
NEW ENGLAND SCHOOL OF LAW
INTERNATIONAL WAR CRIME PROJECT
RWANDA GENOCIDE PROSECUTION

MEMORANDUM FOR OFFICE
OF
THE PROSECUTOR

LEGAL FACTORS AND RESTRICTIONS INVOLVED
IN ASSESSING CONSECUTIVE SENTENCES FOR
MULTIPLE CONVICTIONS (AS PER RULE 101(C))

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5. United Nations Judgment Report, *The Prosecutor v. Clement Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T. Released by the International Criminal Tribunal of Rwanda, Office of the Prosecutor (1997).
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I. Introduction and Summary of Conclusion

A. ISSUE

The following question is presented for analysis in this research memorandum:

What are the legal factors and restrictions involved in assessing consecutive sentences for multiple convictions¹ as per Rule 101C² of the Rule of Procedure and Evidence of the International Criminal Tribunal for Rwanda?

¹ See United Nations International Criminal Tribunal for Rwanda, office of the Prosecutor, Legal Research Topic No. one, Facsimile dated 20 August 1999. The purpose of this memorandum is to identify the principles that must be the basis for the Trial Chamber in determining whether a sentence shall be served consecutively or concurrently. *Id.* at 1. [Reproduced in tag no. 23] Black's Law Dictionary defines consecutive sentence as when one sentence of confinement is to follow another in point of time, the second is deemed to be consecutive whereas concurrent means two or more terms of imprisonment, all or part of each term of which is served simultaneously and the prisoner is entitled to discharge at the expiration of the longest term specified. The scope of this memorandum is to provide the Trial Chamber with a bright line rule in imposing sentences for defendants convicted for more than one crime resulting from different set of facts. [Reproduced in tag no. 8]

² 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 55 (1998). Rule of Procedure and Evidence of the International Criminal Tribunal for Rwanda, U.N. Doc. ICTR/3.Rev. 2 (1996). [Reproduced in tag no. 14]

B. The International Tribunal

The International Criminal Tribunal for Rwanda [hereinafter the ICTR] is the result of Resolution 955³ of the United Nations Security Council. As an International Tribunal, it is founded on the idea of universal justice based on common moral traditions as applicable in civilized society. Convictions for international crimes must, therefore, be sentenced in conformity with the fundamental norms of customary international law, the general practice of states and the positive law of nations.⁴

C. Summary of Conclusion

The mandate of the International Tribunal is to combat impunity and to deter similar conduct in the future. It is not only right that *punitur quia peccatur* (the individual must be punished because he broke the law) but also that *punitur ne peccatur* (he must be punished so that

³ 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 3 (1998). Statute of the International Tribunal for Rwanda, S/RES/955 (1994)* (Annex), 8 November 1994. [Reproduced in tag no. 15]

⁴ See Leo McCarty, *Justice, The State and International Relations* 12-13 (1998). [Reproduced in tag no. 24]

he and others will no longer break the law).⁵ The sentence imposed by the tribunal must therefore be appropriate in order to achieve this goal.

Penalties should be based on principles generally accepted in the international community. It is generally accepted in the international community that the imposition of concurrent or consecutive sentences is dependant on whether the crimes of the defendant arise out of the same transaction.

In the United States, for example, emphasis is placed on the required intent of the defendant and the resulting criminal act. The key is to identify the requisite mental state (*mens rea*) for each crimes and the prohibited act or omission resulting in the crime (*actus reus*). If the two crimes require different elements, then the defendant must be sentenced consecutively.

In the United Kingdom, the "totality principle" is used. Under the "totality principle," the judge imposes a sentence for each count and thereafter makes a determination as to whether the sentence should be

⁵ See United Nations Judgment Report, *The Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T 10, Opinion and Judgment, 10 December 1998, available in United Nations Website at <http://www.icty.org>. [Reproduced in tag no. 4]

concurrent or consecutive at his discretion based on the gravity of the offences.

