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# *Reimagining Punishment for Atrocity Crimes: An Innovative Sentencing Framework for International Criminal Law*

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## I. INTRODUCTION

Persons bearing the greatest responsibility for atrocities during World War II were punished severely, often with the death penalty.<sup>1</sup> Modern international criminal courts lack authority to impose capital punishment. Thus, a convicted person's responsibility for atrocity crimes must be quantified into a number of years of incarceration. That translation is not an easy task. How do we quantify genocide, crimes against humanity, and war crimes into years of imprisonment? International criminal law (ICL) judges purportedly rely on the concept of "gravity". But how is gravity conceptualised by judges? ICL does not provide penalty ranges for individual crimes. Statutes of international criminal courts and tribunals do not provide guidance to judges on the relative gravity of crimes within their jurisdiction. ICL judges enjoy absolute discretion in determining the gravity of crimes and the correlating severity of the punishment. Yet, this wide discretion

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<sup>1</sup> All but four of the convicted Nazi defendants were sentenced to death at the Nuremberg trial of major war criminals. See International Military Tribunal (Nuremberg), *Judgement and Sentences*, reprinted in (1947) 41 *American Journal of International Law* 172; see also Richard H Minear, *Victors' Justice: Tokyo War Crimes Trial* (Princeton University Press 1971); Mark A Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press 2007).

has not resulted in a consistent application of “gravity”.<sup>2</sup> In terms of sentencing outcomes, crimes of the same gravity have been punished by widely different sentences.<sup>3</sup> Sentencing outcomes challenge the judicial narrative that gravity is the key differential factor or even the principle determinant of the severity of the sentence.<sup>4</sup> Moreover, ICL judges have failed to advance a clear doctrinal approach to applying “gravity” to the atrocity crimes before them. The approach of ICL judges to punishing atrocities has been largely *ad hoc*.

This article advances a doctrinal approach to gravity in international atrocity trials. It also develops a communicative sentencing framework for atrocity crimes. The article begins by examining the general ICL jurisprudence, synthesising the key considerations for punishing atrocities. It critically analyses four recurring pillars of atrocity sentencing in ICL jurisprudence: gravity, individual circumstances of the convicted person, aggravating factors, and mitigating circumstances. In addition to offering descriptive claims about these pillars, Section II also interrogates the application of these factors by international judges, identifying and critically reflecting on recurring conceptual and doctrinal problems. Section III then responds to these problems. I reimagine, re-conceptualise and restructure core sentencing criteria with an eye towards optimising their integration with the purpose of atrocity trials. Thus, this article pulls together key sentencing factors to effectuate their harmonised consideration when determining sentence allocations and just distribution of punishment among actors responsible for atrocity crimes. In Section IV, the article offers a new legal framework for atrocity sentencing. I have elsewhere theorized that the enabler factor is a significant consideration and determinant of punishing atrocities.<sup>5</sup> The enabler factor captures the defendant’s role or responsibility in enabling and/or maintaining a milieu or situation of

<sup>2</sup> Pascale Chifflet and Gideon Boas, ‘Sentencing Coherence in International Criminal Law: The Cases of Biljana Plavšić and Miroslav Brao’ (2012) 23 *Criminal Law Forum* 135, 135, 147, 156, 158 (suggesting that gravity does not explain a large number of ICL sentencing outcomes).

<sup>3</sup> See *ibid* 147, 154; Jean Galbraith, ‘The Good Deeds of International Criminal Defendants’ (2012) 25 *Leiden Journal of International Law*, 799, 800; Ines Monica Weinberg de Roca, ‘Sentencing and Incarceration in the Ad Hoc Tribunals’ (2008) 44 *Stanford Journal of International Law*, 1, 6–12; Drumbl, *Atrocity, Punishment and International Law* (n 1) 11, 15, 56–7; Mark B Harmon and Fergal Gaynor, ‘Ordinary Sentences for Extraordinary Crimes’ (2007) 5 *Journal of International Criminal Justice* 683, 684, 710; Andrew Keller, ‘Punishment for Violations of International Criminal Law’ (2001) 12 *Indiana International & Comparative Law Review* 53, 65–6.

<sup>4</sup> Robert Sloane, ‘Sentencing for the ‘Crime of Crimes’’ (2007) 5 *Journal of International Criminal Justice* 713, 734 (rejecting the idea that gravity of the offence is a principle determinant of punishment for atrocity crimes).

<sup>5</sup> Shahram Dana, ‘The Enabler Theory and Atrocity Crimes’ (2019) 4(2) *Cambridge Law Review*, 83.

atrocity crimes.<sup>6</sup> Here, I now integrate this theory into the proposed ICL sentencing framework.

## II. SYSTEMIC PROBLEMS AND THE AD HOC NATURE OF ICL SENTENCING

This section critiques the *ad hoc* nature of atrocity sentencing by interrogating ICL judicial conceptualisation and implementation of key sentencing factors. ICL judges speak of four core considerations essential to determining an appropriate punishment for atrocity crimes: (a) the gravity of the offence; (b) individual circumstances of the convicted person; (c) aggravating factors and mitigating circumstances; and (d) the law and practice of sentencing of the *locus delicti*.<sup>7</sup> How have ICL judges conceptualised and interpreted these concepts? What problems emerge from the extant approach to ICL sentencing? Are they isolated or systemic? Specific attention is given to the notion of gravity, which has arguably been overplayed at the expense of other considerations, representing a lost opportunity to develop ICL sentence law *sui generis* to atrocity criminality. In addition to offering descriptive claims about each category, this section also scrutinises the application of these factors in practice, critically reflecting on recurring conceptual and doctrinal problems.

The statutory law of sentencing at international criminal courts and tribunals (ICC&Ts) is minimal and empowers international judges with broad discretion in fixing punishment.<sup>8</sup> The codified crimes are not individually accompanied by penalty ranges or maximums.<sup>9</sup> Statutes of international criminal tribunals provide only a single scant article on penalties, no identifiable maximum

<sup>6</sup> The introduction of the enabler factor can potentially raise questions as to its relationship to substantive criminal law, in particular modes of liability. However, as conceptualised here, the enabler factor is not presented as a new mode of liability. The accused would have to first be found guilty on an existing mode of liability. The enabler concept is offered here as a factor for the purpose of sentencing only.

<sup>7</sup> *Prosecutor v Ntawukulilyayo*, Judgment and Sentence, ICTR-05-82-T (3 August 2010) [464]; *Prosecutor v Ratko Mladić*, Judgment IV, IT-09-92-T (22 November 2017) [5180]; *Taylor*, Sentencing Judgment, SCSL-03-01-T (30 May 2012) [18]; *AFRC*, Appeal Judgment, SCSL-2004-16-A (22 February 2008) [308]–[309], [313]; *CDF*, Trial Sentencing Judgment, SCSL-04-14-T (9 October 2007) [32]; *CDF*, Appeal Judgment, SCSL-04-14-A (28 May 2008) [465]; *RUF*, Sentencing Judgment, SCSL-04-15-T (8 April 2009) [17]; *RUF*, Appeal Judgment, SCSL-04-15-A (26 October 2009) [1129], [1236], [1239], [1240].

<sup>8</sup> Statute of the International Tribunal of Rwanda (ICTR), Article 23; Statute of the International Criminal Tribunal of the Former Yugoslavia (ICTY), Article 24; Statute of the Special Court of Sierra Leone (SCSL), Article 19; Rome Statute of the International Criminal Court (ICC), Article 78.

<sup>9</sup> See generally Shahram Dana, 'Beyond Retroactivity to Realizing Justice: The Principle of Legality in International Criminal Law Sentencing' (2009) 99 *Journal of Criminal Law and Criminology* 857.

terms, and do nothing more than rule out the death penalty.<sup>10</sup> The ICC limits terms of imprisonment to a maximum of 30 years, but allows for life imprisonment based on the “extreme” gravity of the crime.<sup>11</sup>

A common sentencing provision in ICC&Ts’ statutes states that “[i]n imposing the sentences, the Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person.”<sup>12</sup> Likewise, a common provision in their Rules of Procedure and Evidence (RPE) states that judges should also take into consideration aggravating and mitigating factors when determining a sentence. Except for the sentencing provisions of the ICC, the statutes of all courts and tribunals also direct the judges to turn the sentencing law and practice of the *locus delicti*. Additionally, the sentencing provisions of the Special Court for Sierra Leone (SCSL) included a novel statutory requirement for its judges: an explicit reference to the sentencing practice of another ICC, the International Criminal Tribunal for Rwanda (ICTR), as an appropriate source of sentencing law. Article 19 of the SCSL states that “the Trial Chamber shall, as appropriate, have recourse to the practice regarding prison sentences in the International Criminal Tribunal for Rwanda.” Interestingly, it selects only the ICTR and deliberately excludes the jurisprudence on sentencing of the International Criminal Tribunal for the former Yugoslavia (ICTY). No statute of any other ICC&T explicitly calls upon its judges to consider the case law of another ICC&T. In practice, however, ICL judges from all tribunals reference the sentencing practice of other ICC&Ts.<sup>13</sup> The SCSL in particular cited the ICTY’s jurisprudence far more frequently than the ICTR.

Although ICL jurisprudence establishes four distinct categories for sentencing considerations, the judges do not in fact follow their own road map. They often collapse these categories in their sentencing analysis. One illustration of this is the unexplained collapsing of categories two (individual circumstances)

<sup>10</sup> For a discussion on the death penalty for atrocity crimes, see Jens David Ohlin, ‘Applying the Death Penalty to Crimes of Genocide’ (2005) 99 *American Journal of International Law* 747.

<sup>11</sup> ICC, Article 78.

