

**EFFECT OF WIDE JUDICIAL DISCRETION ON THE LEGALITY OF  
SENTENCING AT THE ICTY**

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# TABLE OF CONTENTS

TABLE OF CONTENTS .....	i
ACKNOWLEDGEMENT.....	iv
DECLARATION.....	v
ABSTRACT.....	vi
LIST OF ABBREVIATIONS.....	vii
LIST OF CASES .....	viii
ICTY CASE LAW.....	viii
ICTR CASE LAW.....	viii
ICC CASE LAW .....	viii
ECtHR CASE LAW .....	viii
USA CASE LAW.....	viii
GERMAN CASE LAW .....	viii
CHAPTER 1: INTRODUCTION .....	1
1.1. BACKGROUND TO THE PROBLEM.....	1
1.2. STATEMENT OF THE PROBLEM.....	2
1.3. JUSTIFICATION OF THE STUDY .....	2
1.4. STATEMENT OF OBJECTIVE.....	2
1.5. RESEARCH QUESTIONS.....	3
1.6. LITERATURE REVIEW .....	3
1.7. HYPOTHESES .....	4
1.8. ASSUMPTIONS.....	4
1.9. RESEARCH METHODOLOGY.....	4
1.9.1. SCOPE AND LIMITATIONS OF THE STUDY .....	5
1.9.2. CHAPTER SUMMARY .....	6
CHAPTER 2: THEORETICAL FRAMEWORK.....	7
2.1. INTRODUCTION .....	7
2.2. FOUNDATIONS OF POSITIVISM.....	7
2.3. FROM BENTHAM TO HART .....	8
2.3.1. Jeremy Bentham .....	8
2.3.2. John Austin .....	8
2.3.2. H L A Hart.....	9
2.4.1 Nulla poena sine praevia lege poenali .....	11
2.4.2 Nulla poena sine lege scripta .....	11

2.4.3	Nulla poena sine lege certa .....	12
2.4.4	Nulla poena sine lege stricta .....	12
2.5.	CONCLUSION .....	13
<b>CHAPTER 3: JURISPRUDENCE OF THE ICTY .....</b>		<b>13</b>
3.1.	INTRODUCTION .....	13
3.2.	HISTORY OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA.....	Error! Bookmark not defined.
3.3.	SENTENCING PRACTICE OF THE ICTY .....	14
3.3.1.	ISSUE OF LEGALITY BEFORE THE ICTY .....	14
3.3.2.	RULES AND PROCEDURE OF SENTENCING.....	15
3.3.3.	PURPOSE OF SENTENCING .....	17
3.3.4.	GRAVITY OF CRIMES.....	19
3.3.5.	REFERENCE TO THE GENERAL PRACTICE IN THE FORMER YUGOSLAVIA .....	20
3.4.	CONCLUSION .....	21
<b>CHAPTER 4: AN ANALYSIS OF THE ICTY JURISPRUDENCE FROM THE POINT OF VIEW OF HART’S JUDICIAL DISCRETION AND THE PRINCIPLE OF LEGALITY .....</b>		<b>22</b>
4.1.	INTRODUCTION .....	22
4.2.	HART’S JUDICIAL DISCRETION AND THE SENTENCING PRACTICE OF THE ICTY .....	23
4.3.	THE PRINCIPLE OF LEGALITY AND THE SENTENCING PRACTICE OF THE ICTY .....	24
4.4.	ICC SENTENCING: LOOKING FORWARD.....	25
<b>CHAPTER 5: CONCLUSION.....</b>		<b>27</b>
5.1.	RECOMMENDATIONS .....	28
<b>BIBLIOGRAPHY .....</b>		<b>29</b>
<b>BOOKS .....</b>		<b>29</b>
<b>STATUTES.....</b>		<b>30</b>
<b>INTERNATIONAL INSTRUMENTS.....</b>		<b>30</b>
<b>JOURNAL ARTICLES.....</b>		<b>30</b>
<b>ONLINE ARTICLES .....</b>		<b>31</b>
<b>UN DOCUMENTS .....</b>		<b>32</b>
<b>CONFERENCE PAPER .....</b>		<b>32</b>
<b>REPORT.....</b>		<b>32</b>

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This dissertation is dedicated to the men and women the world over who refuse to accept that what they know is all there is and live their lives fearlessly, you are not alone.

**DECLARATION**

I, Ivy Nyambura Kinyanjui, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:.....

Dated:.....

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:.....

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## **ABSTRACT**

*This dissertation looks into the jurisprudence of the International Criminal Tribunal for the former Yugoslavia and identifies that the judges enjoyed unfettered judicial discretion in sentencing due to the minimal provisions on sentencing within the Statute and Rules of Evidence and Procedure. This wide judicial discretion has led to inconsistency in the determination of gravity of crimes, aggravating and mitigating circumstances and reference to the general practice of the former Yugoslavia. The study then uses Hart's theory of judicial discretion within the larger context of positivism, in order to determine that the inconsistent jurisprudence of the tribunal has violated the principle of legality. The hypotheses was that there was inconsistent sentencing in the ICTY. The dissertation looked into the sentencing practice of the International Criminal Court as the future of international criminal justice and determines that there are possible challenges to sentencing there and offers recommendations. One of the recommendations is to have the Assembly of State Parties pass a document with sentencing ranges or a more detailed sentencing policies in order to make the sentencing more consistent.*

## **LIST OF ABBREVIATIONS**

ECtHR – European Court of Human Rights

ICC – International Criminal Court

ICTR – International Criminal Tribunal for Rwanda

ICTY – International Criminal Tribunal for the former Yugoslavia

SC – Security Council

UNSC – United Nations Security Council

UNTS – United Nations Treaty Series

UN – United Nations

## **LIST OF CASES**

### **ICTY CASE LAW**

1. *Prosecutor v Aleksovski*, ICTY Judgement of 24 March 2000.
2. *Prosecutor v Blaskic*, ICTY Judgement of 29 July 2004.
3. *Prosecutor v Delalic and Others*, ICTY Judgement of 16 November 1998.
4. *Prosecutor v Delalic and Others*, ICTY Judgement of 20 February 2001.
5. *Prosecutor v Dragan Nikolic*, ICTY Judgement of 4 May 2005.
6. *Prosecutor v Erdemovic*, ICTY Judgement of 21 May 1997.
7. *Prosecutor v Krstic*, ICTY Judgement of 2 August 2001.
8. *Prosecutor v Kunarac and Others*, ICTY Judgement of 22 February 2001.
9. *Prosecutor v Kupreskic and Others*, ICTY Judgement of 22 January 1998.
10. *Prosecutor v Milosevic*, ICTY.
11. *Prosecutor v Mrskic & Slijivancanin*, ICTY Judgement of 5 May 2009.
12. *Prosecutor v Tadic*, ICTY Judgement of 14 July 1997.
13. *Prosecutor v Tadic*, ICTY Judgement of 2 October 1995.
14. *Prosecutor v Tadic*, ICTY Judgement of 26 January 2000.
15. *Prosecutor v Vasilijevic*, ICTY Judgement of 29 November 2002.

### **ICTR CASE LAW**

16. *Prosecutor v Juvenal Kajelijeli*, ICTR Judgement of 1 December 2003.

### **ICC CASE LAW**

17. *Prosecutor v Ahmad Al Faqi Al Mahdi*, ICC Judgement of 24 August 2016.
18. *Prosecutor v Germain Katanga*, ICC Judgement of 7 March 2014.
19. *Prosecutor v Jean-Pierre Bemba Gombo*, ICC Judgement of 21 March 2016.
20. *Prosecutor v Thomas Lubanga*, ICC Judgement of 14 March 2012.

### **ECtHR CASE LAW**

21. *Veeber v Estonia*, ECtHR Judgement of 21 January 2003.
22. *Puhk v Estonia*, ECtHR Judgement of 10 February 2004.

### **USA CASE LAW**

23. *Rogers v Tennessee*, Supreme Court USA, (2001).

### **GERMAN CASE LAW**

24. *Streletz, Kessler and Krenz v Germany*, Federal Constitutional Court of Germany, (2001)



## CHAPTER 1: INTRODUCTION

### 1.1.BACKGROUND TO THE PROBLEM

While the origins of international criminal law go back to the times that the pirate was considered as *hosti humanis generis* and each member of the then small international community had jurisdiction over him, the defining moment of the international criminal justice system as it is known today was The Nuremberg Tribunals.<sup>1</sup> In his opening address as Chief Prosecutor of the International Military Tribunal at Nuremberg, Justice Robert H. Jackson declared that:

*“...the wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated.”<sup>2</sup>*

This set the tone for the beginning of international criminal justice.