In Australia, the judge fixes a sentence for each of the counts comprising the case and a sentence for the case, the later is known as the effective or head sentence.⁶ The effective or head sentence is based on the relationship between the circumstance of the counts.⁷ If the comprising counts are part of a single transaction, then the sentence is to be served concurrently; and where the counts constitute separate transactions, a cumulative sentence is imposed.⁸

Therefore, the Trial Chamber in applying Rule 101(c) should first look at the circumstances of the case and identify whether the counts are part of the same transaction or not. Thereafter, the Chamber must exercise its discretion in judging the appropriateness of the sentence by imposing a sentence that is consistent with the

⁶ Austin Lovegrove, *Sentencing the Multiple Offender: Towards Detailed Sentencing Statistics for Armed Robbers*, *The Australian and New Zealand Journal of Criminology*, Vol. 31, (1998). [Reproduced in tag no. 3]

⁷ *See Id.*

⁸ *See Id.*

intent and purpose of the tribunal and the gravity of the crime.

II. Legal Discussion

A. History of Sentencing in International Law

In the aftermath of World War II, dramatic progress was made in defining international war crimes and crimes against humanity. However, the International Tribunals at Nuremberg and Tokyo, and the successor trials held by various national military tribunals, left few sentencing guidelines applicable to cases of war crimes and crimes against humanity.⁹ For example, twenty-eight defendants were indicted by the International Tribunal for the Far East established for the trial and prosecution of Japanese war criminals.¹⁰ Seven of the twenty-five were sentenced to hang, and sixteen to life in prison.¹¹ In 1946, the

⁹ William A. Schabas, *Sentencing by International Tribunals: A Human Rights Approach*, 7 *Duke J. Comp. & Int'l L.* 461 (1997). [Reproduced in tag no. 16]

¹⁰ Jordan J. Paust, *International Criminal Law, Cases and Material*, 718 (1996). [Reproduced in tag no. 25]

¹¹ See *Id.* at 718

Nuremberg Tribunal sentenced several defendants to death and they were hanged only weeks later.¹² However over the forty-nine years that transpired between the trials at Nuremberg and those at the Hague and Arusha, States throughout Europe, Africa, Asia, and the Americas gradually limited the death penalty and, ultimately abolished it in peacetime and wartime.¹³ In mid-1955, the Secretary General of the United Nations concluded that there was a considerable shift toward abolition of the death penalty both de jure and in practice.¹⁴ In of May 1993, the Security Council ruled that the International Criminal Tribunal for Yugoslavia could not impose the death penalty.¹⁵ The general abolition of the death penalty in international law only complicates the issue of sentencing since certain states view life imprisonment as a more cruel

¹² William A. Schabas, *Sentencing by International Tribunals: A Human Rights Approach*, 7 Duke J. Comp. & Int'l L. 461 (1997). [Reproduced in tag no. 16]

¹³ Williams A. Schabas, *Adjudicating Violence: Problem Confronting International Law and Policy on War Crimes and Crimes Against Humanity, War Crimes, Crimes Against Humanity and the Death Penalty*, 60 Alb. L. Rev. 733 (1997). [Reproduced in tag no. 11].

¹⁴ See *Id.* at 733.

¹⁵ See *Id.* at 734.

and inhumane than the death penalty.

B. General Principles of Sentencing of the ICTR

Imposition of sentences by the ICTY must be consistent with the intent of the Security Council. In determining sentences, The Trial Chamber must seek to dissuade for good those who will be tempted in the future to perpetuate such atrocities by showing them that the international community is no longer willing to tolerate serious violations of international humanitarian law and human rights.¹⁶ The Trial Chamber must impose sentences on convicted persons to achieve retribution, deterrence, rehabilitation and to protect society.¹⁷

¹⁶ See United Nations Judgment Report, *The Prosecutor v. Clement Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T., Opinion and Judgment, 7 May 1997, available in United Nations Website at <http://www.ictr.org>. [Reproduced in tag no. 22]

