles 77 and 78, respectively.⁴¹ According to Article 77, a person convicted of an Article 5 crime may face “[i]mprisonment for a specified number of years which may not exceed a maximum of 30 years” or “[a] term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances”⁴² This is not “an elaborate or specific set of sentencing guidelines [but] rather . . . a vague general description of potential punishments.”⁴³

Article 78 continues with guidelines for determining the sentence, such as in the sentencing of a person convicted of more than one crime. As specified in Article 78(3),

40. Triponel & Pearson, *supra* note 7, at 67–72; *see also About the Court, supra* note 2.

41. *Id.* art. 77–78. This Note will not explore the penalty provisions of the Rome Statute that refer to fines and forfeiture in Article 77(2)(a), and the establishment of a trust fund by Article 79. *Id.* arts. 77, 79. For additional information on these provisions and the Victim’s Trust Fund, see Linda M. Keller, *Seeking Justice at the International Criminal Court: Victims’ Reparations*, 29 T. JEFFERSON L. REV. 189 (2007); *see also* Peter G. Fischer, *The Victims’ Trust Fund of the International Criminal Court—Formation of a Functional Reparations Scheme*, 17 EMORY INT’L L. REV. 187 (2003), for an analysis of the history of victim’s rights and policy considerations for the ICC Victims’ Trust Fund.

42. Rome Statute, *supra* note 6, art. 77. Additionally, this sentencing guideline is somewhat reiterated in Article 78(1), stating, “[i]n determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.” *Id.* art. 78(1). In the ICC Rules of Procedure and Evidence, Rule 145(3) additionally states that “life imprisonment may be imposed when justified by the extreme gravity of the crime and the individual circumstances of the convicted person, as evidenced by the existence of one or more aggravating circumstances.” Int’l Criminal Court, *Rules of Procedure and Evidence*, at 55, Official Records No. ICC-ASP/1/3 (2002), available at http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/official%20journal/Documents/RulesProcedureEvidenceEng.pdf [hereinafter *Rules of Procedure and Evidence*].

43. Dubinsky, *supra* note 11, at 617.

[T]he Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life imprisonment in conformity with article 77⁴⁴

Under Article 78(2), the Court must deduct from the sentence any previous time spent in detention in accordance with an order of the Court, and may also deduct any time spent in detention in connection with the crime.⁴⁵

Article 78(1) requires that in its sentencing procedures, the ICC refer to the ICC Rules of Procedure and Evidence, which set forth a wide-range of circumstances that the Court must also consider.⁴⁶ First, Article 78(1) requires that the “gravity of the crime and individual circumstances of the convicted person” be weighed into the sentencing decision.⁴⁷ Additionally, Rule 145 proscribes a non-exhaustive list of mitigating and aggravating circumstances that must be balanced.⁴⁸ Mitigating circumstances include, but are not limited to, “diminished mental capacity,” duress, or the “person’s conduct after the act.”⁴⁹ Alternatively, aggravating circumstances may include, but are not limited to, prior criminal convictions, abuse of power, particularly defenseless victims, “particular cruelty,” and “any motive involving discrimination.”⁵⁰ The standard of proof for such circumstances is not established in the Rome Statute or the

44. Rome Statute, *supra* note 6, art. 78(3).

45. *Id.* art. 78(2).

46. *Id.* art. 78(1).

47. *Rules of Procedure and Evidence*, *supra* note 42. The Rules of Procedure and Evidence provide additional considerations beyond the Rome Statute. For example, according to Rule 145(1)(c),

In addition to the factors mentioned in article 78, paragraph 1, give consideration, *inter alia*, to the extent of the damage caused, in particular the harm caused to the victims and their families, the nature of the unlawful behaviour and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner, time and location; and the age, education, social and economic condition of the convicted person.

Id.

48. *Id.*

49. *Id.*

50. *Id.*

Rules of Procedure and Evidence, leaving such discretion to the ICC.⁵¹ The ICC has currently set the standard of proof for aggravating circumstances as proof beyond a reasonable doubt, whereas mitigating circumstances are determined by the balancing of probabilities,⁵² also known as preponderance of the evidence.⁵³ Overall, the Rome Statute provides the foundation for the ICC and helps states understand what types of conflicts

51. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Hearing to Deliver the Decision, 4 (July 10, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1440143.pdf>.

52. It is crucially important to understand the difference in the standards of proof that the ICC has instituted for aggravating and mitigating factors. *Id.* First, proof beyond a reasonable doubt is the highest standard of proof, and has been viewed by the U.S. Supreme Court as “designed to exclude as nearly as possible the likelihood of an erroneous judgment.” Etan Mark & Monica F. Rossbach, *Que Rico? Discarding the Fallacy That Florida Rico and Federal Rico Are Identical*, 86 FLA. B.J. 10, 12 (Jan. 2012) (citing *Santosky v. Kramer*, 455 U.S. 745, 755 (1982)). In contrast, balancing of the probabilities, also known as the preponderance of the evidence, has been recognized as indicating “society’s ‘minimal concern with the outcome.’” *Id.* In other words, whereas proof beyond a reasonable doubt entails overwhelming evidence, balancing of the probabilities only requires “51%” likelihood, or that “more evidence supports the finding than contradicts it.” Stephen Wilkinson, *Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions*, GENEVA ACAD., available at <http://www.geneva-academy.ch/docs/Standards%20of%20proof%20report.pdf>. If the ICC wanted to avoid requiring too much proof for aggravating factors, they could have elected for a middle standard of proof such as “clear and convincing evidence.” *Id.* The burden for clear and convincing evidence requires “very solid support,” which is around a “60%” likelihood that the evidence “supports the finding.” *Id.* In choosing the standard of proof beyond a reasonable doubt for aggravating circumstances, and balancing of the probabilities for mitigating circumstances, the ICC chose standards of proof that were as far apart on the spectrum as possible. *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Hearing to Deliver the Decision, at 4. Hence, the ICC made it very easy for mitigating circumstances to lessen a sentence, and very difficult for aggravating circumstances to increase the sentence. *Id.*

53. *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Hearing to Deliver the Decision, at 4. Based on the Rome Statute, the only way a sentence would go beyond thirty years is if there were aggravating circumstances. *See* Rome Statute, *supra* note 6, art. 77. However, aggravating circumstances cannot be factors already considered in the crime itself that must also be proved beyond a reasonable doubt. *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Hearing to Deliver the Decision, at 4. It is difficult to hypothesize where an “aggravating factor” would be proved beyond a reasonable doubt and not be charged as a crime itself. This is further analyzed in Part III of this Note.

may fall within the ICC's jurisdiction, as well as the factors that are relevant to its sentencing decisions.

C. The First Sentencing: The Prosecutor v. Thomas Lubanga Dyilo

1. Background on Thomas "Lubanga" Dyilo

The first ever trial and sentence by the ICC was related to Lubanga's leadership role in the Forces Patriotiques pour la Liberation du Congo ("FPLC"), a military wing of the Union of Congolese Patriots (also known as Union des Patriotes Congolais, or "UPC") in the Democratic Republic of the Congo ("DRC").⁵⁴ Lubanga's abuse of his UPC leadership role would ultimately lead him to face charges and a conviction for the criminal acts he committed in the DRC.⁵⁵

The DRC, formerly known as Zaire, is a country known for its rich mineral wealth.⁵⁶ The natural resources of the DRC, and the wars in neighboring Rwanda and Uganda, have often caused the DRC to be plagued by conflict.⁵⁷ Specifically in 1996, and again in 1998, the DRC was invaded by neighboring Rwanda and Uganda; these nations claimed to be fighting against their own rebels who had taken refuge in the DRC.⁵⁸ The conflict intensified in 2000 when local interethnic conflicts began to brew within the wider context of the DRC war.⁵⁹ Interethnic conflicts increased between the Hema and Lendu

54. Mazurek, *supra* note 15, at 540–46.

55. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment Hearing, 1–7, 12 (Mar. 14, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1380068.pdf>.

56. Mazurek, *supra* note 15, at 540.

57. *Id.* at 540–41.

58. Timothy B. Reid, *Killing Them Softly: Has Foreign Aid to Rwanda and Uganda Contributed to the Humanitarian Tragedy in the DRC?*, 1 AFR. POL'Y J. 74, 74–75 (2006). From the time of that first invasion and until 2004, fighting continued between the DRC and Rwanda, leaving an estimated 3.8 million people dead. *Id.* at 77.

59. Mark A. Drumbl, *International Decision: Prosecutor v. Thomas Lubanga Dyilo: International Criminal Court Decision Confirming War Crimes Charges for Conscripting, Enlisting, and Using Child Soldiers*, 101 A.J.I.L. 841, 842 (2007).

peoples over natural resources, land use, and arms smuggling within the Ituri region of the DRC.⁶⁰

The UPC was created on September 15, 2000 for the purpose of establishing and maintaining political and military control over Ituri.⁶¹ The UPC quickly became an ethnic Hema militia and Lubanga took a primary role in the “common plan to build [a Hema] army.”⁶² Throughout the Ituri conflict, armed groups, including Lubanga’s, often targeted civilians and participated in “widespread killings, torture, and rape.”⁶³ “Thousands of children, some as young as seven were recruited by all sides and used as fighters.”⁶⁴ As leader of the UPC, Lubanga recruited child soldiers and would go to people’s homes “ask[ing] for cash, a cow, or for a child to fight for his rebel army.”⁶⁵ “In 2003, at the height of the DRC armed conflict as many as ‘30,000 boys and girls’ were conscripted into service.”⁶⁶ Overall, an estimated 60,000 people were killed in the Ituri conflict, many of whom were child soldiers.⁶⁷

On April 11, 2002, the DRC became a state party to the ICC, and therefore subject to its jurisdiction.⁶⁸ In March 2004, Joseph Kabila, president of the DRC, referred the situation in Ituri to the ICC Prosecutor, asking him to further investigate the conflict.⁶⁹ The ICC Prosecutor’s investigation led to the

60. CHILD SOLDIERS INT’L, *Child Soldiers Global Report 2008—Congo, Democratic Republic of the* (May 20, 2008), available at <http://www.refworld.org/docid/486cb0f5c.html>.

61. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment Hearing, 5 (Mar. 14, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1380068.pdf>.

62. *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Hearing to Deliver the Decision, at 5.

63. *DR Congo: Q&A on the First Verdict at the International Criminal Court*, HUMAN RIGHTS WATCH (Feb. 29, 2012), www.hrw.org/news/2012/02/29/dr-congo-qa-first-verdict-international-criminal-court.

64. *Id.*

65. *DR Congo Warlord Thomas Lubanga Sentenced to 14 Years*, BBC NEWS (July 12, 2010), www.bbc.co.uk/news/world-africa-18779726.

66. Mazurek, *supra* note 15, at 541.

67. *Id.*; *DR Congo: Q&A on the First Verdict at the International Criminal Court*, *supra* note 63.

68. *About the Court*, *supra* note 2.

69. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment Hearing, 2 (Mar. 14, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1380068.pdf>.

March 2006 arrest of Lubanga.⁷⁰ Lubanga remained imprisoned from the time of his initial arrest through the duration of his trial.⁷¹ Pretrial hearings began soon after his arrest, and on January 29, 2007, the judges confirmed the charges against Lubanga.⁷² Lubanga was charged as the co-perpetrator of the Ituri conflict for “enlisting and conscripting children under the age of fifteen years ... and using [the children] to [actively participate] in hostilities.”⁷³

Lubanga’s trial took place over the course of several years, with opening statements given on January 26, 2009 and closing statements given on August 25–26, 2011.⁷⁴ There were several delays prior to and during the trial, including those caused by two stay of proceedings orders, as well as an adjournment for an interlocutory appeal.⁷⁵ Finally on March 14, 2012, Lubanga was found guilty of “the war crimes of enlisting and conscripting children under the age of fifteen years and using them to participate actively in hostilities in the DRC between September 2002 and August 2003.”⁷⁶ On July 10, 2012 the ICC held its first sentencing hearing, and Lubanga was sentenced to fourteen years imprisonment.⁷⁷

2. The Sentencing of Lubanga

The ICC was founded on the premise that “[t]he most serious crimes of concern to the international community as a whole

70. *Lubanga Case*, COALITION FOR THE INT’L CRIMINAL COURT, <http://www.iccnw.org/?mod=drc TimelineLubanga> (last visited Aug. 22, 2013). The DRC’s ratification of the Rome Statute and its inability to prosecute Lubanga as shown by its referral to the ICC Prosecutor were the necessary preconditions to grant the ICC jurisdiction.

71. *Id.*

72. Wairagala Wakabi, *Timeline: Lubanga’s War Crimes Trial at the ICC*, LUBANGA TRIAL AT THE INT’L CRIMINAL COURT (Sept. 14, 2010), <http://www.lubangatrial.org/2010/09/14/timeline-lubanga’s-war-crimes-trial-at-the-icc/>. On March 17, 2006, Lubanga made his first appearance before the Pre-Trial Chamber I of the ICC. *Id.*

73. *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Judgment Hearing, at 1.

74. *Id.* at 3.

75. *Id.* at 2–3.

76. *Id.* at 12.

77. *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Hearing to Deliver the Decision, 12 (July 10, 2012), <http://www.icc-pi.int/iccdocs/doc/doc1440143.pdf>.

must not go unpunished.”⁷⁸ The Court cited to this at Lubanga’s sentencing, and attempted to make clear that it was taking this important background principle into account.⁷⁹ In arriving at its sentence for Lubanga, the Court specifically considered the provisions of Articles 77 and 78 of the Rome Statute, as well as Rule 145 of the Rules of Procedure and Evidence.⁸⁰

The Court applied and balanced the factors from Article 78 and Rule 145, which together mention the “gravity of the crime and the individual circumstances,” as well as “mitigating and aggravating circumstances.”⁸¹ First, the Court considered the gravity of Lubanga’s crime, finding it to be “very serious” and “affect[ing] the community as whole.”⁸² This was exacerbated by the element of “compulsion”⁸³ in the crime of conscripting.⁸⁴ Next, special attention was given to the vulnerability of the children involved as compared to the general population, recognizing that children must be afforded “particular protection.”⁸⁵ For example, the physical well-being of children was placed at risk of fatal and nonfatal injuries from the violence, and the children may continue to suffer serious trauma to their psychological well-being.⁸⁶ Although the exact number of children involved in the conflict could not be identified, the Court determined that the use of children was “widespread.”⁸⁷ The

78. *Id.* (quoting Rome Statute, *supra* note 6, pmb1.).

79. *See id.* at 1.

80. *Id.* at 4–8.

81. *Id.* at 2; Rome Statute, *supra* note 6, art. 78.

82. *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Hearing to Deliver the Decision, at 4; Rome Statute, *supra* note 6, art. 78.

83. Based on the long-accepted doctrine of international human rights law, it is not necessary to show the element of compulsion in proving the crime of conscription. Christie Nicolson, Lisa Dailey & Rachel Hall, *The International Criminal Court*, WORLD WITHOUT GENOCIDE, worldwithoutgenocide.org/genocides-and-conflicts/icc (last visited Oct. 22, 2012). Therefore, showing this element only worsens or further contributes to the findings against the defendant.

84. *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Hearing to Deliver the Decision, at 4.

85. *Id.*

86. *Id.* at 5.

87. *Id.* It is also important to note that in the circumstances of this case, the Court states the following should be considered as part of the gravity of the crime:

[T]he extent of the damage caused, and in particular the harm caused to the victims and their families, the nature of the unlawful

Court also recognized that Lubanga is “an intelligent and well-educated individual, who would have understood the seriousness of the crimes of which he has been found guilty.”⁸⁸ Although a relevant factor, this was not considered an “aggravating” circumstance because factors considered within the gravity of the crime cannot be counted twice or additionally considered to be an aggravating circumstance.⁸⁹

In Lubanga’s case, several possible aggravating circumstances were considered, including the punishment inflicted among child soldiers and instances of sexual violence.⁹⁰ Although Lubanga was not specifically charged with these crimes, the ICC Prosecutor was still able to put them forth as aggravating circumstances.⁹¹ However, the Court was unable to take such circumstances into account because the ICC Prosecutor could not prove them beyond a reasonable doubt—the Court-established standard of proof for aggravating circumstances.⁹² There were, however, mitigating factors that the ICC found to be adequate under the Court-established standard of proof of balancing the probabilities.⁹³ Mitigating factors included Lubanga’s “respectful and co-operative [nature] throughout the proceedings,” even when placed “under considerable unwarranted pressure by the conduct of the prosecution.”⁹⁴

behavior and the means employed to execute the crime; the degree of participation of the convicted person; the degree of intent; the circumstances of manner; time and location; and the age, education, social and economic condition of the convicted person.

Id. Specifically, in the case of Lubanga, the Court later notes that it has “borne in mind the widespread recruitment and the significant use of child soldiers during the time-frame of the charges; the position of authority held by Mr. Lubanga within the UPC/FPLC and his essential contribution to the common plan that resulted, in the ordinary course of events” *Id.* at 10.

88. *Id.* at 6.

89. *Id.* at 8. As an additional example, the Court mentions that age is already considered in evaluating both the gravity of the crime and the individual and cannot be considered additionally as an aggravating factor. *Id.*

90. *Id.* at 7.

91. *Id.* at 4.

92. *Id.*

93. *Id.*

94. *Id.* at 9. The Court lists all of the “particularly onerous circumstances,” that Lubanga faced during his trial proceedings. *Id.* It is unclear if the Court viewed this as one mitigating factor or several mitigating factors. *Id.*

In accordance with Article 78(3), the Court announced a sentence for each crime Lubanga was found guilty of and a “joint sentence specifying the total period of imprisonment.”⁹⁵ Lubanga was sentenced to thirteen years’ imprisonment for conscripting children under the age of fifteen to join the UPC, twelve years imprisonment for enlisting children under the age of fifteen to join the UPC, and fourteen years’ imprisonment for using children under the age of fifteen to participate actively in hostilities.⁹⁶ However, despite the twelve- to fourteen-year sentences accompanying each crime, the majority⁹⁷ of the Court sentenced Lubanga to a total period of fourteen years imprisonment.⁹⁸ Additionally, pursuant to Article 78(2), the Court deducted the six years Lubanga spent in custody since 2006, finding that only eight years would remain on his sentence.⁹⁹

II. COMPARATIVE SENTENCING REGIMES AND PENAL THEORIES THAT MAY PROVIDE JUSTIFICATIONS IN INTERNATIONAL SENTENCING

A. Overview of Sentencing in the International Criminal Tribunals for Yugoslavia and Rwanda

The ICTY and ICTR, two of the most prominent international tribunals to precede the ICC, were established to “prosecute persons responsible for serious violations of international humanitarian law.”¹⁰⁰ The ICTY addresses widespread human

95. *Id.* at 11; Rome Statute, *supra* note 6, art. 78(3).

96. *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Hearing to Deliver the Decision, at 11.