Until recently, the design of much of the system was ad hoc and reactive to world events rather than the result of any sort of coherent forward-looking process. Following the International Military Tribunal in Nuremberg the next tribunal on the core crimes was the International Criminal Tribunal for the former Yugoslavia. There has since been other tribunals, in response to atrocities committed, which have then led to the International Criminal Court (ICC). A notable exception is that the ICC has only prospective jurisdiction.<sup>3</sup>

Even with the gains that international criminal justice system has made there has been great controversy concerning the sentencing in the ad hoc tribunals.<sup>4</sup> This has been characterized by a lack of transparency on sentencing rulings owing to the lack of clear sentencing guidelines. Any system of law requires a minimum of certainty, and any dispute settlement system a

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<sup>1</sup> Green L, ‘New Trends in International Criminal Law,’ Volume 5 *Israel Yearbook of Human Rights* (1981), 12.

<sup>2</sup> *Trial of the Major War Criminals before the International Military Tribunal*, 1947, 98, [https://www.loc.gov/rr/frd/Military\\_Law/pdf/NT\\_Vol-11.pdf](https://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-11.pdf).

<sup>3</sup> Article 13, *Rome Statute*, 17 July 1998.

<sup>4</sup> Song S, “The Law and Practice of the International Criminal Court: Achievements, Impact and Challenges” The ICC AT 10 Years Conference, Salzburg, 8 August 2011, <https://www.icc-pi.int/nr/rdonlyres/289b449a-347d-4360-a854-3b7d0a4b9f06/283740/010911salzburglawschool.pdf>.

minimum of foreseeability. This, however, is lacking at the international criminal justice system.

## **1.2.STATEMENT OF THE PROBLEM**

The ICTY has no standardized sentencing ranges or guidelines on sentencing. This lack of sentencing ranges or sentencing guidelines is unlike what is found in national criminal law jurisdictions. Common law systems usually have sentencing guidelines while civil law systems usually have sentencing ranges. The ICTY Statute provides that punishment is limited to imprisonment and that while passing judgement, the judges will take into consideration the individual circumstances of the accused person.<sup>5</sup> These laconic provisions on sentencing have granted the judges wide judicial discretion, which provides for inconsistent sentencing within the tribunal. This issue is compounded by the fact that the doctrine of stare decisis does not apply at this level; the lack of determinate reference on sentencing has made it irregular.<sup>6</sup>

## **1.3.JUSTIFICATION OF THE STUDY**

The core international crimes are loaded with many ideological and political interests that are crying for a 'just' solution, which places the international sentence at the forefront of the debate.<sup>7</sup> It is necessary to conduct this research because there has been a lot of criticism on the efficiency of the international criminal tribunals on their sentencing practice.<sup>8</sup> The three core crimes (genocide, crimes against humanity, war crimes) are taken to be so horrific that there is a need to establish special mechanisms and special courts to try the cases. In case the sentencing practice does not align with the principle of legality, then this will affect the legitimacy of the entire criminal justice system.

## **1.4.STATEMENT OF OBJECTIVE**

The objective of this study is to identify whether or not there has been inconsistent sentencing at the ICTY brought about by the wide judicial discretion enjoyed by the judges and whether

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<sup>5</sup> Article 23, *Statute of the International Criminal Tribunal for Rwanda*, 8 November 1994, Article 24, *Statute of the International Criminal Tribunal for the former Yugoslavia*, 25 May 1993.

<sup>6</sup> Allison D, 'Constructing a Hierarchy of Crimes in International Criminal Law Sentencing,' *Virginia Law Review* (1995), 451.

<sup>7</sup><http://www.iccnw.org/documents/FS-CICC-CoreCrimesinRS.pdf>.

<sup>8</sup>Henham R, 'Some Issues for Sentencing in the ICC,' 52 *International and Comparative Law Quarterly* (2003), 81.

the existence of such inconsistency has affected the legality of the tribunal itself. The dissertation will also look at whether or not there is in theory any established principles of sentencing by the ad hoc tribunals that could be codified by the International Criminal Court as its rule of procedure in order to establish a consistent and more transparent way of sentencing thereby reducing the judicial discretion at this level. This will be done by looking into whether or not there is a uniform system of international criminal justice and whether or not the objectives of domestic jurisdictions are similar to or identical to the ones at the international level.

### **1.5.RESEARCH QUESTIONS**

- a. Whether or not there is unfettered judicial discretion at the International Criminal Tribunal for the former Yugoslavia
- b. Whether the wide judicial discretion afforded the judges has led to inconsistencies in sentencing
- c. Whether or not this judicial discretion has affected the legality of the sentences passed by the ICTY

### **1.6.LITERATURE REVIEW**

This research paper will use as the main reference, the book by Silvia D'scoli on Sentencing in International Criminal Law: The UN ad hoc Tribunals and Future Perspectives for the ICC.<sup>9</sup> The Ad Hoc tribunals where the author highlights the inconsistencies of sentencing in the ad hoc tribunals and suggests that the best way to improve on this, is by establishing a hierarchy of the core crimes with genocide being the most grave. She highlights the fact that though the courts have stated that there is no hierarchy, empirical evidence on the jurisprudence, points to the fact that there is in fact a hierarchy based on the sentencing with war crimes receiving the least number of years and genocide receiving the most number of years. Another reference will be the journal article by Allison Marson on Constructing a Hierarchy of Crimes in International Criminal Law Sentencing where she outlines the inconsistencies in sentencing by

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<sup>9</sup> D'Ascoli S, *Sentencing in International Criminal Law: The UN ad hoc Tribunals and Future Perspectives for the ICC*, Hart Publishing, Oxford, 2011, 23.

the international criminal tribunals.<sup>10</sup> She suggests that this is partly because the philosophy of the Netherlands where the Tribunals are found relies heavily on rehabilitation as opposed to retribution. This is also partly the reason for the minimal sentences passed. She however, expressly states that there is no hierarchy of crimes. Another reference is Sentencing and the Gravity of the Offence in International Criminal Law by Andrew Carcano where he suggests that the lack of clear sentencing procedure goes against the principle of *nulla poena sine praevia lege poenali*.<sup>11</sup>

### **1.7.HYPOTHESES**

The hypotheses of this study is that the sentencing practice of the ICTY is inconsistent owing to the wide judicial discretion enjoyed by the judges and that the lack of clear sentencing guidelines within this tribunal either in the form of sentencing ranges for particular crimes or sentencing guidelines for crimes has jeopardised the tribunal's ability to guarantee the highest degree of uniformity and fairness, thereby putting into question the legality of these courts and in particular, the legality of their sentencing practices.

### **1.8.ASSUMPTIONS**

- (i) That there is no hierarchy of crimes in international criminal justice.
- (ii) That there is no uniform international criminal justice system.
- (iii) That the purpose of sentencing in national criminal justice systems are the same as that of the international criminal justice system.
- (iv) That the principles of the rule of law apply to the international criminal justice system.

### **1.9.RESEARCH METHODOLOGY**

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<sup>10</sup> Danner A M, 'Constructing a Hierarchy of Crimes in International Criminal Law Sentencing,' 87 *Virginia Law Review* (2001), 467.

<sup>11</sup>Carcano A, 'Gravity of the Offence in International Criminal Law' 51 *International and Comparative Law Quarterly* (2002), 583 – 609.

The research methodology that is to be used is qualitative method of research. This will involve a lot of computer based research. Books, journal articles, cases and other documents will be used in conducting this research.<sup>12</sup>

### **1.9.1. SCOPE AND LIMITATIONS OF THE STUDY**

The scope of this study is on sentencing within the international criminal justice system and in particular the ICTY. This study will look into case studies from the ICTY and look into what the International Criminal Court has done different with regard to sentencing and what could possibly be done to improve sentencing before the first permanent international criminal court.<sup>13</sup> The limitation of this study is that the court is always issuing new decisions and the decisions may affect the findings made under this study. Further, with regard to the international criminal court, any rules of procedure must be approved by the Assembly of State Parties,<sup>14</sup> a body whose constitution and mandate is political in nature something which may affect the legal working of the court and in turn politicizes every single issue brought before it.<sup>15</sup>

The thesis will be limited to the ICTY and not to both ad hoc tribunals because, even though they had very similar Statutes in wording, the reference to domestic practices in the respective States as far as sentencing is concerned has greatly distinguished the jurisprudence of the two courts.