<sup>12</sup> SCSL, Article 19. See also ICTR, Article 23; ICTY, Article 23; ICC, Article 79.

<sup>13</sup> See generally *Prosecutor v Thomas Lubanga Dyilo*, ICC-01/04-01/06, Decision on Sentence pursuant to Article 76 of the Statute (10 July 2012) (citing the Special Court for Sierra Leone). For an analysis of all the sentences at the Special Court for Sierra Leone, see Shahram Dana, ‘The Sentencing Legacy of the Special Court for Sierra Leone’ (2014) 42 *Georgia Journal for International & Comparative Law* 615.

and three (aggravating and mitigating factors).<sup>14</sup> ICL judges also vacillate in their treatment of particular sentencing considerations, altering the categorisation of certain factors in different cases. For example, in one case, a factor may be treated as a “gravity” factor; yet in another case that same factor is treated as an “aggravating” factor.

Furthermore, ICL judges have not developed a doctrinal approach to atrocity sentencing. Thus, the collapsing of categories and roulette treatment of sentencing factors is not a surprise. It is an expected outcome of a process unmoored from legal doctrine. More significantly, as this article develops, the insipid merger of categories two and three represents a missed opportunity to develop a sentencing framework *sui generis* to international criminal law. A salient feature of ICL sentencing is the wide discretion that judges have been given in sentencing. To be sure, this is a departure from other phases of the international criminal justice process, where the discretion of judges has been circumscribed.<sup>15</sup> But this bestowal of wide discretion has not delivered sentencing theory or doctrine specific to atrocity criminality. Arguably, enjoying wide discretion in sentencing has disincentivised ICL judges from developing doctrine in this area which could encroach on their largely unfettered discretion. Thus, ICL judges have predictably adopted a factor by factor, case by case approach to punishing atrocities. Under this approach, “gravity of the offence” has been proffered as the key sentencing factor – the “litmus test” of a fair punishment and “the touchstone of sentencing”.<sup>16</sup>

The following sections focus on how ICL judges conceptualise and apply core sentencing considerations such as “gravity of the offence”, “individual circumstances of the convicted person”, and “the role of the accused.” Has “gravity” been overplayed? Has “individual circumstances of the convicted person” been underdeveloped? Does the extant approach represent a lost opportunity to

<sup>14</sup> *Taylor* (n 7) [22] (“the Trial Chamber notes that ‘individual circumstances of the convicted person’ can be either mitigating or aggravating”); *CDF*, Appeal Judgment (n 7) [498] (“The Appeals Chamber considers that the level of education and training of a convicted person is part of his individual circumstances which the Trial Chamber is required to take into consideration as aggravating or mitigating circumstance.”); *RUF*, Appeal Judgment (n 7) [1296]; *Prosecutor v Mladen Naletili and Vinko Martinovi*, Appeal Judgment, IT-98-34-A (3 May 2006) [592], quoting *Prosecutor v Blaški*, Appeal Judgment, IT-95-14-A (29 July 2004) [679] (“the individual circumstances of the accused, including aggravating and mitigating circumstances”).

<sup>15</sup> Philippe Kirsch, ‘The International Criminal Court: From Rome to Kampala’ (2010) 43 *John Marshall L Rev* 515, 519–20; See also Shahram Dana, ‘Forward: Law, Justice & Politics: A Reckoning of the International Criminal Court’ (2010) 43 *John Marshall L Rev* xxiii, xxvi.

<sup>16</sup> *Prosecutor v Delali*, Judgment, IT-96-21-T (16 November 1998) [1260].

develop a sentencing principles *sui generis* to ICL? The following sections examine these questions.

### A. GRAVITY: A COLOURLESS LITMUS TEST

ICL sentencing jurisprudence presents “gravity of the offence” as the primary consideration in determining an appropriate sentence.<sup>17</sup> Judges declare gravity to be the key differential principle – the “litmus test” and “touchstone” – of sentencing allocations.<sup>18</sup> Beyond declaring its importance, however, ICL judges generally do not engage in the challenge of doctrinally conceptualising gravity in a manner that would predictably anchor its application. The current approach to the application of gravity is to catalogue a list of “gravity” factors.<sup>19</sup> This approach has not propelled the quality of ICL sentencing.<sup>20</sup> Depending on which judgment is examined, the list of gravity factors runs anywhere between six and eight factors including (1) the “scale” of the offences committed; (2) their “brutality”; (3) the temporal scope of the crime; (4) the “role of the Accused” in their commission; (5) the “number of victims;” (6) the “degree of suffering” or impact of the crime on the immediate victim; (7) the crime’s “effect on relatives” of the victim; and (8) the “vulnerability” of victims.<sup>21</sup>

Developing a doctrinal approach to gravity is not merely an academic exercise; its absence has problematised ICL sentencing practice in several ways. First, reasonable doubts have been raised about whether the concept of gravity functions as a differential principle in atrocity sentencing. ICL judges proclaim gravity to be the key determinant of atrocity sentencing.<sup>22</sup> Kai Ambos believes this is an “overstatement”.<sup>23</sup> Robert Sloane calls it an outright “fiction.”<sup>24</sup> He

<sup>17</sup> See *Prosecutor v Karadžić*, Trial Judgment, IT-95-5/18 (24 March 2016) [6030]; *AFRC*, Trial Judgment (n 7) [19]; *CDF*, Sentencing Judgment (n 7) [33]; *RUF*, Sentencing Judgment (n 7) [19]; *Taylor* (n 7) [19]; *AFRC*, Appeal Judgment (n 7) [308]; *CDF*, Appeal Judgment (n 7) [465]; *RUF*, Appeal Judgment (n 7) [1229].

<sup>18</sup> *Delali* (n 16) [1260]; *AFRC*, Trial Judgment (n 7) [19]; *CDF*, Sentencing Judgment (n 7) [33]; *RUF*, Sentencing Judgment (n 7) [19]; *Taylor* (n 7) [19]–[20]; *AFRC*, Appeal Judgment (n 7) [308]; *CDF*, Appeal Judgment (n 7) [465]; *RUF*, Appeal Judgment (n 7) [1229].

<sup>19</sup> *Karadžić* (n 17) [6031]; *AFRC*, Trial Judgment (n 7) [19]; *CDF*, Sentencing Judgment (n 7) [33]; *RUF*, Sentencing Judgment (n 7) [19]; *Taylor* (n 7) [19]–[20]; *CDF*, Appeal Judgment (n 7) [465]; *RUF*, Appeal Judgment (n 7) [1229].

<sup>20</sup> See generally Chifflet and Boas, ‘Sentencing Coherence in International Criminal Law’ (n 1).

<sup>21</sup> *AFRC*, Trial Judgment (n 7) [19]; *CDF*, Sentencing Judgment (n 17); *RUF*, Sentencing Judgment (n 17); *Taylor* (n 19).

<sup>22</sup> *ibid.*

<sup>23</sup> Kai Ambos, *Treatise on International Criminal Law Volume II: Crimes and Sentencing* (Oxford University Press 2014) 285.

<sup>24</sup> Sloane, ‘Sentencing for the ‘Crime of Crimes’ (n 4) 734.

questions the very “idea that ‘gravity of the offence’ functions as one of two principle determinants of the sentence.”<sup>25</sup>

While Sloane’s damning judgment is based largely on an analysis of ICTR sentences for genocide, his criticism can be extended to sentences at other international tribunals for crimes against humanity and war crimes. An examination of ICL sentences, and the judicial reasoning underlying them, challenges the mantra that gravity is the litmus test of atrocity sentencing. A comparative analysis of Sesay’s and Gbao’s sentences demonstrates this gap. As discussed above, Sesay and Gbao were convicted of crimes of similar gravity. For instance, both were convicted of the same crime under Count 6 of the indictment for rape as a crime against humanity. Yet, while Sesay was sentenced to 45 years in imprisonment, Gbao received only 15 years – a third of Sesay’s punishment.<sup>26</sup> Thus, it is hard to accept that “gravity” is what determined their respective punishments given that both were convicted of rape as a crime against humanity. Of course, one could attempt to explain the difference by accounting for varying aggravating and mitigating factors, assuming there is any difference in this regard. Nevertheless, even conceding for argument’s sake that there is some difference in their aggravating and mitigating circumstances, this explanation attempts to account for a 300 per cent difference in their respective sentences. If aggravating and mitigating factors are in fact responsible for a 300 per cent increase in punishment for the same crime, it can hardly be said that gravity is the litmus test.

Additionally, the primacy of gravity as the controlling factor determining the quantum of punishment can be called into question from a different set of observations. Take for example the sentencing of Dragan Nikolic at the ICTY.<sup>27</sup> Nikolic’s crimes included persecution, murder, rape, and torture as crimes against humanity.<sup>28</sup> The judges found his crimes to be of the highest gravity for which “no other punishment could be imposed except a sentence” of life imprisonment.<sup>29</sup> The trial judges did not, however, impose a sentence of life imprisonment. Instead, they sentenced Nikolic to 23 years in imprisonment after consideration of mitigating factors.<sup>30</sup> Nikolic is now free, having been granted early release in August 2013,

<sup>25</sup> *ibid.* See also Margaret M de Guzman, ‘Harsh Justice for International Crimes’ (2014) 39 *Yale Journal of International Law* 1, 17–24 (raising concerns that the gravity “*rhetoric and narratives risk misleading sentencing decisionmakers*”).

<sup>26</sup> For further examples, see Dana, ‘The Enabler Theory’ (n 5), Section II.B.

<sup>27</sup> *Prosecution v Dragan Nikolic*, Sentencing Judgment, IT-94-2-S (18 December 2003).

<sup>28</sup> *ibid* [73] (Sentencing Disposition).

<sup>29</sup> *ibid* [214].

