

# **Sentencing and Victims and Witnesses**

## **Outline Lecture notes**

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**Rupert Skilbeck**

*Odsjek Krivične Odbrane*

*Ured Registrara*

*Sud Bosna i Hercegovina*

*www.okobih.ba*

## **Outline**

- Sentencing
  - Purpose
  - Penalties
  - Procedure
  - Aggravating factors
  - Mitigating factors
  - Serving time
  - Review of Sentence
  - Guilty pleas

## **Outline**

- Victims and Witnesses
  - New and old ideas
  - Victims and Witnesses Unit
  - Reparations
  - Victims' Participation and Representation Unit
  - Trust Fund for Victims
  - Representation
  - Participation

## **Sud BiH**

- Court of Bosnia and Herzegovina
- *11bis* transfers
- Rules of the Road cases
- Domestic investigations

- 800 to 10,000 cases

## **Odsjek Krivične Odbrane**

- Legal Support
- Administrative Support
- Training and development

## **Pravna podrška**

- Initial representation
- Trial Units
- Panel of Experts
- Research Network
- Investigators

## **Administrativna podrška**

- Research facilities
- Office facilities
- Payment of investigators

## **Training**

- Criminal Law
- Humanitarian Law
- Advocacy
- Writing motions
- Ethics
- Investigations training
- Scientific evidence
- Junior lawyers

## **Sentencing**

- Sentencing
  - Purpose
  - Penalties
  - Procedure
  - Aggravating factors
  - Mitigating factors
  - Serving time

- Review of Sentence
- Guilty pleas

## **Purpose**

- Rome Statute: Preamble
  - End impunity and ‘contribute to the prevention of such crimes’

## **Penalties**

- Article 76 - Sentencing hearing
  - Evidence from trial
  - Additional evidence and submissions
- Article 77 - Applicable penalties
  - Specific sentence up to 30 years
  - Life Imprisonment
  - Additionally a fine
- Article 78 - Determination of Sentence

## **Penalties**

- Article 78 - Determination of Sentence
- Relevant factors
  - Gravity of the Crime
  - Individual circumstances of defendant
- Time on remand
- Totality principle

## **RPE Chapter 7**

- Rule 145: determination of sentence
- Judicial thought process:
  - Totality must reflect culpability
  - Balance mitigators and aggravators
  - Balance defendant and the crime

## **RPE Chapter 7**

- Factors in 145(1)( c)
  - Extent of damage
  - Harm to victims and families

- Nature and means of crime
- Participation
- Intent
- Manner, time and location
- Age, education and social condition

## **RPE Chapter 7**

- Mitigators: Rule 145(2)(a)
  - Failed defences
  - Post offence conduct
  - Attempts to compensate
  - Co-operation

## **RPE Chapter 7**

- Aggravators: Rule 145(2)(b)
  - Any precon
  - Abuse of power
  - Defenceless victim
  - Particular cruelty
  - Multiple victims
  - Discrimination
  - Anything else similar that we forgot

## **Maximum sentences**

- No death penalty
  - Negotiations at Rome
  - Art.80: does not prejudice domestic law
  - Consistency: Sierra Leone

## **Maximum sentences**

- Life sentences
  - Definition
  - Constitutionality
  - Rule 145(3):
  - ‘when justified by the extreme gravity of the crime...’
  - Existence of one or more aggravators

## **Fines**

- In *addition* to imprisonment
- Is prison sufficient?
- Motivated by personal gain
- Other financial orders
- 75% Rule
- Payment in instalments

## **Serving time**

- Art.103:
  - “States Parties should share the responsibility for enforcing sentences of imprisonment in accordance with principles of equitable distribution”
- Agreements to take prisoners
- Designation of State of Enforcement
- Art.103(4): Back up plan

## **Serving time**

- Designation of State of Enforcement
- Art.103(3): Relevant factors
  - Treaty Standards
  - Views of defendant
  - Nationality of defendant
  - Other factors including the circumstances of the Crime

## **Serving time**

- Art.104: Transfer to another State
- Art.105: No role for State of Enforcement
  - Legal basis in domestic law
- Art.106: Supervision of sentence
  - Problems and complaints
  - Varying conditions
- Art.107: Transfer at end of sentence

## **Review of sentence**

- Art.110 Rome Statute
  - 2/3 of determinate sentence
  - 25 years for life sentence
- Art.110(4) factors:
  - Co-operation
  - Assistance in locating assets
  - Change in circumstances as per Rules
- Art.110(5): periodic review