It may be difficult to make causal inferences from the case studies, because it may be impossible to rule out alternative explanations. It may be unclear about the generality of the findings of the case studies that will be done from the jurisprudence of the ICTY. While a case study involves the behaviour of one person, group, or organization, the behaviour of this one unit of analysis may or may not reflect the behaviour of similar entities. In this context, the decisions passed by the International Criminal Tribunal for the Former Yugoslavia were arrived at after many considerations were made and it will be challenging to isolate particular

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<sup>12</sup> Kothari C R, *Research Methodology Methods and Techniques*, New Age International Limited Publishers, New Delhi, 2013, 113, <https://libguides.usc.edu/writingguide/methodology>.

<sup>13</sup> <http://legal.un.org/icc/general/overview.htm>, <https://www.icrc.org/eng/resources/documents/misc/57jp4m.htm>.

<sup>14</sup> [https://www.icc-cpi.int/en\\_menus/asp/publications/factsheet/Documents/ASP-Factsheet-2013-v4-ENG-web.pdf](https://www.icc-cpi.int/en_menus/asp/publications/factsheet/Documents/ASP-Factsheet-2013-v4-ENG-web.pdf).

<sup>15</sup> Guillaume G, 'The Use of Precedent by International Judges and Arbitrators' *Journal of International Dispute Settlement* Volume 2 (2011), 5.

features of sentencing. This issue is exacerbated by the fact that at the international level, the doctrine of *stare decisis* does not apply.<sup>16</sup>

### 1.9.2. CHAPTER SUMMARY

The introductory Chapter lays down the background and justification of this study. The study seeks to identify the inconsistencies in sentencing practice at the international level, which in turn has made the sentencing process opaque.

Chapter two will look into the theoretical framework of the research by looking at positivism and H L A Hart's take on it. It will be used to analyse the existing practice in sentencing in the International Criminal Tribunal for the former Yugoslavia.

Chapter three will look into a case study by looking into the existing jurisprudence. This chapter shall look into areas that point towards the wide judicial discretion enjoyed by the judges of the ICTY. The *ratio decidendi* of the various judges will be looked at.

Chapter four shall discuss the jurisprudence of the ICTY from the point of view of the theoretical framework. Here, the bulk of the work will be done and the new findings shall be discussed.

Finally, the study will make recommendations based the possible principles derived from the ad hoc tribunals on sentencing and prescribe their application by the International Criminal Court in order to streamline sentencing within the international criminal justice system. The chapter will finally conclude.

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<sup>16</sup> The rule of *stare decisis*, or more precisely, the rule of *stare rationibus decisis*: that courts are bound by the reasoning of the judgments already rendered. These judgments create the law, and that law must be respected, Guillaume G, 'The Use of Precedent by International Judges and Arbitrators,' 2 *Journal of Dispute Settlement*(2011), 35.

## **CHAPTER 2: THEORETICAL FRAMEWORK**

### **2.1. INTRODUCTION**

Positivism is among the most influential theoretical approaches to international law.<sup>17</sup> The existence of International Law and especially International Criminal Law is itself an ode to legal positivism. The validity of international law as law has been expounded by legal positivists belonging to the analytical jurisprudence school of thought. Therefore, any conversation concerning legal philosophy and international law, should include a discussion of legal positivism. It is from this departure that the issue of sentencing shall be discussed.

### **2.2. FOUNDATIONS OF POSITIVISM**

Positivism begins with the quest of legal philosophers to distinguish between what law is and what law ought to be. Both Bentham and Austin accused natural law philosophers of making it so that it had become impossible to distinguish between the two. Natural lawyers maintained that there was no separation of the law from morality and in fact that the former stemmed from the latter. Herein lies the key distinction between positivism and natural moral law.

IN the simplest terms, positivism asserts the question of what the law is and what the law ought to be are two different things. It affirms that it is possible to enter into a discussion about what the law is without necessarily looking into the merits or demerits of it.

The earliest proposers of this school of thought include Jeremy Bentham (1748 – 1832) and John Austin (1790 – 1859).

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<sup>17</sup> Ratner and Slaughter, ‘Appraising the Methods of International Law: A Prospectus for Readers’ 93 *American Journal on International Law* (1999), 291, Shapiro S J, *Legality*, Harvard University Press, 2013, 26–30.

## 2.3. FROM BENTHAM TO HART

### 2.3.1. Jeremy Bentham

Jeremy Bentham is credited for being one of the founders of modern day legal positivism.<sup>18</sup> He is well known as a utilitarian who espoused the belief that the law should be viewed as ‘the greatest good for the greatest number.’<sup>19</sup> He went ahead and tore apart the then held beliefs on the law and society. He attacked the central ideas of natural law and the social contract theory as embodied in the Blackstone commentaries.<sup>20</sup>

He stated that nature has given us both pleasure and pain as a way of determining our conduct.<sup>21</sup> According to this rubric, mankind does what gives them the greatest pleasure and avoids what brings pain. This was the basis on which Bentham wanted the laws to be analysed and studied. With this, Bentham challenged that laws were extracted by morals. For him, the law, could be empirically established and had to do with the greatest pleasure for the largest number. His approach was rational and emphasized conceptual clarity and deductive argument.<sup>22</sup>

### 2.3.2. John Austin

John Austin, himself a student of Jeremy Bentham described the law as a command by a sovereign backed by a sanction.<sup>23</sup> In defining the word command, he described it as normative statements laid down in order to influence human conduct, other than merely statements of fact.<sup>24</sup> He described them as imperative. He also went ahead to describe the law as being separate from morals.

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<sup>18</sup>Freeman M, *Lloyd's Introduction to Jurisprudence*, 7ed, Sweet and Maxwell, London, 2014, 15.

<sup>19</sup> Bentham J, *An Introduction to the Principles of Morals and Legislation*, Prometheus Books, 1823, 6. This idea of the ‘greatest good for the greatest number’ was initially adopted by Cesare Beccaria of the Enlightenment Period, *Dei DelittidellePene* (1764) where the Italian law reformer announced that the only valid criterion for evaluating the merits of a law is “la messimafelicitàdivisanelmaggiornumero”—the greatest happiness of the greatest number.

<sup>20</sup> Blackstone W, *Commentaries on the Laws of England*, Clarendon Press, Oxford, 1769, 4.

<sup>21</sup>Bentham, *An Introduction to the Principles of Morals and Legislation*, 6. Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. They alone point out what we ought to do and determine what we shall do; the standard of right and wrong, and the chain of causes and effects, are both fastened to their throne. They govern us in all we do, all we say, all we think; every effort we can make to throw off our subjection to pain and pleasure- will only serve to demonstrate and confirm it. A man may claim to reject their rule but in reality he will remain subject to it. The principle of utility recognises this subjection, and makes it the basis of a system that aims to have the edifice of happiness built by the hands of reason and of law.

<sup>22</sup><https://plato.stanford.edu/entries/bentham/>.

<sup>23</sup> Austin J, *The Province of Jurisprudence Determined*, Nabu Press, 2014, 234, he was heavily influenced by Jeremy Bentham who helped become a lecturer at the newly found University of London.

<sup>24</sup>Freeman M, *Lloyd's Introduction to Jurisprudence*, 6.



### 2.3.2. H L A Hart

H L A Hart is considered one of the most influential contributors to legal positivism as a school of jurisprudence.<sup>25</sup> Hart borrowed from both Austin and Bentham on their views on the law. Hart explains that whether or not the law exists is a separate question from the quality of the law itself and whether it conforms to a particular standard.<sup>26</sup> He further asserts that the law should be formed from rational considerations and not from morality which cannot be empirically determined. He was a great supporter of formalism and empiricism in the analysis of law.

According to Hart, there are two types of rules which constitute the quintessence of the law that is primary rules and secondary rules.<sup>27</sup> It is important to identify the two types of rules as different while at the same time appreciating their interrelation.

Under the one type of rule, that is, the primary rule, people are obliged to either do certain types of actions or to avoid doing certain types of actions. This type of rule does not take into consideration the preference of the human being and people have no choice to follow it. The other type of rule, that is, the secondary rule do not exist on their own. They arise from the first one. They create the rules that determine how laws will be changed and how the law will confer powers to certain individuals or institutions within the society. They help to either modify or remove altogether the primary rules.<sup>28</sup>

For example, Criminal Law may be considered as Primary Rules because they regulate the conduct of individuals by sanctioning certain actions and prescribing punishment for them. The Constitutional articles that confer legislative powers to Parliament are a good example of secondary rules.

Hart further categorised secondary rules as rules of recognition, rules of change, or rules of adjudication. Rules of recognition make it possible to identify what is or is not a legitimate primary rule.<sup>29</sup> In any legal system, this might be a reference to a particular statute or text containing the law that is authoritative in nature. It may also be the pre-set standard of law that

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<sup>25</sup> Herbert Lionel Adolphus Hart was a legal philosopher and professor of Jurisprudence at Oxford University and the principal at Brasenose College, Oxford.

