The Applicability of International Rules to the Sentencing of International Crimes in Domestic Trials: The Swedish Case

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1 Introduction

This article focuses on the question: *What are the reasons for and against national courts taking international rules into account when determining penalties for international crimes?*[1]

The phrase "taking international rules into account" could mean that a national court, e.g. when assessing what penalty corresponds to the seriousness of a crime, is influenced by the case law of the International Criminal Court (hereafter ICC) or the International Criminal Tribunals for the former Yugoslavia (hereafter ICTY) and Rwanda (hereafter ICTR). It could also mean that a national court, e.g. when deliberating possible reasons for a lighter penalty than the seriousness of a crime warrants, turns to the provisions of the Rome Statute of the ICC (hereafter the Rome Statute).

The article is specifically about the relationship between Swedish law and international rules. However, the main question and the arguments put forward are of a general nature and should therefore be possible to apply to other national legal orders.

An obvious first question is whether Swedish courts are at all bound by international law when determining penalties for international crimes; whether the national court *must* take international rules into account. Here, the simple answer would be negative. Swedish law has a "dualistic" approach to international and national law, which means that international law is primarily a matter for the legislature rather than for the courts. International law forms a "ceiling" for national criminal law in that it imposes certain upper limits for what the legislature can do.[2] However, international law may serve as a source of law for the courts through explicit references in the national legislation. More indirectly, international law may also be relevant when national provisions are interpreted.[3] Yet, when it comes to sentencing it is hard to argue that there is an

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[1] The author would like to thank Mark Klamberg, Ivar Lavett, Claes Lernestedt, Sally Longworth and Martin Ratcovich for constructive criticism of the text. Any errors, of course, are entirely the author's own. Unless otherwise stated, "international crimes" refer to the offences in Swedish legislation which constitute incorporation of the crimes included in the Rome Statute – excluding the crime of aggression. The relevant Swedish legislation is the Act on criminal responsibility for genocide, crimes against humanity and war crimes (2014:406), and the now-repealed (but still applicable to acts committed before July 1, 2014) provisions in Ch. 22 Sec. 6 of the Swedish Criminal Code (1962:700) and in the Act on criminal responsibility for genocide (1964: 169).

[2] A number of obligations deriving from international law and EU law relate in this regard to the area of sentencing. For example, Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter the European Convention) and Article 7 of the United Nations Convention on Civil and Political Rights (hereafter ICCPR) prohibit cruel, inhuman or degrading punishment and Article 49(3) of the European Union Charter of Fundamental Rights (hereafter the Charter) states that the severity of penalties must not be disproportionate to the offence. Further, some international instruments show that the principle of legality and prohibition of retroactive application of law also applies to penalties – in the sense that no one may be sentenced to a more severe penalty than was applicable at the time the offence was committed and that if, after commission of the offence, the law provides for a lighter penalty, that penalty shall be applied. See, e.g., Article 7(1) of the European Convention, Article 15(1) of the ICCPR and Article 49(1) of the Charter.

[3] See also Asp, Petter, "Folkrätten och den svenska straffrätten" in Stern, Rebecca & Österdahl, Inger (ed.), *Folkrätten i svensk rätt*, Malmö: Liber, p. 63 ff. In Swedish law a doctrine has

international law in the sense that Swedish national courts are in any respect bound by international rules when determining penalties for criminal offences.[4] The fact that Sweden has ratified the Rome Statute does not change this. Article 80 of the Statute explicitly states that rules in the Statute and in the Rules of Procedure and Evidence (hereafter RPE) relating to applicable penalties and criteria to be taken into account when determining sentences should not affect the national application of penalties.[5] However, rules on sentencing are applied in various international courts, as is case law generated from these courts. But since the rules on sentencing differ between various international courts it can be asked how far there is a coherent legal order in this respect at international level.[6] Further, since the establishment of a permanent court in the form of the ICC, and as the ICC creates its own precedents, it can be argued that the case law of the ad hoc courts becomes increasingly obsolete.[7] When the following text refers to "international rules" what is primarily meant are the regulation of the Rome Statute and the few judgments in which the ICC has so far applied this regulation.

Once it has been established that the national courts are not bound by international rules when determining sentences, the next question could be whether the courts *can* be guided by international rules and if so in what respects.

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been developed which in short means that courts and other authorities should, as far as possible, interpret internal legal rules in accordance with international obligations. See, e.g., prop. 2017/18:186 s. 60 f.

4 There exists no such thing as international customary law in the area of sentencing. See Linton, Suzannah, *Between Disorder, Unpredictability, Inconsistency and Fragmentation, and Diversity and Plurality: Reviewing International Sentencing Practice* 2017, National Judicial Academy Law Journal, vol. 11, p. 4.

5 An underlying reason for the article is that some states during the negotiations in connection with the drafting of the Rome Statute wanted an assurance that the Statute would not have a restrictive influence on internal rules – in particular the authority to impose the death penalty. See D'Ascoli, Silvia, *Sentencing in International Criminal Law: The UN Ad Hoc Tribunals and Future Perspectives for the ICC*, Oxford: Hart Publishing, 2011, p. 267 and Cryer, Robert et al., *An Introduction to International Criminal Law and Procedure*, 3rd ed, Cambridge: Cambridge University Press, 2014, p. 502.

6 See also Holá, Barbora, "Consistency and Pluralism of International Sentencing" in Sliedregt, Elies van & Vasiliev, Sergey (ed.), *Pluralism in International Criminal Law*, Oxford: Oxford University Press, 2014, p. 187 f. While the statutes of international courts such as the ICTY, the ICTR and the Special Court for Sierra Leone (hereafter the SCSL) partly refer to different national legal systems in relation to the rules on sentencing, the Rome Statute contains an independent set of rules.

7 In reviewing the sentence on Thomas Lubanga Dyilo, the ICC stated the following concerning the legal value of ICTY decisions: "[…] the value of other sentencing practices is even lower when the reference is to the sentencing practices of another tribunal, as opposed to that of a Trial Chamber of the Court. This is because, even though there are similarities in the sentencing provisions of the Court and those of other international criminal courts and tribunals, the Court has to apply, in the first place, its own statute and legal instruments." See *Prosecutor v. Thomas Lubanga Dyilo*, ICC A. Ch., Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the "Decision on Sentence pursuant to Article 76 of the Statute", ICC-01/04-01/06 A 4 A 6, December 1 2014, para. 77.

If this is possible we can additionally ask if it is also desirable that this happens – i.e. whether international rules *ought* to be taken into account.[8]

Intuitively, it may seem appropriate for a national judge to consider case law from international courts when sentencing someone for an international crime, at least when determining the seriousness of the offence (what in Swedish law is called "the penalty value"). This also seems to have happened in a couple of Swedish district court cases involving international crimes.[9] This apparent readiness to look outside the national system is probably based on an idea of equal treatment – more precisely what can be called *the interest of consistency in sentencing*. The notion of international crimes (in the sense of crimes that a State under international customary law or treaty obligations is considered to have jurisdiction over even though the crime is completely unrelated to the State in question)[10] implies that the *same types of crime* occur within *different legal systems*. For the same types of crime, it can be considered desirable that cases that are similar in relevant respects give rise to similar legal consequences regardless of the forum in which the prosecution takes place.

A necessary condition for it to make sense for a court to consider international case law is that it tends to be uniform in itself – i.e. like cases are treated equally at international level. An obvious question here is also what the differences between the national (in this case Swedish) and international rules on sentencing are. Were national and international rules alike, thus leading to similar results in terms of sentencing, the question of whether national courts should apply international rules would be irrelevant. Large differences, on the other hand, could be invoked as a reason why national courts *should* look at international rules to achieve uniformity. However (as will be elaborated below) large differences between national and international rules can also be seen as an argument to the contrary – i.e. that international rules should not affect the application, as this leads to *inconsistencies in the national system*. Knowledge of similarities and differences between the systems is also important if one has maintained that international rules should be taken into account. A holistic picture of a legal system is more or less necessary to be able to interpret individual sources of law.

The present article is therefore structured as follows. First, we ask whether and in what ways it can be argued that international norms *can* be taken into

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8 One could argue that from the legal point of view it is not really possible to distinguish between the questions whether legal rules must, can or ought to be applied. If there are reasons justifying a particular solution – i.e. that a rule should or should not be applied – this solution would also reasonably be considered to be in line with the law. In this text the distinction between the questions "must?", "can?" and "ought to?" is made for pedagogical reasons.

9 In one of the cases, the district court outlined ICTY court practice, with the proviso that it was "a material that can only serve as a very rough guide" (Sw. "ett jämförelsematerial som endast kan tjäna som en mycket grov vägledning"). See *Åklagaren ./. Arklöv*, Stockholms tingsrätt, Case B 4084-04, Judgment December 18 2006, p. 65 f. In another judgment, the penalty value was established with reference to the aforementioned case, a Norwegian judgment and "primarily ICTY's sentences for similar crimes" (Sw. "främst ICTY:s domar avseende liknande brott"). See *Åklagaren ./. Makitan*, Stockholms tingsrätt, Case B 382-10, April 8 2011, p. 79 f.

10 See prop. 2013/14:146, p. 30.

account by national courts when sentencing offenders for international crimes. Thereafter, the inquiry moves to the more complex question of whether international rules *should* be considered. This part is arranged under two general headings. Under sub-heading 1.3.1 "Consistency" we discuss in more detail what the interest of consistency means in this context. In addition, we examine how far sentencing at Swedish national level as well as at international level can be said to be consistent. Under the heading "Comparison", the Swedish sentencing system and its international counterpart are briefly compared. The focus is on certain aspects where the systems are similar and different from each other. The comparison concentrates both on the factors that influence the determination of penalties in each system and on the general severity of punishment in each system. Finally, on the basis of the previous investigation, some general conclusions are drawn.

The short answer to the question initially posed is that national courts should be careful about applying international rules when sentencing offenders.