<sup>30</sup> *ibid* [73]. The Appeals Chamber confirmed the Trial Chamber’s findings on law and fact and its application of them to Nikolic’s sentence but reduced the sentence to 20 years: *Prosecution v Dragan Nikolic*, Judgment on Sentencing Appeal, IT-94-2-A (4 February 2005).

less than ten years from when the trial chamber first sentenced him.<sup>31</sup> It would be reasonable to question whether gravity is in fact the “primary” sentencing factor, given that the gravity of the crime demanded a life sentence but the final sentence was substantially and dramatically reduced due to mitigating factors. If the concept of mitigation can reduce a life sentence (as necessitated by gravity) to an effective punishment of ten years, then gravity does not have a strong pull on the sentence. Perhaps, in atrocity sentencing, gravity of the harm is but one factor alongside several other important factors. It can be observed that Nikolic was not an enabler and perhaps this better explains why Nikolic’s punishment was much more lenient compared to what the gravity of his crimes would have otherwise demanded.<sup>32</sup>

Moreover, far from being the primary sentencing consideration, the punishment of certain defendants suggests that the gravity of crimes plays little role in sentencing. In the *CDF* trial, for example, the defendants were sentenced to six and eight years for crimes against humanity and war crimes respectively.<sup>33</sup> To rationalise these very low sentences, the judges stated that *in their view* gravity was an “important factor” rather than the “primary factor” or the “litmus test.”<sup>34</sup> This characterization of gravity contradicts the rulings of the SCSL in the *RUF*, *AFRC*, and *Taylor* cases.<sup>35</sup> It also cuts against the grain of ICL jurisprudence in general where gravity occupies a more controlling role: it is the “litmus test”, the “primary factor” for determining a sentence, not merely an *important* one.

It would be a mistake to dismiss this as a trivial or inconsequential difference in word selection. Rather, it is the law artist at work. Trained judges and lawyers understand how word choice, characterisations, and framing create conceptual space to support distinctions or signal departures from existing norms or practice. In my opinion, the judges’ emphasis that this is *their view* signals that there is more going on here than mere interchangeable word selection; instead they intend to set a platform to support a substantial difference in outcome, which is exactly what happened. The subtle shift here results in prodigious differences in punishment. The *CDF* defendants received the most lenient sentences of all atrocity perpetrators convicted by the SCSL, despite the fact that their crimes were of extreme gravity. They deliberately and systematically killed civilians with discriminatory intent; they brutally disembowelled their victims; they terrorised and tortured men, women, and children.<sup>36</sup> In the face of such extremely grave

<sup>31</sup> *Prosecution v Dragan Nikolic*, Decision of the President on Early Release, IT-94-2-ES (16 January 2014).

<sup>32</sup> See also Dana, ‘The Enabler Theory’ (n 5).

<sup>33</sup> *ibid* Section II.C.

<sup>34</sup> *CDF*, Sentencing Judgment (n 17).

<sup>35</sup> *ibid*.

<sup>36</sup> For a full account of their crimes, see Dana, ‘The Enabler Theory’ (n 5) Section II.C.

harms, a sentence of a few years does not square easily with a punishment ideology that proffers gravity as the “litmus test”.

Thus, a reorientation away from the gravity rhetoric and punitive ideologies in the sentencing narrative became necessary in order to sustain such low penalties. The entire sentencing analysis is designed to loosen gravity’s dominance in determining the appropriate quantum of punishment. But given the entrenchment of gravity as the “litmus test” for punishment, the shift had to be carefully and subtly orchestrated for otherwise it would risk appearing blatantly contrary to the general ICL jurisprudence. And the judges delivered. Every sentencing determinant is singularly funnelled towards supporting a merciful and lenient sentence. This is evidenced by the *CDF* Trial Chamber’s shift to a restorative orientation, its treatment of rehabilitation as a primary purpose of ICL sentencing alongside decisively punitive purposes of retribution and deterrence, and its downscaling of gravity from a *primary* consideration to an *important* one. All this led to punishments of six and eight years for atrocity crimes.

Another area of atrocity sentencing in which the absence of a doctrinal approach to gravity raises concerns has to do with the distinction between gravity and aggravating factors. Failure to adequately conceptualise gravity may explain why ICL judges frequently vacillate between treating a particular factor as a gravity factor in one judgment, and as an aggravating factor in another. They frequently reach contrary conclusions, blurring the line between “gravity” considerations and aggravating factors.<sup>37</sup> Indeed, some ICL judges have altogether abandoned the attempt to distinguish between gravity factors and aggravating factors or include separate discussions and examinations of gravity and aggravating factors in their judgment, opting for a combined discussion of both under a single conflated analysis.<sup>38</sup>

Although the ICL sentencing practice unfortunately permits some factors to be treated as either aggravating circumstances or gravity factors, it is uncertain if judges attribute the same or different weight to them depending on how they are grouped. Since under the case law of international tribunals, gravity and aggravating factors are not of equal weight in sentencing allocations, whether a factor is treated as the former or as the latter may have a dissimilar impact on the sentence. The jurisprudential rhetoric suggests as much: “gravity” *is* the “litmus test” of a fair sentence, not aggravating factors.<sup>39</sup> Of course, whether the sentencing

<sup>37</sup> *Taylor* (n 7) [102].

<sup>38</sup> For example, *Ratko Mladić* (n 7) [5185–5188]; *Nikolic* (n 27) [176]–[213].

<sup>39</sup> *AFRC*, Trial Judgment (n 7) (n 93) [19]; *CDF*, Sentencing Judgment (n 17); *RUF*, Sentencing Judgment (n 17); *Taylor* (n 19).

practice lives up to the rhetoric is debatable. In addition to the problem of differing attributable weight, other difficulties such as the risk of double counting also arise.

Going forward, these concerns will only heighten under the ICC sentencing regime where the existence of an aggravating factor appears necessary to trigger the criteria of “extreme gravity” for the application of life imprisonment. The doctrinal failure to conceptually separate the gravity consideration from aggravating factors came to a head in the ICC’s first sentence judgment in the *Lubanga* case.<sup>40</sup> Under the ICC Statute and RPE, the maximum prison length in terms of years is thirty.<sup>41</sup> To impose life imprisonment, the Prosecution must prove aggravating circumstances: “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.*”<sup>42</sup> Thus under the ICC regime, it could potentially make a significant difference whether a particular factor is treated as part of the gravity matrix or as an aggravating factor.

In the current situation, marked by a lack of doctrinal distinction between gravity and aggravating factors, defence counsel will invariably beseech the judges to subsume a potential aggravating factor into their consideration of gravity of the crime (as happened in the *Lubanga* case), while the ICC Prosecutor, if seeking life imprisonment, will ask the court to treat that same factor as an aggravating factor. Without a doctrinal distinction between the concept of gravity and aggravating factors, ICC judges are put in a precarious position when deciding and explaining how they treated that particular factor. One possible escape route would be to hold that, for the purpose of interpreting the ICC statute and triggering the life imprisonment provision, it should not matter whether the factor is labelled as a “gravity” factor or “aggravating” factor. So long as one of the factors listed in Rule 145 RPE is found by the court, that is to be considered sufficient for triggering the possible application of life imprisonment, regardless of how it is labelled. However, the statutory language does permit a stricter, more categorical approach.

Finally, the absence of a conceptualisation of gravity suitable for atrocity sentencing has also festered legitimacy issues for international criminal justice. ICL sentencing outcomes often do not match the powerful, condemning judicial narrative surrounding the heinous nature of the perpetrator’s crimes.

<sup>40</sup> See also *Lubanga* (n 13) [13].

<sup>41</sup> ICC, Article 77(1)(a).

<sup>42</sup> ICC Rules of Procedure and Evidence, rule 145(3) (emphasis added).

This problematizes the achievement of goals associated with atrocity trials. The sentencing framework proposed in this study helps to overcome these problems.

## B. COLLAPSING DISTRICT CATEGORIES

The problem of collapsing distinct sentencing considerations arises not only in the space between gravity and aggravating factors, but also between other sentencing criteria. One recurring collapse is the merger of categories two (individual circumstances) and three (aggravating and mitigating factors). Another is the treatment of certain modes of participation in criminality as a mitigating factor while that same consideration also informed the severity of punishment under the second prong of “gravity of the offence”. Both will be considered in further detail now.

Across all courts and tribunals, ICL sentencing judgments, both trial and appeals, identify “individual circumstances of the convicted person” as an independent sentencing consideration, distinct from aggravating and mitigating factors.<sup>43</sup> In practice, however, ICL judges routinely collapse these two categories in their sentencing analysis, despite the fact that they enumerate them as *separate* considerations when laying out the applicable legal framework.<sup>44</sup> This analytical deficiency accents a deep automatism in ICL judicial sentencing analysis. Consequently, “individual circumstances of the convicted person” has unimaginatively become a dumping ground for aggravating and mitigating factors. In my opinion, this collapse represents a lost opportunity to develop a meaningful *sui generis* penology for ICL that would be optimal for punishing atrocity crimes. The enabler factor and the sentencing framework proposed below seizes this lost opportunity while at the same time also infusing sentencing judgments with a voice capable of linking to broader narratives about atrocity crimes, accountability, justice, human nature, and war.

Regarding aggravating circumstances, the law on atrocity sentencing holds a number of factors as aggravating, such as superior position, abuse of power, betrayal of trust, exploitation of war for personal financial gain, excessive brutality, attacking traditional places of sanctuary, and more.<sup>45</sup> However, the absence of a strong analytical sentencing framework has made the application of these factors problematic and subsequently led to criticisms of the courts’ sentences. Yet, some of these criticisms may be unwarranted or could be overcome if the sentencing analysis is more methodical. For example, as noted, the Trial Chamber increased

<sup>43</sup> *AFRC*, Trial Judgment (n 7) [308]–[309]; *CDF*, Sentencing Judgment (n 7) [32]; *CDF*, Appeal Judgment (n 7) [465]; *RUF*, Sentencing Judgment (n 7) [17]; *Taylor* (n 7) [18].