<sup>26</sup> Hart H L A, 'Positivism and the Separation of Law and Morals' 71 *Harvard Law Review*(1958), 596.

<sup>27</sup>Hart H, *The Concept of Law*, Oxford University Press, 1961, 130.

<sup>28</sup>Hart H, *The Concept of Law*, 151.

<sup>29</sup>Hart H, *The Concept of Law*, 151.

has already been established. As the society becomes more and more sophisticated, the law also grows in complexity and this is the same for the rules of recognition.<sup>30</sup>

The theoretical core of positivism according to Hart consists of three theses. These are: the separability thesis, the pedigree thesis and the discretion thesis.<sup>31</sup> The separability thesis states that there is a difference between law and morality and that neither one stems from the other. The pedigree thesis is concerned with the validity of laws. It concerns who made the law and whether they had the proper authority to make it, thus rendering the law valid or not. The discretion thesis concerns the judicial discretion that judges exercise in the case where there is not sufficient law on a matter or where two rules conflict. In such a case, a judge may rightly come to whatever rational decision. In these hard cases, judges make new law.

Hart further asserts that when considering all the rules under the law, there are cases that will be a “core of certainty”. That is cases that are central in character where the way in which the law applies is clear. There will also exist certain cases that can only be described as “penumbra of doubt” because it is not certain how the law applies to it. In such a case, the application of the rule is uncertain.<sup>32</sup> At this margin of uncertainty, Hart states that judges will ultimately have to use their own discretion where it is not clear how the law directly applies to a case. That is referred to as “open texture”. In exercising discretion, the judges have to consider the purpose or the final result in society of applying a particular interpretation of the law as opposed to a different one. They essentially have to come up with new law. They have to consider varying policy arguments.<sup>33</sup>

According to Hart, judicial discretion is a result of the uncertainty of social considerations. They are numerous and many times contradictory. It may not be possible to use a singular standard that settle an upcoming contingencies way in advance. To be guided by precedent is not a reliable system since in many cases, the facts and situation will be very different. While common sense might eliminate certain similitudes in standards as unbecoming, conflicting standards that will seem more or less reasonable will always abound.<sup>34</sup> Whereas the law may help to settle these conflicts and doubts, the mere use of statutes to do so does not remove all

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<sup>30</sup>Starr W, ‘Law and Morality in H.L.A. Hart's Legal Philosophy’ 67 *Marquette Law Review* (1984), 684.

<sup>31</sup> Hart, *The Concept of Law*, 152.

<sup>32</sup> Hart, *The Concept of Law*, 123.

<sup>33</sup>Penner J, Schiff D, Nobles R, *Introduction to Jurisprudence and Legal Theory: Commentary and Materials*, Oxford University Press, 2002, 121.

<sup>34</sup> Shapiro S J, ‘The Hart – Dworkin Debate: A Short Guide for the Perplexed, Public Law and Legal Theory’ *Working Paper Series* (2007), 123.

of them and in some instances, none at all. For Hart, then judges have strong discretion when the law is not itself clear or if two competing rules and so the judge ought to use their discretion to come to a decision.

## 2.4 THE PRINCIPLE OF LEGALITY

An important component of the rule of law is the principle of legality, or government according to law.<sup>35</sup> This principle has well been explained by the Constitutional Court of Germany which is quintessential example of a country of the civil law jurisdiction. However, other common law legal philosophers have also expounded on the principle. The principle has four different components outlined below.<sup>36</sup>

### 2.4.1 Nulla poena sine praevia lege poenali

There is to be no penalty without previous law.<sup>37</sup> This prohibits laws that are made after the crime has already been committed then trying to use these new laws to pass sanctions on those previous offenders. It refers to the non-retroactivity of the law and has become pervasive in modern legal practice. It can in fact be considered to be a part of basic rule of law and due process. It protects individuals from being arbitrarily prosecuted, convicted or punished. In a larger sense, it underpins the rule of law. This has already been stressed by the European Court of Human Rights in *Puhk v Estonia*.<sup>38</sup>

### 2.4.2 Nulla poena sine lege scripta

It simply means that there should be no punishment without prior *written* law. All crimes or criminal conduct must not only be proscribed by the law, it must be proscribed by written law. It must not only be clear to members of the public at large but also to members of the bench. This requirement specifically removes as operational any customary law as a basis of criminal law. A person may not be tried or convicted for something that is not already proscribed by law. This principle is accepted and codified in modern democratic states as a basic requirement

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<sup>35</sup>Dicey A, *The Law of the Constitution*, Elibron Classics, 1959, 188.

<sup>36</sup>*Streletz, Kessler and Krenz v Germany*, Federal Constitutional Court of Germany, (2001), 246, Article 103(2), Basic Law for the Federal Republic of Germany (1949), Boot M, 'Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court' *School of Human Rights Research*, (2002), 94.

<sup>37</sup> Article 7, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Article 15(2), *International Convention on Civil and Political Rights*, 16 December 1966.

<sup>38</sup>EctHR, Judgment of 10 February, 2004, para 45.

of the rule of law.<sup>39</sup> It has been described as "one of the most 'widely held value-judgement in the entire history of human thought".<sup>40</sup>

### **2.4.3 Nullapoena sine lege certa**

There can be no punishment without *definite* law. The penal must define a crime with the utmost level of certainty and definiteness. This should be able to assist members of the public to use their rational calculator in assessing what is and is not a crime and what punishment they would incur for undertaking certain criminal actions. This principle is already enunciated in many national jurisdictions and has been recognised by the European Court of Justice as a "general principle of Union law".<sup>41</sup> It is related to the principles of specificity and accessibility.<sup>42</sup> Along with the necessary requirements of certainty, specificity, foreseeability and accessibility, the above account for the principle of legality.<sup>43</sup>

### **2.4.4 Nullapoena sine lege stricta**

There should not be any punishment without *strict* law. This proscribes the application of criminal law and its sanctions by way of analogy. Basically, a person cannot be punished for a crime or conduct for which the law does not provide for and to a high degree of certainty and definiteness.<sup>44</sup>

It is not enough for there to be likeness and a comparison between two similar conducts.<sup>45</sup> It is also a shield for accused persons from any interpretation of the law that would greatly make their case worse. In this sense, it helps to uphold the presumption of innocence. This principle is satisfied when an accused person can read and understand for statute what criminal conduct is and with the help of the judicial system understand what they are liable for with regard to their criminal act or omissions.<sup>46</sup>

This principle generally provides that only the law can proscribe criminal conduct and that it must do so with a certain level of definiteness.

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<sup>39</sup>[Shahram Dana, Beyond Retroactivity to Realizing Justice: The Principle of Legality in International Criminal Law Sentencing, 99 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 857 \(2009\)](#)

<sup>40</sup>Justice Scalia in *Rogers v. Tennessee*, citing J. Hall, General Principles of Criminal Law 59 (2d ed. 1960)

<sup>41</sup> *Klip, André (2011). Substantive Criminal Law of the European Union, p. 69*

<sup>42</sup> Trial Chamber Vasilijevic, IT-98-32-T, 2002 Para 193.

<sup>43</sup> <http://www.lexisnexis.com.ezproxy.library.strathmore.edu/uk/legal/#link0>

<sup>44</sup> *Kunarac et al, IT-96-23-A, IT-96-23/1-A.*

<sup>45</sup> *Veeber v Estonia (No. 2)*, the European Court of Human Rights.

<sup>46</sup> *Veeber v Estonia (No. 2)*, the European Court of Human Rights.

## **2.5. CONCLUSION**

The above chapter has looked into the theoretical framework of the dissertation that is positivism from the point of view of Hart, and the principle of legality and all its components. The following chapter shall look into the jurisprudence of the ICTY and thereafter analyse how the jurisprudence has fared through the lens of the theoretical framework.

## **CHAPTER 3: JURISPRUDENCE OF THE ICTY**

### **3.1. INTRODUCTION**

This Chapter will look into the history of the ICTY and how it came to be. The jurisprudence of the ICTY will be looked into with an emphasis on the general factors that have influenced sentencing, that is: the purposes of sentencing, the gravity of the crimes and the general practice of the former Yugoslavia. Thereafter, the jurisprudence of the court shall be analysed from the point of view of Hart's judicial discretion and the principle of legality.