97. *Id.* at 12. Judge Odio Benito wrote a separate and dissenting opinion in regards to a particular and discrete issue. Judge Benito believed that Lubanga should have been given an overall sentence of fifteen years due to the “damage caused to the victims and their families, particularly as a result of the harsh punishments and sexual violence suffered by the victims of these crimes pursuant to Rule 145(1)(c) of the Rules.” *Id.* The issue of considering sexual violence as an aggravating circumstance is explored in Part II.B.1. of this Note.

98. *Id.*; *see infra* text accompanying note 194.

99. *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Hearing to Deliver the Decision, at 12.

100. Clark, *supra* note 7, at 1687 (quoting Statute of the International Criminal Tribunal for Rwanda, art. 1, Nov. 8, 1994, 33 I.L.M. 1602; Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 1, May 25, 1993, 32 I.L.M. 1192).

rights abuses in the former Yugoslavia since 1991, including violations of the 1949 Geneva Conventions, and violations of the laws or customs of war, genocide, and crimes against humanity.¹⁰¹ The ICTR assumes jurisdiction over criminal matters, specifically genocide and violations of international humanitarian law that occurred in Rwanda and neighboring states in 1994.¹⁰²

The two tribunals are structured similarly to one another; they often issue a joint or global sentence when there are multiple convictions, or they issue separate sentences that are served concurrently.¹⁰³ The “gravity of the offence,” the individual’s circumstances, and aggravating and mitigating factors are all considered in sentencing.¹⁰⁴ The ICTY and ICTR also provide for recourse to the general sentencing practices of the “former Yugoslavia, and Rwanda, respectively.”¹⁰⁵ In reaching a “suitable” sentence, the ICTY and ICTR judges are given what others have labeled as “remarkably wide” or “unfettered discretion to evaluate the facts and attendant circumstances.”¹⁰⁶ However, such unfettered discretion and the resulting sentences are not without criticism.

Both the ICTY and ICTR have been criticized for several reasons, reasons which often play a role in the resulting nonuniform sentences for similar offenders.¹⁰⁷ One criticism is the lack of explanation for the prescribed term of years, resulting in sentences that lose effectiveness and legitimacy.¹⁰⁸ A widely cited example in the ICTY includes the convictions of Generals

101. Mark D. Kielsgard, *War on the International Criminal Court*, 8 N.Y. CITY L. REV. 1, 4 (2005).

102. *Id.*

103. Clark, *supra* note 7, at 1688.

104. *Id.* at 1689.

105. *Id.*; see *infra* text accompanying note 199.

106. Clark, *supra* note 7, at 1689; Drumbl, *supra* note 7, at 553. “The ‘unfettered discretion’ to sentence delegated to international judges inexorably leads to a broad range of actual sentences.” *Id.* at 558.

107. See *supra* text accompanying note 7.

108. Clark, *supra* note 7, at 1689–94. Legitimacy largely depended on consistency in punishment, because consistency in exchange reflects the “notion of equal justice.” *Id.* at 1689. Global sentences may contribute to a lack of legitimacy because “[t]he practice of issuing a single, global sentence for multiple crimes makes it difficult to demonstrate with precision the extent to which similar defendants receive different penalties for similar crimes.” *Id.* at 1692.

Tihomir Blaskic and Dario Kordic.¹⁰⁹ Although both convictions were very similar in nature and included the “crimes against humanity of persecution, murder, and inhumane acts,” Blaskic was sentenced to forty-five years, and “Kordic to only twenty-five years.”¹¹⁰ Additionally, despite the gravity of the crimes in the former Yugoslavia, only one of the ICTY’s sixty-two convictions has resulted in a life sentence.¹¹¹ The ICTY and ICTR have also been criticized as giving insufficient weight to mitigating and aggravating factors, and sentences in both tribunals have been revised for this reason.¹¹² Andrew N. Keller, author of *Punishment for Violations of International Criminal Law: An Analysis Of Sentencing at the ICTY and ICTR*, critiques that “the Trial Chambers [have] full discretion to consider any other aggravating and mitigating circumstance, and to give ‘due weight’ to those factors in the determination of an appropriate punishment . . . perhaps [the discretion is] too broad and should be limited by general sentencing guidelines.”¹¹³

Finally, although the reasons for the establishment of these tribunals are clear, the tribunals’ justifications for punishment are not. In the case of the ICTY, “[t]he Security Council argued in a resolution establishing the tribunal that its purpose would be to bring to justice persons who are responsible for the crimes as well as to deter and to contribute to the restoration and maintenance of peace.”¹¹⁴ However, not only is the statutory language silent as to the penal theories, but the judicial decisions are also inconsistent. An analysis of ICTY judgments from the years 2000 to 2005 reveals that there are “judgments that cite retribution as the ‘primary objective’ and deterrence as a ‘further hope,’ warning deterrence ‘should not be given undue prominence,’ and judgments that flatly state ‘deterrence

109. *See id.* at 1692.

110. *Id.*

111. *Id.* The lack of life sentences should be a particularly alarming precedent to the ICC, especially considering that both the ICTY and the ICC were established for the unique purpose of dealing with criminals who have violated some of the most serious international crimes and/or fundamental human rights.

112. *See id.* at 1693–94.

113. Keller, *supra* note 7, at 57.

114. Christoph J.M. Safferling, *The Justification of Punishment in International Criminal Law*, 4 AUSTRIAN REV. INT’L & EUR. L. 126, 146 (1999).

probably is the most important factor in the assessment of appropriate sentences.”¹¹⁵

Although the ICTY and ICTR clearly highlight some of the criticisms the ICC may face, in order to find a sentencing rationale in the international context, it may be best to look at attempts to justify domestic punishment.¹¹⁶

B. The United States Federal Sentencing Guidelines as a Roadmap for Sentencing

Sentencing regimes pose a challenge for most nations, and it is not surprising that the ICC may struggle in its early years to reach a proper balance, even with the precedent and criticisms of the ICTY and ICTR as guidance. The United States Federal Sentencing Guidelines also serve as an example of how difficult it may be to limit judicial discretion in sentencing. However, a U.S. federal statute, 18 U.S.C. §3553(a), provides a helpful reference.¹¹⁷ Specifically, 18 U.S.C. §3553(a) lists several factors a court should use to determine a “reasonable” sentence.¹¹⁸ These factors, in turn, provide a roadmap for rectifying the shortcomings of the ICC.

Up until the 1970s, federal sentencing in the United States was discretionary and granted judges an enormous amount of authority in crafting sentences.¹¹⁹ The Federal Sentencing

115. Drumbl, *supra* note 7, at 561. As discussed throughout this Note, the issue is not that the ICC, like the ICTY and ICTR, does not speak clearly to one theory of punishment. The issue is, however, when statutory guidelines of the ICC do not satisfy or serve any justification of punishment.

116. See Safferling, *supra* note 114, at 128 (discussing domestic theories of punishment and stating, “before we try to find a rationale for sentencing in international criminal law, we want to look at attempts to justify domestic punishment”).

117. 18 U.S.C. §3553(a) (2006).

118. *Id.*; see also Christine DeMaso, *Advisory Sentencing and the Federalization of Crime: Should Federal Sentencing Judges Consider the Disparity Between State and Federal Sentences Under Booker?*, 106 COLUM. L. REV. 2095, 2108 (2006) (noting “the [Supreme] Court corrected this constitutional defect by declaring the Guidelines advisory and instructing appellate courts to review sentences for ‘reasonableness’”).

119. See Rosemary T. Cakmis, *The Role of the Federal Sentencing Guidelines in the Wake of United States v. Booker and United States v. Fanfan*, 56 MERCER L. REV. 1131, 1133 (2005).

For almost a century, until the federal sentencing guidelines went into effect in 1986, federal judges wielded broad discretion under an

Guidelines were enacted in 1987 as a means to eliminate disparate criminal sentences.¹²⁰ Although the mandatory guidelines reduced disparity, they did not always provide for a “fitting” punishment,¹²¹ and in 2005 the role of the guidelines sharply changed. In *United States v. Booker*, the sentencing guidelines were rendered advisory in nature, leaving sentencing to the district courts’ discretion and largely guided by the factors contained within 18 U.S.C. §3553(a).¹²²

Pursuant to 18 U.S.C. §3553(a)(1), the “nature and circumstances of the offense and the history and characteristics of the defendant” must be considered.¹²³ Additionally, 18 U.S.C. §3553(a)(2) is especially significant as it shows the importance placed on several penal theories by the United States in federal sentences. The section provides reference to the theories of retribution, deterrence, and rehabilitation.¹²⁴ Both 18 U.S.C.

indeterminate sentencing system, whereby federal judges could impose any sentence upon criminal defendants from probation up to and including the statutory maximum as set forth in the United States Code.

Id.

120. Ramon E. Javier, *The Federal Sentencing Guidelines: A Need to Restore “The Balance,”* 9 J. SUFFOLK ACAD. L. 179, 180 (1994). The Federal Sentencing Guidelines were initially mandatory and binding. *Id.*

121. There were several criticisms during the era of binding Federal Sentencing Guidelines. For example, under a three-strikes policy that was initiated, repeat offenders would face life imprisonment on their third offense and it was not necessary that all offenses were violent felonies. See Nkechi Taifa, “Three-Strikes-and-You’re-Out”—Mandatory Life Imprisonment for Third Time Felons, 20 U. DAYTON L. REV. 717, 719 (1995).

122. *United States v. Booker*, 543 U.S. 220, 222 (2005); DeMaso, *supra* note 118, at 2108. In other words, *Booker* “returns to judges their traditional authority to craft an individualized sentence for the defendant standing before them and it allows them to consider facts outside of the guidelines.” *Id.*

123. 18 U.S.C. §3553(a) (2006). The ICC, as governed by the Rome Statute, does this by considering the gravity of the crime and the individual circumstances. However, this still leaves open the issue of how mitigating and aggravating circumstances are additionally considered and often unequally weighed into the sentencing equation. This issue is discussed in Part III of this Note.