2 Can International Rules be Taken into Account?

As previously mentioned, the assessment of the 'penalty value' is the part of the Swedish sentencing law where it would be most likely for international rules to be taken into account. The penalty value is a quantitative measure of the seriousness of an offence. It is formulated as a certain amount of punishment in terms of a number of fines or time of imprisonment. The court might for example arrive at the conclusion that "the penalty value corresponds to imprisonment for six months" (however, if the penalty value is relatively low there are alternatives to imprisonment, so this does not necessarily imply that the sanction will be imprisonment).[11]

Ch. 29 Sec. 1, first paragraph, of the Swedish Criminal Code (Sw. *brottsbalken*) states that when a court determines a penalty value it shall take into consideration "the interest of a uniform application of law". This means that the court must take into account the sentences in other cases. In short, what is of interest is partly where in the applicable penalty scale the assessment should start, and partly what weight different circumstances should be given. In the Criminal Code, the interest of a uniform application of law is mentioned only in this provision. Yet, consistency is reasonably equally important in other parts of the sentencing process.[12] Here "application of law" refers primarily to Swedish national law. The wording, however, does not preclude a wider meaning. When assessing the penalty value for international crimes, one might tentatively contend that the interest extends beyond one's own judicial system – i.e. that it is not only national application that falls within the concept, but also the application when offenders are sentenced for these types of crime in other legal systems.

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[11] Space precludes a more detailed description of Swedish sentencing law. For a more elaborate account in English, see Asp, Petter & Holmgren, Axel "Country Report Sweden" in Satzger, Helmut (ed.) *Harmonisierung strafrechtlicher Sanktionen in der Europäischen Union*, Baden-Baden: Nomos, 2020, p. 455–488.

[12] See Borgeke, Martin & Heidenborg, Mari, *Att bestämma påföljd för brott*, 3rd ed., Wolters Kluwer, Stockholm, 2016, p. 146. On consistency, see below under Section 3.1.

There are additional elements of Swedish sentencing law where, arguably, there is scope to consider international rules – even if it appears to be significantly more far-reaching than in the case of the determination of the penalty value. It could, for example, be considered relevant in the case of equity reasons (Sw. *billighetsskälen*) or when determining what weight should be given to repeat offending or to the young age of the accused.[13]

Another area (relating to the assessment of the penalty value) where international rules could be given relevance is the conversion of life imprisonment. Here one could claim that there is room for separate treatment of persons convicted of international crimes so that the length of the converted fixed-term punishment is in line with the penalties imposed in the ICC for similar crimes.

This section has thus dealt with ways in which international rules arguably *can* be taken into account within the framework of Swedish sentencing law. We have not yet approached the question of whether international norms *ought* to be given influence over national sentencing. As we shall see, in this context, the pursuit of a uniform application of law is a double-edged sword. The interest of consistency can *both* serve as an argument for allowing international rules to gain entrance to the national system *and* be considered a reason to keep such rules outside.

3 Ought International Rules be Taken into Account?

3.1 Consistency

3.1.1 Introduction

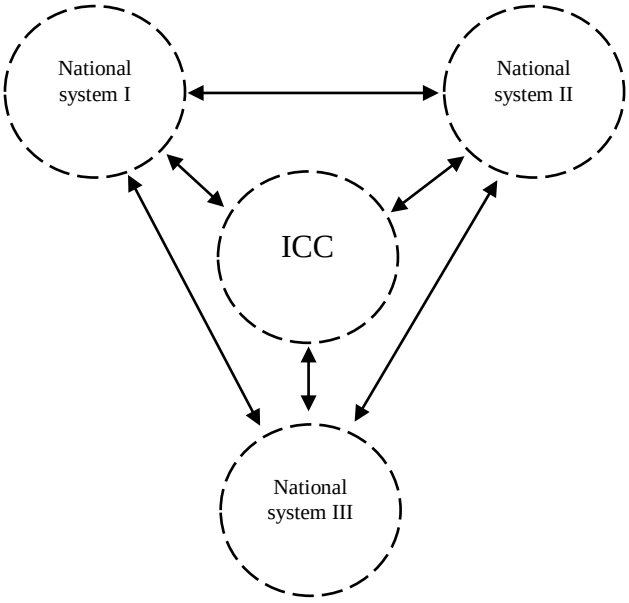
That law is applied consistently – i.e. that cases which in relevant respects are perceived as being alike are treated equally (and thus that cases perceived as being unlike are treated differently) – can be regarded as an important interest for at least two reasons. First, consistency can be considered to be *just*. There is simply an expectation that cases which on certain criteria are similar to each other, will be treated similarly – e.g. that equally serious crimes result in equally severe punishments. Further, consistency is essential for the application of law to be predictable, which is a fundamental criterion for *legal certainty*. The more arbitrary the application of law is, the more difficult it is to form an idea of future outcomes.

International crimes raise issues of consistency from two perspectives – externally and internally. As we shall see, two opposing interests can be identified here: the interest of consistency at international level and the interest of consistency in the national systems.

[13] cf. Ch. 29 Sec. 5, Ch. 29 Sec. 4, Ch. 29 Sec. 7 and Ch. 30 Sec. 4, second paragraph of the Swedish Criminal Code.

3.1.2 The Interest of Consistency at International Level

As described earlier, the construction 'international crimes' posits that the *same types of crime* can be prosecuted in forums established by *various legal systems*. The fact that we are dealing with the same types of crime can be regarded as giving rise to a need for coherence between the different systems. Regarding the crimes in the Rome Statute, we have the relationship both between the ICC's application and that in the different national systems *as well as* the application when we compare different national legal systems to each other. The relationships between the different systems can be illustrated by the figure below.[14]



First, it is important that *criminal liability is defined in a similar way*. For example, an act that in one system is classified as a crime against humanity should also be considered a crime against humanity in another system. If this is not the case, we are not dealing with the "same" type of crime in the different systems. It may therefore appear natural (even without explicit references to international law in the legislation) to use international rules as interpretative data when interpreting penal provisions – e.g. when establishing what characterizes "a widespread or systematic attack directed against […] civilian population".[15] It should also be possible to argue that international rules may be taken into account in the interpretation of various concepts belonging to the 'general' part of criminal law (e.g. intent, duress or complicity).[16]

In the same way, one can contend that *the criminal sanctions* that ensue when criminal liability has been established are imposed in a similar way in the

[14] For the sake of simplicity, it appears in the example as if only three countries are parties to the Rome Statute.

[15] See Sec. 2 first paragraph of the Act on criminal responsibility for genocide, crimes against humanity and war crimes (2014:406) and Article 7(1) of the Rome Statute.

[16] See Asp, 2012, p. 68 f.

different systems. If the imposition of penalties for international crimes differs between different national legal systems and in relation to the ICC, the sanction is a consequence not only of the circumstances of the case, but also of *where* the prosecution takes place.[17]

Compared with other parts of criminal law, the rules on sentencing are such that *differences between different systems can lead to a lack of consistency in all cases*. Assessments regarding criminal liability (e.g. how a penal provision is to be interpreted or whether criminal intent is at hand) usually concern a choice between alternative outcomes; either there is criminal liability or there is not. This means that differences between two systems regarding how criminal liability is defined need not preclude equal treatment in the respective systems. On the contrary, if the differences are not significant, the majority of cases are treated in a similar way. Different outcomes occur only when dealing with *particular borderline cases*. The assessment regarding the penalty, on the other hand, is about choosing between a larger number of alternatives. Different crimes can, first, result in several different types of sanction. Secondly, the sanctions can in themselves vary considerably in severity – especially in the sense that prison sentences can be of different lengths. Consequently, if the rules for sentencing differ between two systems, this generally produces different outcomes *in all similar cases*.

As initially noted, consistency can be considered desirable as it promotes predictability. One can argue that the interest of predictability is asserted not only in relation to what is punishable but also in relation to what forms the criminal sanction can take.[18] The main reason for the special safeguards surrounding criminal law and criminal procedural law is the far-reaching consequences that the suspect risks – i.e. the criminal sanction. For the individual, one can assume that it is often almost as important to know what the penalty will be as whether the suspect will be convicted.[19] With regard to Swedish law, the Supreme Court has stated that the principle of legality – i.e. the requirement that punishment must have support in statutory law – also bears on the area of sentencing (not only in so far as the prohibition on retroactivity is concerned).[20] Here the concern is the fundamental aspect of the principle of legality, which is usually referred to as the *lex certa* requirement – i.e. mere reliance on legislation is not enough; it is also required that the legislation is

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17 It is not only differences in the sentencing rules that can lead to different results in this regard. Different procedural rules and differences regarding extraordinary remedies can have the same effect. See, e.g. Radosavljevic, who takes as an example that a defendant in one legal order could serve life imprisonment while a defendant for a similar crime in another legal order could be pardoned or avoid prosecution entirely because of plea bargaining. See Radosavljevic, Dragana, *Restorative Justice under the ICC Penal Regime*, The Law and Practice of International Courts and Tribunals 2008, vol. 7, no. 2, 235, p. 236.

18 See, e.g., Weigend, Thomas, *Norm vs. Discretion in Sentencing*,. Israeli Law Review 1991, vol. 25, no. 3-4, 628–637, p. 629.