It was not until 1993 when the Security Council proposed to set up a Tribunal. In a passed resolution, the Security Council expressed grave alarm at the widespread violations of international humanitarian law and reported cases of ethnic cleansing and mass killings.<sup>47</sup> As a means to end the crimes committed and to bring to justice the perpetrators, the Council decided to establish the Tribunal.<sup>48</sup> The Tribunal was formally established UN Security Council Resolutions 827.<sup>49</sup> The Resolution adopted the Statute of the Tribunal. The jurisdiction of the

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<sup>47</sup>UNSC/RES/808 (1993) The International Criminal Tribunal for former Yugoslavia, 2.

<sup>48</sup> S/RES/808, 1.

<sup>49</sup> S/RES/827 (1993) Statute of the International Criminal Tribunal for the former Yugoslavia, 4.

court included four areas: breaches of the Geneva Conventions, violations of the laws and customs of war, genocide and crimes against humanity.<sup>50</sup>

By then, there was no precedent on how to conduct international criminal trials other than what was the Nuremberg and Tokyo Trials after World War 2. By the time the judges arrives in November 1993, there were no rules, no procedure and no cases.<sup>51</sup> Staff also had to be recruited from varying jurisdictions with different practices, which had to be forged into a single international criminal justice system. In a sense, the tribunal was a pioneer.

The first indictment delivered by the Trial Chamber of the ICTY was against Dragan Nikolic. He was the director of the Susica Detention Camp located in Bosnia and Herzegovina which was managed by the Serbs. The indictment was delivered in 1994 and was confirmed on 12 February 1999 and contained 80 counts of Crimes against Humanity, Grave Breaches of the Geneva Conventions, and Violations of the Laws or Customs of War.<sup>52</sup> After he pleaded guilty in September 2003, his sentence was later reduced from 23 years to 20 years.<sup>53</sup>

The highest profile case in the Tribunal to date was on Slobodan Milosevic.<sup>54</sup> He was the then President of Serbia from July 1997 to September 2000 having served two terms. In October 2000, he relinquished his position having lost the presidential elections for the Federal Republic of Yugoslavia.<sup>55</sup> He was indicted as a sitting president.<sup>56</sup>

### **3.3. SENTENCING PRACTICE OF THE ICTY**

#### **3.3.1. ISSUE OF LEGALITY BEFORE THE ICTY**

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<sup>50</sup> Art 2 - 5, Updated Statute of the International Criminal Tribunal for the former Yugoslavia, [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf?](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf?)

<sup>51</sup> <http://www.icty.org/en/about/office-of-the-prosecutor/history>.

<sup>52</sup> [http://www.icty.org/x/cases/dragan\\_nikolic/cis/en/cis\\_nikolic\\_dragan.pdf](http://www.icty.org/x/cases/dragan_nikolic/cis/en/cis_nikolic_dragan.pdf).

<sup>53</sup> [http://www.icty.org/x/cases/dragan\\_nikolic/cis/en/cis\\_nikolic\\_dragan.pdf](http://www.icty.org/x/cases/dragan_nikolic/cis/en/cis_nikolic_dragan.pdf).

<sup>54</sup> *Prosecutor v Milosevic*, ICTY.

<sup>55</sup> [http://www.icty.org/x/cases/slobodan\\_milosevic/ind/en/mil-ai040421-e.html](http://www.icty.org/x/cases/slobodan_milosevic/ind/en/mil-ai040421-e.html).

<sup>56</sup> His formal charges included genocide, murder, torture, unlawful confinement, inhumane acts, extermination and attacks on civilians, among others. Separate indictments were filed for his crimes in Kosovo, Bosnia and Croatia. His trial began in February 2002, but he died of a heart attack in March 2006 before a verdict could be rendered.

The issue of legality was dealt with in the landmark case of *Tadic* by the tribunal.<sup>57</sup> Dusko Tadic was accused of committing war crimes in a Serb – run camp within Bosnia and Herzegovina. The issue brought before the Appeals Chamber concerned the illegal foundation of the Tribunal.<sup>58</sup> The Chamber held that the Security Council had the power to establish such a Tribunal while exercising its powers under Chapter 7 of the UN Charter.<sup>59</sup> This made it so that the Chamber look into whether there was retroactive application of law, which it found there was not and the Tribunal had the jurisdiction accorded to it by the Statute. Although the Statute was enacted by the Security Council, after the conflict was underway and many of the crimes had already been enacted, the Geneva Conventions had already proscribed much of the conduct alleged.

However, the case itself, dealt mainly with the issue of the *nulla sine crimine* principle but did not go much into the issue of the penalties prescribed by the Statute. The Chamber did not determine whether, the principle had been satisfied, as far as penalties were concerned.

### **3.3.2. RULES AND PROCEDURE OF SENTENCING**

The Statute of the ICTY sets out the framework within which the ad hoc Tribunals shall operate. Following the trial of the accused, the Trial Chambers shall pronounce judgements and impose sentences and penalties on persons convicted of serious violations of international humanitarian law.<sup>60</sup> Judgements must be made by a majority of the judges in the Chamber, and must be delivered in public. A reasoned opinion made in writing, to which separate or dissenting opinions may be appended, must accompany the judgement.<sup>61</sup> In Article 24 of the ICTY Statute – which contains the substantive provisions on punishment, it is stated that:<sup>62</sup>

*“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. In imposing the sentences,*

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<sup>57</sup> *Prosecutor v Tadic*, ICTY Judgement of 2 October 1995, para. 135.

<sup>58</sup> <http://www.icty.org/x/cases/tadic/acdec/en/51002.html>.

<sup>59</sup> *Prosecutor v Tadic*, para. 35.

<sup>60</sup> <http://www.icty.org/en/about/chambers/judgements-and-sentencing>.

<sup>61</sup> <http://www.icty.org/en/about/chambers/judgements-and-sentencing>.

<sup>62</sup> Secretary- General’s Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia, 3 May 1993, UN Doc. S/25704.

*the Trial Chambers should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.”*

In addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners.<sup>63</sup> The above is the entire substantive law on penalties as prescribed by the Statute.

In order to augment the laconic provisions of the Statute, the ICTY judges have incorporated a number of provisions on sentencing into the Rules of Procedure and Evidence of the ICTY, the most pertinent being Rule 101, which provides that a convicted person may be sentenced to imprisonment for a term up to and including the remainder of the convicted person’s life.<sup>64</sup> It also provides that, in determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 24, paragraph 2, of the Statute, as well as such factors as: any aggravating circumstances; any mitigating circumstances including the substantial cooperation with the Prosecutor by the convicted person before or after conviction; the general practice regarding prison sentences in the courts of the former Yugoslavia; the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already been served.<sup>65</sup> Credit shall be given to the convicted person for the period, if any, during which the convicted person was detained in custody pending surrender to the Tribunal or pending trial or appeal.<sup>66</sup>

The fact that the substantive provisions of punishment are so scarce threatens the principle of legality. Very little is included in this and the mitigating and aggravating factors are only included as part of procedural requirements.

The following part will look into four areas where the sentencing policy of the ICTY has been inconsistent; that is areas where the judges in different cases have made such divergent decisions that it is not clear where the Tribunal lies. These include: the purposes of sentencing, the

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<sup>63</sup> Article 25, *Statute of the International Criminal Tribunal for the former Yugoslavia*.

<sup>64</sup> *Rules of Procedure and Evidence*, ICTY.

<sup>65</sup> [http://www.icty.org/x/file/Legal%20Library/Rules\\_procedure\\_evidence/IT032\\_rev44\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_rev44_en.pdf).

<sup>66</sup> Rule 101, *Rules of Procedure and Evidence*, ICTY, *ICTY Rules*, 12 January 2001, UN Doc. IT/32Rev. 19, Ntanda D, ‘Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia’ 5 *Criminal Law Forum* (1994), 507.



### 3.3.3. PURPOSE OF SENTENCING

The Statute of the ICTY does not specifically mention the reasons for the imposition of criminal sanctions. Nevertheless, the principles of retribution and deterrence have been identified as being the essential functions of punishment.<sup>67</sup> Such an approach replicates the strong language of the resolutions establishing the ad hoc Tribunals in which the Security Council affirmed its conviction that the prosecution of persons accused of committing violations of international humanitarian law in the former Yugoslavia and Rwanda ‘will contribute to ensuring that such violations are halted and effectively redressed’. Retributive or ‘just desert’ theory places the requirements of justice, rather than the pursuit of crime prevention, at the foundation of the general justification for criminal sanctions.<sup>68</sup> According to this theory, punishment is the morally appropriate response to crime and thereby rectifies the moral balance that was upset by the offender’s wrongdoing. As Hart observes, the ‘application to the offender of the pain of punishment is itself a thing of value’.<sup>69</sup> In this connection, despite the negative connotations commonly associated with the concept of retribution, it has been acknowledged that ‘punishment for having violated international humanitarian law is, in light of the serious nature of the crimes committed, a relevant and important consideration’.<sup>70</sup> This view has been endorsed by the ICTY Appeals Chamber in the *Aleksovski* case, who – after noting that this factor should not be understood as fulfilling a desire for revenge – emphasised that ‘a sentence of the Tribunal should make plain the condemnation of the international community was not ready to tolerate serious violations of international humanitarian law and human rights’.<sup>71</sup>

The ICTY has stated that the principle of deterrence is probably the most important factor in the assessment of appropriate sentences for violations of international humanitarian law. Apart from the fact that the accused should be sufficiently deterred by appropriate sentence from ever

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<sup>67</sup>Greenwalt A, ‘International Criminal Law for Retributivists’ 35 *University of Pennsylvania Journal for International Law*, (2014), 1007.