124. 18 U.S.C. §3553(a)(2) (2006).

(a) Factors To Be Considered in Imposing a Sentence—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be im-

§3553(3) and (4) refer to the kind of sentences available, and the associated sentencing ranges.¹²⁵ Lastly, 18 U.S.C. §3553(6) refers to “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.”¹²⁶ However, the ICC has only one determinate guideline: that the sentence does not exceed thirty years unless justified by the extreme gravity of the crime and the individual circumstances of the convicted person.¹²⁷

C. Theories of Punishment in Domestic Criminal Justice Systems

There are several theories of punishment that are incorporated into sentencing guidelines in states throughout the world, including, but not limited to, the United States, Singapore, Hong Kong, New Zealand, Finland, Sweden, and Germany.¹²⁸ As referenced in 18 U.S.C. §3553(a), the most prominent theories include retribution, deterrence, and rehabilitation.¹²⁹

posed, shall consider . . . 2) the need for the sentence imposed—(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

Id.

125. 18 U.S.C. §3553(a) (2006). Other than the thirty-year limitation, the Rome Statute does not set forth any sentencing ranges for the international crimes it governs. *See* Rome Statute, *supra* note 6, art. 78(3).

126. 18 U.S.C. §3553(a) (2006). The U.S. federal statute contains two additional provisions not discussed in this Note. Section (a)(7) states the need to provide restitution to any victims of the offense. *Id.* Section (a)(5) discusses any pertinent policy statements issued by the Sentencing Commission. *Id.*

127. Rome Statute, *supra* note 6, art. 78(3).

128. *See* 18 U.S.C. §3553(a) (2006); Tan Yock Lin, *Public Interest in Sentencing: Deterrence or Desert or Anything Else?*, 2009 SING. J. LEGAL STUD. 25 (2009); Kelly Busche & W. David Walls, *Proportional Justice Versus Efficient Deterrence in Hong Kong Criminal Sentencing*, 25 HONG KONG L.J. 180 (1995); *The Rationales and Goals of Sentencing*, MINISTRY OF JUSTICE, <http://www.justice.govt.nz/publications/global-publications/s/sentencing-policy-and-guidance-a-discussion-paper/3.-the-rationales-and-goals-of-sentencing> (last visited Feb. 18, 2013) (N.Z.) [hereinafter *New Zealand Sentencing Paper*]; Edward J. Eberle, *The Method and Role of Comparative Law*, 8 WASH. U. GLOBAL STUD. L. REV. 451, 484–85 (2009).

129. 18 U.S.C. §3553(a) (2006).

Another theory often considered in the international context is restorative justice.¹³⁰ The ICC, however, refuses to refer to any punishment theories in its decisions and sentencing guidelines.¹³¹ Additionally, the ICC and the Rome Statute have never purported to ascribe to any of these theories specifically.¹³² Rather, the ICC merely looks at the gravity of the crime and the individual circumstances.¹³³ Notwithstanding, punishment theories, as seen through the example of several states, provide important considerations in sentencing and should serve as underlying justifications for imposing individual criminal liability on an international scale.¹³⁴ Furthermore, they highlight the shortcomings of the Rome Statute as demonstrated by the Lubanga trial.

Similar to the United States, criminal statutes in Singapore, Hong Kong, and New Zealand recognize the several theories of punishment to include retribution, deterrence, and rehabilitation.¹³⁵ The theory of retribution specifically focuses on the in-

130. See Jessica Leinwand, *Punishing Horrific Crime: Reconciling International Prosecution with National Sentencing Practices*, 40 COLUM. HUM. RTS. L. REV. 799, 809–10 (2009).

131. See generally Drumbl, *supra* note 7, at 558 (stating that “international criminal tribunals . . . are silent as to the penological purpose of the sentences imposed”). See also David Bosco, *The International Criminal Court and Crime Prevention: Byproduct or Conscious Goal?*, 19 MICH. ST. J. INT'L L. 163, 194 (2011).

The guidelines for sentencing at the ICC are elaborated in the Rule of Procedure and Evidence, but they do not include any reference to the deterrence function or indeed to any of the traditional purposes of punishment . . . a number of aggravating and mitigating conditions are also listed, but none of them relate specifically to prevention or deterrence.

Id.

132. See *supra* text accompanying note 131.

133. Rome Statute, *supra* note 6, art. 78(1).

134. See sources cited *supra* note 128.

135. See Lin, *supra* note 128, at 26 (discussing the Singapore case, *R. v. Sargeant*, and stating “there are four (classical) sentencing goals or aims: retribution, deterrence, prevention and rehabilitation”); Busche & Walls, *supra* note 128, at 180 (discussing the balancing of different penal theories and stating that “[l]egal scholars suggest that the criminal justice system has several aims: retribution, reformation, incapacitation, individual deterrence, and general deterrence. These aims can be thought of as combining considerations of justice relating to past actions and considerations of deterrence of

dividual offender, and the punishment is set forth simply as commensurate with what the criminal deserves.¹³⁶ As expressed by the courts in New Zealand, “the judicial obligation is to ensure that the punishment [the courts] impose in the name of the community is itself a civilized reaction, determined not on impulse or emotion but in terms of justice and deliberations.”¹³⁷ Retribution is also considered to be “proportional justice,” where the punishment increases directly with the seriousness of the crime.¹³⁸ In Finland, for example, the penal code states, “punishment shall be measured so that it is in just proportion to the damage and the danger caused by the offence and to the guilt of the offender manifested in the offence.”¹³⁹ The 1989 Swedish Criminal Code has a similar statement, where the key factors considered for punishment include “the harm, offence or risk which the conduct involved, what the accused realized or should have realized about it, and the intention and motives of the accused.”¹⁴⁰ Ultimately, the moral culpability of the offender places the duty to punish on society.¹⁴¹ The punishment should fit the crime, and the sentence should be comparable to the crime.¹⁴² Therefore, retributive rationales are backward-looking and result in a moral balance being rectified.¹⁴³

The theories of deterrence and rehabilitation both fall within the wider category of utilitarian punishment theories.¹⁴⁴ Utilitarianism, as compared to retribution, focuses on the ultimate betterment of society, and in the case of general deterrence, the

crime by control of future criminal behavior”) (internal citations omitted); *see generally* *New Zealand Sentencing Paper*, *supra* note 128.

136. JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* 38–46 (5th ed. 2007).

137. *New Zealand Sentencing Paper*, *supra* note 128.

138. Ryan Florio, *The [Capital] Punishment Fits the Crime: A Comparative Analysis of the Death Penalty and Proportionality in the United States of America and the People’s Republic of China*, 16 *U. MIAMI INT’L & COMP. L. REV.* 43, 51–52 (2008).

139. *New Zealand Sentencing Paper*, *supra* note 128.

140. *Id.* (quoting A. ASHWORTH, *SENTENCING AND CRIMINAL JUSTICE* 83 (1st ed. 1992)).

141. DRESSLER, *supra* note 136, at 38–46.

142. *Id.*; Leinwand, *supra* note 130, at 804.

143. *See* Dubinsky, *supra* note 11, at 618.

144. DRESSLER, *supra* note 136, at 33–38. Prevention is often considered with deterrence and rehabilitation under utilitarianism. *Id.*

offender becomes part of the means to reach a "greater social good."¹⁴⁵ The purpose of general deterrence is to dissuade others from such acts in the future.¹⁴⁶ The New Zealand courts have also recognized the use of imprisonment as a general deterrent, stating that "there can be no time when it is more necessary for the court to use their sentencing powers firmly in the hope of deterrence than at the early stage of the growth of a new social evil."¹⁴⁷ It is important to note, however, that the effectiveness of deterrence often depends on a potential offender's knowledge as to the likelihood of being caught and convicted, and on the likely penalty.¹⁴⁸

Rehabilitation may also be considered, in the hopes of helping and reforming those who have committed crimes.¹⁴⁹ In many European countries, for example, the focus is on rehabilitation so that convicted criminals can reenter society and resume a normal life.¹⁵⁰ For this reason, life imprisonment is rarely imposed and the death penalty is not an option.¹⁵¹ The importance of re-socialization is seen in a famous German Constitutional Court case, often referred to as "Lebach."¹⁵² In that case, the court granted an injunction so that a documentary on a convicted criminal could not be released after the offender had

145. *New Zealand Sentencing Paper*, *supra* note 128.

146. Deterrence is usually divided into general and individual deterrence. *Id.* "If individual deterrence is the goal, then penalties are escalated once a person starts reoffending. The sentencing judge could, for example, choose to make an example of a persistent burglar by imprisoning him or her for the maximum term, even if the current offense is relatively minor." *Id.* This can also be analogized to the United States three-strikes policy. *See* Taifa, *supra* note 121. However, in the international context this will likely be less relevant as the ICC should not be dealing with repeat offenders for crime of the most serious concern to the international community.

147. *New Zealand Sentencing Paper*, *supra* note 128.

148. *Id.* It is important to note that although retribution and utilitarian theories of punishment have very different means of reaching a just punishment, this does not necessarily mean they will result in different ends. Hypothetically, a sentence of forty years for murder may be considered proportional to the crime and it may also be sufficient to deter others from committing a similar crime.