19 See also Asp, Petter, *Straffet för mord*, Juridisk Publikation 2016, no. 1, p. 161 f.

20 See NJA 2016 s. 3. Note that the fact that the provisions in the Rome Statute lack individual penalty scales – but in fact may be presumed to be of varying gravity – has been claimed to be problematic for reasons of legality. See D'Ascoli, 2011, p. 12 f. and 39 ff. and Ambos, Kai, *Treatise on International Criminal Law. vol. 2, Crimes and Sentencing*, Oxford: Oxford University Press, 2014, p. 217.

reasonably clearly written. The requirement for a written legal basis would be virtually toothless if the law could be as vague as possible. At the same time, it is evident that the degree of foreseeability in terms of what penalties may occur cannot be that great. As mentioned, sentencing involves a choice between a large number of alternatives – especially in the sense that prison sentences can be of different lengths. Legislatively, the area of sentencing must be characterized by a certain openness and indeterminacy.[21] However, where international crimes are concerned, this indeterminacy risks becoming particularly conspicuous. Since several different legal systems exercise jurisdiction over international crimes, the location of the legal proceedings is not given in advance nor what sentencing rules will be applied. A superficial glance is sufficient to note that these rules differ substantially between different States party to the Rome Statute. For example, regarding the severity of applicable penalties the maximum penalty according to Norwegian law is imprisonment for 21 years (life imprisonment does not exist) while Rome Statute parties such as Japan and Afghanistan have the death penalty. In other words, at the time when an international crime is committed, one cannot even roughly predict what statutory minimums and maximums will apply in the event of a prosecution.[22]

A further consequence of a lack of consistency between different systems is that the criteria determining the ICC's jurisdiction can directly affect what the punishment in a given case will be. The principle of complementarity in Article 17 of the Rome Statute provides that national adjudication is given precedence, as long as the state has the *willingness* and *ability* to prosecute the crime. Consequently, if the sentencing rules of a national legal order and the rules that the ICC applies result in different penalties, this will in practice mean that national *will* and *ability* will determine the penalty for a particular crime.

3.1.3 The Interest of Consistency at National Level

Thus, without conducting any in-depth investigations, one can conclude that there is a lack of consistency in the above regard. At the time of writing, 123 states are parties to the Rome Statute, although international crimes have so far been prosecuted in only a part of these jurisdictions.[23] National legal systems differ regarding both substantive rules and the general level of repression. One can therefore be assured that cases are treated differently depending on in what system prosecution takes place.

Perhaps, however, this lack of uniformity from the international perspective is preferable. The particulars of a criminal law system form parts of a larger whole. In the national systems, international crimes can be described as qualified forms of pre-existing types of crime. More or less all the types of conduct that

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21 See also Asp, 2016, p. 162.

22 However, according to most HR treaties, international crimes are expressly exempted from the legality requirement since they are considered to be based on international customary law. See e.g. Article 7 (2) of the European Convention, Article 15 (2) of the ICCPR and Article 49 (2) of the Charter. All the same, this does not mean that predictability in its own right should not be pursued also with regard to these crimes

23 See https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en.

fall within Articles 5–8 of the Rome Statute are already criminalized in other provisions in the national systems. Hence, the rules concur in the sense that international crimes completely overlap with other types of offence (termed "idealkonkurrenz" in the form of "subordination").[24] For example, killing, enslaving or raping people is unlawful, regardless of whether such acts, are "committed as part of a widespread or systematic attack directed against [a] civilian population" (crimes against humanity).[25] If a national court treated international crimes differently by applying different sources of law, it could lead to results that were perceived as unfair within the framework of the domestic system. This would especially be the case if the general level of punishment differed between the systems.[26] For example, a rape "committed as part of a widespread or systematic attack directed against [a] civilian population" could be attributed a lower penalty value than a rape not committed in this context but otherwise exhibiting circumstances similar to those in the first-mentioned act.[27] It would also appear unfair if circumstances related to the accused person (e.g. youth or equity reasons) were given different weights depending only on the type of crime one was dealing with.

The greater the differences between the national and the international rules, the more unfair the results would appear from the internal point of view. Large differences, which can be invoked as an argument that international rules should be taken into account in order to achieve consistency as far as international crimes are concerned are, on the contrary, an argument against doing this if the coherence of the national system is to be safeguarded.[28]

3.1.4 Actual Consistency within Each System

The preceding line of argument has been about consistency when comparing different legal systems with each other. For such comparisons to have any point, the legal application *within the respective system* must be somewhat consistent. If equal cases are nevertheless not treated equally in the national system, it does not matter what sources of law are relied on. Furthermore, lack of coherence in the international application can be seen as a reason for not taking international rules into account at national level.

According to the preparatory works of the Swedish Criminal Code, the sentencing rules have been designed to promote consistency and predictability.[29]

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[24] See Asp, Petter & Ulväng, Magnus, *Kriminalrättens grunder*. 2nd ed., Uppsala: Iustus, 2013, p. 480 f.

[25] See Article 7(1) of the Rome Statute and 2 Sec. 1 paragraph 3 of the Act on criminal responsibility for genocide, crimes against humanity and war crimes (2014:406).

[26] See below under Section 3.2.3 "Comparison of General Severity".

[27] Here it can be recalled that in the preamble to the Rome Statute, international crimes are defined as "[…] the most serious crimes of concern to the international community as a whole […]".

[28] See also Holá, 2014, p. 188 with references.

[29] See prop. 1987/88:120, p. 38. As previously mentioned, it explicitly follows from the central provision for determining the penalty value, Ch. 29 Sec. 1 of the Swedish Criminal Code, that the court must observe "the interest of uniform application of the law".

Two partly related aspects of the Swedish system can primarily be assumed to contribute to this. *First*, the dominant influence that the seriousness of the crime has in the form of the penalty value is likely to give rise to increased consistency. Often, the penalty value is the only thing that determines the penalty and thus the only factor that one needs to concentrate on when comparing such cases. Further, assessment of the seriousness of the crime is retrospective (the committed crime is always a fait accompli) which facilitates comparisons with other cases as opposed to forward-looking evaluations based on a preventive rationale (e.g. predictions of recidivism). *Secondly*, this dominance is likely to contribute to increased consistency since the Swedish sentencing rules are relatively transparent and structured. The decision-making process is divided into two stages: measurement of punishment and choice of sanction.[30] The penalty value fulfils the function of isolating the seriousness of the crime from other types of factor that may affect the final result of the sentence. In practice, a distinction is usually made between a penalty value (which constitutes the seriousness of the crime) and, where applicable, another quantitative value (Sw. *straffmätningsvärde*) consisting of the penalty value after reductions for equity reasons and youth.[31] Even though these calculations are not always explicitly stated in the grounds for the decision, it is usually clear when the court has considered factors other than the penalty value. This transparency reasonably helps when making comparisons between different cases and subsequently forming an idea of how far various circumstances have contributed. However, it must be acknowledged that determining penalties is a human activity and as such is subject to some imperfection. No case is completely identical to another, and as previously mentioned, sentencing by definition means that one has to choose from a large number of alternatives (e.g. prison sentences of various lengths). There is also some evidence to suggest that the Swedish courts treat cases that appear to be similar in different ways.[32]

Turning to the application of law in international courts, the issue of consistency in sentencing has attracted some attention, at least in the literature.[33] From some quarters international sentencing law has been described as irrational and likened to a lottery.[34] Concerning the case law of the ICTY and the ICTR, it has been argued that there are flaws in this regard not only when comparing the tribunals with each other but also within the respective tribunal.[35] With regard to the application in the ICC, it is difficult to say anything about consistency for the simple reason that the volume of case law so far is very limited (the Court

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30 See Chapters 29 and 30 of the Swedish Criminal Code.

31 See Borgeke & Heidenborg, 2016, p. 49.

32 See Brottsförebyggande rådet, *Enhetligt dömande i tingsrätter. En statistisk analys av andelen fängelsedomar. Kortanalys* 3/2017. The study shows that, during the period studied, for certain offences, the likelihood of being sentenced to prison varied depending on the district court and that the likelihood of being sentenced to imprisonment was less for women than for men.

33 See Holá, Barbora, *Sentencing of International Crimes at the ICTY and ICTR*, Amsterdam Law Forum 2012, vol. 4, no 4, p. 4 and Linton, 2017, p. 5 f.

34 See Holá, 2014, p. 188 with references.

35 See D'Ascoli, 2011, p. 198.

has currently only delivered sentences in four cases). Furthermore, it can be assumed that it is generally more difficult to make reliable comparisons of decisions at international level.[36] Such comparisons cannot aim only at the criminal act in each case, as mitigating circumstances that do not relate to the seriousness of the crime can significantly affect the length of the sentence.[37] Moreover, according to a widespread view, sentencing at international level shows considerable shortcomings in terms of transparency.[38] The text of the judgments is often detailed as to *what* circumstances in the case have been taken into account, but usually only to a limited degree expounds upon *how far* various factors have affected the punishment.

Although it is difficult to draw definite conclusions about consistency, it can be stated that sentencing is an area where the international courts grant themselves considerable room for manoeuvre (what is usually called "discretion").[39] The international crimes in the Rome Statute all have the same statutory maximum – imprisonment for at most thirty years or life.[40] Further, the ICC, like the tribunals, is in no way bound by its own precedents. According to Article 21 (2) of the Rome Statute, the Court *may* apply principles and rules of law as interpreted in its previous decisions.[41] From statements of the ICC, it can also be concluded that the Court's freedom in this regard is viewed as important and worthwhile.[42] In the judgments, one can find expressions of what can be called an unfavourable relationship to case law as a source of law. As an example, the Court's reasoning in *Al Mahdi* can be highlighted. During the trial, the defence referred to two ICTY judgments which, like the current case, involved war crimes in the form of destruction of cultural heritage.[43] In response to the arguments of the defence, the Court stated, inter alia:

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[36] See also Heller, K J, *The Taylor Sentencing Judgment: A Critical Analysis*, Journal of International Criminal Justice 2013, vol. 11, no. 4, p. 835 f.

[37] See below under Section 3.2.2 “Comparison of Factors”.

[38] See e.g. Holá, 2014, p. 207 and Linton, 2017, p. 7.

[39] See e.g. Cryer, 2014, p. 500, Longworth, Sally A “Sentencing at the International Criminal Court” in Hiéramente, Mayeul & Schneider, Patricia (ed.), *The Defence in International Criminal Trials: Observations on the Role of the Defence at the ICTY, ICTR and ICC*, Baden-Baden: Nomos, 2016, p. 201 and Linton, 2017, p. 3.