¹⁷ See *Id.* [T]he goal of the criminal punishment must be: (1) retribution which is punishment imposed to vent society's outrage and the need for revenge; (2) deterrence which is punishment imposed to dissuade for good those who will be tempted in the future to perpetrate such atrocities by showing them that the international community is no longer willing to tolerate serious violations of international humanitarian law and human rights; (3) rehabilitation which focuses on the need for the term of imprisonment to provide the opportunity to mold or reform the criminal into a person who upon return to society, will confront his or her behavior to societal norms; (4) to protect society since while imprisoned, a criminal has fewer opportunity to commit acts causing harms to society.

Article 23¹⁸ of the statute of the ICTR and Rule 101¹⁹ of the Rule of Procedure and Evidence provide the general basis for sentencing by the ICTR. Rule 101 B (iii) provides that the trial chamber should take into account "the general practice regarding prison sentences in the courts of Rwanda."²⁰

The tension arises, however, where the sentencing practice set forth by the criminal law of the state of the *locus commisi delicti* (the place where the offence was committed) for the crime in question run afoul of the intent of the United Nations Charter, either because the sentence is too harsh or too lenient.

The International Criminal Tribunal for the Former Yugoslavia [hereinafter the ICTY]²¹ has experienced this dilemma. Like the Rwanda Tribunal's Statute, the Yugoslavia Tribunal Statute provides that it should take

¹⁸ 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 10 (1998).

¹⁹ 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 55 (1998).

²⁰ 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 55 (1998).

²¹ 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for the Former Yugoslavia* (1998). Statute of the International Tribunal for the Former Yugoslavia, S/RES/ (1994)* (Annex), 8 November 1994.

into account the Yugoslavia sentencing practice in determining sentences. In the case of *Dusko Tadic*,²² the first accused to be sentenced by the ICTY, the Trial Chamber imposed a number of concurrent sentences, the maximum being 20 years. The maximum time of confinement allowed under the Penal Code of the Former Yugoslavia, however was coincidentally 15 years. More serious crimes were given the death penalty.²³ The question is therefore is it possible for The Trial Chamber to impose a sentence that is in harmony both with the practice of the former Yugoslavia (and Rwanda) and with the intent²⁴ and purpose of the Security Council?

Rule 101C²⁵ gives The Trial Chamber the possibility of imposing imprisonment for more than twenty years according to the principle of *Maius Includit Minus*.²⁶

²² United Nations Judgment Report, *The Prosecutor v. Dusko Tadic a/k/a "Dule"*, Case No. IT-94-1-T, T. Ch. II, Opinion and Judgment, 7 May 1997, available in United Nations Website at <http://www.un.org>. [Reproduced in tag no. 5]

²³ **Yugoslavia Penal Code, Article 38.**

²⁴ See United Nations Judgment Report, *The Prosecutor v. Clement Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T., Opinion and Judgment, 7 May 1997, available in United Nations Website at <http://www.icttr.org>. [Reproduced in tag no. 22]

²⁵ See 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 55 (1998).

During the drafting the statute of the Yugoslavia tribunal, the Organizations of the Islamic Conference proposed that penalties shall be based on "general principles" of law as they exist in the world's major legal system.²⁷ This proposal was viewed as an acceptable compromise because it is in harmony with the principles of customary international law which is the basis of the tribunal. The principle of *Maius Includit Minus* is widely accepted in modern civilized societies, therefore sentences must be imposed in accordance with this principle.

C. Assessment of Sentences for Multiple Convictions

i. The United States Approach

In the United States, the Federal Courts have adopted a presumption that sentences imposed for charges related to a single event should run concurrently, absent express statement to the contrary.²⁸ This presumption was further recognized when the Court stated, "Absent clear language to

²⁶ See William A. Schabas, *Sentencing by International Tribunals: A Human Rights Approach*, 7 Duke J. Com. & Int'l L. 461, 471(1997). [Reproduced in tag no. 16]

²⁷ See *id.* at 473.