<sup>44</sup> *ibid.*

<sup>45</sup> *Taylor* (n 7) [95]–[103].

Taylor's punishment based on several aggravating circumstances: his leadership role; his special status as Head of State; his betrayal of trust; the extraterritorial reach of his crimes; and his exploitation of war for personal financial gain.<sup>46</sup> According to Kevin Jon Heller, the judges' sentencing analysis here falls short of sufficiently distinguishing the first three aggravating factors, suggesting discernible error due to double counting.<sup>47</sup> For example, regarding betrayal of public trust as an aggravating factor, Taylor abused his position, authority, and power over "state machinery and public resources,"<sup>48</sup> including military assets, to assist in the commission of atrocity crimes. This same type of abuse of authority is germane to the judges' justification for aggravating his sentence on the account of his "leadership role" and "status as Head of State."<sup>49</sup> On the other hand, the judges arguably correctly appreciated that these three factors – leadership role, crimes by a Head of State, and betrayal of trust – have converged to aggregately enhance both Taylor's culpability and the harms resulting from his wrongful conduct in a way that the combined damage is more than each factor could inflict in isolation. The judges sensibly understand and recognise that this warrants a more severe punishment, but the ICL sentencing framework is insufficient to capture and logically account for this form of criminality. Consequently, observers interpret the sentencing judgment as flawed for double counting or emotively fixating on status.<sup>50</sup> Adding to this confusion is the judges' imprecise language, which blurs the line between "gravity" considerations and aggravating factors as noted above.<sup>51</sup>

Perhaps it is not surprising that in the absence of an articulated sentencing framework, a coherent theory, and a more exacting analysis, some commentators attributed the SCSL's 50 year sentencing of Taylor as manifesting a "fetish" with Head of State status rather than sound sentencing principles.<sup>52</sup> However, even if reasonable minds disagree on the soundness of permitting a "leadership" position to aggravate a perpetrator's punishment in more than one way, to attribute this approach to a "fetish" ignores the rest of the court's sentencing jurisprudence. In fact, this approach by the SCSL is not unique to Taylor. For example, in the *CDF* case, when a Kamajor leader was found criminally responsible under Article 6(1) of the court's statute, for alleged crimes committed by the Kamajors, the Trial

<sup>46</sup> *ibid.*

<sup>47</sup> Kevin Jon Heller, 'The Taylor Sentencing Judgment: A Critical Analysis' (2013) *Journal of International Criminal Justice* 835.

<sup>48</sup> *Taylor* (n 7) [97].

<sup>49</sup> *ibid.*

<sup>50</sup> For example, Heller, 'Taylor Sentencing' (n 47); Drumbl, *Atrocity, Punishment and International Law* (n 3).

<sup>51</sup> *Taylor* (n 7) [102].

<sup>52</sup> Drumbl, *Atrocity, Punishment and International Law* (n 3); Heller, 'Taylor Sentencing' (n 47).

Chamber also considered multiple ways in which his leadership position could aggravate his sentence.<sup>53</sup> Thus, far from fixating the application of this principle on Charles Taylor because he was a Head of State, the SCSL applies this approach (whether correct or erroneous) to government officials, police chiefs, commanders, and significantly, also to non-official positions of prominence in the community. Thus, both *de jure* and *de facto* positions can qualify for this aggravating factor, the former amounting to a combined breach of *authority* and breach of *trust*; whereas the latter, the failure of *de facto* community leaders, is treated primarily only as a breach of trust.

Regarding mitigating circumstances, exercising their wide discretion, the ICL judges have held a number of factors pertinent to reducing punishment: expression of remorse;<sup>54</sup> good character with no prior conviction;<sup>55</sup> acknowledgment of responsibility;<sup>56</sup> the accused's lack of education or training;<sup>57</sup> advanced age of the accused;<sup>58</sup> duress;<sup>59</sup> indirect participation.<sup>60</sup> Additionally, a few trial judges at the SCSL controversially held that a "legitimate cause" constitutes a mitigating factor.<sup>61</sup> Some of these mitigating factors are particularly problematic both conceptually and theoretically. Others are arguably conceptually sound, but the court's method of analysis and application of them raises concerns or exposes doctrinal deficiencies. For the purpose of this section, I will focus further on "indirect participation", as an example, as it bears on assessing the perpetrator's mode of liability.

Treating "indirect participation" as a *mitigating* factor unsettles the sentencing matrix because the accused's mode of liability is purportedly already accounted for in the assessment of the *gravity* of the offence. Furthermore, conceptualising "indirect participation" as a mitigating factor is incongruent with the position typically proffered by ICL judges that there is no hierarchy in modes of liability for sentencing purposes. In this regard, the SCSL offered important rulings on the nexus between modes of liability and sentencing. The SCSL's final judgment held that domestic and international criminal law do not support the notion that

<sup>53</sup> *CDF*, Sentencing Judgment (n 7) [38]; see also Dana, 'The Enabler Theory' (n 5) Section II.C (discussing the punishment of *CDF* defendants).

<sup>54</sup> *AFRC*, Trial Judgment (n 7) [25]; *CDF*, Sentencing Judgment (n 7) [40]; *CDF*, Appeal Judgment (n 7) [489]–[490]; *RUF*, Sentencing Judgment (n 7) [29]; *Taylor* (n 7) [34].

<sup>55</sup> *CDF*, Appeal Judgment (n 7) [511]; *Taylor* (n 7) [34].

<sup>56</sup> *AFRC*, Trial Judgment (n 7) [25]; *CDF*, Sentencing Judgment (n 7) [40]; *CDF*, Appeal Judgment (n 7) [489]; *RUF*, Sentencing Judgment (n 7) [29]; *Taylor* (n 7) [34].

<sup>57</sup> *CDF*, Appeal Judgment (n 7) [40]; *RUF*, Sentencing Judgment (n 7) [29]; *Taylor* (n 7) [34].

<sup>58</sup> *AFRC*, Trial Judgment (n 7) [25].

<sup>59</sup> *ibid.*

<sup>60</sup> *ibid.*

<sup>61</sup> *CDF*, Sentencing Judgment (n 7).

aiding and abetting *ipso jure* warrants a lesser sentence than more direct forms of participation.<sup>62</sup> The court refused to introduce a hierarchy of modes of liability for the purpose of sentencing, just as the judges at the *ad hoc* tribunals declined to impose a hierarchy of crimes. This is not surprising as any such ruling would curtail the wide discretion ICL judges enjoy in sentencing matters, a discretion they guard very watchfully. Previously, the *Taylor* Trial Chamber had painted itself into a corner by erroneously declaring that “aiding and abetting *as a mode of liability* generally warrants a lesser sentence,”<sup>63</sup> but then handed out a 50-year sentence on par with *direct* perpetrators in the *RUF* and *AFRC* trials. In a somewhat unconvincing manner, the Trial Chamber attempted to justify its departure from a proffered “general principle” because of the “unique circumstances of a case.”<sup>64</sup> The sentencing judgment, however, would have benefitted from explaining this point more clearly.

The judges could have strengthened their position by noting that the argument that “aiding and abetting warrants a lesser sentence” does not apply to planning or ordering atrocity crimes (depending on the facts).<sup>65</sup> ICL statutory law treats these as separate and distinct modes of liability,<sup>66</sup> even though, in a general sense, they also amount to assisting in the commission of a crime. Neither “planning” nor “ordering” as a mode of liability requires, *stricto sensu*, the actual commission of the crime. Thus, a broad stroke calling for lesser punishment for aiders and abettors based on a presumed notion that such culpability is *ipso jure* less serious is misplaced in the context of ICL and atrocity crimes. That said, drawing a distinction between planning and aiding and abetting does not cover sufficient ground to explain why Taylor’s lengthy sentencing is appropriate compared to other perpetrators, especially given that the “planning” mode of liability only applied to his crimes in the capture of Freetown. For all other crimes that he was found guilty of, he was convicted as an aider and abettor. This brings us back to the gap in the Trial Chamber’s explanation that the “unique circumstances of a case” justify departing from its avowed principle. What exactly is the “unique” circumstance of the case against Charles Taylor?

The explanatory gap here can be explained by the enabler factor. Rather than unsatisfyingly ending their sentencing analysis dependent on the “unique circumstances of a case”, the judges could have returned to the findings in their judgment where they had determined that Taylor had enabled the *RUF/AFRC* in

<sup>62</sup> *Taylor*, Appeal Judgment, SCSL-03-01-A (26 September 2013).

<sup>63</sup> *Taylor* (n 7) [21] (emphasis added). The decision was overruled on appeal.

<sup>64</sup> *ibid.*

<sup>65</sup> SCSL, Article 6(1); ICC, Article 25; ICTR, Article 6(1); ICTY, Article 7(1).

<sup>66</sup> *ibid.*

the conflict and the atrocities they had committed.<sup>67</sup> A Head of State's wrongdoing that enables large scale violence and atrocities in another country is wrongdoing that must be captured in his punishment. In this way, the enabler factor closes the explanatory gap between the judge's ruling on aiding and abetting and their 50-year sentence of Charles Taylor.