[40] See Article 77 (1) of the Rome Statute.

[41] One might think that anything else would seem strange and that the information therefore appears a bit redundant. The article further provides that the Court's sources of law primarily consist of the Statute, The Elements of Crime and the RPE. In the second place, where appropriate, the Court shall apply “applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict”.

[42] cf. following initial statement of the Appeals Chamber in the case against Thomas Lubanga Dyilo: “A Trial Chamber enjoys broad discretion in determining a sentence. The sentence must be determined by weighing and balancing all the relevant factors. The weight given to an individual factor and the balancing of all relevant factors in arriving at the sentence is at the core of a Trial Chamber’s exercise of discretion.” See *Lubanga*, ICC A. Ch., 1 December 2014, para. 1.

[43] See *Prosecutor v. Ahmad Al Faqi Al Mahdi*, Transcript, Trial Chamber VIII, August 24 2016: ICC-01/12-01/15/T-6-ENG, p. 52 ff.

> The Chamber stresses that sentencing an individual for crimes he committed is a unique exercise for which comparison with different cases can be of very limited relevance only, if any.[44]

From a Swedish perspective (where the interest of consistency is explicitly stated in the sentencing legislation) the statement seems peculiar. While no two cases are identical, it is always possible (not to say required) to make comparisons with other cases. Even if no similarities are found, you will find *differences* that provide guidance on determining the penalty.[45] For example, it is possible to establish that a war crime currently under trial is more, or less, serious than previously tried war crimes where the circumstances were different.[46] It is not so much a matter of referring to previous judgments as an authoritative source of law but, rather, of furthering consistency. This can only be done by taking other cases into account. As said, the penalty scale for all crimes under the Rome Statute is imprisonment for up to 30 years or life. When, on this wide scale, the court decided to sentence the accused Al Mahdi to prison for nine years, the court should reasonably (at least summarily) have reflected somewhat on previous cases. In other words, it is difficult to imagine that the members of the ICC would be immune to the initially-described intuition to pursue consistency.[47] To be fair, it must be said that in other cases both the ICC and the tribunals have explicitly considered case law. For example, some space in the *Lubanga* judgment was devoted to considering judgments from the SCSL which, like the present case,

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[44] See *Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC T. Ch. VIII, Judgment and Sentence, ICC-01/12-01/1527, September 27 2017 (hereafter *Al Mahdi*, ICC T. Ch. VIII, September 27 2017), para. 107. In *Lubanga*, the Appeals Chamber also expressed a conservative (albeit less drastic) approach to comparisons with other cases, this time to address case law invoked by the prosecution. The Appeals Chamber referred to cases of the ICTY and further stated: ”According to the Court’s provisions, the sentence must be ‘appropriate’ and must be based on all the relevant factors of the specific case. This makes it difficult, at the least, to infer from the sentence that was imposed in one case the appropriate sentence in another case.”; See *Lubanga*, ICC A. Ch., December 1 2014, para. 77. For similar statements see also *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC T. Ch. III, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/05-01/08, June 21 2016 (hereafter *Bemba*, ICC T. Ch. III, June 21 2016), para. 92 and *Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido*, ICC T. Ch. VII, Decision Re-sentencing Mr Jean-Pierre Bemba Gombo, Mr Aimé Kilolo Musamba and Mr Jean-Jacques Mangenda Kabongo, ICC-01/05-01/13, September 17 2018 (hereafter *Bemba et al.*, ICC T. Ch. VII, September 17 2018), para. 137. The same cautious attitude to case law as a source of law is expressed in numerous ICTY decisions. See Cryer, 2014, p. 504 and Linton (2017), p. 16 f. and 39 with references.

[45] cf. Ulväng, Magnus, *Suum cuique – om påföljdsbestämning och behovet av påföljdspraxis*, Svensk juristtidning 2006, 828–841, p. 829 f.

[46] In the same way, one can make comparisons regarding “the individual circumstances of the convicted person” that can be mitigating when determining the punishment. See below under Section 3.2.2 "Comparison of Factors”. For example, one can assess whether the defendant's prospects for rehabilitation in a particular case are greater or less than such prospects in other previous cases, and whether this circumstance should thus be given greater or lesser impact in the present case than in these previous cases. Likewise, comparisons can determine whether the convicted person in a particular case has cooperated with the court to a greater or lesser extent than in previous cases, whether the defendant's expression of remorse is more or less pronounced compared to previous cases, and so on.

[47] See above under Section 1 “Introduction”.

concerned war crimes where child soldiers were used.[48] It must also be assumed that earlier cases play a role even when this is not explicitly stated in the grounds of the judgments. Consequently, the emergence of a case law should suggest that the ICC's application is moving towards increased uniformity. Studies of the judgments of the ad hoc tribunals also provide support for such an assumption. If one compares the statute of the Nuremberg Court, the statutes of the later ad hoc tribunals and the Rome Statute, one can see a development where the article text relating to sentencing in each instrument has become increasingly detailed, and this should also bring about greater consistency.[49]

Although it is difficult to be certain how far, one can conclude that there are some shortcomings regarding uniformity at both Swedish and international level. However, due to a lack of transparency and what appears to be a peculiar view of the Court's independence in the imposition of penalties, the international level may be presumed to be inferior in terms of consistency and predictability.

3.2 Comparison

3.2.1 Introduction

A fundamental similarity between Swedish national sentencing and international sentencing of the crimes referred to in the Rome Statute is that in both instances the type of penalty should more or less always be imprisonment.[50] Thus, sentencing at national and international levels can be described as *two processes taking into account certain factors that result in prison sentences of certain lengths*. When comparing these processes there is a point in distinguishing between two different aspects. A comparison can aim partly at the *factors* that are considered relevant in each system and partly at the *general severity* of punishment in each system. One could talk about comparisons from *qualitative* and *quantitative* standpoints.

The following simple example is intended to illustrate what is meant by this. Let us envision two systems of sentencing rules, which we call System A and

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[48] See *Prosecutor v. Thomas Lubanga Dyilo*, ICC T. Ch. I, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/04-01/06-2901, July 13 2012 (hereafter *Lubanga*, ICC T. Ch. I, July 13 2012), paras. 12–15. Here, the Court stated that although "the decisions of other international courts and tribunals are not part of the direct applicable law under Article 21 of the Statute, the ad hoc tribunals are comparable to the Court in the context of sentencing." See *Lubanga*, ICC T. Ch. I, July 13 2012, para. 12.

[49] See also Cryer, 2014, p. 500 f.; Ambos, 2014, p. 277 and Linton, 2017, p. 11. The charter of the Nuremberg Tribunal was distinctly laconic in providing guidance in sentencing matters. The tribunal was in all simplicity empowered to "impose upon a Defendant, on conviction, death or such other punishment as shall be determined by it to be just." See Article 22 of the 1945 Charter of the International Military Tribunal.

[50] As we have seen, there are no alternatives to imprisonment on the international level. As to Swedish law, there are certainly alternative, non-custodial, penalties. Regarding the international crimes, however, a penalty other than imprisonment would usually be unthinkable (if not because of the high penalty value of the crime then because of the crime's "nature" – see Ch. 30 Sec. 4 paragraph 2 of the Swedish Criminal Code). In some exceptional cases, however, it is possible to imagine that the youth sanctions in Ch. 32 of the Swedish Criminal Code or the sanction of forensic psychiatric care in accordance with Ch. 31 Sec. 3 of the Criminal Code could be applicable.

System B. If in System A only the seriousness of the crime can be a factor in determining punishment, while in System B (in addition to the seriousness of the crime) there is also room to take into account, as a mitigating factor, that the accused has cooperated with the court, then we have a *qualitative difference*. If, on the other hand, in both systems there is room to take into account both the seriousness of the crime and the fact that the accused has cooperated with the court, then we instead have a *qualitative similarity*. In addition to this qualitative similarity, we imagine that in System A the seriousness of the crime corresponds to imprisonment for ten years and the cooperation with the court is considered to mitigate by two years – the final sentence will consequently be eight years. Instead, in System B (all else equal) the seriousness of the crime is equivalent to 20 years in prison and the cooperation with the court is considered to reduce the sentence by four years, giving a final sentence 16 years. We can thus, in parallel with qualitative similarity, talk about a *quantitative difference*.

Therefore, the following brief survey of each system first looks at *factors* and then concentrates on the *general severity* of the punishment.[51]

3.2.2 Comparison of Factors

The Rome Statute is terse when it comes to the circumstances which form the basis for the penalty. According to Article 78 (1) of the Statute, the penalty shall be determined taking into account such factors as *the gravity of the crime* and *the individual circumstances of the convicted person*. The statutes of the ICTY, ICTR and SCSL are equally brief on this point and cite the same two factors.[52] An important difference between the ad hoc tribunals and the ICC, however, is that while the tribunals have only had the short-cut text of the articles to rely on, the Rome Statute is supplemented by relatively detailed instructions regarding how the ICC should proceed when determining penalties in the RPE (see Article 78(1) of the Rome Statute). The rules state that "the totality of any sentence of imprisonment and fine, as the case may be, imposed under article 77 must reflect the culpability of the convicted person" (Rule 145(1)(a)). It is further said that the court must "balance all the relevant factors, including any mitigating and aggravating factors and consider the circumstances both of the convicted person and of the crime" (Rule 145(1)(b)). Subsequently, non-exhaustive catalogues are provided, with certain circumstances to be considered *in addition to* what is stated in Article 78(1) of the Statute. These circumstances can be attributed to three different categories. Some are what may be called *general circumstances* (Rule 145(1)(c)); others are termed *mitigating circumstances* (145(2)(a)) and *aggravating circumstances* (145(2)(b)). The wording "in addition to" implies that a distinction must be made between, on the one hand, circumstances which refer to *the gravity of the crime* or *the individual circumstances of the convicted* and on the other, *additional circumstances* (i.e. those listed in (145(1)(c) and 145(2)(a)–145(2)(b)). In line with this, the ICC states in its judgments that the

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[51] Note that the comparison in no way claims to be exhaustive. One could of course go into much more depth.

