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Imprisonment for Life at the International Criminal Court

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1. Introduction

Nowadays, international criminal tribunals (ICTs) are increasingly being accused of being reluctant to show concern for defendants,[1] whose fundamental human rights may easily be undermined during criminal proceedings. This is probably due to the fact that such tribunals are often too busy trying to increase their credibility, which so far seems to be based on the number of convictions. Consequently, the real 'Copernican revolution' of international criminal law would be to start focusing on the rights recognized to the accused indicted by ICTs' apparatuses. Moreover, such safeguards should extend to both the convicted and the detained, since the criminal trial wields its most potent effects at the moment that the punishment is imposed. To this end, a radical reconsideration of the penalties imposable by the International Criminal Court (ICC), the international criminal tribunal of the present and of the future, is crucial. Therefore, it is necessary to reassess the role and the meaning of the supreme punishment envisaged in the ICC system: life imprisonment. Doing so, the ICC could truly start serving as a beacon for the culture of respect for human dignity and rights that it proffers to foster.

Indeed, imprisonment for life is often considered the only appropriate alternative to the death penalty in order to condemn nefarious crimes and is strongly supported at the international level. In effect, international human rights standards as conceived by the United Nations' (UN) main organs and bodies and the majority of regional organizations and courts – most notably, the European Court of Human Rights (ECtHR) – do not question the legitimacy of life imprisonment *per se*. In contrast, they have only, at times, attempted to undermine the legitimacy of life imprisonment *without* parole, not touching on the issue of life imprisonment *with* parole.[2]

Nonetheless, although life sentences are based on imprisonment, which is generally considered a tolerable infliction of pain, they present an indefinite term of imprisonment, taking to the extreme the traditional issues of incarceration.[3] This is because they pose characteristic difficulties, for instance the unlimited power they confer on the authority.[4] Also, it is impossible to focus here on the noxious psychological and sociological consequences of life imprisonment on the indicted, mainly caused by the outstanding and uncertain length of the deprivation of liberty it implies.[5] It suffices to underline that, due to these issues,

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1 See e.g. S. Zappalà, 'The Rights of Victims v. the Rights of the Accused', (2010) 8 *Journal of International Criminal Justice*, no. 1, pp. 137-164.

2 See e.g. *László Magyar v Hungary,* Judgment of 20 May 2014, [2014] ECHR; *Vinter and Others v The United Kingdom*, Judgment (Grand Chamber) of 9 July 2013, [2013] ECHR.

3 G. Mosconi, 'Il Massimo della Pena', in S. Anastasia & F. Corleone (eds.), *Contro l'Ergastolo: Il carcere a vita, la Rieducazione e la Dignità della Persona* (2009), p. 94.

4 D. van Zyl Smit, 'Life Imprisonment as the Ultimate Penalty in International Law: A Human Rights Perspective', (1999) 9 *Criminal Law Forum*, no. 5, p. 29. Due to this issue, some states, such as Portugal, have rejected life imprisonment.

5 The literature on the subject is conspicuous and surpasses the borders of legal studies. See e.g. K. Drenkhahn et al. (eds), *Long-Term Imprisonment and Human Rights* (2014); S. Yang et al., 'Doing Time: A Qualitative Study of Long-Term Incarceration and the Impact of Mental Illness', (2009) 32 *International Journal of Law and Psychiatry*, pp. 294-303; E. Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (1961).

some authors argue that such a penalty may violate fundamental human rights.[6] For instance, the right to a family life, freedom of expression and privacy,[7] as well as the crucial principle of rehabilitation, also risking to constitute a form of cruel, degrading and inhuman treatment that violates human dignity.[8]

Moreover, the increasingly controversial nature of life imprisonment is proved by a comparative analysis of national legislation, since the number of countries that have abolished life imprisonment *tout court* or *de facto* or where life imprisonment has been censured as unconstitutional is considerable. Also among the States Parties to the Rome Statute (SPs) they are in double figures, namely 23, mainly in Latin America and Europe.[9] Furthermore, such SPs, according to Article 89 of the Rome Statute of the ICC (ICCS),[10] in Part IX about 'International cooperation and judicial assistance', are obliged to surrender persons on their territory at the request of the Court. However, this may cause some issues in those SPs that do not envisage life imprisonment in their national jurisdictions. Indeed, for example, Portugal has banned the possibility to extradite an individual if that person will face the prospect of having a life sentence imposed by the requesting state.[11] In such cases, there are various options. For instance, Colombia and El Salvador reformed their constitutions, explicitly making such a surrender possible only to the ICC.[12] Differently, Costa Rica disentangled the issue with a sentence of the Constitutional Court that reinterpreted the Constitution.[13] In a similar vein, even though the Brazilian Constitution prohibits life imprisonment,[14] such a ban has been interpreted as regarding only the relationship between the individual who committed the offence in the Brazilian territory and Brazil itself.[15] Such a concise catalogue of some of the diverse expedients enacted in different SPs that do not envisage life imprisonment clearly shows that these States had to adapt in order to avoid any tension between international obligations and national jurisdictions. In effect, the ICC system has mistakenly failed to provide for any way out for abolitionist SPs.

The debate regarding this penalty is therefore almost omnipresent at the national level, thus reversing the trend of quasi-disinterest that reigns in international law. Such remarks clearly indicate that the provision and imposition of imprisonment for life should at least be carefully considered and surrounded by guarantees and safeguards for the convicted.

The objective of the article is to call attention to the delicate but often disregarded issue of life imprisonment at the ICC, especially regarding how such a penalty could be imposed and reviewed, and the problems this entails. This article contends that several reforms of the ICCS and changes in the ICC's line of case law should be considered as vital in order to tackle the urgencies caused by some of the provisions of the ICC system concerning life imprisonment. In fact, notably, there are a plethora of elements that render the possible future application of such a grave penalty devoid of fundamental minimum requirements for the protection of the offender, which are essential in the context of a criminal trial.

6 D. van Zyl Smit & C. Appleton, *Life Imprisonment and Human Rights* (2016), p. 3; see Van Zyl Smit, supra note 4, p. 3.
7 Ibid.
8 This last argument was widely used at the Rome Conference as well; see e.g. Advocacy Project, 'Trinidad Execution Plan Raises Spectre of Death Penalty Row at Rome', (1998) 1 *On the Record: Your Link to the Rome Conference for the Establishment of an International Criminal Court*, no. 10, NGO_ADVOCACYPROJECT_OTR10.
9 These are Andorra, Bosnia and Herzegovina, Bolivia, Brazil, Cape Verde, Colombia, Costa Rica, Croatia, Cyprus, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Iceland, Mexico, Montenegro, Norway, Panama, Paraguay, Portugal, Serbia and Uruguay.
10 'ICCS' is always intended to refer to the Rome Statute of the International Criminal Court (1998).
11 Constitution of Portugal (2 April 1976), Art. 33(5).
12 E. Fronza, 'Le Sanzioni', in G. Lattanzi & V. Monetti (eds.), *La Corte Penale Internazionale: Organi, Competenza, Reati, Processo* (2006), p. 536.
13 Ibid.
14 Constitution of the Federative Republic of Brazil (5 October 1988), Art. 5 (XLVII).
15 R.S. Lee, 'States' Responses: Issues and Solutions', in R.S. Lee (ed.), *States' Responses to Issues Arising from the ICC Statute: Constitutional, Sovereignty, Judicial Cooperation and Criminal Law* (2005), pp. 193-194.

2. The regulation of life imprisonment in the ICC legal framework and the problem of sentencing

2.1 Life imprisonment in the ICCS and the criteria of 'extreme gravity of the crime and the individual circumstances of the convicted person'

Life imprisonment was included as an option in the ICC system after a long and strenuous political debate about penalties that resulted in the ICCS.[16] In particular, the conflict between the states that traditionally reject the death penalty and life imprisonment – mainly South America and part of Europe – and the states that consider such penalties as a prerequisite for the credibility of the ICC – for example Caribbean and Arab States – intensified at the 1998 Rome Conference. In the end, the ICCS refused to include the death penalty and introduced a moderate form of life imprisonment. Therefore, Article 80 was added in order to soothe the heated discussion. It provides that nothing in the ICCS 'affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part'.

As a result, as in all other international and internationalised criminal tribunals established after World War II – with the exception of the Special Tribunal for Lebanon – life imprisonment is envisaged by the ICC legal framework in Part 7 of the ICCS, concerning penalties available in case of conviction. It is the gravest penalty imposable by the ICC and, according to Article 78(3) of the ICCS, it can also be imposed if a person has been convicted for more than one crime at once. As suggested by Article 77, while imprisonment for a specified number of years is the standard penalty, life imprisonment may be imposed when the normative criteria – i.e. the 'extreme gravity of the crime and the individual circumstances of the convicted person' – are met. Therefore, it is presented as an exceptional punishment. This is also confirmed by the fact that the abovementioned requirements, although in line with those provided for the determination of sentences in general in Article 78(1), include the additional significant adjective 'extreme'. As a consequence, the regulation should be interpreted as stating that life imprisonment should *only* be imposed when the two criteria are strictly and cumulatively met, even though the wording of Article 77(1)(b) does not explicitly state so and the Spanish proposal of adding the word 'only' in the corresponding Rule of the ICC Rules of Procedure and Evidence (RPE) was disregarded.[17] Such an approach is also justified because the reference to the exceptionality of life imprisonment, together with the introduction of a system of review of sentences, played a crucial role in the negotiations about penalties.[18]

Moving to the analysis of the two criteria, it is preliminarily relevant to underline that the ICCS does not provide any ranking between them[19] and, as a consequence, the two criteria should be viewed as equally important. Indeed, even though in the case law of both the *ad hoc* tribunals and several national courts the criterion of the gravity of the crime is usually considered the most decisive factor in the determination of a sentence,[20] such an approach was watered down by the ICC Trial Chamber (TC) in *Lubanga*, in line with other national case law and the ECtHR approach.[21] In *Lubanga*, the gravity of the crime was simply described as 'one of the principal factors' to be assessed with other equally fundamental factors, such as the culpability of the individual indicted.[22] This shows that this factor is still particularly significant – as it clearly emerges in *Bemba*, where it is qualified as constituting 'a principal consideration in imposing a sentence'[23] – but it is no longer the so-called 'litmus test' of the *ad hoc* tribunals.[24] Therefore, this factor should be balanced with the other element: the individual circumstances of the convicted person.