149. DRESSLER, *supra* note 136, at 33–45.

150. Eberle, *supra* note 128, at 484–85.

151. *Id.*

152. *Id.* at 485. Eberle, the author, also explains this case as an example of a situation where the felon's healthy re-entry into society was more important than an accurate depiction of his role in a notorious crime. *Id.*

served his prison sentence.¹⁵³ In the judgment, the court gave priority to protection of personality over freedom of expression or information, and found the right to re-socialization to be an integral part of the offender's constitutionally guaranteed rights.¹⁵⁴ Ultimately, utilitarian rationales are forward-looking, hoping to both deter and rehabilitate the offender, while generally deterring society as a whole.

Finally, restorative justice is often considered on an international scale in order to encourage peace building for the nation.¹⁵⁵ One definition of restorative justice is the "bringing together [of] individuals who have been affected by an offense and having them agree on how to repair the harm caused by the crime."¹⁵⁶ The hope is that restorative justice will result in a restoration that both benefits and is agreed upon by the victims, the offenders, and the affected communities.¹⁵⁷ Although a newer penal theory with less practical examples, many scholars consider restorative justice an important consideration for international courts.¹⁵⁸

Overall, the ICC's main goal is to end impunity, or exemption, from punishment. Despite the Rome Statute's clear statement of this goal, the statute fails to provide any penal theory, or combination of theories, to justify such punishment. It remains unclear if sentences should be driven by a backward- or forward-looking approach, and whether the needs of victims, the needs of society as a whole, or the rehabilitation of victims should be given primary, if any, importance. The ICTY, ICTR, and the U.S. federal sentencing regime provide a comparative tool that can be used to show where the ICC has fallen short in its sentencing guidelines, and in the sentencing of

153. Christine Morgenstern, *Judicial Rehabilitation in Germany—The Use of Criminal Records and the Removal of Recorded Convictions*, 3 EUR. J. PROBATION 20, 22 (2011).

154. *Id.*

155. Leinwand, *supra* note 130, at 809–10.

156. Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 228 (2003).

157. *Id.* The article provides some examples of restorative justice, such as "family group conferencing in Australia and New Zealand, community reparative boards in Vermont, circle sentencing in Canada, and victim-offender mediation throughout North America and Europe—all aimed at bringing stakeholders together to fashion appropriate resolutions to crime, typically through mediated dialogue." *Id.* at 229.

158. See generally Leinwand, *supra* note 130; Luna, *supra* note 156.

Lubanga. Furthermore, they highlight how the ICC has failed to account for the theories of punishment, which provide important justifications that could help the ICC to reach its goals.

III. MITIGATING AND AGGRAVATING CIRCUMSTANCES, MAXIMUM SENTENCES, AND GLOBAL SENTENCES ONLY FRUSTRATE THE THEORIES OF PUNISHMENT THAT THE ICC MAY CONSIDER

In an attempt to solve the problems and inconsistencies that plagued the ICTY and ICTR, the Rome Statute and the ICC have made it increasingly difficult to consider any of the penal theories. One major concern that was prevalent in both the ICTY and ICTR was the unequal weight given to mitigating and aggravating circumstances.¹⁵⁹ As a consequence, the ICTY and ICTR were often criticized as having discretion that was too broad, resulting in sentences that lacked uniformity and were too far removed from the theories of punishment.¹⁶⁰

With the intention to resolve this problem, or at least to allow for more consistent sentences, the Rome Statute set forth the thirty-year maximum imprisonment sentence, with a life sentence available only in extreme circumstances.¹⁶¹ However, the

159. See sources cited *supra* note 7.

160. See Keller, *supra* note 7, at 57–74 (discussing that in the use of aggravating and mitigating circumstances “discretion is perhaps too broad,” and “[t]he ICTY and ICTR should reassess certain aspects of their sentencing practice with regard to the use of aggravating and mitigating circumstances, the Trial Chambers must refrain from deviating substantially from the principles of deterrence and retribution merely because of the existence of mitigating factors”); see generally Clark, *supra* note 7, at 1707–08 (discussing the lack of uniformity in Ad Hoc Tribunal’s sentencing, where many times on appeal, the Appeals Chamber had to increase or decrease a sentence due to the weight that the Trial Chamber had given to both mitigating and aggravating factors. In the ICTY, a two-and-a-half-year sentence was found to be “manifestly inadequate,” and in the ICTR, cases on appeal included purported mitigating factors of relative insignificance).

161. See Ines Monica Weinberg de Roca & Christopher M. Rassi, *Sentencing and Incarceration in the Ad Hoc Tribunals*, 44 STAN. J. INT’L L. 1, 8–9 (2008).

According to commentators, the primary goal of sentencing reform in the past thirty years has been to eliminate disparity in the punishment of offenders for similar crimes . . . Notably, the ICC has attempted to streamline sentencing practice. Article 77 of the ICC Statute allows for the imposition of a term not to exceed thirty years or the imposition of a life sentence. In Article 77(1)(b), when ‘justified by the extreme gravity of the crime and the individual circumstances of the convicted person.’

provisions of the Rome Statute have not resolved these problems, but actually created more of them. First, the inconsistencies created by mitigating and aggravating circumstances remains and can be seen by their unequal application in Lubanga's sentence. Second, the thirty-year maximum provision, together with the use of joint and concurrent sentences, will likely lead to more lenient sentences.

A. The Problems That Remain from the ICTY and ICTR: Unequal Balance of Mitigating and Aggravating Circumstances in the ICC

The unequal balancing of mitigating and aggravating circumstances that often caused lenient and inconsistent sentencing in the ICTY and ICTR are likely to have the same result in the ICC as seen through the example of the Lubanga trial.¹⁶² As discussed in *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, Professor Mark Drumbl¹⁶³ states:

No ordering principle is provided as to the relative weight to attribute to any of these [aggravating and mitigating] factors. Nor is there any explicit guidance as to the weight to accord to a factor in sentencing when that same factor already may have been considered in establishing the mental element of the substantive offense. Consequently, the quantification of sentence in individual cases still is effectively left to the exercise of judicial discretion in a manner similar to the ICTY and ICTR. Nor does the ICC's . . . law provide any significant guidance regarding the purposes of sentencing.¹⁶⁴

Despite the intent of the drafters of the Rome Statute to adopt what they "considered the best rulings and practices of earlier courts," Lubanga's case demonstrates that Drumbl's

Id.

162. See generally sources cited *supra* note 7.

163. Professor Mark Drumbl has researched, published, and given numerous lectures in the area of international criminal law, especially relating to child soldiers. For more information, see *Mark A. Drumbl*, WASH. & LEE UNIV. SCH. OF LAW, law.wlu.edu/faculty/profiledetail.asp?id=11 (last visited Jan. 12, 2013).

164. Drumbl, *supra* note 7, at 554 (internal citations omitted).

statement is correct and the ICC has fallen victim to the same criticism as the ICTY and ICTR.¹⁶⁵

First, the Lubanga Court's decision to adopt unequal standards of proof for aggravating and mitigating circumstances demonstrates that the Court's discretion is too broad. At the sentencing hearing, the Court stated that "[i]t is for the Chamber to establish the standard of proof for the purposes of sentencing, given the Statute and the Rules do not provide any guidance."¹⁶⁶ The Court continues to explain that because the aggravating factors established "may have a significant effect on the overall length of the sentence [Lubanga will serve, it is necessary that they are established to the criminal standard of proof, namely 'beyond a reasonable doubt.'"¹⁶⁷ Mitigating circumstances, however, were granted the much lower evidentiary standard of being established by a balancing of the probabilities.¹⁶⁸

Not only are these standards now evaluated on far from equal footing, but a circular problem is created as aggravating circumstances cannot be factors considered within the gravity of the crime, *and* they must be proved beyond a reasonable doubt.¹⁶⁹ However, if a crime or charge could be proved beyond a reasonable doubt, then the ICC Prosecutor would have likely charged the defendant with that crime.¹⁷⁰ For example, the ICC Prosecutor did not charge Lubanga with rape and other forms of sexual violence as separate or additional crimes.¹⁷¹ The

165. Patricia M. Wald, *Sharpening the Cutting Edge of International Human Rights Law: Unresolved Issues of War Crimes Tribunal*, 30 B.C. INT'L & COMP. L. REV. 15, 27 (2007).

166. *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Hearing to Deliver the Decision, at 4.

167. *Id.*

168. *Id.*

169. *Id.* at 8.

170. Although, in the July 10 Hearing to Deliver the Decision, the Court seems to be of the view that the ICC Prosecutor "failed" to charge Lubanga with sexual crimes, this still does not alter the problem that arises when aggravating circumstances must be proved beyond a reasonable doubt. *Id.* at 7.

171. *Id.* at 6-7. There are issues that arise with this, as the Court seems to blame the ICC Prosecutor for failing to include this as a charged offense and then for referring to it throughout trial. *Id.* However, knowing this was an important factor, especially to victims, makes it increasingly unfair that the Court did not allow its inclusion and shows that the Court's discretion was too broad. *Id.* The Court knew this was a factor that was going to be considered in sentencing, and using "the balancing of probabilities" would have

Court was unable to conclude that “sexual violence against the children who were recruited was sufficiently widespread to mean that it could be characterized as occurring in the ordinary course of the implementation of the common plan for which [Lubanga is responsible,” and hence, Lubanga’s role could not be proved beyond a reasonable doubt.¹⁷² These factors, however, still should have been given some consideration in sentencing, especially since the purpose of aggravating circumstances is to give weight to additional negative factors affecting the defendant’s role or crime.¹⁷³ The Court has ultimately set a standard of proof that will almost always fail to consider aggravating circumstances.¹⁷⁴ In contrast, if the much lower standard of proof that applies to mitigating circumstances, balancing of the probabilities, applied equally to aggravating circumstances, then Lubanga’s role in sexual crimes would have likely qualified as an aggravating circumstance.