<sup>68</sup>M D Dubber, ‘The Unprincipled Punishment of Repeat Offenders: A Critique of California’s Habitual Criminal Statute’ 43 *Stanford Law Review* (1990), 202.

<sup>69</sup>Hart H L A, *Punishment and Responsibility* Oxford University Press, Oxford, 1968, 8–9, Pickard D B, ‘Proposed Sentencing Guidelines for the International Criminal Court’ 20 *Loyola Los Angeles International and Comparative Law Journal* (1997), 125 (noting that ‘the retributive theory emphasises that punishment should primarily view the offender rather than society at large; that the gravity of the offence should generally dictate the extent of the sanction; and, most importantly, that the offender must suffer for the choice to do wrong’).

<sup>70</sup>*Prosecutor v. Kupreškić & Others*, ICTY Judgement of 22 January 1998, para. 848.

<sup>71</sup>*Prosecutor v. Aleksovski*, ICTY Judgement of 24 March 2000, para. 185.

contemplating taking part in such crimes again, persons in similar situations in the future should similarly be deterred from resorting to such crimes.<sup>72</sup> This view was also shared by the Chief Prosecutor of the International Military Tribunal.<sup>73</sup>

However, the view that sentences have a special deterrent effect in that they deter the specific accused from again committing similar crimes has not been widely supported. In the *Kunaraccase*, for instance, the Trial Chamber held that ‘the likelihood of persons convicted here ever again being faced with an opportunity to commit war crimes, crimes against humanity, genocide or grave breaches is so remote as to render its consideration in this way unreasonable and unfair’.<sup>74</sup>

The ICTY has recognised that besides being retributory and a deterrent, punishment should also fulfil an objective of rehabilitation and incapacitation.<sup>75</sup> The first of these theories – which emphasises the treatment, rather than the punishment of convicted offenders – is necessary especially when the accused are young and ill-trained.

The Trial Chamber sitting in the case of *Prosecutor v. Delalic & Others* recognised that the protection of society from convicted persons was a prominent factor in the determination of appropriate sentence.<sup>76</sup> However, since they did not adjudge any of the three accused found guilty to be dangerous to society, the rationale of incapacitative sentencing did not play a crucial role in their decision.

In light of the fierce criticism that followed the pronouncement of a five-year sentence with respect to Drazen Erdemovic, it is plausible that the ad hoc Tribunals may be encouraged to adopt some form of incapacitative sentencing and lengthen the sentences of convicted persons on grounds of public protection.<sup>77</sup> In such instances – given that the rights of offenders must be balanced against those of potential victims – the Trial Chambers must be mindful of the need to ensure that the predictive judgements stand up to thorough challenge.

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<sup>72</sup> *Prosecutor v. Delalic & Others*, ICTY Judgement of 16 November 1998, para. 1234.

<sup>73</sup> Memorandum of Proposals for the Prosecution and Punishment of Certain War Criminals and Other Offenders (1946).

<sup>74</sup> *Prosecutor v. Kunarac & Others*, para. 840.

<sup>75</sup> *Prosecutor v. Tadic*, ICTY Judgement of 26 January 2000, para. 48, *Prosecutor v. Aleksovski* para. 185; and *Prosecutor v. Delalic & Others*, ICTY Judgement of 20 February 2001, para. 801.

<sup>76</sup> *Prosecutor v. Delalic and others*, para. 456.

<sup>77</sup> *Prosecutor v. Erdemovic*, para. 339.

In the *Tadic* case, in the Trial Chamber, the court, while providing equal emphasis to deterrence and retribution as purposes of sentencing, the court also went ahead and provided rehabilitation and incapacitation as other desired purposes of sentencing.<sup>78</sup> In the Appeals Chamber of the *Tadic* case, highlighted that deterrence cannot be given undue prominence in the assessment of punishment.<sup>79</sup>

A review of the sentencing decisions of the ad hoc Tribunals reveal that the judges at The Hague face a substantial challenge balancing the various rationales for punishment. Based on the Security Council Resolution, retribution and deterrence were understood to be the main purposes of sentencing, however, the judges of the ICTY have used their discretion to include other purposes such as incapacitation and rehabilitation as purposes of sentencing. However, the judges have failed to show how these purposes reflect on the sentences themselves.

### 3.3.4. GRAVITY OF CRIMES

The Appeals Chamber of the ICTY in *Alekskovski*, stated that the gravity of the crimes is the ‘litmus test for sentencing for the appropriate sentence.’<sup>80</sup> The *Blaskic* and *Alekskovski* cases have also stated that the gravity of the offence is the most important consideration in sentencing.<sup>81</sup> Theoretically, gravity of crimes is determined *inabstracto* and *in concreto*. The gravity in *abstracto* is based on the subjective and objective elements of the crime while the gravity in *concreto* depends on the harm done and on the culpability of the offender.<sup>82</sup> Connected with the gravity in *abstracto* is the issue of the hierarchy of the crimes before the court. The Appeals Chamber has previously stated that there is no hierarchy of the crimes and among war crimes, crimes against humanity and genocide.<sup>83</sup> The Chamber stated that they are all serious violations of international law.<sup>84</sup> However, in earlier case law, the court entertained the idea that there did exist hierarchy of crimes as a way of determining the gravity of the crimes.<sup>85</sup> There is no uniform approach to the issue of a hierarchy of crimes. In the *Erdemovic*, *Tadic* and *Furundzija* cases, the Appeals Chamber favoured some sort of

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<sup>78</sup>*Prosecutor v Tadic*, para. 61.

<sup>79</sup>*Prosecutor v Tadic*, para. 56.

<sup>80</sup>*Prosecutor v Alekskovski*, para. 1225.

<sup>81</sup>*Prosecutor v Blaskic*, ICTY Judgement of 29 July 2004, *Prosecutor v Alekskovski*, para. 360.

<sup>82</sup> Danner A M, ‘Constructing a Hierarchy of Crimes in International Criminal Law Sentencing’ 609.

<sup>83</sup>*Prosecutor v Mrksic & Sljivancanin*, ICTY Judgement of 5 May 2009, 298.

<sup>84</sup>*Prosecutor v Mrksic & Sljivancanin*, para. 546.

<sup>85</sup>*Prosecutor v Tadic*, ICTY Judgemnt of 14 July 1997, para. 73.

classification of the crimes while the court in *Tadic* and *Alekskovski* rejected the notion that there was a hierarchy of crimes.<sup>86</sup>

With regard to genocide, the court held it is the most heinous crime based on its *dolus specialis*.<sup>87</sup> However, it should be noted that the notion of a gradation of the crimes is still very much disputed.

It should be noted that there is no statutory hierarchy of the crimes or a gradation of any kind. This jurisprudence has come up as a result of the scant law on sentencing within the ICTY Statute.

A further issue exists, with regard to gravity in *concreto*. This relates to the individual conduct of the accused person. The courts have on occasion failed to differentiate between the aggravating circumstances and the gravity of the crime charged when making their judgement.

### **3.3.5. REFERENCE TO THE GENERAL PRACTICE IN THE FORMER YUGOSLAVIA**

The ICTY has indicted 161 individuals, 83 were sentenced and 19 were acquitted.<sup>88</sup>

The criminal law of the former Socialist Federal Republic of Yugoslavia, in this connection, permitted courts to sentence convicted persons to death, a term of imprisonment or a fine. With respect to imprisonment (the only punishment applicable to the present discussion), the general rule was that imprisonment may not be shorter than fifteen days, nor exceed fifteen years.<sup>89</sup> However, for crimes for which capital punishment was prescribed, the court could also impose the sanction of imprisonment for twenty years.<sup>90</sup> Imprisonment for life was not authorised under the penal code as it was deemed to be ‘a fate worse than death’.<sup>91</sup>

As for the case law of the courts of the former Yugoslavia, the Chamber noted that it was so sparse that significant conclusions as to the sentencing practices thereof could not be drawn. The Chamber concluded that reference to law in the former Yugoslavia and its application

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<sup>86</sup>*Prosecutor v Tadic*, para. 123, *Prosecutor v Alekskovski*, para. 436.