[52] See Article 24(2) of the Statute of the ICTY, Article 23(2) of the Statute of the ICTR and Article 19(2) of the Statute of the SCSL.

factors that have been used to assess the gravity of the crime must not also be invoked in terms of aggravating circumstances.[53]

Here one can note a use of concepts which, from a Swedish perspective, appears peculiar. According to Swedish law, all the circumstances listed in the RPE, with the exception of the defendant's past convictions (145(2)(b)(i)) and the defendant's conduct after the offence (145(2)(b)(ii)), would be attributable to the penalty value, i.e. the seriousness of the crime.[54]

Part of the explanation of these differences could be that a Swedish court is given significantly more help from the legislator. All offences under Swedish law are provided with individual statutory minimums and maximums (i.e. "penalty scales"). Further, the offences are often divided into degrees of severity with their own penalty scales and usually it is stated what circumstances qualify a crime to a certain degree. A distinction is made between *the abstract penalty value* (i.e. the penalty scale set by the legislature) and *the concrete penalty value* (i.e. the penalty value determined by the court in the individual case).[55] However, the four international crimes in the Rome Statute lack anything that resembles their own abstract penalty values. According to Article 77, the penalty scale is in all cases imprisonment for a maximum of 30 years or life. Although it is not clear from the judgments, the ICC appears to apply a decision structure where the gravity of the crime in the narrow sense forms a kind of (approximate) starting point and the presence of aggravating and mitigating circumstances affects whether one goes above or below this starting point.[56] Thus, there are some systematic differences between the regulation of the ICC and the Swedish system. However, if one looks beyond how things are categorized and the order in which different assessments are made, and instead isolates the question as to *what types of circumstance exert an influence on the punishment*, one may find the actual differences less pronounced. It can be noted that *proportionality* – in the meaning that the severity of the punishment should correspond to the seriousness of the crime (in the broad sense) – is of central importance in the sentencing schemes of both systems. In the case of the Rome Statute, this is expressed in the element "the gravity of the crime" in Article 78(1) and in the majority of the circumstances mentioned in Rule 145 of the RPE. Another sign of the importance of proportionality is found in the Statute's regulation of appeal. The only ground that the statute provides for appeals regarding the sentence is "disproportion between the crime and the sentence."[57] In Swedish law, the

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[53] See *Lubanga*, ICC T. Ch. I, July 13 2012, para. 35 and *Prosecutor v. Germain Katanga*, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/04-01/07-3484, May 23 2014 (hereafter *Katanga*, ICC T. Ch. II, May 23 2014), para. 35. A similar structure (with a distinction between the gravity of the crime and aggravating/mitigating circumstances) was developed in the cases of the ICTY and the ICTR. See Cryer, 2014, p. 507.

[54] See Ch. 29 Sec. 1–3 of the Swedish Criminal Code.

[55] See, e.g. SOU 1986:14, p. 131; Jareborg, Nils & Zila, Josef, *Straffrättens påföljdslära*. 5th edn., Stockholm: Norstedts juridik, 2017, p. 105 f. and Borgeke & Heidenborg, 2016, p. 160.

[56] See D'Ascoli, 2011, p. 146 ff. and Ambos, 2014, p. 305. Another reason for the distinction between the gravity of the crime in the narrow sense and (other) circumstances is likely that the existence of aggravating circumstances is a prerequisite for sentencing to life imprisonment. See Article 77 (1) (b) of the Rome Statute and Rule 145 (39) of the RPE.

[57] See Article 81 (2) (a) of the Rome Statute.

interest of proportionality is manifested through the penalty value that forms the starting point for the determination of the sentence.[58] As previously mentioned, the penalty value can be described as a quantification of the seriousness of the crime and in many cases alone determines the sentence.

From circumstances affecting the seriousness of the crime (in the broad sense), one can discern circumstances contained in the second element of Article 78(1) of the Rome Statute: "the individual circumstances of the convicted person". Here it is a matter of *circumstances that have to do with the person of the convicted and occurrences before or after the act*. These types of factor usually tend to mitigate the sentence.[59] As for the circumstances that can be categorized in this way, there are both similarities and differences between the two systems. Pursuant to Rule 145.2(a)(ii) of the RPE, the Court, as mitigating circumstances, shall take into account the conduct of the convicted person after the act, including any efforts by the person to compensate the victims and any cooperation with the Court. There are counterparts in Swedish law. The Swedish court may take into account whether the accused has tried to prevent, remedy or limit harmful effects of the crime or if the accused has provided information that is of material importance to the investigation.[60] At international level, however, these mitigating elements are given a more extensive and somewhat different content. It is clear from case law that expressions of regret and sympathy for the victims can be considered regardless of whether this has been expressed in active actions.[61] In *Al Mahdi*, space was devoted to reproducing statements from the defendant to corroborate that he felt genuine regret and sympathy for his victims.[62] These circumstances were also stated to be a "substantial factor" in mitigating the sentence.[63] The fact that the defendant early confessed to the crime and participated in the investigation also constituted mitigating circumstances.[64] If we turn our attention to Swedish law, the emphasis is on efficiency and objective results rather than on the conscience of the accused. To be given a reduction of sentence, it is not enough that the defendant is remorseful and cooperative. According to the provision in question, the defendant has to provide information that is "of significant importance for the investigation of the offence".[65] The preparatory works (which in Swedish law have an essential function when interpreting legislation) state that a confession is neither a

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58 See Ch. 29 Sections 1–3 of the Swedish Criminal Code.

59 An exception is the defendant's criminal record, which can be an aggravating factor both at international level and under Swedish law. See Rule 145.2 (b) (i) of the RPE and Ch. 29 Sec. 4 and Ch. 30 Sec. 4, second paragraph, of the Swedish Criminal Code.

60 See Ch. 29 Sec. 5, first paragraph 4–5 of the Swedish Criminal Code.

61 See *Katanga*, ICC T. Ch. II, May 23 2014, para. 117. It may be added that the Court did not find that any of the circumstances existed in the present case. The defendant's expression of sympathy with the victims was not considered sufficient, but was described as "mere convention" in such a context. See *Katanga*, ICC T. Ch. II, May 23 2014, para. 119.

62 See *Al Mahdi*, ICC T. Ch. VIII, September 27 2017, paras. 103–104.

63 See *Al Mahdi*, ICC T. Ch. VIII, September 27 2017, paras. 105 and 109.

64 See *Al Mahdi*, ICC T. Ch. VIII, September 27 2017, para. 100.

65 See Ch. 29 Sec. 5 first paragraph 5 of the Swedish Criminal Code.

sufficient nor a necessary prerequisite for mitigation.[66] One can probably also conclude that where the provision is applicable, cooperation in the investigation does not result in as large discounts as at international level.[67]

General statements in the judgments of the ICC underline the value of special prevention through rehabilitation, i.e. the importance of facilitating the sentenced person's reintegration in society. At the same time, it is stated that this objective must be given a secondary role in international criminal law.[68] Nevertheless, there is some scope to allow individual preventive considerations to affect the length of the sentence, which cannot be done under Swedish law.[69] The only judgment so far issued by the ICC where such individual preventive considerations have had an impact on the punishment is *Katanga*. In this case, the court found that the low age of the convicted at the time of the offence, and his family situation, should be taken into account as mitigating circumstances.[70]

A significant difference when comparing Swedish judgments with those of the ICC and the ad hoc tribunals is what space is devoted to the question of sentencing. In a typical Swedish judgment, the part of the text that relates to the determination of the penalty and the choice of sanction rarely exceeds one page. This can be compared with e.g. the judgment regarding the sentence in *Lubanga* which amounted to 40 pages, excluding the account of a dissenting opinion.[71]

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66 See prop. 2014/15:37, p. 38.

67 The preparatory works behind the Swedish provision speaks of a reduction of "months or even years". See prop. 2014/15:37, s. 39. In *Al Mahdi*, it appears that the defendant's confession and remorse had a substantial impact on the length of the sentence – albeit from the judgment it cannot be inferred exactly how much. Mention may also be made of the first sentencing decision of the ICTY, *Erdemović*, although it is a judgment which today may be presumed to be of limited precedential value. In that case, the accused pleaded guilty to war crimes in connection with the Srebrenica massacre, where he personally executed around 70 Bosniak boys and men. He was sentenced on appeal to imprisonment for five years. It is clear that the defendant's confession, remorse and cooperation played a crucial role in reducing the sentence by several years. See *The Prosecutor v. Dražen Erdemović*, (Case No. IT-96-22-Tbis), ICTY, Sentencing Judgment, 5 March 1998, p. 15 ff.

68 See *Al Mahdi*, ICC T. Ch. VIII, September 27 2017, para. 67, *Katanga*, ICC T. Ch. II, May 23 2014, para. 38 and *Bemba*, ICC T. Ch. III, June 21 2016, para. 11.

69 According to Swedish law, individual preventive considerations in principle have no place in the determination of penalties but may have significance for the choice of sanction. See for example the special reasons for choosing non-custodial sanctions instead of imprisonment, Ch. 30 Sec. 9 second paragraph of the Swedish Criminal Code.

70 In assessing the age at the time of the offense (24 years) as a mitigating circumstance, the court held that the convicted person had matured at the time of the trial and arrived at certain insights which were considered favorable to his rehabilitation. The family situation, with a number of children and foster children, was considered both as a third-party interest (the sentence would mean that the children lived without a parent) and as a circumstance that could contribute to rehabilitation and reintegration. See *Katanga*, ICC T. Ch. II, May 23 2014, paras. 81, 82, 85 and 144. Even under Swedish law, it is possible to take into account that the accused has the custody of young children to mitigate the sentence. See e.g. NJA 1989 s. 564 and NJA 1989 s. 810. However, this is exclusively about the child's third-party interest and not the defendant's prospects for rehabilitation. In some decisions, ICTY has also attached its views on the defendant's conditions for reintegration. See Cryer, 2014, p. 503 with references.