16 For a detailed description of this path, see e.g. M.C. Bassiouni (ed.), *The Legislative History of the International Criminal Court* (2005); M.C. Bassiouni, *The Statute of the International Criminal Court: A Documentary History* (1998).
17 UN Doc. PCNICC/2000/WGRPE/L.11 (2000); UN Doc. PCNICC/1999/WGRPE(7)/RT.2 (1999).
18 W.A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (2017), p. 1157.
19 Ibid., p. 1169.
20 K. Ambos, *Treatise on International Criminal Law* (2014), Vol. II, p. 284.
21 N. Kisic & S. King, 'Toward a More Lenient Law: Trends in Sentencing from the European Court of Human Rights', (2014) 21 *Human Rights Brief*, no. 2, p. 5.
22 The *Lubanga* case (Decision on Sentence pursuant to Article 76 of the Statute), ICC-01/04-01/06 (10 July 2012), para. 36.
23 The *Bemba* case (Decision on Sentence pursuant to Article 76 of the Statute), ICC-01/05-01/08 (21 June 2016), para. 15.
24 See e.g. the *Mucić et al.* case (Appeal Judgment), IT-96-21-A (20 February 2001), para. 731.

Notwithstanding the prominence of the criterion, the phrase 'extreme gravity of the crime' appears inchoate and its interpretation rather complex. Indeed, by definition, the ICC was established and developed with the express intention to prosecute and punish – citing the solemn statement of the Preamble and Article 5 of ICCS – only 'the most serious crimes of concern to the international community as a whole'. It follows that life imprisonment is imposable only in cases of exceptional and outstanding gravity in crimes that are, intrinsically, of extraordinary seriousness.

Nevertheless, it is not clear whether the requirement of 'extreme gravity' should be interpreted as relative to other crimes of the same type already committed or conceivable, for instance different kinds of war crimes,[25] or also to other typologies of crimes under the ICC jurisdiction. What is certain is that both possible explanations provoke doubts. In any case, setting aside the difficulty posed by an assessment that can be partially abstract, it is not straightforward to identify a hierarchy between the crimes covered by the ICCS, since such a hierarchy is not explicitly provided.[26] The case law of the *ad hoc* tribunals, as well as numerous scholars, have attempted to create a ranking of types of gravity, taking into account diverse criteria[27] such as the degree of harm caused[28] and the characteristics of crimes.[29] Generally, there is great consensus that crimes against humanity and the crime of genocide – defined as 'the crime of crimes' by the International Criminal Tribunal for Rwanda (ICTR)[30] – are usually more serious and deserve harsher penalties, at least, than single war crimes, which normally do not attract a life sentence.[31] In addition, according to the same case law, in a particular kind of crime, for instance crimes against humanity, imprisonment could be abstractly evaluated as less serious than torture.[32] However, these guidelines could be disregarded after a concrete assessment of the case in question. As a consequence, very harsh penalties such as life imprisonment should not be *tout court* imposed for crimes generally considered as characterised by 'extreme gravity' *in abstracto*, since an assessment *in concreto* of the crime is always necessary.[33] With reference to the ICC, the abovementioned conclusions can be confirmed by clues present in the ICCS.[34] For instance, Article 124 is a transitional provision that temporarily allows SPs not to accept the jurisdiction of the Court with reference only to war crimes. Similarly, Article 33 asserts that no defence of superior orders can be claimed in case of genocide and crimes against humanity; *a contrario*, this defence could apply to war crimes. As a result, it appears that both indications suggest that war crimes are less serious.[35] Moreover, in *Katanga*, the TC stated that '[a]ll crimes forming the grounds for the criminal conviction are not necessarily of equivalent gravity and the Chamber has the duty to weight each of them by distinguishing, for example, those against persons from those targeting only property'.[36] The same is emphasized in *Al Mahdi*.[37] However, these are simply hints. The lack of determinateness that qualifies such an issue causes negative consequences, most notably the unpredictability of the punishment to be imposed. Therefore, sentences could be perceived as unfair and inconsistent, entailing a wide range of problems related to the credibility of the Court.

Furthermore, the phrase 'gravity of the crime' generally embraces a number of mixed and vague factors that make the quantification of 'gravity' a difficult task.[38] Neither the ICCS nor the RPE clarify the issue, since the only indications provided are in Rule 145(1)(c), which chaotically lists a limited series of factors. Part of

25 A. Lanciotti, 'Le Pene Comminabili dalla Corte Penale Internazionale', in G. Carlizzi et al. (eds.), *La Corte Penale Internazionale: Problemi e Prospettive* (2003), pp. 426-427.
26 S. D'Ascoli, 'International Sentencing: Law and Practice', in R. Mulgrew & D. Abels (eds.), *Research Handbook on the International Penal System* (2016), p. 147.
27 S. D'Ascoli, *Sentencing in International Criminal Law: The UN Ad Hoc Tribunals and Future Perspectives for the ICC* (2011), p. 304.
28 M.C. Bassiouni, *International Criminal Law* (1999), Vol. I, pp. 95-100.
29 A.M. Danner, 'Constructing a Hierarchy of Crimes in International Criminal Law Sentencing', (2001) 87 *Virginia Law Review*, pp. 472-483.
30 E.g. the *Rutaganda* case (Judgment and Sentence), ICTR-96-3-T (6 December 1999), para. 451; the *Kambanda* case (Judgment and Sentence), ICTR-97-23-S (4 September 1998), para 16.
31 See D'Ascoli, supra note 27, p. 225; F.P. King & A. La Rosa, 'Penalties', in F. Lattanzi & W.A. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court* (1999), Vol. 1, pp. 322-323.
32 See Ambos, supra note 20, p. 294.
33 See D'Ascoli, supra note 27, p. 307.
34 W.A. Schabas, 'Penalties', in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002), Vol. II, p. 1506.
35 Ibid.
36 The *Katanga* case (Decision on Sentence pursuant to Article 76 of the Statute), ICC-01/04-01/07 (23 May 2014), para. 43.
37 The *Al Mahdi* case (Judgment and Sentence), ICC-01/12-01/15 (27 September 2016), para. 77.
38 See Ambos, supra note 20, p. 291.

them can be considered as elements of the assessment of gravity, namely 'the extent of the damage caused, in particular the harm caused to the victims and their families'; 'the nature of the unlawful behaviour and the means employed to execute the crime'; 'the degree of participation of the convicted person'; 'the degree of intent' and 'the circumstances of manner, time and location'. However, on the one hand, the catalogue appears incomplete. On the other, so far, such a criterion has not been organically analysed by ICC case law with reference to sentencing, the Court mainly having focused on the concept of jurisdictional gravity that could justify the admissibility of a case.[39] A reference to gravity as a factor in sentencing was made in *Al Mahdi*, where the TC tried to summarise the factors to be taken into account, mentioning 'the extent of damage caused, the nature of the unlawful behaviour and, to a certain extent, the circumstances of the time, place and manner'.[40] In a similar vein, the *ad hoc* tribunals' case law generally refers to the nature and magnitude of the crime, the manner in which it was committed, the criminal conduct, the degree of participation and role of the accused, his/her intent, any contempt of the rule of law and the values protected demonstrated by the offender, the number of victims and the degree of physical and psychological suffering caused and other particular circumstances of the case.[41] In all probability, the ICC will refer to such case law. However, overall, the factors claimed to be part of the assessment of the gravity criterion are various and diverse. Moreover, the relevant norms offer no certainty.

To add to the confusion, there is the fact that many of the criteria mentioned could also be considered as aggravating or mitigating circumstances,[42] especially bearing in mind that the list of circumstances provided in Rule 145(2)(a) and (b) of the RPE is not exhaustive. As recalled also in *Al Mahdi*,[43] in *Bemba* the TC attempted to clarify the distinction.[44] In particular, it stated that 'gravity necessarily involves consideration of the elements of the offence itself', while '[a]ggravating circumstances must relate to the crimes upon which a person was convicted and to the convicted person himself'.[45] However, it then admitted that '[b]eyond such elements, the Chamber has a degree of discretion to consider relevant factors in assessing gravity or, if exceptional, as aggravating circumstances'.[46] As a consequence, the risk of double counting emerges, even though such a practice is strictly prohibited, as underlined by unanimous ICC case law.[47]

The criterion of the 'gravity of the crime', however, is implemented and associated with the 'individual circumstances of the convicted person'.[48] In this manner, as also underlined in *Al Mahdi*[49] and in the *ad hoc* tribunals' case law,[50] the gravity is to be considered *in concreto*.