²⁸ *United States v. Miguel Gonzales et al.*, 520 U.S. 1, 117 S.Ct. 1032. Defendants were convicted of various drug offenses and of using firearms during drug trafficking crimes. [Reproduced in tag no. 19]

the contrary, it is presumed that sentences imposed on more than one offense at the same time, or at different times, will run concurrently."²⁹ The adaptation of this presumption is consistent with the Double Jeopardy Clause of the Fifth Amendment of the constitution of the United States which at the very least precludes Federal Courts from imposing consecutive sentences unless authorized by law.³⁰ However, where a term of imprisonment for a state offense is imposed on a person already serving a prison term for a federal offense, the second sentence will be served consecutively.³¹

The United States Congress addressed the problem by enacting the Sentencing Reform Act³² which created the Federal Sentencing Commission³³ to address whether a

²⁹ See *Id.* at 7.

³⁰ See *Thomas W. Whalen v. United States*, 445 U.S. 684, 100 S. Ct. 1432, 1436 (1979, 1980). [Reproduced in tag no. 18]

³¹ *United States v. Miguel Gonzales et al.*, 520 U.S. 1, 117 S.Ct. 1032. Defendants were convicted of various drug offenses and of using firearms during drug trafficking crimes. [Reproduced in tag no. 19]

³² Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987. [Reproduced in tag no. 12]

³³ *Georgetown Law Journal, Sentencing, Probation, and Parole*, 76 Geo. L.J. 1073(1988). The act direct the sentencing commissions to devise narrow sentencing guidelines for every federal offense to provide certainty and fairness in achieving the four goals of sentencing the act recognizes, among them, just punishment and deterrence. [Reproduced in tag no. 21]

sentence should run concurrently or consecutively.³⁴ The Commission was enacted because of "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."³⁵ In his analysis of the issue, Abraham, J. Clott argues that where the defendant is prosecuted separately for an unrelated offense, the court should impose consecutive sentence, but only to the extent necessary to achieve "a reasonable incremental punishment."³⁶

The Federal sentencing Commission address the issue in Chapter 3 and Chapter 5 of the Federal Sentencing Guidelines Manuals. In its introductory comments in the Federal Sentencing Guidelines Manuals,³⁷ the United States Sentencing Commission states that the purpose of that section is:

...to provide incremental punishment³⁸ for significant additional criminal conduct. The

³⁴ Abraham L. Clott, *How to Sentence a Defendant Prosecuted Separately for Factually Unrelated Crimes: An Explanation and Defense of §5G1.3(c)*, Federal Sentencing Reporter, Volume 7, No. 4 (1995). [Reproduced in tag no. 9]

³⁵ See United States ex rel. Forman v. McCall, 776 F.2d 1156,1169 (3d Cir. 1985) [Reproduced in tag no. 21, page 2]

³⁶ See Id.

³⁷ U.S. Sentencing Guidelines Manual § 3D and § 5G (1998). [Reproduced in tag no. 12, and 13]

most serious offense is used as a starting point. The other counts determine how to increase the offense level. The amount of additional punishment declines as the number of additional offenses increases.³⁹

The procedure used for determining sentences is to group together closely related counts.⁴⁰ Counts that are grouped together are treated as constituting "a single offense" for purposes of sentencing.⁴¹ For example, where the defendant is convicted of two counts of assault on a federal officer for shooting at the same officer twice while attempting to prevent apprehension as part of a single criminal episode, the counts are to be grouped together.⁴² But where the defendant is convicted of two counts of assault on a federal officer for shooting at the officer on two separate days, the counts are not to be grouped together.⁴³

³⁸ Abraham L. Clott, *How to Sentence a Defendant Prosecuted Separately for Factually Unrelated Crimes: An Explanation and Defense of §5G1.3(c)*, Volume 7, No. 4 (1995). A "reasonable incremental punishment" is defined as a sentence that will achieve a total punishment equal to what would have been imposed had the sentence covered all the offenses in a single proceeding. [Reproduced in tag no. 9]

³⁹ See *id.*

⁴⁰ See U.S. Sentencing Guidelines Manual § 3D and § 5G (1998). [Reproduced in tag no. 12 and 13]

⁴¹ See *id.* at 276.