71 According to Article 76 (2) of the Rome Statute, at the request of the prosecutor or the accused a special hearing shall be held regarding the sentence (in addition to the hearing on the question of criminal liability). The sentence is thus announced in the form of a separate

Against this background, it may seem ironic that international adjudication has been blamed for a lack of transparency.[72] Part of the explanation of the extensive argumentation as regards the question of sentencing probably lies in the special nature of international criminal law where purposes such as truth-seeking and reconciliation deviate somewhat from those of national criminal law. Giving a full account of circumstances relating to the gravity of the crime, such as the various types of harmful effect caused by the use of child soldiers, presumably has an important symbolic meaning. The reasoning about sentencing at international level thus has a symbolic dimension that is not as salient in Swedish national sentencing. The grounds for Swedish sentences are more technical in the sense that only circumstances of immediate importance for determining the sanction are addressed.

Another thing that seems strange from the Swedish horizon is that the ICC and the tribunals in their judgments regularly address aspects related to the purposes of the punishment and of international criminal law in general. All the ICC's four sentencing judgments so far announced in the first instance refer to the preamble to the Rome Statute.[73] In *Al Mahdi* and *Bemba* it was stated that this text should be interpreted in the sense that the main purposes of the punishment of international crimes are *retribution* and *deterrence*.[74] In *Al Mahdi*, the clarification was made that retribution should be understood as the function of punishment to express the international community's condemnation of the crime rather than satisfying a need for revenge. Further, it was maintained that in terms of deterrence, both the deterrence of the convicted person from reoffending (special deterrence) and the deterrence of other potential offenders are referred to.[75] In *Katanga* it was emphasized that the court, when determining the punishment, also needs to respond to "the legitimate need for truth and justice voiced by the victims and their family members" and that the inevitability of the sentence is more important than its severity.[76]

One question that arises is what role these considerations play in relation to the circumstances which, in accordance with Article 78 of the Rome Statute and Rule 145 of the RPE, should be taken into account in determining the sentence.

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judgment. In *Al Mahdi*, where the defendant confessed to the crimes he was charged with and did not request a special hearing, the liability and sentence issues was dealt with in the same judgment. The document amounts to 49 pages, of which 17 pages are devoted to reasoning regarding the sentence. See *Al Mahdi*, ICC T. Ch. VIII, September 27 2017, paras. 64–111.

72 See above under Section 3.1.4 "Actual Consistency within Each System".

73 See *Lubanga*, ICC T. Ch. I, July 13 2012, para. 16, *Katanga*, ICC T. Ch. II, May 23 2014, para. 37, *Bemba*, ICC T. Ch. III, June 21 2016, para. 10 and *Al Mahdi*, ICC T. Ch. VIII, September 27 2017, para. 66.

74 See *Al Mahdi*, ICC T. Ch. VIII, September 27 2017, para. 66 and *Bemba*, ICC T. Ch. III, June 21 2016, para. 10. These two objectives have also been highlighted as primary in the case law of the ICTY and ICTR. See Cryer, 2014, p. 503 with references.

75 See *Al Mahdi*, ICC T. Ch. VIII, September 27 2017, para. 67. See also *Bemba*, ICC T. Ch. III, June 21 2016, para. 11.

76 See *Katanga*, ICC T. Ch. II, May 23 2014, para. 38. Similar writings recur in *Bemba*, ICC T. Ch. III, June 21 2016, paras. 10–11 and *Al Mahdi*, ICC T. Ch. VIII, September 27 2017, paras. 66–67.

Conceivably, the purposes of punishment are taken up for purely symbolic reasons – i.e. *pro forma* – and they may not exert any actual influence on the punishment in the individual case. However, the wording gives the impression that the various purposes of punishment have a direct impact on the length of the sentence.[77]

How the institute of punishment should be justified and what place should be given to various (and not infrequently competing) interests that the punishment can be expected to satisfy, is a classic conundrum in the philosophy of criminal law.[78] Arguments that could justify the punishment can be referred to as *forward-looking* or *backward-looking*. The forward-looking ones are about how punishment can meet different goals in the future. For example, the penalty may be a deterrent or have a norm-setting function in relation to other potential offenders (general prevention), or the punishment should prevent the individual offender from recidivism (special prevention). The interests of truth-seeking and reconciliation, which are usually described as characteristic of international criminal law, are also forward-looking in nature. The retrospective arguments, on the other hand, aim at making the punishment appear just in view of how culpable or blameworthy the offender appears, especially with regard to the crime committed; which is sometimes referred to as proportionality.[79] Everything that relates to blameworthiness in the broader sense – i.e. not only the crime and the degree of guilt, but also such manifestations as later attempts to remedy damage, willingness to cooperate during the judicial process and repentance – can be seen as backward-looking arguments. The Rome Statute's criteria for determining the sentence – *the gravity of the offence* and *the individual circumstances of the convicted person* – as well as the supplementary circumstances included in the RPE can therefore be referred to as predominantly backward-looking.[80]

If you want the punishment to be determined on the basis of both forward- and backward-looking rationality, you risk the various interests conflicting with each other. For example, a penalty that is perceived to correspond to the defendant's culpability may be considered too lenient if the ambition is that the penalty should act as a deterrent. At the same time, the same punishment can be deemed too severe if the purpose is to promote the convicted person's reintegration into society. An established way of resolving possible conflicts between different expectations of the punishment is to distinguish between two issues: first, what considerations should justify punishment in general (i.e. the

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77 cf. "In considering the purposes of punishment, the Chamber has taken into account […]" (*Lubanga*, ICC T. Ch. I, July 13 2012, para. 16), "In determining the sentence, the Chamber must also respond to […]" (*Katanga*, ICC T. Ch. II, May 23 2014, para. 38) and "[…] the Chamber considers […]" (*Bemba*, ICC T. Ch. III, June 21 2016, para. 10).

78 See, e.g., Hart, H L A, "Prolegomenon to the Principles of Punishment" in *Punishment and Responsibility: Essays in the Philosophy of Law*, 2nd ed., Oxford University Press: Oxford, 2008, p. 5 f.

79 See Borgeke & Heidenborg, 2016, p. 38 f. and Jareborg & Zila, 2017, p. 67 ff.

80 Sometimes the convicted person's personal circumstances, cooperation with the court and remorse are presented as evidence that he or she can be rehabilitated, which justifies a reduction in punishment. See *Katanga*, ICC T. Ch. II, May 23 2014, para. 85 and *Al Mahdi*, ICC T. Ch. VIII, September 27 2017, para. 97. In such cases, of course, we are dealing with forward-looking arguments.

question "why?") and secondly, what in the individual case should warrant a certain punishment (i.e. the question "how?"). From such a perspective, the general justification of the punishment may be based on forward-looking pursuits such as general prevention, while the principles for the distribution of punishment in specific cases can be based mainly on backward-looking considerations.[81] Such a structural understanding underlies the Swedish rules on sentencing.[82] Transferred to international criminal law, with this approach it makes perfect sense to invoke e.g. deterrence, truth-seeking and reconciliation as the very reason for the punishment in the general sense, but at the same time to claim that the degree of punishment in the individual case must be determined primarily with reference to the blameworthiness of the convicted person. Nor does anything prevent the subsequent enforcement of the prison sentence from being given a content on the basis of special prevention (rehabilitation).

The ICC judgments provide little guidance on how to understand the references to the various purposes of punishment. It would be strange if the general aims of punishment – e.g. deterrence or victims' and relatives' need for truth and justice – should play independent roles as factors in individual cases. It would mean that in two cases where the circumstances under Article 78 of the Statute (i.e. the gravity of the crime and the personal circumstances of the convicted person) warranted punishment of similar severity, but where the need for deterrence or the need to seek the truth differed, could lead to different punishments in the two cases.

A better explanation could be that references to the aims of the punishment – in addition to fulfilling a purely symbolic function – partly legitimise *a general level of punishment severity* that relates to the criminal offence *types* rather than to the specific acts. As previously mentioned, according to Article 77 of the Statute, the ICC has to rely on a considerably extensive penalty scale in all cases – imprisonment for a maximum of 30 years or life. The distinction, unfamiliar from a Swedish perspective, between a narrow categorization of the gravity of the crime and aggravating and mitigating circumstances (which must also be considered to be related mainly to the gravity of the crime) has been explained above by the fact that the Court needs to orientate and create fixed points in this wide scale.

However, proportionality (in criminal justice) is a relative concept. It is possible to establish how blameworthy a certain crime is compared to other crimes, or – in the wider sense – how blameworthy one perpetrator is compared to other perpetrators. Yet, to attach a penalty of a certain severity to this blameworthiness, at least one additional point of departure is required. One needs to be able to compare with other cases where blameworthiness has been reflected in punishment. To put it another way, systems based on proportionality

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[81] See, e.g., Hart, 2008, p. 5 f.; Roxin, Claus, *Strafrechtliche Grundlagenprobleme*, Berlin: Gruyter, 1973, p. 1 ff. and Jareborg, Nils, *Straffrättsideologiska fragment*, Uppsala: Iustus, 1992, p. 135.