Nevertheless, also the expression concerning the 'individual circumstances of the convicted person' is rather unclear. Rule 145(1)(c) of the RPE only mentions 'the age, education, social and economic condition of the convicted person', again without providing for a comprehensive list. Based on the International Criminal Tribunal for the former Yugoslavia (ICTY) and ICTR case law, the factors which can be taken into consideration are various.[51] First of all, it would be necessary to take into account the physical and psychological biology of the person convicted, namely his/her age and physical and mental health. Indeed, both at national and international level, life imprisonment is generally not imposed in case of poor health, especially on very elderly people, or on particularly young individuals, since offenders in early life are considered more susceptible to rehabilitation.[52] Secondly, it is significant to consider the social and economic history and status of the

39 See e.g. the *Lubanga* case (Judgment on the Prosecutor's Appeal Against the Decision of Pre-Trial Chamber I Entitled 'Decision on the Prosecutor's Application for Warrants of Arrest, Article 58'), ICC-01/04 (13 July 2006), paras. 54 et seq.
40 See the *Al Mahdi* case, supra note 37, para. 76.
41 See Schabas, supra note 18, p. 1169; Ambos, supra note 20, p. 292; A. Carcano, 'Sentencing and the Gravity of the Offence in International Criminal Law', (2002) 51 *Int.'l. & Comp. L. Q.*, pp. 592-593.
42 See Ambos, supra note 20, p. 289.
43 See the *Al Mahdi* case, supra note 37, para. 73.
44 See the *Bemba* case, supra note 23, para. 18.
45 Ibid.
46 Ibid., para. 15.
47 See the *Al Mahdi* case, supra note 37, para. 70; the *Bemba* case, supra note 23, para. 14; the *Katanga* case, supra note 36, para. 35; the *Lubanga* case, supra note 22, para. 35.
48 See Ambos, supra note 20, p. 293.
49 See the *Al Mahdi* case, supra note 37, para. 71.
50 E.g. the *Delalić* case (Sentencing Judgment), IT-96-21-T (16 November 1998), p. 1231.
51 See e.g. D'Ascoli, supra note 27, pp. 156-184; R. Dixon & K.A.A. Khan, *Archbold International Criminal Courts: Practice, Procedure and Evidence* (2013), pp. 1455-1457. Here it follows a categorization of the author based mainly on these sources.
52 E.g. the *Erdemović* case (Sentencing Judgment), IT-96-22-Tbis (5 March 1998), para. 16.

convicted person, with a particular focus on the likelihood of rehabilitation and the absence of risk presented by the individual. For instance, factors such as family situation and background; character, personality and maturity, even with reference to possible previous criminal records and the capability to disobey the authority that ordered to commit the crime; education and IQ; job; position in society; the behaviour adopted after the crime, for example during the proceedings before the ICC and to victims, and the list may continue. The criteria that the Court could consider are therefore numerous and varied. On the one hand, this facilitates the individualisation of the sentence, which is fundamental, as underlined in *Katanga*.[53] On the other, the fact that there are no guidelines causes possible inequalities of treatment between convicted persons as well as a general lack of certainty, which, in criminal law, is a censurable approach in itself.

Moreover, also in this case, the majority of the factors to be assessed in the evaluation of the criterion in question could be contemplated as aggravating or as mitigating circumstances, causing the aforementioned problems, which are increased in case of life imprisonment.

Eventually, it should be emphasised that, where Article 77(1) provides that the imposition of life imprisonment should be 'justified' by the criteria examined, it is highly possible to imagine that the choice of such a penalty should be carefully accounted for, in order to highlight the exceptional considerations that have led to the imposition of a life sentence. For this reason, the motivation of the sentence should be justified in minute detail and understandable for both the convicted person and the general public.

2.2 Further problems of sentencing

With reference to the general issue of sentencing, unlike the *ad hoc* tribunals, it is not envisaged in the ICCS that the Court should have recourse to the sentencing practice of the territory where the crime has been committed or to any other national law. However, the ICC can consider national law under Article 21(1)(c) of the ICCS. This could have an indirect negative impact on the assessment of the appropriateness of imposing life imprisonment, since most SPs provide for life imprisonment in their national jurisdictions.

Moreover, on the whole, the principle of proportionality, which is a horizontal principle of civilization and reasonableness,[54] fundamental both at national and international level,[55] permeates the ICC system and emerges from different norms.[56] First, it is implied by the phrase 'when justified by the extreme gravity of the crime and the individual circumstances of the convicted person' of Article 77(1) of the ICCS. Second, Rule 145(1)(a) of the RPE states that, in determining the sentence, the Court should '[b]ear in mind 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'. Third, Article 81(2)(a) of the ICCS authorizes an appeal in case of 'disproportion between the crime and the sentence'. The recognition of the principle is also present in ICC case law,[57] for instance in *Lubanga*, where it is asserted that the TC 'must ensure that the sentence is in proportion to the crime'.[58] In the ICC system, proportionality is generally interpreted as correspondence between the gravity of the crime and the penalty imposed, also with reference to the culpability of the offender.[59] The principle of proportionality interpreted in the light of culpability has the pivotal function of grading the penalty in respect of the crime committed, guaranteeing not only the imposition of a minimum penalty but also of a maximum one.[60] Hence, as emphasized also by Rule 145(a) of the RPE and by ICC case law,[61] culpability is a crucial concept.[62] However, it is also rather convoluted. Indeed, it is usually meant as the involvement of the convicted person in the commission of the crime, the intentionality in inflicting the

53 See the *Katanga* case, supra note 36, para. 39.
54 G. Fiandaca & E. Musco, *Diritto Penale. Parte Generale* (2012), p. 704; A. Toscano, *La Funzione della Pena e le Garanzie dei Diritti Fondamentali* (2012), p. 64.
55 See Ambos, supra note 20, p. 287.
56 W.A. Schabas, *An Introduction to the International Criminal Court* (2017), p. 326.
57 Ibid.
58 See the *Lubanga* case, supra note 22, para. 26.
59 See Ambos, supra note 20, pp. 286-287.
60 Ibid., pp. 287-288.
61 See the *Al Mahdi* case, supra note 37, paras. 83-85; the *Bemba* case, supra note 23, paras. 59-67; the *Katanga* case, supra note 36, para. 39; the *Lubanga* case (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 (1 December 2014), para. 40; the *Lubanga* case, supra note 22, para. 93.
62 See D'Ascoli, supra note 27, p. 293.

harm, his/her rank in the hierarchy of power or any other role covered and the overall harm caused,[63] to be assessed '*ex ante*, from the perspective of the perpetrator'.[64] Moreover, proportionality itself is not a clear standard, since the ICC legal framework does not specify how proportionality should be assessed,[65] and leaves the Court with a high degree of discretion. Consequently, the Appeals Chamber could probably intervene only if the sentence goes beyond its natural discretionary path.[66]

All in all, on the one hand, one could consider meritorious the choice of anchoring the penalty of life imprisonment to requirements provided by the ICCS, but leaving enough freedom to manoeuvre to the Court in order to individualize the sentence on a case-by-case basis. On the other, the same practice is susceptible to criticism. Indeed, the two criteria provided are nebulous and vague. This, *de facto,* frustrates the purpose of limiting the imposition of life imprisonment, which, because of the interests at stake, needs more certainty in sentencing. The Court could alternatively be extremely reluctant or likely to impose imprisonment for life, depending on their legal background and personal beliefs. Even though the provisions of the ICCS guarantee TCs constituted of a bench of judges, balancing the situation, it does not seem acceptable to leave judges *carte blanche* on such a crucial issue.

In addition, such judicial discretion is even more debatable taking into account the general approximation that governs all the ICC norms about penalties. This entails that the ICC system, contrary to the majority of national criminal codes, does not envisage 'sentencing tariffs' or specific penalties tailored to the crimes under ICC jurisdiction.[67] Moreover, the ICCS does not explicitly provide, in line with the other ICTs, for the purposes of sentencing and punishment, as already underlined by the ICC case law.[68] Today, there is great confusion on the issue and several are the aims argued to be the actual objective of the ICC, for instance victims' satisfaction, retribution, reconciliation, prevention of crimes and deterrence, end of impunity and so forth, none of them being completely satisfying. However, during sentencing, it is essential for the TCs to keep in mind the specific purposes they should pursue, since sentencing and punishment always need to be directed to particular aims. Otherwise, judges would resort to their own personal beliefs, but it is unlikely that every judge will embrace the same philosophy, which creates tension between opposed objectives. This lack is a serious deficiency that pervades the entire ICC system, leaving the Court room to become creators of a teleological substratum that the ICC misses and needs. Furthermore, it results in a breeding ground for inequality between convicted persons, who could be sentenced referring to different and potentially contrasting purposes. Against such a vague backdrop, penalties at the ICC are highly unpredictable and the life sentence is likely to be applied with carelessness, also considering that international crimes are often surrounded by 'rhetoric' that pushes the Court to impose extremely severe punishment.[69] Hence, it is necessary to abandon what Ashworth calls the 'cafeteria system' of sentencing, namely the approach according to which it is permissible to choose the purpose of sentencing that is considered more fitting each time, and to adopt a reasoned and consistent rationale for sentencing and punishment.[70] To accomplish such result, it is essential to avoid the uncritical and indolent adhesion to the *ad hoc* tribunals' case law that ICC case law has so far produced on the issue.[71]

2.3 The criterion of 'the existence of one or more aggravating circumstances'

In addition, Rule 145(3) of the RPE states that:

> Life imprisonment may be imposed when justified by the extreme gravity of the crime and the individual circumstances of the convicted person, as evidenced by the existence of one or more aggravating circumstances.