⁴² See *id.* at 276.

⁴³ See *Id.* at 276.

The Supreme Court of the United States in applying this proposition reasoned that multiple punishments cannot be imposed for two offenses arising out of the same criminal transaction unless each offense "requires proof of a fact which the other does not."⁴⁴ In order to assess what sentence to impose, the Court must decide whether one or two offenses were committed. The Court stated that the test to apply is determining whether there are two offenses or only one is whether each offense requires proof of an additional fact which the other does not.⁴⁵ Thus, the United States have adopted the view that multiple convictions arising out of the same set of facts will be sentenced concurrently, whereas convictions arising out of different sets of facts will be sentenced consecutively. The key is to identify the requisite mental state (*mens rea*) for each crimes and the prohibited act or omission resulting in the crime (*actus reus*). If the two crimes require different elements, then the defendant must be sentenced consecutively. If one crime is considered to be a lesser included offense with the offense that the defendant is charged with, or if the two crimes arise out of the same

⁴⁴ See *Thomas W. Whalen v. United States*, 445 U.S. 684, 691,692 (1980).

mental state and acts, the defendant will be sentenced concurrently.

ii. The Australian Approach

Australia has adopted a different approach in dealing with the same issue. The underlying concept behind the Australian approach is the minimization of the potential crushing effects of imprisonment.⁴⁶ Thus, emphasis is placed heavily on rehabilitation.

A study conducted by Austin Lovegrove based on past cases heard in the Victorian Court of Criminal Appeal between 1985 to 1994, indicates that the decision strategy for the determination of effective sentences used by Australian judges constitute as a three-stage process.⁴⁷

In the first stage, The judge must first group the counts into separate transactions, and impose an appropriate sentence for each of the counts.⁴⁸ Where a single count constitutes a separate transaction, the

⁴⁵ See *Blockburger v. United States*, 284 U.S. 299, 303 (1932).

⁴⁶ Austin Lovegrove, *Sentencing the Multiple Offender: Towards Detailed Sentencing Statistics for Armed Robbers*, *The Australian and New Zealand Journal of Criminology*, Vol. 31, (1998). [Reproduced in tag no. 20]

⁴⁷ See *id* at 9.

sentence for that count represents that transaction.⁴⁹ Where two or more counts form a single transaction and together constitutes a separate transaction, the highest sentence fixed for those counts represents that transaction.⁵⁰ Once this is done, the judge identifies the principal offense (transaction); the principal transaction is the transaction with the highest sentence or, when two or more transactions have equally high sentences, any one of these.⁵¹ The sentence for the principal offense (transaction) is regarded as the foundation for the cumulation in the sense that the effective sentence is built upon this sentence.

Consider, for example, a case comprising three armed robberies and an aggravated burglary, for which the respective sentences were five, three, three and four years. assume also that the first armed robbery and the aggravated burglary formed a single transaction, and that the second and third counts of armed robbery were separate

⁴⁸ See Id. at 10.

⁴⁹ See Id. at 10.

⁵⁰ See Id. at 10.

⁵¹ See Id. at 10.

transactions.⁵² The former two counts would constitute the principal transaction and there would be two secondary counts (transactions) - the latter two counts.⁵³ The sentences of five and four years would be served concurrently and the two sentences of three years in principle would be served cumulatively. How the judge determines the extent to which these latter two sentences should be served partially cumulatively on the sentence of five years so as not to offend the totality principle is the subject of the next two stages of the decision model.⁵⁴ Therefore in the first stage of the process, the scene is set for the cumulation - the counts comprising the case are sorted into separate transactions, and sentences imposed for the counts.⁵⁵

In the second stage,⁵⁶ attention is directed to the effect on cumulation of the sentence for the principal

⁵² See *Id.* at 11.