### C. THE MANY FACES OF "THE ROLE OF THE ACCUSED"

What do international judges mean by "the role of the accused?" How does it operate within their sentencing considerations? Although judges routinely identify it as a sentencing factor, ICL sentencing jurisprudence is not consistent in its conceptualisation and integration of this factor. Two questions remain under-examined: How is "the role of the accused" conceptualised? And where does it fit in within the sentencing considerations? The ICL sentencing judgments frequently reference "the role of the accused" in their general discussion of "gravity of the offence" but the decisions are not consistent in how they account for it.<sup>68</sup> The jurisprudence offers a confused and varied treatment of "the role of the accused" as a sentencing factor.<sup>69</sup>

Across international tribunals, judges understand and account for "the role of the accused" in three different ways. Recalling the analysis of gravity in Section A above, "gravity of the *offence*" consists of two considerations: the gravity of the *crime* and the criminal conduct of the accused. The former consists of a bunch of different "gravity factors" and the latter includes the accused's mode of liability and the nature and degree of his participation in the crime.<sup>70</sup> Some sentencing judgments treat "the role of the accused" as one of the many enumerated "gravity" factors, but other judgments treat it as part of the accused's mode of liability and participation in the crime.<sup>71</sup> Still, other judgments treat the "role of the accused" as an aggravating factor. Thus, in ICL jurisprudence, we see three

<sup>67</sup> *Taylor* (n 7) [5834], [5835], [5842], [6913]–[6915] (finding that Taylor "enabled the RUF/AFRC's Operational Strategy" and "supported, sustained and enhanced the RUF/AFRC's capacity to implement its Operational Strategy").

<sup>68</sup> *Taylor*, Appeal Judgment (n 62); *Prosecutor v Blaškić*, Appeal Judgment, IT-95-14-A (29 July 2004) [683]; *RUF*, Sentencing Judgment (n 7) [40]; *CDF*, Sentencing Judgment (n 7) [33]; *Prosecutor v Aleksovski*, Appeal Judgment, IT-95-14/1-A (24 March 2000) [182]; *Prosecutor v Brima*, Sentencing Judgment, SCSL-04-16-T (July 19, 2007) [19]; *Prosecutor v Furundžija*, Appeal Judgment, IT-95-17/1-A (21 July 2000) [249]; *Prosecutor v Delalić* ("elebi i Case"), Appeal Judgment, IT-96-21-A (20 February 2001) [731].

<sup>69</sup> *ibid.*

<sup>70</sup> See also *RUF*, Sentencing Judgment (n 7) [20]; *Taylor* (n 7) [21].

<sup>71</sup> This ambivalent treatment of "role of the accused" traces its origins to the early jurisprudence of the ICTY. See *Furundžija* (n 68) [249]; *Blaškić* (n 68) [683]; *Aleksovski* (n 68) [182]; *elebi i Case* (n 68) [731].

different applications of “the role of the accused”: (1) as a gravity factor; (2) as a factor to assess the individual’s culpability based on the nature of his participation in the crime; and (3) as an aggravating factor.

Regarding the first approach, some ICL judges locate “the role of the accused” as a “gravity factor” but do not infuse it with any distinctive substance. In fact, it is frequently equated to circumstances that the jurisprudence treats as aggravating factors. The only clear understanding that emerges from these judgments is that “role of the accused” is something other than the accused’s mode of liability. Thus, for judges following the first approach, “the role of the accused” is not a measure of the accused’s mode of liability, such as ordering, planning, or command responsibility. But for other ICL judges, this is precisely what it entails.<sup>72</sup> This latter group describes the “role of the accused in the crime” in terms of (1) the mode of liability attributed to the perpetrator, and (2) the nature and degree of his participation in the crime.<sup>73</sup>

However, under this approach, a cogent conceptualisation of this factor is compromised by the lack of a sentencing framework drawing a coherent pathway between the perpetrator’s criminality, as determined by his culpability and wrongdoing, the proper attribution of a mode of liability, and the appropriate punishment. It is at this point in many judgments that the sentence analysis typically becomes obfuscated. For example, in the *CDF* case, trial judges attempted to make the above assessment by considering whether the accused was a direct or indirect participant in the crimes.<sup>74</sup> However, they typically do not identify what modes of liability they consider to be direct or indirect. Sentencing judgments of ICCs seldom provide crystal clear analysis in this regard.<sup>75</sup> This confusion is attributable to the absence of a theory piecing together the three ingredients of a fair punishment – the perpetrator’s criminal conduct, the legally attributed mode of liability, and the actual sentence. Some ICL cases do not even treat “the role of the accused” as part of the gravity of the offence at all, but as an aggravating factor. Thus, there is no consensus in ICL case law about how to account for “the role of the accused.”

What there is agreement on is that “role of the accused” is an important sentencing factor. However, questions relevant to determining its content and influence remain unresolved, making it an important, but unpredictable factor in sentencing. This raises further questions: for judges for whom “the role of the

<sup>72</sup> *CDF*, Sentencing Judgment (n 7) [34].

<sup>73</sup> *ibid.*

<sup>74</sup> *ibid.*

<sup>75</sup> An example of this is the ICTY *Blaškić* case (n 68). See Shahram Dana, ‘Revisiting the Blaškić Sentence: Some Reflections on the Sentencing Jurisprudence of the ICTY’ (2004) 4 Int’l Crim L Rev 321, 336–40.

accused” is not a measure of the accused’s participation in the crime, such as ordering, planning, or command responsibility, then what is it? And for judges who insist on treating it as a “gravity factor” instead of an aggravating circumstance, why is that difference important? An important contribution of the enabler theory is that it conceptualises “the role of the accused” as something distinct from the concepts of gravity, modes of liability, and aggravating factors. Moreover, the enabler factor also infuses the concept of “the role of the accused” with substance significant and distinctive to international criminality and mass atrocities, thereby capturing its salience to situations of systemic criminality. I argue that ICL’s conceptualisation of “the role of the accused” should be informed by the enabler factor and understood as the accused’s responsibility for enabling the situation or milieu for mass atrocity criminality.

#### D. NATIONAL LAW PROTECTION

According to the general ICL sentencing jurisprudence, consideration of the sentencing laws and practices of the *locus delicti* constitutes one of the four pillars of an appropriate sentence.<sup>76</sup> It is fair to say that this consideration never gained significant traction in ICL sentencing practice. It rarely, if at all, had any meaningful influence on the quantum of punishment, despite the fact that a provision to this effect appears in the statutes of all ICC&Ts discussed herein, except for the ICC. Some consider the marginalisation of the national law provision to be an error in interpretation and application of ICL statutory law.<sup>77</sup> Others lament that it was overlooked from a philosophical or criminological perspective.<sup>78</sup>

### III. RE-CONCEPTUALISING ATROCITY SENTENCING

International criminal law has not developed an analytical framework for punishing atrocities. The extant practice of international judges is to enumerate many “sentencing factors” under various headings found in the statute or RPE with great laxity allowing each panel of judges to conceptualise the factors as suits their purpose so long as they are careful to not double count. There is no common approach among ICL judges regarding the categorisations. Even if we assume that this method has some semblance of a framework, it is far too weak and underdeveloped to handle the complexity of sentencing perpetrators of atrocity crimes. The weakness of the current approach is demonstrated by observing a troubling pattern in sentencing judgments of (1) articulating guiding principles that

<sup>76</sup> See Dana, ‘Beyond Retroactivity to Realizing Justice’ (n 9).

<sup>77</sup> *ibid.*

<sup>78</sup> *ibid.*

are not actually adhered to in the judicial analysis or outcome;<sup>79</sup> or (2) proffering purportedly differential considerations that are not doing any heavy lifting.<sup>80</sup>

In the following sections, I develop an innovative framework for ICL sentencing. As discussed in the previous sections, in practice, ICL jurisprudence does not sufficiently develop the doctrinal aspects of key sentencing criteria. Thus, as a preliminary matter, it is necessary to briefly revisit the extant discourse surrounding these criteria, particularly gravity, modes of liability, and the role of the accused. My proposed framework reasserts the distinctiveness of atrocity sentencing, infusing it with considerations *sui generis* to atrocity crimes. There are two benefits to this approach. The first is to give structure to concepts such as gravity, modes of liability, and the role of the accused in order to realise their potential to atrocity sentencing. Second, the conceptualisations and claims advanced herein illuminate these concepts in a manner that can aid lawyers and judges in international trials independent of whether they find my framework persuasive.

#### A. GRAVITY CONCEPTUALISED

As noted above, the *Taylor* case contributes important analysis for the purpose of conceptualising gravity. This section builds upon this jurisprudence to further refine the notion of gravity as it pertains to atrocity sentencing. My goal here is to offer a conceptualisation of gravity that stabilises its content, makes its influence predictable, and harmonises sentencing narratives with sentencing allocations. Moreover, if adopted by ICC judges, it will allow them to develop robust and communicative sentencing judgments.

Some trial chambers consider factors pertinent to the enabler theory in their assessment of the “gravity of the crime”. However, consuming a war criminal’s role as an enabler within the concept of gravity obfuscates the function and influence of the former. It also muddies the notion of gravity itself, diminishing the expressive power of sentencing judgments. The confusion is exacerbated by the fact that at times international judges treat “the role of the accused” as an aggravating circumstance rather than a factor in assessing gravity of the offence. I argue that the enabler factor should be distinguished from both concepts of gravity of the offence and aggravating circumstances. This requires a shift in the discourse currently found in sentencing judgments. When ICL sentences are

<sup>79</sup> See Section II.A and B above for a discussion of the Trial Chamber’s treatment of sentencing for aiding and abetting; see also Heller, ‘Taylor Sentencing’ (n 47) 835–840.