63 See Ambos, supra note 20, pp. 287-288.
64 J. Gardner, 'Crime: In Proportion and in Perspective', in A. Ashworth & M. Wasik (eds.), *Fundamentals of Sentencing Theory* (1998), p. 42.
65 M.M. deGuzman, 'Proportionate Sentencing at the ICC', in C. Stahn, *The Law and Practice of the International Criminal Court* (2015) p. 943.
66 See Ambos, supra note 20, p. 290.
67 G. Boas et al., *International Criminal Law Practitioner Library* (2013), Vol. III: International Criminal Procedure, p. 394.
68 See the *Al Mahdi* Case, supra note 37, para. 66.
69 M.M. deGuzman, 'Harsh Justice for International Crimes?', (2014) 39 *Yale J Int'l L*, no. 1, p. 3.
70 A. Ashworth, *Sentencing and Criminal Justice* (2015), p. 33.
71 See the *Al Mahdi* case, supra note 37, para. 67; see the *Bemba* case, supra note 23, para. 11.

The Rule not only reiterates the two abovementioned requirements, but, even though the phrase 'as evidenced by' is not crystal clear, it also seems to add the necessity of the presence of at least one aggravating circumstance in order to impose life imprisonment. Contrarily, it is not compulsory to impose life imprisonment if one aggravating circumstance exists. Similarly, Rule 145(1)(b) asserts that, for the determination of the sentence in general, the Court should '[b]alance all the relevant factors, including any mitigating and aggravating factors and consider the circumstances both of the convicted person and of the crime'.

Turning back to the preparatory works of the ICCS, there was a long discussion about mitigating and aggravating circumstances, especially regarding their degree of specificity and the discretion that should be left to the Court.[72] At the Preparatory Committee (PrepCom), for lack of consensus on the issue whether the list of circumstances should have been exhaustive or not,[73] it was decided to introduce in the ICCS only the factors of the gravity of the crime and the individual circumstances of the person convicted, whilst more factors should have been included in the RPE.[74] This approach was confirmed at the Rome Conference.[75] The circumstances suggested in the PrepCom included the following: impact of the crime committed on victims and their families; extent of damage caused or the danger posed; degree of participation in the commission of the crime; substantially diminished capacity; duress; age of the perpetrator; social and economic conditions of the convicted; motive for the crime; subsequent conducts; superior orders and the use of minors in the commission of the crime.[76] This list was supplemented with other factors, such as the sentences imposed on co-offenders, admission of guilt and assistance to the Prosecutor.[77] Different were the proposals about how mitigating and aggravating circumstances should have been formulated. For example, France suggested a non-exhaustive list of factors that could be considered as containing both aggravating and mitigating circumstances,[78] while Spain was in favour of more detailed provisions.[79] Merging the proposals, consensus was reached.

Today the aggravating circumstances are listed in Rule 145(2)(b) of the RPE for the determination of the sentence in general. However, the provision is puzzling. Indeed, since the list is not only non-exhaustive, but also rather succinct, it does not render the circumstances easily identifiable and does not adequately clarify when it is appropriate to impose life imprisonment. Although some progress has been made in comparison with the *ad hoc* tribunals, the fact that Rule 145(2)(b)(vi) underlines that other circumstances could be taken into account only if similar in nature to the ones mentioned does not seem to suffice to adequately improve legal certainty in sentencing.[80] Moreover, further complications arise from the overlap between some factors, which could be considered both as part of the two basic requirements previously analysed and as aggravating circumstances. The ICC jurisprudence, as well as the case law of the *ad hoc* tribunals before, is trying to improve the identification of the factors that could be considered as aggravating circumstances.[81] Similarly, in literature, various systematisations exist on the issue, especially on the ICTY and ICTR experiences.[82] For instance, it is possible to group the aggravating circumstances in the following categories.[83] The first regards the commission of the crime and includes, for example, the scale of the crime; the presence of discriminatory grounds (*inter alia* sex, religion and ethnicity) in the commission of the crime;[84] the infliction of punishments on victims and the commission of sexual violence;[85] abuse of trust, official capacity or of a particular authoritative position and high level of responsibility or command;[86] the means of

72 R.E. Fife, 'Penalties', in R.S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001) p. 557.
73 R.E. Fife, 'Penalties', in R.S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (1999), p. 341.
74 UN Doc A/CONF.183/2 (1998); UN Doc A/AC.249/1997/L.9/Rev.1 (1997).
75 See Fife, supra note 72, p. 558.
76 See note 74, supra.
77 Fife, supra note 72, p. 559.
78 UN Doc. PCNICC/1999/WGRPE(7)/DP.1 (1999).
79 UN Doc. PCNICC/1999/WGRPE(7)/DP.2 (1999).
80 See D'Ascoli, supra note 27, p. 270.
81 See the *Lubanga* case, supra note 22, para. 91.
82 See e.g. Ambos, supra note 20, p. 301; Dixon & Khan, supra note 51, pp. 1430-1441; Schabas, supra note 34, pp. 1524-25.
83 The following is a systematisation of the author based on the criteria analysed in the sources mentioned above.
84 See the *Lubanga* case, supra note 22, paras. 79-81; the *Katanga* case, supra note 36, paras. 53-54.
85 See the *Lubanga* case, supra note 22, paras. 57-76.
86 See the *Katanga* case, supra note 36, para. 75.

commission of the crime; the direct and willing participation in the crime; the motives of the perpetrator; the cruelty of the convicted;[87] the particular vulnerability of the victims and their defencelessness[88] and so forth. The second deals with the consequences of the crime, such as the high degree of harm caused on victims and their relatives, as well as other particular effects. The third considers the category that takes into account the convicted person, such as similar criminal conducts previously committed, membership of extremist organisations and evidence of bad character. The fourth refers to the behaviour of the convicted person specifically after the commission of the crime, like inappropriate conduct in courtroom or in the proceedings in general, absence of cooperation, threatening of witnesses, statement of a false alibi defence, no signs of remorse and denial of guilt. Moreover, Article 78(1) of the ICCS states that these factors should be taken into account 'in accordance with' the RPE. However, it is controversial how this phrase should be interpreted. There are two possible alternative approaches. According to the first, Rule 145 would be distinct and supplemental to Article 78, while, according to the second, it clarifies Article 78.[89] So far, the TCs (with the dissent of Judge Song)[90] have not considered the harm caused to victims and their families as a separate factor according to Rule 145,[91] but it was evaluated under the gravity of the crime. In *Al Mahdi*, this approach was recalled and it was underlined that also in *Lubanga* the Appeals Chamber had not 'found it necessary to decide which of the possible approaches is the correct one'.[92] Furthermore, particularly important regarding life imprisonment is that the TCs clarified, in *Bemba* and *Al Mahdi*, that the absence of mitigating factors cannot *per se* constitute an aggravating circumstance.[93] Another element of confusion is that, although aggravating circumstances should be proven beyond any reasonable doubt since they substantially negatively affect the position of the convicted person (as remarked in the case law of the ICC),[94] it is not clear which criterion of imputability is to be applied.[95] In addition, the weight of the circumstances is not clear-cut either. In effect, in the case law of the *ad hoc* tribunals some circumstances had more impact than other circumstances[96] and this is likely to happen at the ICC as well.

Contrary to the aggravating circumstances, the ICC norms do not include any provisions regarding the impact of mitigating circumstances on the possibility to impose life imprisonment. At the PrepCom, Spain suggested providing for the requirement of the absence of mitigating circumstances to impose life imprisonment, but this proposal was rejected.[97] As a consequence, in order to respect the objectives of the preparatory work, the presence or lack of mitigating circumstances should be considered irrelevant in relation with the evaluation of the appropriateness of the imposition of life imprisonment. However, such an approach would be illogical because, since mitigating circumstances impact on the length of imprisonment for a defined number of years, it would be inconsistent to affirm that they do not play any role when it comes to life imprisonment. The rejection of the Spanish proposal simply appears to mean that the strict requirement of the absence of mitigating circumstances is not necessary for the imposition of a life sentence, without entailing that mitigating circumstances should not be taken into consideration in the overall assessment of the aptness of life imprisonment.

2.4 Conclusive remarks

Ultimately, coming to a conclusive evaluation of the system analysed, there are several critical issues to be improved with particular reference to life imprisonment.

87 See the *Bemba* case, supra note 23, paras. 44-47, 52-58.
88 Ibid. paras. 41-43; see the *Lubanga* case, supra note 22, paras. 77-78.
89 See Schabas, supra note 18, p. 1170.
90 See the *Lubanga* case, supra note 22, Partly Dissenting Opinion of Judge Sang-Hyun Song, paras. 1-3.
91 See the *Bemba* case, supra note 23, paras. 36-40; the *Katanga* case, supra note 36, paras. 49-51; the *Lubanga* case, supra note 61, paras. 61-65.
92 See the *Al Mahdi* case, supra note 37, para. 69.
93 Ibid., para. 73; see the *Bemba* case, supra note 23, para. 18.
94 See the *Al Mahdi* case, supra note 37, para. 73; the *Bemba* case, supra note 23, para. 18; the *Katanga* case, supra note 36, para. 32; the *Lubanga* case, supra note 22, paras. 33-34.
95 E. Amati et al., *Introduzione al Diritto Penale Internazionale* (2016), p. 275.
96 See D'Ascoli, supra note 27, p. 257.
97 See note 79, supra.

First, the criteria of the 'extreme gravity of the crime and the individual circumstances of the convicted person' should be specified. The advisable method would be to amend the ICC norms. Otherwise, the Court would have to bear the responsibility of such efforts. Of particular importance would be to clarify what 'extreme gravity of the crime' actually means and openly elaborate on cases in which it is legitimate and appropriate to impose a life sentence, at least by indicating for what kinds of crimes and with reference to what conducts and degree of participation life imprisonment is imposable. Indeed, only by taking such a stand and developing a hierarchy of the gravity of crimes, generally hoped for by various authors,[98] is it possible to avoid a discretionary use of life imprisonment, influenced by the political atmosphere of the moment, as well as to eliminate the possibility of its imposition for other less heinous crimes. Moreover, for instance, it would be advisable to avoid life imprisonment at the very least in the cases in which an admission of guilt is accompanied by substantial cooperation with the Prosecutor and the Court, clear signs of remorse and admission of guilt, which could be a precious instrument for the Court in terms of facilitation of the investigations and speed of the trial.