<sup>87</sup>*Prosecutor v Krstic*, ICTY Judgement of 2 August 2001, para. 700.

<sup>88</sup><http://www.icty.org/en/content/infographic-icty-facts-figures>.

<sup>89</sup>*Criminal Code of the Socialist Federal Republic of Yugoslavia*, (Yugoslavia).

<sup>90</sup> Article 38, *Criminal Code of The Socialist Federal Republic of Yugoslavia* (Yugoslavia), it was adopted by the SFRY Assembly at the session of the Federal Council held in September 28, 1976.

<sup>91</sup>Jones J, *The Practice of the International Criminal Tribunals for the former Yugoslavia and Rwanda*, Transnational Publishers, New York, 2000, 438.

reflected the practice in the general principle of law recognised by nations where the most severe penalty is imposed for crimes against humanity. This meant that all such persons could be held responsible.

This merely provided that the crimes did exist prior to the conflict but it did not help much by way of the sentencing. It did not provide specific rules or guidance for the meting out of punishment. In any case, the Appeals Chamber held that even though the Tribunals is guided by the general practice of sentencing in the former Yugoslavia, it is not bound to follow it.<sup>92</sup> So this still leaves us with a situation where the judicial discretion is still unfettered.

### **3.4. CONCLUSION**

This Chapter has provided for the practice of the former Yugoslavia and highlighted the factors that have influence the sentencing practice while looking into the case law of the court. This will provide a necessary basis for the next chapter while looking discussion the jurisprudence of the court from the point of view of Hart's judicial discretion and the principle of legality

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<sup>92</sup>*Prosecutor v. Dragan Nikolic*, ICTY Judgement of 4 May 2005, para. 224.

## **CHAPTER 4: AN ANALYSIS OF THE ICTY JURISPRUDENCE FROM THE POINT OF VIEW OF HART'S JUDICIAL DISCRETION AND THE PRINCIPLE OF LEGALITY**

### **4.1. INTRODUCTION**

This chapter shall look into the ICTY jurisprudence through the lens of H.L.A. Hart and the principle of legality. An in depth discussion will be made on whether or not the judges of the court had such wide judicial discretion as would threaten the principle of legality. This discussion will seek to establish that factors of sentencing have been inconsistently applied by the judges who on one hand had little substantive law to rely on and on the other hand were not bound by the principle of stare decisis.

The Statute of the ICTY provides some norms on sentencing, however, it contains very few sentencing principles. The elements that are themselves underdeveloped include a comprehensive sentencing scheme, the purposes of sentencing, and the scope of the punishment.<sup>93</sup> This has then led to judges having wide discretion which has in turn led to inconsistencies in similar cases. The final result has been the challenge to legality of the sentencing of the Tribunal.

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<sup>93</sup>D'ascoli S, *Sentencing in International Criminal Law: the UN ad hoc Tribunals and Future Perspectives for the ICC*, 2.

## 4.2. HART'S JUDICIAL DISCRETION AND THE SENTENCING PRACTICE OF THE ICTY

The first thing to consider is the fact that the provisions on sentencing are minimal. The law on sentencing is actually codified in the Statute and as such acts as the primary rules for sentencing according to Hart. That means, that it is the substantive law on sentencing as far as the ICTY is concerned. The Rules of Procedure and Evidence later passed also contains other provisions on sentencing in Rule 101<sup>94</sup>. The reference to the general practice of the former Yugoslavia acts as a secondary rule. This is because it assists the judges on the procedural part of the law. In particular, it is a secondary rule of recognition because it points judges to another potential source of law<sup>95</sup>.

However, As far as the ICTY Statute is concerned, very little by way of the sentencing penalties is mentioned. This is a huge part of the problem. The Statute merely provides that the sentence is limited to life imprisonment and that the Tribunal shall refer to the general sentencing practice of the former Yugoslavia.<sup>96</sup> This is in itself different from the sentencing practice found the Civil Law tradition of sentencing ranges and the Common Law tradition of sentencing guidelines.

When looking at the theses that Hart proposed are the core of positivism, I shall focus on two only. These are the pedigree thesis and the discretion thesis.<sup>97</sup> The pedigree thesis deals with who makes the laws and whether the laws made are valid. It does this by looking at whether the body that made the laws has the power to make the laws. In this case, the *Tadic* case settles this issue by emphasizing that the Security Council has the power to set up the Tribunal owing to its Chapter VII powers of maintaining international peace and security. This then rendered the ICTY Statute valid as law. It also affirmed the jurisdiction of the Tribunal to hear the crimes within the Statute.

The issue comes in with the discretion thesis.<sup>98</sup> This states that where there is scarce law, judges have the right to decide in whichever way they want. In such a case, they enjoy wide discretion, especially when they have to consider conflicting social considerations. This has been the case within the Tribunal. Since there was little law on sentencing to begin with, and the doctrine of

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<sup>94</sup>*Rules of Procedure and Evidence*, ICTY.

<sup>95</sup> Hart H L A, *The Concept of Law*, 91.

<sup>96</sup>Article 24, Statute of the International Criminal Tribunal for the former Yugoslavia.

<sup>97</sup>Hart H L A, *The Concept of Law*, 141.

<sup>98</sup>Hart H L A, *The Concept of Law*, 100.

stare decisis does not occur, there has been inconsistent interpretation on issues with regard to sentencing which has then put the judges in a precarious position where they have become the law makers within the Tribunal as far as sentencing is concerned. The judges are not bound by precedent, and neither are they bound by the general practice of the former Yugoslavia. Since, this has left the judges acting as the law makers on the sentencing, this has in turn undermined the legality of the sentences passed. This has led to the encroachment of the pedigree thesis which looks at who passes the law.<sup>99</sup> Since the Statute itself is the law, and the lawmakers in this case is the Security Council, this has then given judges powers which are unfettered and has threatened the legality of the sentences passed. It has also led to lack of uniformity which is unfair to potential accused persons.

This wide discretion that the judges have enjoyed is shown by the fact that the Chambers has been unable to decide on the sentencing purposes of the Tribunal. The Statute itself was not clear to begin with, and this made the judges decide differently on this issue. This has in turn, led to very different sentences. The ICTY has recognised that besides being retributory and a deterrent, punishment should also fulfil an objective of rehabilitation and incapacitation.<sup>100</sup> The first of these theories – which emphasises the treatment, rather than the punishment of convicted offenders – is necessary especially when the accused are young and ill-trained.

The Trial Chamber sitting in the case of *Prosecutor v. Delalic & Others* recognised that the protection of society from convicted persons was a prominent factor in the determination of appropriate sentence<sup>101</sup>.

### **4.3. THE PRINCIPLE OF LEGALITY AND THE SENTENCING PRACTICE OF THE ICTY**

While looking at the principle of legality, the component of nullapoena sine praevia lege poenali and the component of nullapoena sine lege stricta has been satisfied. For the first one, since the law on sentencing is already written down. Further, the laws proscribing genocide, war crimes and crimes against humanity are in the Statute. There is no retroactivity of the law here since the crimes are prohibited in the Statute. The component of nullapoena sine lege stricta has also been satisfied since the law itself is clearly written and there are no analogies used in describing the laws or in describing the sentencing laws and procedure.

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<sup>99</sup>Himma K, 'Judicial Discretion and the Concept of Law' *Oxford Journal of Legal Studies* (1999), 71 – 82.

<sup>100</sup>*Prosecutor v. Dusko Tadic*, para. 48, *Prosecutor v Delalic & Others*, para. 801.

<sup>101</sup>Judgement of 20 February 2001, para. 456.



The issue comes in with the component of *nullapoena sine legecerta*. The laws on sentencing are do not have specificity and are not certain. They only maintain that punishment may be up to life imprisonment. This makes it hard for individuals to be able to foresee the sort of punishment that they would incur if convicted of a certain crime under the Statute. It lacks the necessary amount of predictability required in any legal system. Further, it can be argued that the component of *nullapoena sine legescripta* has not been satisfied owing to the fact that very little law is found in the Statute as far as sentencing is concerned. This has led to judges having very wide discretion on sentencing, placing them in a position to make a lot of law on sentencing within the Tribunal.