<sup>80</sup> *Taylor* (n 7) [22] (“The Trial Chamber notes that ‘individual circumstances of the convicted person’ can be either mitigating or aggravating”); *CDF*, Appeal Judgment (n 7) [498] (“The Appeals Chamber considers that the level of education and training of a convicted person is part of his individual circumstances which the Trial Chamber is required to take into consideration as an aggravating or mitigating circumstance”); *RUF*, Appeal Judgment (n 14); *Mladen Naletili* (n 14) [679].

understood through the prism of the enabler factor, greater congruency is achieved between judicial narratives about the atrocities and their actual sentences. This does not diminish the role of gravity but rather brings clarity and transparency to punishing atrocities. Gravity of the offence still plays an important role but does not monopolise the judicial narrative.

In the *Taylor* case, the court advanced the notion of *inherent* gravity as a *distinct* consideration for the proper assessment of gravity of the offence. The judges stated that “gravity of the offence is determined by assessing the inherent gravity of the crime and the criminal conduct of the accused.”<sup>81</sup> As a preliminary matter, it is worth noting that the *Taylor* Trial Chamber’s conceptualisation of gravity suggests a distinction between gravity of the *offence* and gravity of the *crime*. It implies that the latter is narrower, limited to the elements of the crime whereas the former is broader and includes an assessment of the form and degree of participation combined with the elements of the crime. Thus, we may understand the Trial Chamber’s approach as conceptualising gravity as requiring a two-prong assessment of the perpetrator’s criminality.<sup>82</sup> The first prong requires a determination of “the *inherent* gravity of the *crime*”, and the second prong considers the “criminal conduct of the accused”.<sup>83</sup> Determining *inherent* gravity calls for an assessment of the seriousness of harm (gravity) as determined by the elements of the crime (inherent) for which the perpetrator was found criminally responsible.<sup>84</sup> This assessment plays an important role in sentencing because it ties the perpetrator’s criminality directly to deviations from the community’s norms and values.

To positively utilise this conceptualisation of gravity, however, requires an adjustment in how judges narrate their sentencing opinions. Formulistic recitations of an enumerated list of gravity factors of general applicability must be replaced with a focused gravity assessment of the specific elements of the crime. This is after all what an “inherent” examination demands. Unfortunately, although the Trial Chamber makes this important contribution to the conceptualisation of “gravity” for the purpose of sentencing in *Taylor*, it did not actually engage in an assessment of the *inherent* gravity of the crime. Instead, it reverted back to a gravity-*in-fact* analysis by simply regurgitating a list of “gravity” factors, some of which could be treated as aggravating factors.<sup>85</sup> This reversion back to the enumerated list of

<sup>81</sup> *Taylor* (n 7) [19].

<sup>82</sup> *ibid.*

<sup>83</sup> *ibid* (emphasis added).

<sup>84</sup> See further Jan Philipp Book, *Appeal and Sentence in International Criminal Law* (BWV Berliner Wissenschafts-Verlag 2012).

<sup>85</sup> *Taylor* (n 7) [20].

gravity factors may be out of habit or due to the Trial Chamber's overly broad construction of the scope of the considerations that fall under the second prong.

The judges explained that a determination of the second prong – the criminal conduct of the accused – “requires consideration of the particular circumstances of the case and the crimes for which the person was convicted as well as the form and degree of participation of the Accused in the crime.”<sup>86</sup> Thus, the second prong itself consists of several additional considerations. The scope of the second prong is so broad that literally any factor could be considered here, including factors from the enumerated “gravity” list, aggravating factors, and even mitigating factors alongside modes of liability, so long as what is being considered falls under the general umbrella of “particular circumstances of the case.” Recall that the judges considered *two* aspects of the alleged criminality as integral to their conceptualisation of gravity: “the *inherent* gravity of the *crime* and the criminal conduct of the accused.”<sup>87</sup> The scope of the former has clear parameters and is well-defined. However, the trial chamber has interpreted the second prong so broadly that it marginalises the impact of the first prong (the inherent gravity assessment). What started out as a promising analysis offering a contoured concept of gravity melted into a shapeless amoeba. The concept of inherent gravity gets steamrolled and disappears under the weight of a multitude of “factors” and “particular circumstances of the case.”

It is not surprising then that the SCSL trial chambers do not actually engage in a granular assessment of the *inherent* gravity of the *crime*. Rather, they skip right over an inherent assessment, opting instead to generate a list by select reference to one or more of their enumerated gravity factors, such as vulnerability of victims or the brutal manner of perpetration. As discussed above, many of these so-called “gravity” factors could logically and conceptually be treated as aggravating factors.<sup>88</sup> The absence of a doctrinal approach to gravity explains why ICL judges have difficulty deciding if a particular factor should be treated under its gravity analysis or as an aggravating factor. But more importantly, this approach causes the notion of gravity itself to become too broad and diluted.

Additionally, the need for atrocity sentencing to reimagine the notion of “gravity” pertains not only to doctrinal issues, but also extends to the role that gravity plays in judicial narratives about punishing atrocities. ICL sentencing narratives are excessively dominated by gravity rhetoric. Recall the *CDF* trial sentencing judgment. Whatever criticisms the sentences in that case may merit, the trial judges' downscaling characterisation of gravity as an “important” but not

<sup>86</sup> *ibid* [19].

<sup>87</sup> *ibid* (emphasis added).

<sup>88</sup> See Sections II.A and II.B above; see also Section III above.

“primary” factor in punishing atrocities arguably better reflects the general body of ICL sentencing outcomes in practice.<sup>89</sup> Connecting the dots to other tribunals, this conceptualisation – that gravity is an important factor but not a primary factor in the CDF case – would be in line with how gravity functionally operated at the ICTY in, for example, Nikolic’s punishment discussed above.<sup>90</sup> These and other judgments cast doubt on whether “gravity of the offence” is the controlling consideration for ICL punishments.<sup>91</sup>

This trend of moving away from overstating the role of gravity is a welcomed one because it invites space for more granular considerations. Margaret de Guzman explains that the insistent gravity rhetoric in sentencing narratives can “narrow the range of discursive space and interpretive possibility.”<sup>92</sup> This trend also appears to find favour with the ICC. For example, in the *Katanga* sentencing judgment, the trial judges discussed gravity as a sentencing factor per the ICC statute without attaching hyperbolic qualifiers such as “primary” or “litmus test”.<sup>93</sup> Likewise, in the *Lubanga* case, the sentencing judges, like the SCSL judges in the CDF case, treated “gravity” as an important consideration without giving it lofty dominance over atrocity sentencing as the “litmus test”.<sup>94</sup>

## B. MODES OF LIABILITY

Determining a just distribution of punishment among actors who perpetrate atrocity crimes requires careful consideration of various ICL modes of liability. Debate surrounding ICL modes of liability remain unresolved, especially concerning theoretical and doctrinal aspects of accomplice liability. It is beyond the scope of the research questions of this study to resolve the elemental debates surrounding ICL modes of liability.<sup>95</sup> For the purpose of this study on sentencing, it is sufficient to reflect on the broad categorisations influencing the sentence.

<sup>89</sup> See also Chifflet and Boas, ‘Sentencing Coherence in International Criminal Law’ (n 1) 147, 158 (claiming that “judges and their staff are primarily focused” on a perpetrator’s *responsibility* for the atrocities, not the *gravity* of crimes).

<sup>90</sup> See Section II.A above.

<sup>91</sup> For more examples from the ICTY, see generally Chifflet and Boas, ‘Sentencing Coherence in International Criminal Law’ (n 1).

<sup>92</sup> De Guzman, “Harsh Justice for International Crimes” (n 25) 19, quoting Anthony Amsterdam and Jerome Bruner, *Minding the Law* (Harvard University Press 2002).

<sup>93</sup> *Prosecutor v Germain Katanga*, Decision on Sentence, ICC-01/04-01/07 (23 May 2014).

<sup>94</sup> *Lubanga* (n 13) [36].

<sup>95</sup> See also Miles Jackson, *Complicity in International Law* (Oxford University Press 2015); Kai Ambos, *Treatise on International Criminal Law Volume 1: Foundations and General Part* (Oxford University Press 2013); Miles Jackson, ‘The Attribution of Responsibility and Modes of Liability in International Criminal Law’ (2016) 29 *Leiden Journal of International Law* 879; James G Stewart, ‘The End of ‘Modes of Liability’ for International Crimes’ (2012) 25 *Leiden Journal of International Law* 165.

Because of the peculiarities of atrocity criminality, domestic concepts of “accessory liability” and understandings of “direct” versus “indirect” participation are often insufficient as differential doctrines in international criminal law, or at least require some adjustment when transposed. Consequently, international judges relying on analogies with domestic doctrines often misappropriate them in their sentencing judgments. As argued above, it may be best to avoid narrating culpability for atrocity crimes in typical domestic law language because the concept or doctrine is often teleologically ill-suited for ICL or because international judges, who often lack criminal law expertise or judicial experience, tend to misapply them.<sup>96</sup>

On the other hand, if characterisations such as “direct” and “indirect” are to be retained in international criminal justice, then there exists a pressing need to establish clarity around them. For the specific purpose of sentencing, I propose that international judges adopt the following approach to conceptualising the direct or indirect nature of criminal conduct for atrocity crimes. An individual who physically commits the crime on the ground, the commander who orders it, and the leaders who plan it are all *direct* participants in the crime. A superior or commander who fails to prevent or punish the crimes of subordinates under his or her control is an *indirect* participant in the crime. Aiding and abetting is a “wobbler” – depending on the nature of the assistance it can be so substantial so as to amount to direct participation while lesser forms of assistance might rightly be regarded as indirect participation. In terms of the ICC statute, modes of liability articulated in Article 25(3)(a), (b) and (e) are direct forms of participation whereas liability pursuant to Article 28 constitutes indirect participation in the crime. However, one should bear in mind that the ICC statute does not establish a hierarchy among modes of liability.