Second, it is of extreme importance to provide for an exhaustive and comprehensive list of aggravating circumstances in the RPE, as exists, for example, in Italy and France. Although it is true that such a list is not provided for in many other SPs, it is essential for the sake of certainty and to better ensure the rights of the accused person to specify such circumstances. Moreover, only in this manner could double counting be more efficiently avoided and could penalties be more foreseeable. Yet, the amendment of the present norms is probably the only effective manner to reach the aforementioned objectives. It is possible to rebut the counter-argument that some circumstances are unpredictable by affirming that unforeseeable aggravating factors can always be considered in the assessment of the gravity of the crime, which will hardly prevent the evaluation of further relevant factors, no matter how strictly interpreted.

Third, case law should clarify that mitigating circumstances also matter when assessing the appropriateness of life imprisonment, since it is illogical to disregard them only when imposing a life sentence.

Fourth, in a similar vein, the TCs should rein in excessive consideration of national laws on the issue of life imprisonment, in order to avoid contravening the independence of the Court.

Fifth, the implicit concepts of proportionality and culpability should be elucidated. Furthermore, the ordinal principle of proportionality, namely that the punishment for a particular crime is proportionate in comparison to punishments for other crimes,[99] should be stressed, in its function of being 'limiting'.[100] The aim would be to soften extreme punishments, rendering the penalty more predictable and ensuring equality among convicted persons. For this reason, it is necessary to eradicate any 'serious misreading of the proportionality principle' based on the false claim that victims should be consoled with harsh penalties.[101] However, such an ordinal proportionality principle, as stated by Von Hirsch, is based on three principles, namely the 'parity' between various offenders that have committed the same crime, the 'rank-ordering' of crimes in terms of seriousness and the 'spacing of penalties' that reflect the gravity of the crimes.[102] Hence, a sort of 'scale of punishments' should also be elaborated, taking into consideration the seriousness of the crimes.[103]

Sixth, the purposes of sentencing and punishment should be definitively stated, in order to clarify the fundamental objectives that the Court should consistently pursue in the choice of the appropriate punishment.

Finally, according to the ICCS and the RPE, which have a far more temperate and lenient system than that of the *ad hoc* tribunals,[104] life imprisonment should at least be imposable only in extremely rare and sporadic cases. Indeed, imprisonment for life should be considered as what actually appears to be after a

98 See D'Ascoli, supra note 27, p. 321.

99 R. Sloane, 'The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law', (2007) 43 *Stan Int'l L*, no. 2, p. 83; A. Hole, 'The Sentencing Provisions of the International Criminal Court', (2005) 1 *International Journal of Punishment and Sentencing*, no. 1, p. 56; A. von Hirsch, 'Proportionality in the Philosophy of Punishment', (1992) 16 *Crime and Justice*, pp. 79-83.

100 See DeGuzman, supra note 65, p. 933; N. Morris, 'Punishment, Desert and Rehabilitation', in H. Gross & A. von Hirsch (eds.), *Sentencing* (1981), pp. 268-269.

101 See Gardner, supra note 64, p. 38.

102 See Hole, supra note 99, p. 18; A. von Hirsch & A. Ashworth, *Proportionate Sentencing* (2005), pp. 139-140.

103 See Hole, supra note 99, p. 56.

104 See Schabas, supra note 18, p. 1160.

systematic reading of the penalties' regime of the ICC: an extraordinary punishment to be imposed with extreme prudence. The principle that governs the imposition of life imprisonment should therefore be interpreted as a beacon that guides the complete sentencing practice of the Court in the name of balance, in contrast with the case law of the *ad hoc* tribunals and especially the ICTR, which imposed 17 life sentences. Such an approach is highly desirable even though the principle of parsimony, which is envisaged in a number of national jurisdictions, is not explicitly provided for in the ICC system.[105]

The abovementioned proposals aim to meet the exigency of effectiveness and consistency of sentencing – strongly claimed in literature[106] – with particular reference to life imprisonment. What is generally needed is a systematic approach based on the elaboration of clearer guidelines and a more certain framework that could create standards to distinguish whether imprisonment should be imposed for a certain amount of time or for life. This should be attained without undermining in its essence the power of the Court to individualise the sentence, which proves fundamental. Indeed, sentencing cannot be considered as a mathematical exercise, which lacks flexibility and individualization,[107] but should be considered as more of an art than a science,[108] contrary to what is argued by other authors.[109] At the same time, it is necessary to rely on devices that could enhance consistency, preventing vagueness and equivocation.[110] Overall, the perfunctory approach that has been adopted so far with regard to sentencing should be abandoned and such an issue should be given the importance it deserves.[111] If these requirements are set with reference to sentencing in general, they should only be more strongly set for life imprisonment because of its unique criticalities.

Yet, there has been progress in comparison to the practice of *ad hoc* tribunals. Accordingly, the difficulties related to the lack of universal consensus at the preparatory stage and the immaturity of international criminal law have shaped a system that is still '*in fieri*'.[112] In effect, the norms of the ICC regime of penalties show what has been called 'the symptomatic indices' of the birth and inception of international criminal law.[113]

3. Life imprisonment in International Criminal Court case law

In its 15 years of existence, the ICC has never imposed life imprisonment. Also, for none of the convictions handed down it seemed even remotely appropriate to demand a life sentence. This is highlighted by the fact that the highest penalty imposed was imprisonment for 18 years in the *Bemba* case and that life imprisonment was never requested by the Prosecutor, despite the common practice of the prosecution of generally trying to demand a penalty higher than what will actually be imposed. In practice, the highest penalty the Prosecutor asked for was a penalty of 30 years of imprisonment in *Lubanga*[114] and 'for no less than 25 years' in *Bemba*,[115] where the phrase 'no less than 25 years' should not be interpreted as a request for life imprisonment. In fact, because of the exceptionality that characterises such a penalty in the ICC system, a request for life imprisonment should be explicitly made and justified in the light of the necessary criteria.

That being said, it is noteworthy that the TCs mentioned life imprisonment in both the *Lubanga* and the *Katanga* sentence. In particular, in *Lubanga*, the TC stated that '[g]iven the Chamber has not found any aggravating factors in this case, a whole life term would be inappropriate'.[116] Similarly, in *Katanga*, it is affirmed that '[a]s the Chamber is not taking any aggravating circumstance into account against Germain Katanga, the imposition of life imprisonment is uncalled for'.[117] This approach is worrying and hardly understandable, since the question that instantly comes to mind here is why the TCs felt bound to explain

105 See Hole, supra note 99, pp. 62-63.
106 See e.g. D'Ascoli, supra note 27, p. 287.
107 Ibid., pp. 282-283.
108 'Sentencing is an art and not a science' (Lord Lane, quoted in Ashworth, supra note 70, p. 34).
109 D.B. Pickard, 'Proposed Sentencing Guidelines for the International Criminal Court', (1997) 20 *Loy L. A. Int.'l. & Comp. L. Rev.*, p. 123.
110 See e.g. the Council of Europe, Recommendation No. R (92) 17 Concerning Consistency in Sentencing (1992), which suggests using 'sentencing orientations' and 'starting points'.
111 See D'Ascoli, supra note 26, p. 166.
112 See Fronza, supra note 12, p. 537.
113 Ibid., p. 530.
114 See the *Lubanga* case, supra note 22, para. 95.
115 See the *Bemba* case, supra note 23, para. 90.
116 See the *Lubanga* case, supra note 22, para. 96.
117 See the *Katanga* case, supra note 36, para. 144.

the reasons why life imprisonment did not seem appropriate in the given cases. In effect, it was evident that life imprisonment was not only inappropriate, but also completely out of the question with reference to the two normative criteria for imposing this penalty. Both the confirmation of the sentence at the appeal stage in *Lubanga* and the withdrawal of the appeal in *Katanga* can be seen as proof of the fact that the sentences were considered reasonable and befitting.[118] Consequently, even if any aggravating circumstances had applied, it seems hard to believe that such circumstances could have been able to fill the gap between the sentence actually imposed and life imprisonment. Moreover, the presence of aggravating circumstances cannot in itself substitute the analysis of the two basic criteria for the imposition of life imprisonment, even though Rule 145(3) of the RPE is not perfectly clear about the issue, since it simply provides that the two criteria should be 'evidenced by the existence of one or more aggravating circumstances'. Otherwise, it would have been useless to provide two requirements. As a consequence, the question of whether Rule 145(3) is actually at odds with Article 77(1)(b) of the ICCS has been raised, since the Preparatory Committee seems to have gone beyond the framework established in the Rome Conference.[119] Furthermore, the view adopted by the TCs in *Lubanga* and *Katanga* appears even more eccentric, considering that in neither of the two cases the Prosecutor had asked for life imprisonment. Even though it is true that the TCs are not in any way bound to the sentence asked by the Prosecutor, it is also true that the penalties suggested by the prosecution are generally emblematic and are taken into proper consideration by the Court, since they usually give an idea of the very maximum penalty that could be reasonably imposed in that case.

This unusual approach was not repeated in the following *Al Mahdi* and *Bemba* sentences, even though Bemba was actually convicted to a sentence higher than the ones imposed on Lubanga and Katanga. This could lead to the conclusion that such references to life imprisonment were merely justified by an overly meticulous approach in the first sentences of the Court that drove the TCs to the urgent wish to be as exhaustive as possible in their motivation, even if this could create confusion (as it actually did). This would be the only rational justification as well as the only explanation that would not create any alarm. Otherwise, it might be reasonable to believe that the Court initiated an extremely reprehensible case law, overly inclined to impose life imprisonment through a reshaping of the requirements imposed by the ICCS and the RPE that would certainly curtail their significance.

