

# CONTENTS

	<i>p.</i>
<i>Acknowledgments</i>	XI
<i>List of Abbreviations</i>	XIII
<i>Introduction</i>	XV

## CHAPTER I

### SENTENCING IN ICL: IN SEARCH FOR CONSISTENCY

1.	The Characteristics of Rationales of Sentencing in ICL	1
1.1.	What are Rationales of Sentencing?	1
1.2.	No Positive Guidelines and Unfettered Judicial Discretion	5
1.3.	Inconsistency in Sentencing, Absence of Justifications and Lack of Transparency	7
1.4.	Why is a System of Sentencing Rationales Needed?	10
2.	Theories of Punishment in ICL	13
2.1.	Backward-Looking Theories of Punishment	14
2.1.1.	Backward-Looking Theories in General	14
2.1.2.	Backward-Looking Theories in ICL	17
2.2.	Forward-Looking Theories of Punishment	20
2.2.1.	Forward-Looking Theories in General	20
2.2.2.	Forward-Looking Theories in ICL	22
2.3.	Restorative Justice	26
3.	To Whom Do International Criminal Trials Speak?	30

**PART I**

**RATIONALES OF SENTENCING AT THE IMTS  
AND AD HOC TRIBUNALS**

**CHAPTER II**

**RATIONALES AT THE IMTS**

1. Introduction	37
2. The IMTs' Applicable Law	37
3. The Drafting History of the Nuremberg Charter	39
4. The IMTs' Judgments	44
5. Conclusions	47

**CHAPTER III**

**RATIONALES AT THE AD HOC TRIBUNALS**

1. Introduction	49
2. Chambers' Approaches in Identifying Rationales	51
2.1. Textual Approach	52
2.2. Contextual Approach	55
2.2.1. The Principle of Gravity	55
2.2.1.1. Notion of Gravity	55
2.2.1.2. Gravity as a Means to Choose Sentencing Rationales	60
2.2.2. Principle of Individualization of Sentences	61
2.2.2.1. Notion of Individualization	61
2.2.2.2. Individualization as a Means to Choose Sentencing Rationales	62
2.3. Teleological Approach	64
2.3.1. The Teleological Approach in the ICTY Case-Law	64
2.3.2. The Teleological Approach in the ICTR Case-Law	66
2.3.3. Assessment of the Teleological Approach	68
3. Judicial Interpretation of Sentencing Rationales	69
3.1. Introduction	69
3.2. Retribution	71
3.2.1. Functions	71
3.2.2. Influence on Sentencing Determination	72
3.3. General Deterrence	74
3.3.1. Functions	75
3.3.2. Influence on Sentencing Determination	76
3.4. Other Rationales	78

	<i>p.</i>
3.4.1. Special Deterrence	79
3.4.2. Rehabilitation	80
3.4.3. Incapacitation of the Offender	83
3.4.4. General Affirmative Prevention	84
3.4.5. Reconciliation and Restoration	87
3.5. Overall Conclusions	90
3.5.1. Introduction	90
3.5.2. Tracing the Judicial Development	91
3.5.2.1. Ordinary Cases	92
3.5.2.2. Guilty Plea Cases	97
3.5.2.3. Appeals Judgments	99
3.5.3. Theoretical Assessment of Retribution and General Deterrence	100
3.5.3.1. Retribution	100
3.5.3.2. General Deterrence	105
3.5.4. Conclusions	106

## PART II

### RATIONALES OF SENTENCING AT THE ICC

#### CHAPTER IV

#### INTERPRETING THE ICC APPLICABLE LAW

1. Introduction	113
2. Interpreting Article 77 ICC St.	114
2.1. Literal Interpretation	115
2.2. Contextual Interpretation	116
2.2.1. Article 77(1)(b) ICC St. and Rule 145(3) ICC RPE: Life Imprisonment	116
2.2.2. Articles 77 and 110 ICC St.: Mechanism of Sentence Review	118
2.3. Drafting History	119
2.3.1. Early Negotiations	120
2.3.2. PrepCom	123
2.3.3. The Rome Conference	124
2.3.3.1. The Discussion on the Death Penalty	125
2.3.3.2. The Discussion on Life Imprisonment	126
2.3.3.3. The Discussion on Maximum and Minimum Penalties	127
3. Interpreting Article 78 ICC St.	128