Rather than learning from the inconsistent sentencing that plagued the ICTY and ICTR, the ICC’s broad discretion will likely lead it down an analogous, nonuniform path where similar crimes result in a wide range of sentences.¹⁷⁵ Furthermore, the Court’s broad discretion has resulted in a lenient sentence that does not seem to serve the theories of punishment. Lubanga was found guilty of conscripting, enlisting, and having children under the age of fifteen participate actively in hostilities. However, his sentence seems to go against both retributive and utilitarian theories, as a high bar has been placed that denies

made it very likely that this could be considered in Lubanga’s sentencing as compared to the standard of proof that was set forth for aggravating circumstances.

172. *Id.* at 7.

173. *Id.* at 4. It is also important to note that aggravating, mitigating, and individual circumstances, as well as the gravity of the crime, are all factored into the sentencing equation. *Id.* Why the court chose to acknowledge that aggravating circumstances have a significant impact on sentencing, but did not say mitigating circumstances have an impact, only adds to the confusion set forth by the ICC in its first sentencing. *See id.* As the Court mentions, there is nothing in the rules that provides guidance on the standard of proof. *Id.* However, that being said, there is also nothing that gives the Court reason to set different and unequal standards.

174. *See generally id.* at 4.

175. *See generally* Clark, *supra* note 7, at 1707. This statement follows the assumption that the ICC will continue to follow a similar path to that of the ICTY and ICTR.

consideration of the possible sexual crimes and punishments the defendant committed, but allows leniency for the defendant's respect and cooperation during proceedings. First, under the retributive theory, Lubanga's true moral culpability is not considered because aggravating circumstances, such as sexual crimes, cannot be factored into sentencing, but mitigating circumstances can and ultimately allow for leniency.¹⁷⁶ Additionally, deterrence is not adequately considered, as Lubanga would have no reason to be deterred from participating or taking a less substantial role in other crimes, so long as they could not be proved beyond a reasonable doubt.

B. The ICC's Problematic Provisions of Concurrent Sentences and the Thirty-Year Limit

Additional problems arise as the penalties section of the Rome Statute, specifically Article 77, seems unable to serve the purposes of most, if not all, theories of punishment. This inadequacy can be seen first in the thirty-year maximum sentence that the statute implements for almost all penalties.¹⁷⁷ Such a strict limitation cannot be found in the statutes governing other international tribunals, such as those of Rwanda or Yugoslavia.

The ICC Prosecutor will almost always be unable to request a sentence greater than thirty years.¹⁷⁸ This limitation further frustrates having punishments that are proportional to the offense.¹⁷⁹ It has ultimately been predetermined that no crime

176. DRESSLER, *supra* note 136, at 38–46. As discussed in Part II.A, “true moral culpability” speaks to the heart of the theory of retribution. *See id.* For a sentence to reflect the offender's true moral culpability, it should be proportional. *See id.* Here, by allowing positive or mitigating factors to decrease the sentence but not allowing “negative” or aggravating factors to increase it, the resulting sentence is not proportional to the offender's actions and therefore does not reflect the offender's “true moral culpability.”

177. Rome Statute, *supra* note 6, art. 77. Part III.A explains why the life imprisonment sentence is extremely unlikely because of the additional limiting circumstances that are placed on it by the standards governing aggravating circumstances.

178. *See id.*; *see generally* Kevin Jon Heller, *A Sentence-Based Theory of Complementarity*, 53 HARV. INT'L L.J. 85, 113–14 (2012).

179. Rome Statute, *supra* note 6, art. 81(2)(a). Despite the several contradictions to this goal, including the thirty-year limitation set forth by the Rome Statute, the Court states, “pursuant to Article 81(2)(a) of the Statute, the Chamber must ensure that the sentence is in *proportion* to the crime.”

will be proportional to a sentence that is greater than thirty years but not deserving of life imprisonment.¹⁸⁰ Additionally, even a thirty-year sentence will be a high bar to overcome, since thirty years is the maximum sentence for almost all cases.¹⁸¹

The problem worsens when the individual and joint sentence provisions are considered. As seen in Lubanga's case, he received three sentences of twelve, thirteen, and fourteen years, but a joint sentence of only fourteen years for all three crimes he was convicted of.¹⁸² First, Lubanga could not be sentenced to serve these terms consecutively because thirty-nine years is not an available sentencing option.¹⁸³ Second, as stated in Article 77, the Court was only required to sentence Lubanga to the highest of his individual sentences.¹⁸⁴ Hence, the Court sen-

Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Hearing to Deliver the Decision, 3 (July 10, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1440143.pdf> (emphasis added).

180. According to the Rome Statute, there can be no sentence that is greater than thirty years, except in extreme situations where a life sentence may be imposed. Rome Statute, *supra* note 6, art. 78(3).

181. If the Court is already afraid to set a high sentence in its first case, and thirty years will almost always be the maximum sentence, the Court may be reserving this for the criminals it sees as the worst offenders. However, it is unclear who the Court will determine this to be or when this may happen. See Kate Kovarovic, *Pleading for Justice: The Availability of Plea Bargaining as a Method of Alternative Dispute Resolution at the International Criminal Court*, 2011 J. DISP. RESOL. 283, 299–300 (2011). In Kovarovic's article, this proposition is additionally supported through the discussion of plea bargains.

Critics also discount the fact that prosecutors must work within the sentencing confines established by the Tribunal. The sentencing range of the ICC is "already perceived by some as too low," as the Rome Statute does not provide for the death penalty and only allows life imprisonment to be assigned in exceptional circumstances . . . The appeal for most defendants in seeking a plea bargain is the hope of securing a more lenient sentence. When the sentencing maximum is fairly minimal, prosecutors are thus forced to reduce a defendant's sentence even further . . . the problem of leniency stems from the Rome Statute itself.

Id.

182. *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Hearing to Deliver the Decision, at 11.

183. Rome Statute, *supra* note 6, art. 77(1)(a). Thirty-nine years exceeds the thirty-year limitation. *Id.*

184. Rome Statute, *supra* note 6, art. 78(3).

tenced Lubanga to the minimum required by the statute, resulting in his fourteen-year sentence.¹⁸⁵ Further, without any type of minimum sentence requirement, the ICC could theoretically choose between zero and thirty years.¹⁸⁶ By providing a minimal explanation to Lubanga's fourteen-year sentence, it appears as though the ICC simply chose an arbitrary number that was in the middle of the available range, influenced only by a thirty-year limitation, with no mandatory minimum weighing in.¹⁸⁷

Setting such a low bar for its first sentence is not unique for an international court. The ICTY in *Prosecutor v. Erdemovic*, one of the first cases ever before the ICTY, experienced a similar problem.¹⁸⁸ The ICTY sentenced Erdemovic to only a five-year sentence after he pled guilty to killing between ten and

185. *Id.*

186. See Rome Statute, *supra* note 6, art. 78(3). As discussed above, although extreme situations may warrant a life sentence, in all other cases there can be no sentence that is greater than thirty years. *Id.* Hence, the upper-limit of a sentence will almost always be thirty years. *Id.* With no minimum sentence provided for in the Rome Statute, the lowest sentence available is theoretically zero years.

187. At the sentencing, the Court addressed all the relevant provisions of the Rome Statute, as also discussed throughout this Note. See generally *Prosecutor v. Lubanga*, Case No. ICC-01/04-01/06, Hearing to Deliver the Decision. For example, the Court explained that there were no aggravating circumstances as they could not be proved beyond a reasonable doubt, and hence, there were no extreme circumstances warranting a life sentence. *Id.* at 10. The Court also reviewed the mitigating circumstances it would take into account. *Id.* at 9. However, other than "taking into account all the factors ... discussed," an explanation as to why the term of years was fourteen, as opposed to any other available sentence, is not provided in the sentencing transcript. *Id.* at 11.

188. Marisa Bassett, *Defending International Sentencing: Past Criticism to the Promises of the ICC*, HUM. RTS. BRIEF, Winter 2009, at 22, 23. See also Dubinsky, *supra* note 11, at 636, where Dubinsky discusses that the ICC must learn from Erdemovic's trial.

The purpose of an international court is not to punish crimes such as petty theft or common law torts. Instead, cases before such a court will involve serious crimes inflicted on populations of people, such as crimes against humanity and war crimes. Crimes in front of the ICC will involve the systemic rape, torture, and murder of many people. Therefore, the ICC will only try the world's most heinous criminals. Because of this, it is unacceptable for people like . . . Drazen Erdemovic to walk out of a jailhouse alive.

Id.

100 civilian Muslim men.¹⁸⁹ The ICTY received major criticism for imposing such a low first sentence.¹⁹⁰ However, in the ICTY's sixty-two convictions, it has ultimately imposed much higher sentences on many other offenders and has been able to overcome the low bar it initially set.¹⁹¹ Unfortunately, due to the joint sentence and thirty-year limitations, it will be very difficult for the ICC to overcome what many have criticized as a very low sentence for its first case.¹⁹²

Finally, the provisions of Article 77 fail to satisfy the theories of punishment for several reasons. First, based on the theory of retribution, the punishment should fit and be comparable to the crime.¹⁹³ However, based on the Lubanga sentencing, it appears that whether Lubanga committed only the crime deserving of the fourteen-year sentence, or all three crimes, he only deserved a fourteen-year sentence. This punishment seems to fit only one of the crimes, rather than all three of them as it should.¹⁹⁴ Second, it is possible that an offender would be deterred from committing a crime based on his or her knowledge of the ICC and the fact that he or she may face imprisonment. However, once he or she chooses to commit one crime, there

189. Dubinsky, *supra* note 11, at 622–25.

190. Bassett, *supra* note 188, at 23.

191. *See generally* Weinberg de Roca & Rassi, *supra* note 161.