4. The review of life sentences at the International Criminal Court

4.1 The review of life sentences in the International Criminal Court normative framework and case law

The review of sentences is regulated in Article 110 of the ICCS, in Part X about enforcement, as well as in Rules 223 and 224 of the RPE. It is the judicial instrument arranged to enable the Court to reduce the sentences, trying to balance the interests of victims and society as a whole as well as the interests of the convicted.[120]

The mechanism acquires particular relevance in case of life sentences, since such a review is the only manner in which a person sentenced to life imprisonment could be released. In effect, even though neither the ICCS nor the RPE specify the amount of reduction that may be possible to concede,[121] the review was intended as being able to reduce the sentence to zero,[122] resulting in the early release of the convict. In addition, life imprisonment without the possibility of early release is increasingly being censured according to the most accepted human rights standards, for example in ECtHR case law.[123] For this reason, this review system has proved crucial and indispensable, since it allows the ICC to avoid violating the emerging human rights guidelines on life imprisonment.

118 Schabas, supra note 56, p. 319.
119 J.D. Mujuzi, '(Mis)interpreting the Statute? The International Criminal Court, the Sentence of Life Imprisonment and Other Emerging Sentencing Issues: A Comment on the Trial Chamber I Decision on the Sentence in Prosecutor v. Thomas Lubanga Dyilo', (2013) 13 *Int.'l. Crim. L. Rev.*, p. 1041.
120 See Hole, supra note 99, p. 66.
121 See Schabas, supra note 18, p. 1423.
122 C. Kress & G. Sluiter, 'Imprisonment', in A. Cassese et al. (eds.), *The Rome Statute of the International Criminal Court*' (2002), Vol. II, p. 1793.
123 See note 2, supra.

In the preparatory works, the debate on the reduction of sentences strongly emerged in the Working Group on Penalties because of the concerns expressed by some states regarding life imprisonment.[124] In this context, the proposal of a mechanism of review of sentences was welcomed. However, some delegations underlined the necessity of having 'lengthy periods of imprisonment before such a review could take place, as well as strict criteria which would govern the Court's determination of the question', suggesting some of the required criteria.[125] On 8 July 1998, Rolf Einar Fife, Coordinator of the Working Group on Penalties, introduced the review mechanism in the Report of the Group.[126] As a result, with the merging of the requests for a more centralised system of early release as well as the claims of life imprisonment detractors, a centred system of review was included in the ICCS.

In contrast with the *ad hoc* tribunals, where the convicted person needs to apply for a reduction of the sentence, the ICC system of review is automatic and mandatory.[127] This means that it activates '*proprio motu*'[128] when the minimum sentence term that is necessary to consider a review has been served. Article 110(3) sets a high threshold, at 25 years for life imprisonment – even though a more appropriate term of 20 years was previously suggested[129] – and two thirds of the sentence in any other case. Only at that moment, Article 110(3) asserts that 'the Court shall review the sentence to determine whether it should be reduced' and it cannot be done 'before that time'. Such an approach, which seems to categorically exclude exceptions as a result of the compromise with the death penalty supporters, raises the issue of early release for humanitarian reasons and other exceptional cases.[130] Furthermore, the term is rather severe, especially when considering the most advanced national legislations on the issue, for example Norway and Denmark. This is also proved by the fact that, among the offenders convicted to life imprisonment by the International Military Tribunal of Nuremberg, the first international criminal tribunal, only one, Rudolph Hesse, actually served that term.[131]

As affirmed in Rule 223 of the RPE, the review mechanism is under the competence of three judges of the Appeals Chamber, appointed by the same Chamber. However, it is not clear how and according to which criteria these three judges of the Appeals Chamber should be appointed.

According to Article 110(4), the Court 'may reduce the sentence' only if at least one of the factors listed are present. In *Lubanga*, the Panel clarified that the 'threshold serves as a trigger mechanism for the commencement of the sentence review' and that the ICC does not support a 'presumption of early release' simply 'based on the fact that two-thirds of a sentence have been served', rejecting the defence argument.[132] It is therefore compulsory to take into consideration the possibility of review, but not to actually reduce the sentence imposed, since the reduction, as underlined in *Lubanga*, is 'discretionary in nature'.[133]

The factors to be taken into account in the assessment of the appropriateness of reducing the sentence are: (a) 'The early and continuing willingness of the person to cooperate with the Court in its investigations and prosecutions'; (b) 'The voluntary assistance of the person in enabling the enforcement of the judgements and orders of the Court in other cases, and in particular providing assistance in locating assets subject to orders of fine, forfeiture or reparation which may be used for the benefit of victims'; and (c) 'Other factors establishing a clear and significant change of circumstances sufficient to justify the reduction of sentence, as provided in the Rules of Procedure and Evidence'. It could be inferred from (c) that the list is not exhaustive but both in *Lubanga* and *Katanga* the Court affirmed that the 'other factors' mentioned are only those

124 NGO_ADVOCACYPROJECT_OTR14 (1998); NGO_ADVOCACYPROJECT_OTR15 (1998).
125 UN Doc. A/CONF.183/C.1/WGP/L.3/Rev.1 (1998).
126 UN Doc. A/CONF.183/C.1/WGP/L.14/Add.1 (1998).
127 See Schabas, supra note 18, p. 1416.
128 See Amati et al., supra note 95, p. 281.
129 See UN Doc. A/CONF.183/C.1/WGP/L.3/Rev.1, supra note 125.
130 D. van Zyl Smit, *Taking Life Imprisonment Seriously in National and International Law* (2002), p. 194; D. van Zyl Smit, 'Punishment and Human Rights in International Criminal Justice', (2002) 2 *Hum Rts L Rev*, no. 1, p. 16.
131 See Van Zyl Smit, 'Punishment and Human Rights in International Criminal Justice', supra note 130, p. 16.
132 See the *Lubanga* case (Decision on the Review Concerning Reduction of Sentence of Mr Thomas Lubanga Dyilo), ICC-01/04/01/06 (22 September 2015), para. 27.
133 Ibid., para. 21.

listed in the RPE,[134] embracing a 'rigorously positivistic approach'.[135] Such a standpoint is debatable because, even though the factors seem to be comprehensive enough, it could be necessary in some cases to take into consideration other unforeseeable criteria in favour of the sentenced person. However, in *Lubanga*, the Panel rightly underlined that, unlike other ICTs, 'the gravity of the crime is not a factor that in itself weighs for or against reduction of sentence',[136] rejecting the Prosecutor's argument. This is particularly important, because, given the gravity of the crimes under the jurisdiction of the Court, the instrument of reduction risks to be otherwise inapplicable.

The other factors are listed in Rule 223 of the RPE and are similar to those usually evaluated at national level for parole or reduction of sentence.[137] This Rule is the fruit of the combination of proposals suggested in the Preparatory Commission by France,[138] Spain[139] and Canada together with Germany.[140] It covers: (a) 'The conduct of the sentenced person while in detention, which shows a genuine dissociation from his or her crime'; (b) 'The prospect of the resocialization and successful resettlement of the sentenced person'; (c) 'Whether the early release of the sentenced person would give rise to significant social instability'; (d) 'Any significant action taken by the sentenced person for the benefit of the victims as well as any impact on the victims and their families as a result of the early release'; (e) the traditional criterion of the '[i]ndividual circumstances of the sentenced person, including a worsening state of physical or mental health or advanced age'. All these factors should be analysed on a case-by-case basis through a delicate balance. In effect, as underlined in *Lubanga*, not all factors listed in Rule 223:

> (…) weigh in favour of reduction of sentence. For instance, the risk of significant social instability (…) is a negative factor, weighing against reduction. Thus, the presence of at least one factor in favour of reduction is a prerequisite to the Panel exercising its discretion to reduce a sentence.[141]

However, the criteria provided, even if apparently sufficiently definite, leave a great extent of judicial discretion. Indeed, the assessment of the factors themselves actually entails a prognostic judgment based on a balancing act, which, by definition, hardly implies any certainty. Nevertheless, it is also true that such elements are definitely more precise and limiting than those of the *ad hoc* tribunals,[142] where pardon and commutation are allowed simply in the 'interests of justice and the general principles of law'.[143] Moreover, the first case law of the Court is helpful to further clarify the norms. First of all, according to *Lubanga*, the 'changed circumstances' mentioned in Article 110(4)(c) of the ICCS demonstrate that the factors listed in Rule 223(a), (d) and (e) should be assessed 'from the time that the sentence was imposed'.[144] On the contrary, the same Panel underlined that such a requirement is not envisaged for factors listed in Article 11(4)(a) and (b).[145] In these cases, the Panel concluded that:

> [W]hether information taken into account at sentencing, regarding a person's cooperation with the Court or assistance in enabling the enforcement of judgments and orders in other cases, is relevant to a review of sentence under article 110 of the Statute, should be assessed on a case by case basis.[146]

Furthermore, referring to Article 104(a), in *Katanga*, the Panel stated that if a convicted person decides not to exercise the right to appeal because of 'acknowledging that he/she is guilty of the crimes committed and