[82] See SOU 1986:14, p. 66 ff. The criminalization – and the answer to the question "why punishment?" – is legitimized by a general preventive rationale, i.e. the need of counteracting certain unwanted behaviors. When the court in each case determines the penalty – i.e. when the question is "how to punish?" – the punishment is primarily a consequence of the seriousness of the crime.

need to be "anchored".[83] As previously touched upon, the factors listed in Article 78(1) of the Rome Statute and in Rule 145 of the RPE can largely be termed backward-looking (i.e. relating to proportionality). Further, ICC's adjudication is a relatively new endeavour in relation to which cases from previously established international courts can serve only as a rough reference.[84] Given the marked lack of previous rulings – to date, the Court has imposed sentences in four cases – few standpoints indicate how different acts should be distributed in the wide penalty scale. To this may be added the above-described reluctance of the Court to make comparisons with other cases.[85] The Court, in the individual case, therefore needs to justify the choice of general level of punishment it settles on. In an analogy with national law the Court needs to adopt the role of legislator and create a narrower penalty scale within the general wide one.

According to this interpretation, by invoking the various purposes of punishment, the ICC thus establishes an appropriate *general level of punishment* to meet such goals as to deter, to express the society's condemnation or to respond to the victims' need for truth-seeking. In a next step, this general level is adjusted based on the factors in Article 78 of the Rome Statute and in Rule 145 of the RPE. If the interpretation is correct, the general purposes of the punishment should become increasingly subordinate in the individual case as more case law emerges. Instead, the Court will seek guidance on the level of punishment set out in previous cases. The legal application would then be more similar to that of Swedish courts.

To summarize the inquiry in this section, one can – despite some differences in how the respective regulations are designed – conclude that the differences between the two systems are not so significant in terms of the factors that play a role in sentencing. In both systems, the seriousness of the offence is attributed substantial importance to the final result. Although individual preventive considerations are of minor significance, such reasons can exert some influence on the length of the punishment in the international system in a way that does not exist in Swedish law. Moreover, certain retrospective factors unrelated to the seriousness of the crime are given a relatively large weight. According to Swedish law, the scope is much more limited when it comes to taking into consideration circumstances that have to do with the defendant's actions or attitude after the act, such as admission of guilt, remorse and cooperation with the prosecution. International application is also distinguished in relation to the Swedish counterpart by far more extensive judgments and by its tendency to invoke the various purposes of the punishment. The last-mentioned dissimilarities can probably be attributed to the different conditions under which Swedish national courts and the ICC operate, and it seems that the differences occasion no actual discrepancy in terms of the factors affecting sentencing in the individual case.

This section has focused on qualitative aspects of the sentencing rules in the two systems – i.e. what factors affect the determination of the penalty. In the

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83 See, e.g., Hirsch, Andrew von, *Censure and Sanctions*, Oxford: Clarendon Press, 1993, p. 36 ff. See also Jareborg & Zila, 2017, p. 70.

84 See above under footnote 7.

85 See above under Section 3.1.4 "Actual Consistency in Each System".

following, we examine the impact these factors have in terms of punishment – i.e. the general severity of punishment in each system.

3.2.3 Comparison of General Severity

In a superficial comparison of the respective regulations, the impression is conveyed that the 'international' level of punishment would be higher than the Swedish national level. The ICC has to apply a general penalty scale for fixed-term prison sentences with a significantly higher maximum than the longest fixed time that can be sentenced under Swedish law – 30 years compared to 18 years. Further, the rules for conditional release under the Rome Statute are less generous than the corresponding rules under Swedish law. In the case of a Swedish prison sentence that does not fall below one month, conditional release is compulsory after two thirds of the time has been served unless there are special reasons to postpone the release.[86] The regulation in Article 110 of the Rome Statute which *allows* the ICC to reduce the sentence after the convicted person has served two thirds of the time is comparatively far more discretionary. Thus, if two prison sentences of the same length are imposed by the ICC and by a Swedish court, the actual severity of the sentence determined by the ICC may be greater if release does not take place after two-thirds of the execution. Moreover, it can be noted that the actual meaning of life imprisonment according to the Rome Statute and to Swedish law differs. According to Article 110(3) of the Rome Statute, a life sentence can be reconsidered and possibly reduced after 25 years. In the case of Swedish law, the shortest time to which life imprisonment can be converted corresponds to the longest fixed term of imprisonment – i.e. 18 years under current law. Due to the conditional release, only two-thirds of the converted sentence needs to be served in prison. Consequently, if two persons are sentenced to life by a Swedish court and by the ICC, it is very likely that the life sentence in the former case will be shorter than in the latter.[87]

Despite the mentioned differences regarding the respective regulations, much indicates that the penalties are generally lower at the international level than at the national. To begin with, we could compare the prerequisites for choosing life imprisonment in the respective systems. For the ICC to be able to impose a life sentence, Article 77(1)(b) of the Rome Statute requires that two cumulative conditions are met.[88] The life sentence must be justified both by the extreme gravity of the crime *and* the individual circumstances of the convicted person. The wording "the extreme gravity of the crime" should be read in the light of the fact that all the offences under the jurisdiction of the court must themselves be regarded as significantly grave.[89] In other words, the bar is quite high. According

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[86] See Ch. 26 Sec. 6, first and second paragraphs of the Swedish Criminal Code.

[87] The average time of Swedish converted life sentences during the period 2007-2013 was about 25 years. See Brottsförebyggande rådet, 2015, *Livstidsdomar – Utveckling och faktisk strafftid. Kortanalys*, p. 7.

[88] See D'Ascoli, 2011, p. 265.

[89] As we have seen, in the preamble to the Rome Statute the offences are characterized as "[…] the most serious crimes of concern to the international community as a whole […]." "Sufficient gravity" is actually a minimum requirement for the court to at all try a case. According to Article 17 (1) (d) of the Rome Statute, the ICC must reject a charge if "the case

to Rule 145(3) of the RPE, the imposition of a life sentence requires that one or more aggravating circumstances obtains. Relevant here are the circumstances that are listed under Rule 145(2)(b) and that, where appropriate, can be taken into account *in addition* to the gravity of the crime. Of course, the existence of one or more such circumstances does not automatically mean that a life sentence is applicable.[90] When it comes to Swedish law, the requirements for a life sentence must be considered to be lower. Imprisonment for life applies to a number of crimes, but is imposed mainly for murder.[91] Until recently, certain aggravating circumstances in connection with the murder (such as the killing of two people) were necessary for a life sentence.[92] However, on January 1 2020, the provision was revised with the intended consequence that life imprisonment shall be imposed in the majority of convicted murder cases.[93]

A comparison between the sentences in the ICC and the sentences in Swedish courts when persons have been prosecuted for international crimes leads to the conclusion that the average prison sentence in Sweden is longer than the average sentence imposed by the ICC – even taking the above-mentioned differences regarding conditional release and life imprisonment into account. Since the circumstances of different cases differ, it is of course precarious to draw too far-reaching conclusions from such comparisons – especially as the number of judgments so far is limited.

In the ICC's four rulings to date, the defendants were sentenced to between nine and 18 years in prison.[94] The most severe penalty (18 years) was imposed in *Bemba*, where the defendant, as a military leader with effective control over rebel troops, was found guilty of crimes against humanity and war crimes in the form of numerous instances of murder and rape as well as looting over a period of four and a half months.[95] The case law of the ad hoc tribunals offers a more

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is not of sufficient gravity to justify further action by the Court." The Court interpreted the meaning of the words during the pre-trial of Thomas Lubanga, i.a. by setting the criteria that "the conduct which is the subject of a case must be either systematic (pattern of incidents) or large-scale." See Case No. ICC-01/04-01/06), ICC Pre-Trial Chamber I, Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr. Thomas Lubanga Dyilo, 24 February 2006, Annex 1, para. 46.

90 For instance, the court found a total of three aggravating circumstances in connection with the crimes for which Jean-Pierre Bemba Gombo was convicted in the first instance, *Bemba*, ICC T. Ch. III, June 21 2016, para. 93. Nevertheless, the sentence stayed at 18 years in prison. In the judgment, the ICC mentioned the conditions for sentencing to life imprisonment but did not discuss in detail why a life sentence was not applicable in the present case. See *Bemba*, ICC T. Ch. III, June 21 2016, para. 91. This can be compared to *Lubanga* where life imprisonment was deemed inappropriate due to the absence of aggravating circumstances. See *Lubanga*, ICC T. Ch. I, July 13 2012, para. 96.

91 See Brottsförebyggande rådet, 2015, p. 5 f.

92 See NJA 2013 s. 376 and NJA 2016 s. 3.

93 See prop. 2018/19:138.

94 With the exception of a judgment delivered in September 2018, in which Jean-Pierre Bemba Gombo and certain defendants were sentenced to shorter prison sentences and fines for violating Article 70 (1) (a)–(c) of the Rome Statute (offences against the administration of justice). See *Bemba et al.*, ICC T. Ch. VII, September 17 2018.

95 See *Bemba*, ICC T. Ch. III, June 21 2016. Although it is irrelevant for the discussion here, note that Jean-Pierre Bemba Gombo was later acquitted on all counts by the Appeals

comprehensive material for making assumptions about punishment levels. However, remember that the sentencing regulations differ between the ICC and the tribunals. It can be seen that the penalties imposed by the ICTR are significantly more severe than those of the ICTY. The differences in general severity can, at least in part, be explained by diverse circumstances in the cases up for review. Among other things, a greater proportion of the ICTR judgments concerns genocide.[96] According to calculations made in 2017, the median sentence length in the ICTY was 15 years and in the ICTR 33 years and 6 months.[97]

Turing to Swedish judgments of international crimes, the penalties range from imprisonment for eight months to life imprisonment. In five of a total of eleven cases, life sentences were imposed.[98] As we have seen, murder of more than one person is regularly punished with life imprisonment under Swedish law. In specific cases international crimes often involve the intentional killing of several people. Three of the five life sentences were for genocide and two concerned war crimes.[99] In one of these cases, the offence consisted of murdering seven persons in the context of an execution.[100] Among the eleven judgments are also three cases of war crimes with relatively short prison sentences, the most severe of which was 1 year and 3 months.[101] These charges would probably not have been considered serious enough to be brought before the ICC.[102] Despite some uncertainty in making comparisons between cases, it is enough to conclude that *Swedish adjudication shows a higher general level of punishment* than the ICC does. It is, for example, difficult to imagine that the crimes in *Lubanga* and *Bemba* (which according to the ICC deserved penalties of 14 and 18 years,

Chamber. See *Prosecutor v. Jean-Pierre Bemba Gombo*, ICC A. Ch., Judgment on the appeal of Mr Jean-Pierre Bemba Gombo against Trial Chamber III's "Judgment pursuant to Article 74 of the Statute", ICC-01/05-01/08 A, June 8 2018.