#### 4.4. ICC SENTENCING: LOOKING FORWARD

Article 22 and 23 of the Statute deals with the principle of legality.<sup>102</sup> Article 22 deals with the *nullacrimen sine lege* component while Article 23 deals with the *nullapoena sine lege* component.<sup>103</sup>

The Rome Statute contains similar provisions on sentencing as the ICTY Statute. Article 77 and 78 of the Rome Statute provides for the applicable penalties before the ICC. These are imprisonment up to 30 years and life imprisonment justified by extreme gravity of the crime.<sup>104</sup> In addition a fine may be imposed and forfeiture of goods, assets and property derived directly or indirectly from the crimes committed.<sup>105</sup>

The Rome Statute and the ICTY Statute are similar in as far as they both prescribe imprisonment as the applicable punishment while not recognising the death penalty. The Rome Statute, however, goes a bit further and provides that fines and forfeitures can be ordered. This has been influenced by the practice by many states to remove death penalty within their domestic criminal justice systems. It is also influenced by one of the more dominant purposes of punishment within criminal justice systems in the twenty first century which is rehabilitation. Unlike the ICTY Statute, the Rome Statute limits the imprisonment term imposed by the court to thirty years unless when justified by extreme gravity of the crime and the individual circumstances of the convicted person.<sup>106</sup> The Rome Statute further prescribes that in determining the sentence, the court shall take into account factors such as the gravity of

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<sup>102</sup>[https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome\\_statute\\_english.pdf](https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf).

<sup>103</sup>*Rome Statute*.

<sup>104</sup> Article 77(1), *Rome Statute*.

<sup>105</sup> Article 77(2), *Rome Statute*.

<sup>106</sup> Article 77(1) b, *Rome Statute*

the crime and the individual circumstances of the convicted person.<sup>107</sup> The courts also consider aggravating or mitigating circumstances, the gravity of the crime and the role of the perpetrator.<sup>108</sup> For example, the ICTR and the ICTY have established that aiders and abettors get a lower sentence than co-perpetrators.<sup>109</sup>

In determining the sentence, the court will look at the gravity of the crime and the individual circumstances of the convict and shall pronounce the sentence, with regard to every single count for which the individual has been convicted.<sup>110</sup>

So far, only four individuals have been convicted Jean Pierre Bemba, Germaine Katanga, Thomas LubangaDvilo, Ahmad al-Faqi al-Mahdi.<sup>111</sup> It is too early to predict or outline a sentencing practice of the ICC as of yet, but caution must be advised to the court.

In its thirteen years of existence the ICC has convicted four persons. The first convicted person was Thomas Lubanga, who was found guilty for the war crime of conscripting and enlisting children under the age of fifteen. He was sentenced to 14 years imprisonment.<sup>112</sup> The second convicted person was Germaine Katanga who was jailed for 12 years.<sup>113</sup> Mr. Katanga was found guilty, as an accessory, of one count of crimes against humanity (murder) and four counts of war crimes. The third person was Jean Pierre Bemba who was convicted of two counts of crimes against humanity and three counts of war crimes.<sup>114</sup> He was sentenced to 18 years, the highest imprisonment term passed since the court began its work.<sup>115</sup> The fourth person was Ahmad al-Faqi al-Mahdi who plead guilty for the war crime of attacking religious and historical buildings in the Malian city of Timbuktu.<sup>116</sup> He was sentenced to 9 years imprisonment.<sup>117</sup>

While the Rome Statute is more detailed, there still lacks a bit more on the sentencing. There should be more law as far as sentencing is concerned, otherwise, the court may find itself, in

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<sup>107</sup>Article 78(b), Rome Statute.

<sup>108</sup>Article 24, Statute of the International Criminal Tribunal for the former Yugoslavia, Rule 101(b), Rules of Procedure and Evidence, ICTY, Article 24, Statute of the International Criminal Tribunal for the former Yugoslavia, Rule 101(b), Rules of Procedure ICTY.

<sup>109</sup>[http://www.icty.org/x/cases/milan\\_lukic\\_sredoje\\_lukic/custom6/en/091102.pdf](http://www.icty.org/x/cases/milan_lukic_sredoje_lukic/custom6/en/091102.pdf), Prosecutor v JuvenalKajelijeli, ICC Judgement of 1 December 2003, 963.

<sup>110</sup>Article 78 (1), Rome Statute, Article 78, Rome Statute

<sup>111</sup> 12 years after the International Criminal Court was established, 1 billion dollars had been used to run it and only 2 individuals had been convicted.

<sup>112</sup>Prosecutor V Thomas Lubanga, ICC Judgement of 14 March 2012.

<sup>113</sup>Prosecutor V Germaine Katanga, ICC Judgement of 7 March 2014.

<sup>114</sup>Prosecutor v. Jean-Pierre Bemba Gombo, ICC Judgement of 21 March 2016.

<sup>115</sup><https://www.icc-cpi.int/car/bemba>.

<sup>116</sup>The Prosecutor v. Ahmad Al Faqi Al Mahdi, ICC Judgement of 24 August 2016

<sup>117</sup><https://www.icc-cpi.int/mali/al-mahdi>.

the same situation as the ICTY where judges have wide judicial discretion which might affect the legality of the sentences passed and infringe on the rights of the convicted persons.

## **CHAPTER 5: CONCLUSION**

The entire thesis looks at the sentencing practice of the ICTY from the point of view of positivism and in particular, the theories espoused by H L A Hart. It also evaluates the sentencing practice of the ICTY by looking at the principle of legality. Finally, the thesis looks at the ICC so far.

According to Hart, the law is based on these three. These are the separability thesis, the pedigree thesis and the discretion thesis.<sup>118</sup>

The rules on sentencing of the ICTY include a maximum of life imprisonment and consideration based on the gravity of the offence and the individual circumstances of the accused person. This is unlike the common law practice of sentencing guidelines or the civil law practice of sentencing ranges.

The sentencing of the ICTY is largely based on the discretion thesis that allows for judges to look at all the considerations before them and come to whatever conclusion they need to. This then leads to a lack of uniformity on decisions concerning the same thing. This is encouraged by the limited amount of law on sentencing in the ICTY Statute. This then places the judges in

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<sup>118</sup> Hart H L A, *The Concept of Law*, 123.

a position where their discretion is unfettered and they end up making a lot of the law on sentencing. This then undermines the pedigree thesis.

The evidence of this wide discretion leading to the lack of uniformity is seen in three main things: the divergent views of Chambers on the purposes of sentencing, the application of the general practice of the former Yugoslavia and the lacking written law on punishment.

The Chambers cannot decide whether the purpose of sentencing should be deterrence, rehabilitation, incapacitation or retribution. With regard to the general practice of the former Yugoslavia, which the tribunal should use as a guide, the Chambers has been clear that it is not bound by it. Further, the practice of the former Yugoslavia at the time was not detailed on how to handle sentencing, especially for the crimes for which the tribunal has jurisdiction.

The judges' wide discretion leaves them making a lot of the law on sentencing which supersedes their powers. The Security Council in this case is the body that could make the laws as was established by *Tadic*. This then means that the validity of the sentences passed is in question.

Also, when looking at the principle of legality. The component of *nulla poena sine lege certa* and *nulla poena sine lege scripta* are not satisfied. This is owing to the fact that the written law on sentencing is so little and so much remains unwritten. The judges are left to decide on so much, which ends up with them making the law themselves.<sup>119</sup>

The overall effect is that there is no foreseeability as far as the punishment to be meted out is concerned. This is unfair to potential accused persons who should be able to determine, though not with accuracy, what penalty they might incur.

Since the ICC is the first ever permanent international criminal law court, it should take precaution on its sentencing practices so that it will not make the same mistakes of its predecessors.

## **5.1. RECOMMENDATIONS**

In conclusion, the following recommendations are made:

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<sup>119</sup>*Prosecutor v Alekskovski, Prosecutor v Delalic and Others, Prosecutor v Tadic.*

- (i) There should be a collaborative effort between Assembly of State Parties in order to establish a hierarchy for the crimes stated in the Rome Statute. This would make it easier to determine the likely punishment for a certain crime.
- (ii) The judges should draft sentencing guidelines which should subsequently be passed by the Assembly of State Parties, in order to add more guidance for the judges.
- (iii) Alternatively, the judges could come up with sentencing ranges for the crimes proscribed by the Rome Statute.
- (iv) A new rule on sentencing judgements should be passed by the ASP, requiring judges to write down more detailed judgements so that it is easier to determine what policy considerations the judge made on a certain case.
- (v) In order to prevent retroactivity, the judges should also endeavour to codify, the rules or judges they would need, in order to reduce the likelihood of them relying on certain laws not found within the Rome Statute or the Rules of Procedure.

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