134 Ibid., para. 25; the *Katanga* case (Decision on the Review Concerning Reduction of Sentence of Mr Germain Katanga), ICC-01/04/01/07 (13 November 2015), para 19.
135 See Schabas, supra note 18, p. 1420.
136 See the *Lubanga* case, supra note 132, para. 24.
137 See Schabas, supra note 18, p. 1420.
138 UN Doc. PCNICC/1999/WGRPE(10)/DP.1 (1999).
139 UN Doc. PCNICC/1999/WGRPE(10)/DP.2 (1999).
140 UN Doc. PCNICC/1999/WGRPE(10)/DP.3 (1999).
141 See the *Lubanga* case, supra note 132, para. 22.
142 See Schabas, supra note 18, pp. 1417-1418.
143 Statute of the International Criminal Tribunal for the Former Yugoslavia (1993), Art. 28; Statute of the International Criminal Tribunal for Rwanda (1994), Art. 27.
144 See the *Lubanga* case, supra note 132, para. 28.
145 Ibid., para. 29.
146 Ibid.

publicly apologising therefor, as is the case with Mr Katanga when he chose to withdraw his appeal, such an act prevents the unnecessary prolongation of the proceedings' and should be interpreted as cooperation with the Court.[147] Such a conclusion is hazardous since it could lead the convicted person to renounce the right to appeal in order to more easily obtain a reduction of the sentence, especially when the chances of success of the appeal are small. However, the wish to appeal should be seen neither as a way to obstruct the Court nor as a refusal to accept the consequences of the crime committed and show remorse. Indeed, to appeal a sentence means to exercise a statutory right and the use of such a device can also be aimed to simply revise a detail of the judgment or the sentence, which does not automatically entail the intention to deny responsibility for the crime committed. With reference to (a), this has been interpreted in *Lubanga* as meaning that good conduct in detention 'on its own' is not sufficient 'to establish the necessary connection between this conduct and a dissociation from the crimes'.[148] In addition, the Panel noted that, even though Mr Lubanga expressed 'opposition to a particular criminal act in the abstract', this is different from 'accepting responsibility and expressing remorse for having committed those criminal acts' referred to by the factor mentioning the convicted person's dissociation from the crime.[149] The Panel considered as dissociation from the crimes Mr Katanga's decision 'to withdraw his appeal against the Conviction Decision, coupled with his acceptance of the TC's findings on his role and conduct in the Bogoro crimes and his expression of regret to the victims of Bogoro, attached to the notice of withdrawal' together with 'the video recording containing Mr Katanga's filmed apology that was made available to various communities' in the Democratic Republic of the Congo (DRC).[150] Moreover, 'Mr Katanga has repeatedly and publicly taken responsibility for the crimes for which he was convicted, as well as expressed regret for the harm caused to the victims by his actions'.[151] Hence, here the criterion was considered as having been met.[152] With reference to (b), the Panel attached importance to the fact that Mr Lubanga 'maintains regular contact' with the family and 'has taken steps to arrange to be a post-graduate student following his incarceration', showing 'prospect for the resocialization and successful resettlement' in the DRC.[153] In *Katanga*, the following factors were considered as signs of resocialization and resettlement: strong family ties, plans for future career and studies and 'a feasible prospect' of resettlement 'supported by family and communities'.[154] Nevertheless, it should be noted that, in order to assist the convicted persons in effectively meeting this requirement, it is fundamental to give them access to rehabilitation programmes.[155] Regarding (c), specifically in the field of international criminal law,[156] it has already proved to be problematic to several delegations in the Preparatory Commission due to its political sensitiveness.[157] Accordingly, in *Lubanga*, it was underlined that the social instability must be 'significant' but that its assessment is highly discretional.[158] Moreover, in *Katanga*, it was emphasised that such a factor should be considered 'with caution' since it is 'an 'excluding criterion', meaning that if a reduction in sentence would not cause any social instability, then the factor could weigh in favour of release'.[159] The same judgment, also recalling *Lubanga*, adds:

> Significant social instability may be demonstrated by information indicating that the sentenced person's return to the State at issue could, inter alia, undermine public safety, cause social unrest such as riots or acts of ethnic-based violence, lead to the commission of new international crimes by the sentenced person or by his or her supporters, or undermine public confidence in the domestic legal system.[160]

147 See the *Katanga* case, supra note 134, para. 34.
148 See the *Lubanga* case, supra note 132, para. 45.
149 Ibid., para. 46.
150 See the *Katanga* case, supra note 134, para. 50.
151 Ibid.
152 Ibid.
153 See the *Lubanga* case, supra note 132, paras. 52-53.
154 See the *Katanga* case, supra note 134, para. 58.
155 K. Ambos, *Treatise on International Criminal Law* (2016), Vol. III, p. 646.
156 See Schabas, supra note 18, p. 1422.
157 K. Prost, 'Enforcement', in R.S. Lee (ed.), *The International Criminal Court: Elements of Crimes and Rules of Procedure and Evidence* (2001), p. 699.
158 See the *Lubanga* case, supra note 132, paras. 63-64.
159 See the *Katanga* case, supra note 134, para. 74.
160 Ibid.

Similar to this element was the then-excluded factor proposed by Canada and Germany of a change in political circumstances that would make it improbable for the sentenced person to again commit another crime under the jurisdiction of the Court.[161] Generally speaking, these factors, even if important in the context of international crimes, could be debatable because rejecting the possibility of early release based only on external factors, which the convicted person cannot control, might result in 'arbitrary detention' and 'abuse of imprisonment for convenience'.[162] However, they should play a significant role in conceding a reduction in order not to prolong a futile punishment. Indeed, if it is improbable that the convicted person will represent a risk, there is no reason not to reduce the sentence. In addition, (d) has been interpreted restrictively in *Katanga*, where it is affirmed that 'there is a limited benefit to the Victims from several of the actions taken by Mr Katanga' for which reason it is interpreted as no significant actions having been taken.[163] Moreover, in *Lubanga* it was clarified that the 'concept of reduction of sentences as a remedy for a human rights violation' is not present in the ICC norms.[164]

Also, it is not clear how much weight is to be given to the factors listed[165] and exactly when the reduction of the sentence should be granted and when it should not, since the assessment is rather undefined. As discussed in *Lubanga* and recalled in *Katanga*:

> Given the discretionary nature of the decision, the presence of a factor in favour of reduction does not in itself mean that a sentence will be reduced. Similarly, the presence of a factor militating against a reduction of sentence does not preclude the exercise of its discretion. Such factors must be weighed against factors in favour of reduction to determine whether a reduction of sentence is appropriate.[166]

In the same decisions, it was also affirmed that 'all participants in the Sentence Review, not only the sentenced person, are required to provide any information in their possession, whether weighing for or against release' and that, '[o]n the basis of all of the relevant information provided, the Panel will determine if any of the factors set out in the Court's legal framework are present and, if so, whether they justify a reduction of sentence'.[167] This means that there is no 'burden of proof as such' on the sentenced person.[168] Furthermore, in *Lubanga*, the defence argument that '[t]o refuse early release requires demonstration that exceptional circumstances do exist' was rejected on the basis that, differently from 'the practice of domestic and other international criminal courts in support', such a contention does not find any confirmation in the ICC system.[169] Moreover, some of these factors can be also included to some extent in the mitigating circumstances, as underlined in *Katanga.*[170]

Pursuant to Article 110(5), if the Court does not consider it 'appropriate' to reduce the sentence in its first assessment, it must in any case reconsider the review according to the RPE. Rule 224(3) specifies that this should occur 'every three years', unless the Panel provides 'a shorter interval', for instance two years as it was decided in *Lubanga*.[171] In any case, according to Rule 224(3), where a 'significant change in circumstances' occurs, the three judges 'may permit the sentenced person to apply for a review within the three-year period or such shorter period as may have been set by the three judges'. The term of three years, suggested by France[172] against the proposal of two of Canada and Germany,[173] nevertheless seems appropriate, since it is combined with the possibilities of earlier review.

161 UN Doc. PCNICC/1999/WGRPE(10)/DP.2, supra note 139.
162 E. Gumboh, 'The Penalty of Life Imprisonment Under International Criminal Law', (2011) 11 *Afr. Hum. Rts. L. J.*, no. 1, p. 90.
163 See the *Katanga* case, supra note 134, para. 105.
164 See the *Lubanga* case, supra note 132, para. 74.
165 See Kress & Sluiter, supra note 122, p. 1793.
166 See the *Katanga* case, supra note 134, para. 20; the *Lubanga* case, supra note 132, para. 24.
167 See the *Katanga* case, supra note 134, para. 21; the *Lubanga* case, supra note 132, para. 32.
168 See the *Katanga* case, supra note 134, para. 21.
169 See the *Lubanga* case, supra note 132, para. 23.
170 See the *Katanga* case, supra note 134, paras. 26, 48, 57.
171 See the *Lubanga* case, supra note 132.
172 See UN Doc. PCNICC/1999/WGRPE(10)/DP.1, supra note 138.
173 See UN Doc. PCNICC/1999/WGRPE(10)/DP.2, supra note 139.