192. *See DR Congo Warlord Thomas Lubanga Sentenced to 14 Years*, *supra* note 65.

193. DRESSLER, *supra* note 136, at 38–46; Leinwand, *supra* note 130, at 804.

194. The Court rejected the Prosecutor's argument that there should be a consistent baseline of 80% of the statutory maximum for sentencing, which would then take into account aggravating or mitigating circumstances. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Hearing to Deliver the Decision, 11 (July 10, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1440143.pdf>. Here, this would be twenty-four years, based on the thirty-year statutory guideline, and then properly balanced for other circumstances. *See id.* The Court rejected the Prosecutor's proposal and stated that one reason the sentence passed was that the sentence "should always be proportionate to the crime" and "an automatic starting point—as proposed by the former Prosecutor—that is the same for all offences would tend to undermine that fundamental principle." *Id.* at 10. However, this argument can be seen as ironic considering the joint sentence of fourteen years in the case of Lubanga. *Id.* at 4. He was individually sentenced to twelve to fourteen years for each of his three crimes but his joint sentence is only fourteen years. *Id.* By this standard, it appears that whether one or three crimes was committed, almost the same sentence would be given. One may argue that this decision of the Court is contrary to the Article 81(2)(a) requirement that sentences should be proportionate to the crime. Rome Statute, *supra* note 6, art. 81(2)(a).

would be little to deter an offender from committing multiple crimes when the resulting sentence remains the same. Finally, with Lubanga returning to the DRC in eight years or less, it seems unlikely to satisfy the restorative justice theory because the affected individuals have lost the opportunity to weigh in on the sentence and have had little time to rebuild peace in the nation.

IV. A CHANGE FROM OTHER INTERNATIONAL COURTS: WHY THE NATIONAL DEFERENCE PROVISION SHOULD NOT HAVE BEEN REMOVED

In order to better serve the theories of punishment, and provide additional means of guidance in sentencing, the Rome Statute should be amended to provide deference to the laws of the nation involved. For example, international criminal justice was sought for the crimes committed by Charles Taylor in Sierra Leone.¹⁹⁵ Taylor was found guilty by the Special Court for Sierra Leone (“SCSL”) for “crimes against humanity and war crimes,” including murder, rape, mutilation of civilians, and the use of child soldiers.¹⁹⁶ However, in Taylor’s case, the prosecutors requested that he receive eighty years imprisonment, and the judge ultimately sentenced the 64-year-old Taylor to fifty years.¹⁹⁷ With a fifty-year sentence, Taylor will likely spend the rest of his life in prison, whereas Lubanga may return to the DRC in less than eight years.¹⁹⁸ There is one factor that may help to explain this discrepancy. Special international courts or tribunals like that of the SCSL, and similar to the ICTY and ICTR, give deference to laws of the nation involved,

195. *Thomas Lubanga, Charles Taylor & International Justice*, WATCHLIST, <http://www.watchlist.org/thomas-lubanga-charles-taylor-international-justice> (last visited Sept. 5, 2012).

196. Marlise Simons & J. David Goodman, *Ex-Liberian Leader Gets 50 Years for War Crimes*, N.Y. TIMES (May 30, 2012), <http://www.nytimes.com/2012/05/31/world/africa/charles-taylor-sentenced-to-50-years-for-war-crimes.html>.

197. Alpha Sesay, *Prosecution and Defense to Appeal Charles Taylor Judgment and Sentence*, THE TRIAL OF CHARLES TAYLOR, <http://www.charlestaylortrial.org/2012/07/20/prosecution-and-defense-to-appeal-charles-taylor-judgment-and-sentence/> (last visited Dec. 5, 2012).

198. Simons & Goodman, *supra* note 196.

especially when considering “penalties” or sentencing.¹⁹⁹ The Rome Statute, however, contains no such provision.²⁰⁰

Unlike the SCSL that sentenced Taylor, which is special to Sierra Leone, or the ICTY and ICTR, which are special to Yugoslavia and Rwanda respectively, the ICC could potentially take on cases from 122 different nations.²⁰¹ Initially, considering the increasing commitment required to give deference to a different nation every time one of its individuals is brought to the ICC, it makes sense that the ICC removed such a provision from the Rome Statute. When the principles of “complementarity” and “implementation” are considered, however, the justifications for not giving deference seem to lose support.

First, the principle of complementarity is unique to the ICC, as it allows the ICC to complement the justice system of the

199. The ICTY, ICTR, and the Special Court for Sierra Leone, respectively, gave deference to the national sentencing guidelines as follows: “The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia.” Statute of the International Tribunal for the Prosecution of Persons Responsible for Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 art. 24(1), U.N. Doc. S/RES/827 (1993); “The penalty imposed by the Trial Chamber shall be limited to imprisonment. In determining the terms of imprisonment, the trial chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda.” S.C. Res. 955, Annex art. 23(1), U.N. Doc. S/RES/955 (Nov. 8, 1994). “The Trial Chamber shall impose upon a convicted person other than a juvenile offender imprisonment for a specified number of years. In determining the terms of imprisonment the Trial Chamber shall, as appropriate, have recourse to the practice regarding prison sentences in the International Tribunal for Rwanda and the national courts of Sierra Leone.” Agreement for and Statute of the Special Court for Sierra Leone, U.N.-Sierra Leone, art. 19, Jan. 16, 2002, THE SPECIAL COURT OF SIERRA LEONE, <http://www.sc-sl.org/DOCUMENTS/tabid/176/Default.aspx> (last visited Aug. 6, 2013).

200. See Weinberg de Roca & Rassi, *supra* note 161, at 9. The article states that “the ICC Statute does not expressly permit recourse to the sentencing practice of the territory where the crimes were committed; rather, Article 76(1) allows the Chambers to consider such practices if they are relevant to an ‘appropriate’ sentence.” *Id.* (quoting Rome Statute, *supra* note 6, art. 76(1)). The article further states, “it is the general view that the overriding sentence obligation must be to ‘individualize a penalty to fit the individual circumstances of the accused and the gravity of the crime.’” *Id.* (quoting Prosecutor v. Delalic, Case No. IT-96-21-A, Judgment, 717 (Feb. 20, 2001); Prosecutor v. Krnojelac, Case No. IT-97-25-T, Judgment, 511 (Mar. 15, 2002)).

201. *About the Court*, *supra* note 2.

nation involved.²⁰² As discussed in Part I,²⁰³ the ICC is a court of last resort and the nation must be unable or unwilling to handle the case before the ICC can gain jurisdiction.²⁰⁴ It is only after the failure of the nation to prosecute its own criminals, and after acquiring proper jurisdiction, that the ICC will step in to investigate and prosecute individuals suspected of major criminal wrongdoing.²⁰⁵ Second, it is in response to the complementarity principle that “implementation” of the provisions of the Rome Statute becomes important.²⁰⁶ In order for a state to maintain its sovereignty, and have the ability to prosecute its own criminals for international crimes, it must first have legislation that provides it with jurisdiction over such crimes.²⁰⁷ For example, if a state has signed the Rome Statute but does not include “war crimes” in its own penal code or legislation, then the only way war crimes could be prosecuted is by the ICC. Therefore, the principle of complementarity is not in force, as the ICC would be the only way to prosecute such crimes, rather than acting as the court of last resort.²⁰⁸

For this reason, nations adopting the Rome Statute will at least set forth draft legislation providing penalties in their domestic systems for the same crimes which the ICC may prosecute.²⁰⁹ This often includes the crimes of genocide, crimes against humanity, and war crimes, which are offenses prohib-

202. Rome Statute, *supra* note 6, pmb1. The preamble states that the “International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.” *Id.*

203. Discussion of jurisdiction can be found in Part I.B.1. of this Note.

204. See Triponel & Pearson, *supra* note 9, at 67.

205. See *id.*; see also CARTER & WEINER, *supra* note 30, at 1143.

206. Triponel & Pearson, *supra* note 9, at 68. Triponel and Pearson assert that “this principle [of complementarity] also requires that State Parties take an active role to implement the Rome Statute into their domestic legislation.” *Id.*

207. See Lijun Yang, *On the Principle of Complementarity in the Rome Statute of the International Criminal Court*, CHINESE J. INT'L L. 121, 123 (2005), available at <http://chinesejil.oxfordjournals.org/content/4/1/121.full>.

208. See *id.*

209. *Id.* at 124–26. See also Lee Stone & Max du Plessis, *The Implementation of the Rome Statute of the International Criminal Court (ICC) in African Countries*, ISSAFRICA, <http://www.issafrika.org/cdromestatute/pages/document.pdf> (last visited Jan. 19, 2013).

ited by the Rome Statute.²¹⁰ In addition, implementing legislation sets forth sentencing guidelines for how that nation would punish international crimes.²¹¹ For example, Senegal is one nation that has ratified the Rome Statute and put implementing legislation in force.²¹² Several other nations, including the DRC, have at least drafted implementing legislation.²¹³

In drafting implementing legislation, most countries have adopted stronger penalties than those in the Rome Statute, and few African countries have adopted the specific wording of Article 77, or the thirty-year maximum penalty.²¹⁴ The DRC is one example of a nation with draft legislation that sets forth sentencing guidelines very different from Article 77 and its thirty-year imprisonment provision.²¹⁵ For example, Article 25 of the DRC draft legislation states, “whosoever kills a person protected by international humanitarian law during armed international or non-international conflict, is sentenced to life imprisonment,” and Article 26(1) states, “[p]unishable by a criminal sentence of five to twenty years is whosoever takes hostage a person protected by international humanitarian law.”²¹⁶ Throughout the DRC draft legislation, this format is followed, and varying degrees of crimes are assigned different sentences.²¹⁷ Additionally, unlike the Rome Statute, many crimes are assigned a range, including a minimum sentence.²¹⁸

Importantly, and relevant to Lubanga’s sentencing, is that the “DRC’s draft legislation has adopted the [Rome] Statute’s definition of war crimes and has included the recruitment of children under the age of eighteen years as a punishable offense.”²¹⁹ This is broader than the Rome Statute, where the age for penalized enlistment is children under the age of fifteen.²²⁰

210. See Stone & Plessis, *supra* note 209.

211. *Id.*; Yang, *supra* note 207.