Had ICL judges at the SCSL conceptualised ICL modes of liability in this manner, they could have advanced a clearer link between the role of the accused, the perpetrator’s mode of liability, and the sentence. Failure to do so makes the sentence vulnerable to several criticisms as illustrated in the *Taylor* case. For example, Heller considers Taylor’s punishment to be too high and excessive because, in his view, Taylor was merely an “accessory.”<sup>97</sup> But in Taylor’s own words, he was not just some “thug street criminal”; he was the “president of Liberia.” Categorical legalese, such as “accessory”, should not cause us to lose sight of Taylor’s real power and influence. Even Taylor was not willing to belittle his position, even if it meant placing himself in the centre of responsibility for the conflict and atrocities. An insignificant accomplice distracting an unwitting victim while a street criminal

<sup>96</sup> By operation of its statute, the ICC permits appointment of diplomats and other persons without legal training or judicial experience to serve as judges.

<sup>97</sup> Heller, ‘Taylor Sentencing’ (n 47) 855–860.

snatches a purse or wallet is one thing. A Head of State welding the power of militaries and armed forces enabling crimes against humanity and war crimes in another country is quite another. I have argued elsewhere against decontextualized transposition of national criminal law concepts to international law.<sup>98</sup> The nature of domestic criminality for ordinary crimes in national law is not the same as criminality underlying atrocity crimes, even if they share certain characteristics. Describing Taylor as simply an “accessory” risks giving the misimpression that his wrongdoing and criminality was not serious or grave or central. Moreover, Heller’s position does not distinguish between “aiding and abetting” and “planning” treating both as “accessory” liability.<sup>99</sup> However, I argue that these are distinctive forms of participation in atrocity crimes, and depending on the facts of the case, may often bear on gravity considerations, and the individual’s culpability and criminal responsibility for the atrocities. Jurisprudentially, international criminal law treats “aiding and abetting” and “planning” as distinct modes of liability, as does the ICC statute.<sup>100</sup>

Even if we accept the appropriateness of labelling Taylor as an “accessory,” the label alone does not shed any light on whether his punishment is too severe. The SCSL rejected the suggestion that there is a hierarchy among modes of liability.<sup>101</sup> Likewise, the statutes of ICC&Ts do not support such a hierarchy. In fact, given their failures as differential concepts at sentencing, many national legal systems have abandoned legal categorisation of perpetrators into “principals” and “accessories” for the purpose of punishment. For example, in Sierra Leone as well as the United States, an accessory to murder can be punished as severely as the principal perpetrator.<sup>102</sup> Likewise, the ICTY trial sentence in *Krstić* illustrates that there is nothing automatic about aiding and abetting receiving a lower penalty.<sup>103</sup> Accordingly, the term “accessory” is a hollow label for the purposes of ICL sentencing, especially as applied to high ranking perpetrators. Of course, if the Trial Chamber in *Taylor* had actually given individualised sentences for each count

<sup>98</sup> Dana, ‘Revisiting the Blaškić Sentence’ (n 75) 330–336.

<sup>99</sup> Heller, ‘Taylor Sentencing’ (n 47) 837.

<sup>100</sup> ICC, Article 25.

<sup>101</sup> *Taylor*, Appeal Judgment (n 62) [666]–[670].

<sup>102</sup> *Taylor* (n 7) [37].

<sup>103</sup> *Prosecutor v Krstić*, Judgment, IT-98-33-T (2 August 2001) (sentencing Krstić to 46 years of imprisonment). On appeal, the ICTY sentenced him to 35 years’ imprisonment: *Prosecutor v Krstić*, Appeal Judgment, IT-98-33-A (19 April 2004).

instead of a single global sentence, we could have better appreciated the difference in practice, if any, for punishment between the different modes of liability.

#### IV. TOWARDS AN ORIGINAL FRAMEWORK FOR PUNISHING ATROCITIES

ICL sentencing practice suffers from the absence of an analytical framework to support international judges when exercising their discretion to arrive at a just punishment. My goal in this section is to propose such a framework. Admittedly, proposing an effective sentencing framework for atrocity crimes is no easy task, and a risky one. It is risky because the law of atrocity sentencing remains unsettled and the practice of global sentencing obfuscated ICL sentencing practice. Thus, in attempting such a task, the effort may possibly overlook or underappreciate issues that impact the outcome. It is difficult because a hard choice has to be made: should the proposal develop a framework that maps onto the proclaimed sentencing approach as presented in the judgments? Or should the proposed sentencing framework map onto what is actually happening in practice? As analysed above, ICL judges, in practice, do not actually follow their avowed structure of four distinct pillars of atrocity sentencing. For this reason, I propose a sentencing framework that maps onto the actual sentencing practice.

A synthesis of ICL sentencing practice reveals three core determinants of the quantum of punishment: (1) gravity of the crime; (2) individual circumstance of the convicted person; and (3) aggravating factors and mitigating circumstances. The national law provision, often declared as a fourth determinant of a sentence, never meaningfully influenced ICL sentencing outcomes in general.<sup>104</sup> Although, some ICTR judgments justified higher sentences on the grounds that Rwandan domestic law permitted the death penalty.<sup>105</sup> Additionally, as discussed above, in practice ICL judges collapse categories two and three. “Individual circumstances of the convicted person” has been conceptualised in terms of aggravating and mitigating factors. My proposed framework reasserts the distinctiveness of these categories. It separates consideration of aggravating and mitigating factors from the consideration of “individual circumstances of the convicted person.” It infuses

<sup>104</sup> See also Dana, ‘Beyond Retroactivity to Realizing Justice’ (n 9).

<sup>105</sup> Rwanda’s parliament controversially voted to abolish the death penalty in 2007, while the ICTR was in operation: see BBC News, ‘Rwanda Scraps the Death Penalty’ (*BBC News*, 8 June 2007) <<http://news.bbc.co.uk/2/hi/africa/6735435.stm>> (accessed 11 August 2020).

the latter with substance that is *sui generis* to atrocity crimes, namely the role of the convicted person as an enabler.

#### A. AN INNOVATIVE FRAMEWORK FOR ICL SENTENCING

I propose a sentencing framework for the ICC and ICL in general that combines the constitutive sentencing considerations (identified in ICL sentencing jurisprudence) with the Trial Chamber's conceptualisation of gravity in *Taylor*. The constitutive elements of atrocity sentencing are: (1) gravity of the crime; (2) individual circumstances of the convicted person; and (3) applicable aggravating and mitigating factors.<sup>106</sup> The Trial Chamber in *Taylor* conceptualised "gravity" by weighing two facets of a perpetrator's criminality: the inherent gravity of the crime and the criminal conduct of the accused. However, unlike the extant ICL sentencing practice, I would not collapse the framework's constitutive aspects. My framework identifies considerations specific to each and begins by assessing each dependently.

More specifically, under my framework, judges initially assess *inherent* gravity independently. The concept of inherent gravity entails an objective assessment of the seriousness of the elements of the crime. As noted above, an assessment of the inherent gravity of the crime is an essential step in tying the perpetrator's wrongdoing to the community norms embedded in the prohibited conduct as reflected in elements of the crime. This link is vital to retributive justifications and expressive goals of punishment, as well as other goals of international atrocity trials. Next, judges consider the mode of liability attributed to the accused specific to each proven crime. As discussed above, I gradate modes of liability into three groups.<sup>107</sup> The most severe for the purpose of punishment are forms of responsibility that reflect grave responsibility for the crime, such as planning atrocities, ordering atrocity crimes, and personally committing the crime. Some commentators view planning and ordering atrocity crimes as a form of participation similar to aiding and abetting. However, planning and ordering are not merely aiding and abetting modes of liability. They are far graver and conceptually distinct from the latter. Statutes of ICC&Ts identify planning and ordering as separate and distinct modes of liability from aiding and abetting.<sup>108</sup> The former are in fact direct forms of responsibility because the accused is held liable for the actual planning or ordering of activities or actions that constituted genocide, war crimes, and crimes against humanity. The third group consists of command or superior responsibility of the

<sup>106</sup> *Taylor* (n 7) [18]; *RUF*, Sentencing Judgment (n 7) [17]; *RUF*, Appeal Judgment (n 7) [1201]; *AFRC*, Trial Judgment (n 7) [30B]; *CDF*, Appeal Judgment (n 7) [20B].

<sup>107</sup> See Section III.B above.

<sup>108</sup> Compare ICC, Article 25(3)(b); ICTY, Article 7(1); ICTR, Article 6(1); SCSL, Article 6(1).

type found in the ICC Statute Article 28, ICTY Article 7(3), and Article 6(3) in the statutes of the ICTR and SCSL. All things being equal, this form of criminal responsibility is less grave than the first category because it is indirect liability based on an omission. It is still a serious form of criminal liability and can attract a substantial sentence. As serious as it is for a commander to fail to prevent or punish subordinates who commit crimes, commanders who plan or order atrocities present a far greater evil and attract much more moral culpability in terms of individual wrongdoing. Based on these two considerations – the inherent gravity of the offence and the perpetrator’s mode of liability – judges arrive at the *overall* gravity of the *crime*. This accounts for the first constitutive consideration noted above.