In addition, it is important to point out that there may possibly be a parallel reduction of the sentence at the level of national law if the state of enforcement set conditions in this respect.[174]

No appeal or other judicial reviews are provided with regard to decisions taken under Article 110.[175]

In general, there have been few reviewable cases and neither have there been any cases with reference to life imprisonment nor any cases of immediate early release. The 12-year sentence of Katanga was reduced by 3 years and 8 months because of his continuing cooperation with the Court, his genuine dissociation from his crime, the prospects of resocialisation and successful resettlement in DRC, and a change of individual circumstances since one of the members of his family had died and 'Mr Katanga has gained the new role of primary provider for the families of both his deceased father and brother'.[176] Lubanga, however, was denied the reduction.[177] This was because, even though '[t]he Panel has determined in accordance with rule 223 (c) of the Rules of Procedure and Evidence, that there is a prospect for the resocialization and successful resettlement of Mr Lubanga in the DRC', 'the Panel considers that in the absence of any other factors in favour of reduction, a reduction of Mr Lubanga's sentence cannot be justified'.[178] This approach is debatable because there were no other factors against the reduction of the sentence. In *Katanga*, it was not explained which criteria had been used to reduce the sentence of the aforementioned amount, but the reduction actually covered about 30% of the sentence.[179]

A fundamental characteristic of this review regime is that early release is 'irreversible and not conditional'.[180] As a consequence, it is not correct to consider it as parole or conditional release.[181] The reason of this difference is that, unlike national jurisdictions, the ICC has no police force nor an autonomous enforcement regime that can rearrest the sentenced person that has benefited from conditional early release but has violated the prescriptions imposed, rendering it difficult to make such institutions operative in the ICC system. Yet, that it is difficult does not mean that it is impossible. In effect, the *ad hoc* tribunals provide for conditional release relying on the monitoring system of the states of enforcement,[182] which means that this possibility is not excluded. At the time of the ICC negotiations, no conditional releases had been granted by the *ad hoc* tribunals, which meant that no real terms of comparison were available.[183] Today, however, it seems advisable to include such a possibility, since it may constitute a valuable instrument in the hands of the Court: indeed, it might be useful because, thanks to its characteristic of non-definitiveness, it actually encourages early releases and could prove beneficial to better guarantee both the interests of the convicted person and the interests of the social community of the victim of the crime, who could see the perpetrator back in prison if, for example, the rehabilitation process is unsuccessful.

4.2 Conclusive remarks

All in all, the norms about the reduction of sentences are satisfactory. However, some amendments may be adopted in order to improve the regime.

First, in order to change the current line of case law on the issue, it would be desirable to specify in the RPE that the list of factors to be assessed in the review procedure is not exhaustive.

Second, it is necessary to clarify how to evaluate such factors, when to grant a reduction or not and to what extent. In a similar vein, it would be advisable to emphasise the necessity of providing comprehensive motivations of the choices made. Only in this manner would the procedure be fully transparent.

Third, it would be appropriate to reduce the minimum term to be served before a review may take place to 20 years, in line with several national jurisdictions, such as Argentina, or rather to tailor different minimum terms with reference to the crimes committed, as is done for example in Italy, Australia, Canada

174 See Kress & Sluiter, supra note 122, p. 1795.
175 See Schabas, supra note 18, p. 1417.
176 See the *Katanga* case, supra note 134, paras. 50, 109.
177 See the *Lubanga* case, supra note 132.
178 Ibid., para. 77.
179 See Schabas, supra note 18, p. 1423.
180 See Schabas, supra note 34, p. 1512.
181 See Schabas, supra note 56, p. 330.
182 See Schabas, supra note 18, pp. 1416-1417.
183 Ibid.

and France, in order to render the system more flexible. Moreover, the possibility of review before the prescribed term if exceptional circumstances occur should at least be envisaged.

Fourth, some specifications regarding the criteria on how to appoint the judges of the panel that is going to review the sentence would be beneficial.

Finally, the possibility of including parole and conditional release should be considered.

These amendments would make the review procedure more transparent, certain, foreseeable and balanced.

5. Conclusion

Overall, the ICC system has the enormous merit of having not only rejected the death penalty, differently from the first ICTs, but also softened life imprisonment by including the review mechanism. This appears to be a forward-thinking solution that complies with the current protection of human rights requested by the international and most of the main regional provisions, organs, bodies and courts, being far more innovative than the penalty systems of several states that ratified the ICCS. This was not obvious at the time of the Rome Conference and hopefully such a normative framework will have a positive impact on international and national criminal and human rights law.

However, it is fundamental to underline that, *de lage lata*, with reference to the current legal framework, in order to stick to what is provided for in the ICCS and the ICC RPE, life imprisonment should be considered as an exceptional punishment, to be imposed only when the legal criteria are strictly met. Furthermore, given the problematic aspects of life imprisonment and its application, more effort should be made to render the provisions related to such a penalty more prudent, transparent and rigorous as well as less discretional. The aim is to guarantee the rights of the offenders in the manner in which criminal law principles require. Above all, it is paramount to implement the principle of legality and legal certainty through legal amendments on different levels, after deep reflection on the significance of life imprisonment and its consequences on a human being. Such an approach would be necessary to avoid an instrumental use of human rights law that serves to threaten, and not to safeguard, the rights of defendants, in the name of vague new rights of victims, for instance the right to the truth.[184] In addition, the principles that have shaped the establishment of the ICC should be borne in mind,[185] adopting the criteria of reasonableness and sensibleness. For this reason, the approach that should be embraced is that of minimal criminal law, according to which punishment is a painful necessity that should be imposed with prudence.[186]

Moreover, although the debate on the matter clearly has not matured yet and international human rights standards do not currently acknowledge the inappropriateness of life imprisonment *per se*, such a penalty is a worrying issue and needs to be the object of attentive reflection. In particular, *de lege ferenda*, it would be desirable to abolish life imprisonment from the ICCS. Not only because of its inhumanity, but also due to its inadequateness to tackle the problems posed by the nature of international crimes, often political and context-related, so much so that they have been called 'one-off crimes'.[187] This approach would be of great impact both nationally and internationally: if even the gravest crimes can be punished in a balanced system, changes can be made at all levels. In effect, the change in importance attached to the issue cannot be initiated by entities like the UN and courts like the ECtHR, which are partially inadequate to drive progressive human rights standards forward in fields like life imprisonment, since the subject of penalties is strictly in the reign of States' sovereignty. In particular, even though the ECtHR's case law is increasingly taken into consideration as the most enlightened model to delineate international human rights standards, three fundamental problems are often forgotten. First, that the ECtHR is a regional court; as a consequence,

184 P. Caroli, 'The Interaction between the International Criminal Court and the European Court of Human Rights – The Right to the Truth for Victims of Serious Violations of Human Rights: The Importation of a New Right?', in P. Lobba & T. Mariniello (eds.), *Judicial Dialogue on Human Rights* (2017), p. 270.

185 DeGuzman, supra note 69, p. 3.

186 S. Senese, 'Per l'Abolizione dell'Ergastolo. Relazione al Senato della Repubblica', in S. Anastasia & F. Corleone (eds.), *Contro l'Ergastolo: Il carcere a vita, la Rieducazione e la Dignità della Persona* (2009), pp. 73-74.

187 J. von Holderstein Holtermann, 'A "Slice of Cheese" – a Deterrence-Based Argument for the International Criminal Court', (2010) 11 *Human Rights Review*, no. 3, p. 291.

it is necessary to be cautious before elevating European case law to international standards. Second, that the ECtHR is not a criminal court: it outlines human rights that cannot be immediately transferred to criminal law, without the necessary adaptation.[188] Third, that the ECtHR is rather restrained in its case law because of the wide usage of the 'margin of appreciation', which frequently prevents the Court from venturing to make innovative human rights statements, especially in extremely sensitive situations.

Therefore, the ICC, which is always in the spotlight, should have the courage to reflect the most advanced human rights views concerning criminal law, even though not internationally accepted, which come from several of the SPs that can boast decades of history in imposing definite terms of imprisonment. In effect, to protect human rights should not mean to wait for a large majority of states to accept new progressive views that may then become internationally recognised standards, but should mean to push forward by taking highly progressive standpoints and attempting to have them increasingly embraced at the international level, supported by the elaborations in national states.

However, at the moment such an about-turn is unlikely in the ICC system, since life imprisonment is still a strong-rooted punishment, considered even more necessary in international criminal law. Yet, to listen to public sentiments on the issue of life imprisonment simply offers the public a placebo, masking international crimes-related problems.[189] Moreover, studies have revealed that victims often want accountability and that the desire for revenge is relatively weak, since they are generally aware that feuds would create other violence.[190] In any case, the objective of criminal law should not be to satisfy victims' desires and emotional impulses, but to bring justice in a rational manner.[191] Contrarily, what could actually make the difference in the fight against international crimes is not the severity of the punishment, but its certainty and the swiftness of its imposition, which are more likely to deter crimes.[192] Even though in *Katanga* it was affirmed that 'it is not so much the severity of the sentence that should prevail as its inevitability', such a lesson does not seem to have been properly learnt so far.[193]

188 J. Geneuss, '"Directory Authority": Fertilising International Criminal Tribunals' Human Rights Standards with European Court of Human Rights' Case Law', in P. Lobba & T. Mariniello (eds.), *Judicial Dialogue on Human Rights* (2017), pp. 44-45.

189 S. Anastasia & F. Corleone, 'Le Buone e Tenaci Ragioni per l'Abolizione dell'Ergastolo', in S. Anastasia & Corleone (eds.), *Contro l'Ergastolo: Il carcere a vita, la Rieducazione e la Dignità della Persona* (2009), pp. 12, 14.

190 E. Kiza & H. Rohne, 'Victims' Expectations towards Justice in Post-Conflict Societies: A Bottom-Up Perspective', in R. Henham & M. Findlay (eds.), *Exploring the Boundaries of International Criminal Justice* (2011), p. 96.

191 L. Cornacchia, *Funzione della Pena nello Statuto della Corte Penale Internazionale* (2009), pp. 102-103.

192 E.g. 'Deterrence', in A. von Hirsch et al., *Principled Sentencing: Readings on Theory and Policy* (2009), p. 40; A.N. Doob & C.M. Webster, 'Sentence Severity and Crime: Accepting the Null Hypothesis', (2003) 30 *Crime and Justice*, p. 143 gives significant evidence of this at the national level, but the reasoning may also apply at the international level.

193 *Katanga* case, supra note 36, para. 11.