212. Stone & Plessis, *supra* note 209.

213. *Id.*

214. Triponel & Pearson, *supra* note 9, at 95–96.

215. *Draft Legislation—Implementation of the Rome Statute*, COALITION FOR THE INT’L CRIMINAL COURT, available at <http://www.iccnw.org/documents/DRCDraftLegEng.pdf> (last visited Nov. 9, 2012).

216. *Id.*

217. See *id.*

218. See *id.*

219. Triponel & Pearson, *supra* note 9, at 85.

220. *Id.*

Since Lubanga's case provides only an estimate for the thousands of soldiers used, it is unclear if this could have impacted the ICC's sentencing.²²¹ Regardless, the DRC's definition seems to reflect a desire for broader, harsher enforcement, and this could have been an influential factor in sentencing.²²²

If a nation has at least drafted implementing legislation, the ICC could then easily give deference to how the nation itself would have prosecuted the crime.²²³ Although deference to national legislation may not favor uniformity across all states, it would instead allow for sentences that better reflect the different theories of punishment and are more likely to be respected as fair and legitimate by each state.²²⁴ First, a minimum sentence increases the effectiveness of deterrence, as potential offenders will more likely be aware of the consequences.²²⁵ Second, as part of the theory of retribution, the punishment should fit the crime and provide a moral balance.²²⁶ National legislation may provide for sentencing ranges, which include minimums and maximums, resulting in proportional punishments that better fit the crime.²²⁷ Additionally, if a sentence reflects the legislation that has been recorded by the state, then the desires of the victims and the community are more likely to be heard, and the theory of restorative justice is more likely to be satisfied.²²⁸

Although it seems that many African nations have adopted broader interpretations or recommended higher sentences than the Rome Statute, this may not always be the case.²²⁹ For ex-

221. Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Hearing to Deliver the Decision, 5 (July 10, 2012), <http://www.icc-cpi.int/iccdocs/doc/doc1440143.pdf>.

222. See Triponel & Pearson, *supra* note 9, at 85. The DRC's desire can be assumed by its clear change in guidelines in draft legislation.

223. See *generally id.* at 84–85.

224. This specifically speaks to the theories of retribution and restorative justice. Additionally, increased awareness of the sentence one may face could also serve as a better deterrent.

225. See *generally New Zealand Sentencing Paper, supra* note 128.

226. See Dubinsky, *supra* note 11, at 618.

227. See *Draft Legislation—Implementation of the Rome Statute, supra* note 216; see *generally* Stone & du Plessis, *supra* note 209.

228. See Leinwand, *supra* note 130, at 809.

229. See *generally Implementation of the Rome Statute*, COALITION FOR THE INT'L CRIMINAL COURT, *available at* <http://www.iccnw.org/?mod=romeimplementation> (last visited Nov. 9, 2012).

ample, there may be state parties that adopt draft legislation that actually lends support to or even lowers the maximum penalties below the thirty years provided by the Rome Statute.²³⁰ Regardless, the theories of punishment, especially restorative justice to the victims and the community, would be best satisfied by giving deference to a nation's draft implementing legislation.²³¹ Therefore, "complementarity," "implementation," draft legislation, and the different theories of punishment all lend support to giving deference to how a nation would sentence an individual who has committed an international crime in its territory.

V. FINAL RECOMMENDATIONS

As discussed, the criticisms of the ICTY and ICTR left the drafters of the Rome Statute in pursuit of sentencing provisions that would result in greater consistency in sentencing.²³² The drafters of the Rome Statute chose to continue the balancing of mitigating, aggravating, and individual circumstances with the gravity of the crime.²³³ However, the Rome Statute included the additional use of a thirty-year imprisonment limitation that would be applicable in almost all cases.²³⁴ Finally, the Rome Statute differed from the guidelines governing the ICTY, ICTR, and SCSL when it did not include the provision requiring deference to national law.²³⁵

Unfortunately, in a possible attempt to reach more consistent results, the drafters of the Rome Statute granted the ICC judges too much discretion and failed to account for the theories of punishment. Lubanga's case demonstrates that the problems that existed in the ICTY and ICTR have carried over to the ICC and will likely result in further inconsistencies in the future. However, rather than focus solely on "consistency," the drafters of the Rome Statute should have given more consideration to the discretion granted to judges, the theories of punishment, and the purposes that the punishment of international criminals should serve.

230. *Id.*

231. *See infra* text accompanying note 238.

232. *See supra* text accompanying note 161.

233. Rome Statute, *supra* note 6, arts. 77–78.

234. *Id.* art. 77.

235. *See sources cited supra* note 199.

First, the thirty-year imprisonment provision should be removed. Even if the thirty-year limitation leads to greater consistency in sentencing, it will do little to deter criminals by imposing sentences that are too lenient, thereby failing the theories of punishment and resulting in minimal justice for victims.²³⁶ Hence, by focusing only on consistency, the ICC is failing to recognize its most important purpose, to *punish* “the perpetrators of the *most serious crimes* of concern to the international community.”²³⁷ However, by deferring to national legislation, any state party concerns regarding the removal of the thirty-year imprisonment provision may be counterbalanced.²³⁸ Additionally, deferring to national legislation will often provide a sentencing range, including a minimum,²³⁹ making it more difficult for the ICC to arbitrarily sentence perpetrators.

Second, finding a solution for the balance of mitigating and aggravating circumstances is a more challenging endeavor. However, allowing the ICC broad discretion to choose the standards of proof used to evaluate these circumstances does not aid the situation. Alternatively, the same standard of proof should be used for both mitigating and aggravating circumstances, whether that standard is balancing of the probabilities, proof beyond a reasonable doubt, or an intermediate standard of proof such as clear and convincing evidence.²⁴⁰ This will serve to remove some judicial discretion and lead to sen-

236. If all proposed recommendations were adopted, however, and a state implementing legislation involved the use of thirty-year maximum imprisonment sentences, then that would be acceptable. This is because the ICC would be giving deference to the nations and restoring justice in a way that the victims and society approves of.

237. See *About the Court*, *supra* note 2 (emphasis added).

238. Assuming that both this recommendation and the later recommendation for deference to national implementation legislation were adopted, a procedural safeguard would be provided for any states that disagree with the removal of the thirty-year limitation. For example, a state could reinstate the thirty-year limitation, or any limitation for that matter, in their implementing legislation, and that would be given deference. Therefore, any concerns regarding the removal of the thirty-year limitation would be counterbalanced by deference to national legislation.

239. See Stone & Plessis, *supra* note 209. This is based on the earlier explanation that the ICC arbitrarily chose a sentence between zero and thirty years. See *supra* text accompanying note 186. Having some type of minimum guideline would prevent the ICC from sentencing below a certain threshold.

240. See *supra* text accompanying note 52.

tences that fairly and equitably balance both positive and negative considerations relating to the defendant.

Finally, the ICC should reinstate the provision of the ICTY, ICTR, and SCSL that allow for deference to the law of the nation, and specifically allow for at least some deference to drafts of implementing legislation. Although this may not result in consistency on the international level, it would result in consistency on the national level by taking away some of the broad discretion granted to the ICC; and most importantly, it would cater to the theories of punishment. First, it connects the “departure from international sentencing guidelines to a State’s domestic law” or implementation law.²⁴¹ This in turn “both justifies its reasoning to the international community, and assures the domestic constituency that local values will be considered and protected.”²⁴² Second, it forces the court to “express its reasoning, avoiding reliance on discretion alone.”²⁴³ This would, in effect, limit the ICC’s broad discretion and force it to better serve the injured nation.²⁴⁴

By implementing all of these changes, the ICC would ultimately use the relevant nation’s draft legislation as a guideline for the sentence, mitigating and aggravating circumstances would be equally weighed into the sentencing equation, and the thirty-year provision would no longer apply. These changes would better serve all of the theories of punishment. First, with national legislation providing a different sentence range based on the offense, and the removal of the thirty-year limitation, the sentences would be “proportional” to the offence committed

241. Leinwand, *supra* note 130, at 850.

242. *Id.*

243. *Id.*

244. See Keller, *supra* note 7, at 57. In the section entitled “The Use of Aggravating and Mitigating Circumstances,” Keller discussed that “the [ICTY and ICTR] Trial Chambers’ discretion is perhaps too broad and should be limited by general sentencing guidelines.” *Id.*

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and better satisfy the theory of retribution. Second, the removal of the thirty-year limitation and the equal weighing of mitigating and aggravating circumstances would provide for harsher sentences, strengthening the general deterrent effect. Finally, by deferring to draft legislation, the nation itself will weigh in on the sentence, helping to restore justice to that nation.

In the end, *Lubanga* is the first and only case the ICC has considered. With proper changes to its sentencing guidelines, the ICC can be a strong enforcer of international criminal law that deters future offenders, punishes perpetrators based on their true moral culpability, and brings restorative justice to the nations involved.

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