Next, the judges would then determine the accused’s responsibility as an enabler, if any, for maintaining, facilitating, and/or sustaining the context in which the atrocity crimes were committed. This consideration informs the second constitutive element as a determination of the “role of the accused” which forms the “individual circumstances of the convicted person”. As noted above, the approach of some ICL judges is to treat “the role of the accused” as part of their assessment of gravity of the offence.<sup>109</sup> My proposed framework pulls “the role of the accused” out of the first constitutive element, the gravity box, and analyses it under the second constitutive element. This injects the second constitutive sentencing consideration with criteria and content specifically pertinent to atrocity crimes as distinct from ordinary crimes. This approach gives a more purposive application to the second constitutive element, which has thus far been a dumping ground for aggravating and mitigating factors, despite the fact that ICL judges consider them to be separate and distinct considerations. Thus, my proposed framework has the advantage of also preserving the integrity of the third constitutive sentencing consideration. The “individual circumstances of the convicted person” encompasses an evaluation of “the role of the accused” as determined by the enabler factor, *i.e.* the defendant’s role or responsibility in enabling and/or maintaining a milieu or situation of atrocity crimes. The accused’s punishment would be largely the product of the *overall gravity* and his responsibility as an enabler to arrive at the totality of the accused’s criminality. This sentence could be moderately adjusted up or down based on aggravating or mitigating factors.

## B. ADVANTAGES OF THE NEW FRAMEWORK

In a certain sense, simply having a sentencing framework contributes to advancing the ICL sentencing process, norms, distribution, and allocations.

<sup>109</sup> See Section II.C above.

However, there are other advantages too. Following the above-proposed sentencing framework advances a more analytical approach to explaining and allocating sentences. It allows the judges, through the sentencing jurisprudence, to develop a more granular sentencing practice and narrative that supports a normative discourse of accountability for the atrocities. This framework optimally facilitates an important expressive function of ICL judges and trials: it allows judges to more readily achieve coherence between justice and punishment for atrocity crimes.<sup>110</sup>

Presently, the normative expressions are compromised under an exclusive reliance on hyper gravity imagery that far outpaces and overshadows the actual quantum of punishment. Judicial narratives tirelessly badger the reader about the gravity of the offence and how monstrous the accused's crimes are.<sup>111</sup> Yet, the final sentences are underwhelming in the face of such explosive rhetoric. This method of communication surrenders too much. Gravity needs to yield its monopoly as an explanatory tool for punishing atrocity crimes. The enabler factor allows the judges to speak the language of gravity to acknowledge the harms suffered by the victims and yet explain why not every war criminal is being sentenced to life imprisonment or a lengthy prison term. The enabler factor combined with my proposed sentencing framework optimises the expressive capacity of ICL punishment by offering a clear pathway linking justice, to the offender's criminal culpability, to the purposes of international trials, and finally to the sentence.

The proposed sentencing framework also guards against confusion and double counting that currently problematises ICL sentencing. The current sentencing methodology of ICL judges bombards the judgments with an unstructured catalogue of sentencing "factors" with no connectivity or coherence. Not only does this approach risk legal and factual errors; it also fails to sufficiently integrate sentencing into the overall goals of international prosecutions. The proposed framework also gives scope to the gravity assessment, thereby limiting the contaminating effect of narrating everything in terms of gravity. When everything is narrated in terms of gravity, international judges have difficulty rationalising upward or downward movements in sentencing.

While in a general sense gravity, broadly conceived, may also include the enabler factor, for the purposes of sentencing discourse, it is important and beneficial to evaluate and weigh them up separately. A nuanced, distinctive treatment of the enabler factor in sentencing opinions, unencumbered by gravity language, will enhance the communicative and expressive functions of international criminal

<sup>110</sup> On the expressive capacity of international atrocity trials, see Robert Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law' (2007) 43 *Stanford J Int'l L* 39, 50–51.

<sup>111</sup> De Guzman, "Harsh Justice for International Crimes" (n 25) 17–24.

prosecutions. Our understanding of the gravity of ICL crimes also benefits from the separation. Gravity gets form and shape, becoming leaner and stronger, rather than remaining a bloated and formless notion where all sentencing factors are rolled into some broad notion of gravity.

Moreover, gravity of the offence implies a focus on individual crimes because different crimes vary in gravity or seriousness. Take for example a head of an armed force who orders his soldiers to kill all males in a captured village but is also responsible for failing to punish his subordinates who tortured five peacekeepers. The gravity measurement for each of these offences requires consideration of very different factors. Thus, gravity properly assessed and conceptualised is crime specific. The enabler factor, however, potentially has a nexus to all the commander's crimes. This is another reason why it warrants separate consideration outside the gravity box. Additionally, assessing the accused's responsibility for enabling a toxic environment for atrocity crimes independent of gravity of the crime advances transparency in ICL sentencing judgments. It also brings clarity to the accused's moral culpability and makes punishment more communicative. It can account for the fact why individuals whose crimes are of comparable gravity, like Sesay, Kallon, and Gbao, received substantially different penalties. Victims can better understand why the perpetrator of crimes against them received a lesser penalty than another perpetrator, without ICL giving the impression that their suffering is not important or that the crimes against them were not of significant gravity.

Another advantage of my framework is that "the role of the accused" is given its own distinct analytical space and consideration, allowing for a more granular and complete narrative of the accused's responsibility in relation to atrocities and conflict. The advantage of this approach is to allow international criminal justice mechanisms to better build a historical record, which judges seem to be eager to do, without muddling or diminishing the gravity of the accused's crimes. An independent assessment of a convicted person's responsibility as an enabler furthers the different goals that ICL has ascribed to including retribution, deterrence, reconciliation, and expressivism. Supporters of each of these theories ought to welcome a sentencing framework that properly accounts for enabling conflicts that fuel atrocities.

Likewise, conceptualising "the role of the accused" as an enabler as a consideration within the second constitutive element ("individual circumstances of the convicted person") also helps to distinguish it from aggravating factors. This separation is also warranted because the enabler factor influences sentencing allocations to such a large degree that the concept of aggravating circumstances is insufficient to account for, as evidenced by the sentences in the *RUF* case, the *CDF* case, and the *Taylor* case. Aggravating circumstances, properly conceived

and applied, do not exert extreme influence on the sentence. When a penalty is increased by more than 25 years or more than double as happened in the *RUF* case,<sup>112</sup> it is difficult to classify this extreme difference as the mere consequence of an aggravating factor. The notion of aggravating circumstances simply cannot cope with the magnitude of such an increase. I argue that the enabler factor better accounts for this dramatic increase because it captures the extent of the perpetrator's criminality in a way that is very pertinent to atrocity criminality.

## V. CONCLUSION

ICL sentencing jurisprudence identifies four core considerations essential to determining an appropriate sentencing for atrocity crimes: (a) gravity of the offence; (b) individual circumstances of the convicted person; (c) applicable aggravating and mitigating factors; and (d) the sentencing law and practice of the *locus delicti*.<sup>113</sup> Although these four considerations are routinely espoused in every ICL sentencing judgment, giving the semblance of a robust approach to sentencing, the ICL judges do not, in practice, adhere to this structure in their sentencing analysis. These proffered considerations are either effectively sidelined, such as the national law provisions on sentencing, or are banally lumped into an amoebic consideration of gravity. The assessment of "individual circumstances of the convicted person" was unimaginatively limited to consideration of aggravating and mitigating factors,<sup>114</sup> overlooking its potential to capture aspects of criminality specific to atrocity crimes.

After discussing the methodological and conceptual problems in the sentencing allocations and narratives in international criminal law, this article offers several suggestions to advance the law of atrocity sentencing. First, it (re) conceptualises key sentencing criteria, such as gravity and individual circumstances of the accused, cohesively integrating them into a sentencing process that more robustly intertwines narratives about the accused's wrongdoing, the gravity of the atrocities, the role of international prosecutions, and the quantum of punishment. The second contribution of this article is to develop the scaffolding towards

<sup>112</sup> Sesay and Gbao were convicted of substantially the same crimes, but the former received double the sentence of the latter. See Dana, 'The Enabler Theory' (n 5) Section II.B.

<sup>113</sup> *Taylor* (n 7) [18]; *AFRC*, Appeal Judgment (n 7); *CDF*, Trial Sentencing Judgment (n 7); *CDF*, Appeal Judgment (n 7) [465]; *RUF*, Sentencing Judgment (n 106); *AFRC*, Trial Judgment (n 7) [313]; *RUF*, Appeal Judgment (n 7).

<sup>114</sup> *Taylor* (n 7) [22] ("The Trial Chamber notes that 'individual circumstances of the convicted person' can be either mitigating or aggravating"); *CDF*, Appeal Judgment (n 7) [498] ("The Appeals Chamber considers that the level of education and training of a convicted person is part of his individual circumstances which the Trial Chamber is required to take into consideration as an aggravating or mitigating circumstance."); *RUF*, Appeal Judgment (n 14); *Mladen Naletili* (n 14).

a sentencing framework specific to atrocity crimes. The methodology of the proposed framework begins with considerations of the inherent gravity of crime and the convicted person's mode of liability. The quantum of punishment can then be adjusted where the convicted person is found to be an enabler or based on aggravating or mitigating factors.

Finally, the article integrates enabler theory into an innovative sentencing framework for punishing atrocity crimes. In ICL sentencing narratives, gravity falsely dominates the justification for the quantum of punishment. The passionate rhetoric about the severity of the gravity of the perpetrator's crimes is rarely matched by the severity of the punishment. At the same time, other considerations, such as "individual circumstances of the convicted person", have been underdeveloped, representing a lost opportunity to advance sentencing considerations *sui generis* to punishing atrocities. The proposed sentencing framework reconceptualises and organises key statutory sentencing criteria and integrates them within the enabler factor, offering several advantages to ICL sentencing. By departing from a sentencing discourse that narrates the analysis entirely in terms of gravity, my approach allows for important nuances to be communicated and expressed in the sentencing process. It also closes the gap between judicial narratives about atrocities and sentencing outcomes. It is time for ICL judges to include the enabler factor in their sentencing analysis, in addition to the concept of gravity, to better explain their sentencing outcomes. The original sentencing framework proposed in this article innovates. Doctrinal approach to gravity and invigorates atrocity sentencing with the enabler factor, thereby improving upon the much criticised extant ICL sentencing practice.