VIII *Sentencing at the International Criminal Court. From Nuremberg to the Hague*

	<i>p.</i>
3.1. Literal and Contextual Interpretation	128
3.2. Drafting History	131
3.3. Assessment of the Interpretation of Articles 77 and 78 ICC St.	134
4. Interpreting the Preamble	137
4.1. Literal Interpretation	137
4.1.1. Introduction	137
4.1.2. Analysis	138
4.2. Drafting History	142
4.2.1. Early Negotiations	142
4.2.2. Discussions at the Rome Conference	143
4.3. Conclusions	144
5. Interpreting Articles 68(3) and 75 ICC St.	145
5.1. Introduction	145
5.2. Reconciliation and Keeping an Historical Record	146
5.3. Retribution and Deterrence	150
5.4. Conclusions	152
6. ICC Applicable Law Put to the Test of IHRL	154
6.1. Introduction	154
6.2. The Right to a Reasoned Decision on the Sentence	155
6.3. The Prohibition of Arbitrary Detention	159
6.3.1. The Principle of Necessity	159
6.3.2. The Principle of Proportionality	160
6.4. The Right to Rehabilitation	162
7. Overall Conclusions	165

**CHAPTER V**

**TRACING THE ICC SENTENCING DECISION MAKING**

1. Introduction	171
2. The Process of Sentencing Determination	172
3. The Pre-Sentencing Hearing Phase	173
3.1. Parties' Submissions on General Principles Applicable to Sentencing	174
3.1.1. The OTP's Submissions	174
3.1.2. The LRVs' Submissions	177
3.1.3. Defences' Submissions	178
3.2. Parties' Submissions on the Determination of the Sentence	179
3.2.1. The OTP's Submissions	179
3.2.2. LRVs' Submissions	181
3.2.3. Defences' Submissions	182
4. The Sentencing Hearing Phase	184

*p.*

5.	The Sentencing Decisions and Beyond	187
5.1.	Precedents of Other ICTs and of National Jurisdictions	188
5.2.	Inherent Gravity of Crimes under the ICC Jurisdiction	190
5.3.	Rationales of Sentencing Professed	191
5.4.	Determination of the Sentence	194
5.5.	Beyond the Sentences	202

## CHAPTER VI

### ATTEMPTING A SENTENCING THEORY FOR THE ICC

1.	Introduction	207
2.	Building Block Principles	208
2.1.	Rationales Shall Be Selected Vis-à-vis the Objectives of the ICC Justice System	208
2.2.	The ICC Sentencing System is Unique	210
2.2.1.	Ordinary v Extraordinary Crimes	211
2.2.2.	'National Laws of the States that Would Normally Exercise Jurisdiction'	216
2.2.3.	Conclusions	220
2.3.	The ICC Is and Remains a Criminal Tribunal	221
3.	Principles concerning the Selection of Rationales of Sentencing	221
3.1.	No Room for Keeping an Historical Record, Reconciliation and Restoration	222
3.2.	ICC Sentences Cannot Pursue Backward Rationales of Sentencing	223
3.3.	Forward-Looking Theories of Punishment Shall Be Re-Oriented	223
4.	Principles Framing a Policy of Sentencing Determination	229
4.1.	Proportionality Re-Assessed	229
4.2.	Further Policy Principles	233
	<i>Conclusions</i>	235
	<i>Table of cases</i>	239
	<i>Selected Bibliography</i>	247
	<i>Index</i>	253