⁵³ See *Id.* at 11.

⁵⁴ See Austin Lovegrove, *Sentencing the Multiple Offender: Towards Detailed Sentencing Statistics for Armed Robbers*, *The Australian and New Zealand Journal of Criminology*, Vol. 31, (1998). [Reproduced in tag no. 3]

⁵⁵ Austin Lovegrove, *Sentencing the Multiple Offender: Towards Detailed Sentencing Statistics for Armed Robbers*, *The Australian and New Zealand Journal of Criminology*, Vol. 31, (1998). [Reproduced in tag no. 3]

offense (transaction).⁵⁷ The effective sentence is treated as comprising the full measure of the sentence for the principal offense (transaction) and a proportion (component) of the sentences representing each of the secondary counts (transactions).⁵⁸ It follows from this that the sentence for the principal offense (transaction) governs what scope is left for the quantum cumulated upon this sentence to reflect the seriousness of the secondary counts (transactions).⁵⁹ Where the sentence for a principal offense (transaction) is higher, so the quantum of sentence cumulated to allow for the seriousness of the secondary counts (transaction) in the effective sentence is a smaller proportion of the sentences appropriate to these other transactions. This stage of the strategy can be illustrated numerically.

Consider for example a case comprising an armed robbery and 10 counts of burglary, all separate transactions, for which the respective sentences are 10

⁵⁶ Austin Lovegrove, *Sentencing the Multiple Offender: Towards Detailed Sentencing Statistics for Armed Robbers*, *The Australian and New Zealand Journal of Criminology*, Vol. 31, (1998). [Reproduced in tag no. 3]

⁵⁷ Austin Lovegrove, *Sentencing the Multiple Offender: Towards Detailed Sentencing Statistics for Armed Robbers*, *The Australian and New Zealand Journal of Criminology*, Vol. 31, (1998). [Reproduced in tag no. 3]

⁵⁸ See *Id.* at 12.

years and one year each; little of the 10 years of sentences for the burglaries should be added on to the sentence for the armed robbery (say, two years - 20% of the 10 years for the burglaries, giving an effective sentence of 12 years) because its sentence of 10 years already presents a daunting prospect to an offender. But was the sentence for the armed robbery only three years, then a greater proportion of the 10 years of sentences for the burglaries could be made cumulative (say, two years six months - 25% of these 10 years) because concern over the crushing effects of the potential effective sentence would carry less weight.⁵⁹

The third stage deals with the treatment of the sentences for the secondary counts (transactions).⁶⁰ The scope for cumulation having been determined by the sentence for the principal offense (transaction) to be added on to the sentence for the principal offense (transaction). As the sum of the sentences for the secondary counts (transactions) becomes higher, so the quantum of sentence cumulated to represent the seriousness of these

⁵⁹ See Id.

transactions in the effective sentence must be a smaller proportion of their appropriate sentences. Nevertheless, this progressive decrease in the proportion cumulated must be tempered to ensure that the quantum cumulated is greater when the sum of the sentences for the secondary counts (transactions) is higher.

This three-step analysis represents the judges' approach in determining effective sentences for the multiple offender.⁶¹ The goal of this procedure is to reach an effective sentence, based on the degree of severity of the crimes, appropriate to the seriousness of the offender's criminality manifest in the case as a whole.⁶² The Court focuses on the totality of the sentence to decide its effectiveness.

In essence the United States and Australia use the same test which focuses on whether the defendant is convicted of crimes arising out of the same set of facts.