96 See Linton, 2017, p. 49 f.

97 See Linton, 2017, p. 50. Also, of a total of 175 imposed penalties in the ICTY, eleven defendants were sentenced to life imprisonment. See http://www.icty.org/en/cases/judgement-list.

98 See *Åklagaren ./. M.M.*, Stockholms tingsrätt, Case B 5373-10, Judgment January 20 2012; *Åklagaren ./. Mbanenande*, Svea hovrätt, Case B 6659-13, Judgment June 19 2014; *Åklagaren ./. Berinkindi*, Svea hovrätt, Case B 4951-16, Judgment February 15 2017; *Åklagaren ./. Haisam*, Svea hovrätt, Case B 2259-17, Judgment May 31 2017 and *Åklagaren ./. Tabaro*, Stockholms tingsrätt, Case B 13688-16, Judgment June 27 2018.

99 It should be noted that one of the defendants in these cases, M.M., was fully acquitted in the court of appeals. See *Åklagaren ./. M.M.*, Svea hovrätt, Case B 1248-12, Judgment December 19 2012.

100 See *Åklagaren ./. Haisam*.

101 More specifically, the cases *Åklagaren ./. Abdulkareem*, Hovrätten över Skåne och Blekinge, Case B 3187-16, Judgment April 11 2017, with the sentence 9 months' imprisonment; *Åklagaren ./. Abdullah*, Södertörns tingsrätt, Case B 11191-17, Judgment September 25 2017, with the sentence 8 months´ imprisonment and *Åklagaren ./. Saeed*, Örebro tingsrätt, Case B 1662-18, Judgment February 19 2019, with the sentence 1 year and 3 months' imprisonment.

102 See above under footnote 89.

respectively) would have resulted anything less than life imprisonment in a Swedish court.[103]

One aspect that contributes to a difference in the level of punishment is that the handling of multiple offences differs considerably between Swedish national courts and the ICC. According to Swedish law, when a defendant is convicted of multiple offences the court shall, as a general rule, impose a joint punishment for the crimes.[104] In practice, this is done by starting with the penalty value of the most serious crime and adding gradually decreasing shares of the penalty value for each of the other crimes (termed "aspiration").[105] When the ICC has convicted a person of more than one crime, Article 78(3) of the Rome Statute applies. The Article stipulates that the court shall determine sentences for each of the crimes plus a joint sentence specifying a total period of imprisonment. The time shall not be less than the highest individual penalty imposed, nor exceed 30 years imprisonment or a life sentence if Article 77(1)(b) applies. The Court has so far interpreted the provision by imposing so-called concurrent sentences (i.e. the accused only serves the time for the most serious of the crimes).[106] If two persons are convicted of similar multiple crimes in the ICC and in a Swedish court, therefore, all else being equal, the ICC's prison sentence will be shorter than that in a Swedish court. For example, the ICC initially sentenced the defendant in *Bemba* for five crimes – two instances of crimes against humanity to 16 and 18 years in prison and three instances of war crimes (rape and looting) to 16, 16 and 18 years imprisonment. The joint sentence was set at 18 years in prison. It should be clarified that the ICC, on the basis of the same acts (murder and rape), convicted the accused both of war crimes and of crimes against humanity. In a Swedish context, this issue of competing offences might have been resolved by the accused being convicted only of three crimes – two instances of crimes against humanity and one war crime (looting). However, at least one of these crimes had most certainly been attributed an individual penalty value corresponding to life imprisonment. We can disregard the latter and imagine that, under Swedish law, the individual prison sentences (i.e. 16, 18 and 16 years, exempting two cases of war crime) would constitute penalty values for the individual acts. In such a case, with the usual method of calculation, the combined penalty value would exceed the applicable maximum period for fixed prison sentences, and this would justify the joint penalty of life imprisonment.[107]

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[103] In *Lubanga*, the sentencing concerned war crimes in the form of the use of child soldiers (i.e. soldiers under the age of 15). The Court found that the use of child soldiers was "widespread" but did not specify an exact figure. According to evidence cited by the Prosecutor, the number was about 2,600 individuals. See *Lubanga*, ICC T. Ch. I, July 13 2012, paras. 45–50.

[104] See Ch. 30 Sec. 3 of the Swedish Criminal Code.

[105] See NJA 2008 s. 359. In order for the application to be consistent, the court uses tables. See Borgeke & Heidenborg, 2016, p. 178 ff. Reason to deviate from the tables and make a smaller reduction can be e.g. whether the criminal activity is systematic or if there are multiple offences targeting the same victim. See NJA 2018 s. 378 and NJA 2019 s. 238.

[106] See *Lubanga*, ICC T. Ch. I, July 13 2012, paras. 98–99, *Katanga*, ICC T. Ch. II, May 23 2014, paras. 146–147 and *Bemba*, ICC T. Ch. III, June 21 2016, paras. 94–95.

[107] Using the table applicable in Swedish law, one would arrive at a value of about 26 years. cf. Borgeke & Heidenborg, 2016, p. 179.

4 Summary and Concluding Remarks

This article has sought to answer the question of whether Swedish courts – as well as national courts in general – should ever take international norms into account when determining penalties for international crimes. What seems most natural is that the court, when assessing the penalty value for a particular offence (i.e. the part of the penalty relating to the seriousness of the crime), should be guided by the case law of international courts – preferably the ICC.

It is difficult to argue that national courts determining penalties should to any extent be bound to apply international rules. There is no international law that the court is expected to comply with when sentencing. One argument in favour of still looking beyond the national system is *the interest of consistency in sentencing* – i.e. the concern that cases equal in relevant respects should also be treated equally (and thus that different cases should be treated differently). Because states share the jurisdiction, international crimes can be viewed as a form of collective norms cutting through the national systems. In the first place, the fact that these crimes lead to similar legal consequences can be considered desirable because it seems *just*. It can be assumed that there is an expectation that acts classified as e.g. war crimes or crimes against humanity in one system are subject to the same legal treatment in another system. Furthermore, uniformity is considered desirable due to the requirement of *legal certainty*. It is in the nature of international crimes that when one is committed, it is not determined in advance where a possible prosecution will take place (within several different national legal systems or before the ICC). The greater the differences between the systems, the more difficult it is to predict what the penalty will be in the event of prosecution. International rules could here serve as a shared yardstick, making the application of law more uniform. On the other hand, however, we have *the interest of national consistency*. International crimes under the Rome Statute can be described as qualified forms of otherwise criminalized acts in the national systems. Therefore, treating these types of crime in a different judicial manner could result in outcomes that were perceived as unfair from a national point of view.

Against this background, an important question is the ways in which Swedish law and international rules differ. First, such differences may constitute arguments for and against whether Swedish courts should take international rules into account. Secondly, it is important to identify these differences if and where one decides to take international rules into account. As stated above, it can be argued that the differences between Swedish law and the ICC rules are not so great in terms of *the factors that influence sentencing*. At international level, in some cases, circumstances such as the defendant's confession, remorse and potential for rehabilitation are given a weight that is foreign to Swedish law. Yet, the systems are similar in that the seriousness of the crime is the decisive factor when punishment is determined. However, much indicates that *the general level of punishmen*t in each system differs: Swedish courts generally impose more severe penalties than the ICC does. Among all criminal offences, the international crimes (possibly with the exception of some instances of war crimes) fall into the category of offences with the highest abstract penalty values. It is therefore expected that verdicts of genocide, crimes against humanity and serious war crimes regularly result in life imprisonment in Swedish courts. At

international level, on the other hand, life imprisonment is rather the exception than the rule. Furthermore, although the ICC penalty scale for fixed terms of imprisonment is more generous than Swedish law, the penalty in any ICC sentencing judgments so far does not exceed the highest fixed term of imprisonment under Swedish law.

Hence, the answer to the general question of whether Swedish courts should take international rules into account must be answered by weighing the interests of international coherence and national coherence against each other. Most would probably find that the latter interest outweighs the former – which means that one should be careful about letting international rules find their way into the national adjudication. Although the Swedish system and the international system are similar in terms of the factors that influence the measurement of penalties, were international rules to be taken into account, the differences in the general punishment level between national and international application could lead to results that appeared unjust.[108] Uncertainty regarding the consistency of international application also constitutes an argument against relying on individual judgments as a source of law.

Another significant argument against considering international rules is that Swedish adjudication accounts for only a small part of the total volume of convictions of international crimes globally. If Swedish courts took international rules into account, this would not add much to the overall consistency, unless courts in other national systems did the same. Further, it is not obvious that the regulations of the Rome Statute and the case law of the ICC should constitute the yardstick. As has been argued, the international rules in this area lack the status of authoritative sources of law. One could also say that the interest of consistency with the same strength suggests that rules in the national systems of all state parties to the Rome Statute should be taken into account by the domestic court – which of course would be unmanageable.[109] In the absence of a completely supranational criminal law, there is no perfect solution to the problems described.

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[108] In any case, this need not rule out allowing international case law to provide some guidance to determine the *relative* seriousness of different acts within the framework of the different systems. If e.g. the ICC states that a war crime involving certain circumstances is considered more severe than a war crime without the same circumstances, the national court should be able to take this into account as long as the national general level of repression is maintained.

[109] cf. the figure above under Section 3.1.2 “The Interest of Consistency at International Level”.

International Crimes