⁶⁰ Austin Lovegrove, *Sentencing the Multiple Offender: Towards Detailed Sentencing Statistics for Armed Robbers*, *The Australian and New Zealand Journal of Criminology*, Vol. 31, (1998). [Reproduced in tag no. 3]

⁶¹ Austin Lovegrove, *Sentencing the Multiple Offender: Towards Detailed Sentencing Statistics for Armed Robbers*, *The Australian and New Zealand Journal of Criminology*, Vol. 31, (1998). [Reproduced in tag no. 3]

⁶² *See* Austin Lovegrove, *Sentencing the Multiple Offender: Towards Detailed Sentencing Statistics for Armed Robbers*, *The Australian and*

However in Australia the final sentence will be based on the count with the highest sentence with additional term for each additional counts. Thereafter, the judge will look at the offender's manifest criminal intent to decide if the sentence is appropriate.

iii. The United Kingdoms Approach

In the United Kingdom, the "totality principle" is used in determining the appropriate sentence.⁶³ This means that, after the sentence has been imposed on each count, the court should then consider whether the total sentence is too long.⁶⁴ Under the "totality principle" the Court should first seek to hit upon the appropriate sentence for each offense.⁶⁵ The next step is to decide whether, in principle, the final sentences should so expressed as to involve in each instance, a real addition, rather than being compressed into a set of concurrent sentences.⁶⁶ Those two questions should, then, be put in perspective in

New Zealand Journal of Criminology, Vol. 31, (1998). [Reproduced in tag no. 3]

⁶³ Peter Hutchesson, *Re SA Conversions LTD*, New Law Journal, Vol. 6361, 169 (1988).

⁶⁴ See *id.*

⁶⁵ See *id.*

⁶⁶ See *id.*

order to see whether logic should yield to a broader concept of proportionality between the time which the offender has to spend in prison and the wrongfulness of his conduct.⁶⁷ The sentencer must do his best to arrive at a suitable global figure, and then arrive at it either by reducing the individual sentences while keeping them consecutive, or making some or all of them take effect concurrently.⁶⁸ Thus in the United Kingdom, the Court uses a comprehensive balancing test in determining whether an offender should be sentenced concurrently or consecutively. The court, however, is given a great amount of judicial discretion in reaching the final decision.

D. Effect of the Statutory and Regulatory Provision of the ICTR on Sentencing.

The ICTR's statutory and regulatory provisions on sentencing must be weighted as well in determining whether to impose a concurrent or a consecutive sentence. Article 23 (2)⁶⁹ of the statute of the ICTR and Rule 101 (B)⁷⁰

⁶⁷ See id.

⁶⁸ See id.

⁶⁹ See 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda 10* (1998). Article 23(2) which provides: In imposing the sentences, the Trial Chambers should take into account such factors as the gravity of the offense and the individual circumstances of the convicted person. [Reproduced in tag no. 14]

provide the relevant statutory and regulatory framework that the court must consider.

It is settled, as per the plain meaning of the Statute and the Rules of Procedure and Evidence of the ICTR, that the determination of sentences is left to the discretion of the Trial Chamber.⁷¹ The Special Rapporteur on, International Criminal Court, for the International Law Commissioner suggested that the penalties should be proportionate to the gravity of the crime committed.⁷² He

⁷⁰ See 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 55 (1998). Rule 101 B of the Rule of Procedure and Evidence of the ICTR which provides: [Reproduced in tag no. 14]

In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 23(2) of the Statute, as well as such factors as:

- (i) any aggravating circumstances;
- (ii) mitigating circumstances including the substantial co-operation with the Prosecutor by the convicted person before or after conviction;
- (iii) the general practice regarding prison sentences in the courts of Rwanda;
- (iv) the extent to which any penalty imposed by a court of any State on the convicted person for the same act has already served, as referred to in Article 9(3) of the Statute.

⁷¹ United Nations Judgment Report, *The Prosecutor v. Jean Kambada*, Case No. ICTR 97-23-S. Released by The International Criminal Tribunal for Rwanda, Office of the Prosecutor. [Reproduced in tag no. 6]

further stated that it is appropriate to select penalties on which there is the broadest agreement and whose underlying principle is generally accepted by the international community.⁷³

The trial chamber should take into account, apart from the general practice regarding prison sentences in the court of Rwanda,⁷⁴ a number of other factors including the gravity of the crime, the personal circumstances of the convicted person, the existence of any aggravating or mitigating circumstances, including the substantial cooperation by the convicted person before or after conviction.

The gravity of the offense is of the most significant factor. In *Prosecutor v. Kayishema*,⁷⁵ the Trial Chamber found that Kayishema's four convictions of genocide constitute "offenses beyond human comprehension and of the

⁷² William A. Schabas, *Panel II: Adjudicating Violence: Problems Confronting International Law and Policy on War Crimes and Crimes Against Humanity* 60, Alb. L. Rev. 733,744 (1997). [Reproduced in tag no. 11]

⁷³ See *id.* at 744, 745.

⁷⁴ See 2 Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 55 (1998). [Reproduced in tag no. 14]

⁷⁵ See United Nations Judgment Report, *The Prosecutor v. Clement Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T., Opinion and Judgment, 7 May 1997, available in United Nations Website at <http://www.ictr.org>. [Reproduced in tag no. 22]

most extreme gravity.”⁷⁶ He was sentenced of four life sentences to be served concurrently.⁷⁷ The test applied by the court to judge the gravity of the offense is whether the offense is one of the most extreme gravity, an offense that shocks the conscience of humanity.⁷⁸

Another important factor in the jurisprudence of the ICTR is the defendant’s motivation. In *Prosecutor v. Tadic*, the ICTY focused on the “willingness” of *Dusko Tadic* to perpetuate the crimes.⁷⁹ The court referred to “his conscious desire to contribute to the elimination of non-Serb elements and his continuous involvement in the prosecution of non-Serbs.”⁸⁰ *Tadic* was subsequently convicted and sentenced concurrently for crimes committed on the Muslim population in Kozarac and Omarska. It is clear that the crimes arise out of different transactions and on different dates. Thus, the *Tadic*’s sentencing is in

⁷⁶ See *Id.*

⁷⁷ See *Id.*

⁷⁸ See *id.*

⁷⁹ United Nations Judgment Report, *The Prosecutor v. Dusko Tadic a/k/a "Dule"*, Case No. IT-94-1-T, T. Ch. II, Opinion and Judgment, 7 May 1997, available in United Nations Website at <http://www.un.org>. [Reproduced in tag no. 5]

⁸⁰ See *id.*

contradiction with customary International Law. In *Prosecutor v. Kayishema*, the Trial Chamber similarly focused on the fact that the defendant voluntarily committed and participated in the offenses.⁸¹

Finally, the ICTY and the ICTR have taken into account the individual circumstances of the convicted person in determining the sentence.⁸² In evaluating the individual circumstances of the accused, the Trial Chamber looks at previous criminal convictions, the age of the defendant, his standing in the community, and the position held by the convicted person.⁸³ The effect of the length of sentence on the family of the accused is to be considered as well.⁸⁴ However, those factor should not be looked at until after the determination of the appropriate sentence is reached.

⁸¹ United Nations Judgment Report, *The Prosecutor v. Jean Kambada*, Case No. ICTR 97-23-S. Released by The International Criminal Tribunal for Rwanda, Office of the Prosecutor. [Reproduced in tag no. 6]

⁸² United Nations Judgment Report, *The Prosecutor v. Dusko Tadic a/k/a "Dule"*, Case No. IT-94-1-T, T. Ch. II, Opinion and Judgment, 7 May 1997, available in United Nations Website at <http://www.un.org>. [Reproduced in tag no. 6]

⁸³ See id.

⁸⁴ See id.

CONCLUSION

The Security Council granted to the ICTR the discretion to impose sentences that are consistent with the purpose of the Tribunal. It well documented that the perpetrators of the Rwanda genocide engaged willingly in a course of conduct that is in violation of humanitarian international law. Therefore, regardless of the provision of the Penal Code of Rwanda or previous non-binding decisions of the ICTY, the ICTR may impose consecutive sentences for multiple convictions as long as the crimes arise out of different set of facts.