## **Review of sentence**

- Rule 223: Criteria for review
  - Conduct in prison
  - Disassociation with the crime
  - Prospect for rehabilitation
  - Dangers of early release
  - Benefits of early release to victims
  - Individual circumstances such as health or age

## **Review of sentence**

- Rule 224: Procedure for review
  - 3 Judge appeal panel
  - Fair Hearing rights
  - Representations from victims and Pros
  - Periodic review at least every 3 years
- Early release
  - Not on parole
  - Final and irreversible

## **Guilty pleas**

- Art.65
  - Consequences
  - Made voluntarily
  - Admission supported by facts
  - Can reject the plea
  - Evidential hearing on guilty plea
- Plea agreements: 65(5)
  - Not binding on the Court

## **ICTY: Purpose**

- Deterrence
- Retribution
- Rehabilitation
- Social Defense
- Restorative goal

## **ICTY Sentences**

- No guidelines
- Sentencing arguments presented
  - During the Trial – rule 85 (A)(vi)
  - During closing arguments - 86(c)
- Sentencing on a guilty plea – Rule 100

## **ICTY Sentences**

- Sentence under Rule 87(c):
  - Consecutive
  - Concurrent
  - A single sentence reflecting the totality of the criminal conduct.

## **ICTY: Factors**

- Article 24 and Rule 101(B)
  - Gravity of the crime
  - Any aggravating or mitigating circumstances
  - General practice regarding prison sentencing of the former Yugoslavia

## **Totality principle**

## **Consistency**

- *Mucic*

- Consistency in punishment as a reflection of equal justice
- *Jelusic*
  - A sentence should not be capricious or excessive

## Individualized

- *Jelusic*
  - Sentence must be individualized
- *Furundzija*
  - A previous decision on sentence may provide guidance

## ICTY: Appeals

- *Aleksovski*
  - Sentence can be lengthened
- *Tadic, Kordic, Cerkez*
  - Credit for time spent in detention, even abroad
- *Kordic, Cerkez*
  - Court may recommend minimum sentence before reduction

## Ranking of crimes?

- Is Genocide the most serious of crimes?
- Is there a distinction between the seriousness of a crime against humanity and a war crime?

## Gravity of Offences

- *Kupreskic*
  - Particular circumstances of the case
  - Degree of the accused's participation
- *Knojelac*
  - Consequences of crime on victim
- *Krstic*
  - Number of victims, physical and physiological suffering

## Gravity of Offences

- *Mucic*
  - Command responsibility for murder is graver than for plunder
- *Tadic*
  - Sentencing should reflect the role of the accused in the context of the conflict
- *Kovac and Vokovic*
  - Vulnerability of the victim, even if vulnerability constitutes an element of a crime (e.g. rape)

## **Aggravators and Mitigators**

- *Naletilic and Martinovic*
  - Obligation to consider mitigating circumstances
  - Discretion as to the weight

## **Burden of Proof**

- *Kunarac, Kovac and Vukovic*
  - Prosecution:
    - Prove aggravating circumstances beyond a reasonable doubt
  - Defence:
    - Prove mitigating circumstances on the balance of probabilities.

## **Aggravating Factors**

- The magnitude of the crime/s
- The zeal with which the accused committed the crime/s

## **Command Responsibility**

- *Blaskic*
  - Command responsibility is an aggravating factor
  - Command position is more aggravating than direct responsibility
- *Krstic*
  - A high rank does not, in itself, lead to a harsher sentence
- *Mucic*
  - Command responsibility for murder is graver than for plunder

## **Direct participation**

- *Krstic*

- The most direct forms of participation “planning, ordering, instigating” are possible aggravating circumstances
- *Blaskic*
  - Informed participation is a less aggravating circumstance than willing participation

## **Direct participation**

- Role as fellow perpetrator could be as important as direct participation
- Discriminatory state of mind is an aggravator

## **Other Aggravators**

- *Krstic*
  - Premeditation, when not part of the crime can constitute an aggravating factor
- *Blaskic*
  - Motive of crime, such as ethnic and religious persecution, desire for revenge and sadism

## **Other Aggravators**

- *Simic*
  - The sexual, violent and humiliating nature of the acts
- *Kunarac, Kovac and Vukovic*
  - Sexual, violent and humiliating acts against particularly defenseless and vulnerable women and girls

## **Other Aggravators**

- *Blaskic*
  - Status of victims
  - Manifest physical and mental suffering of the victims
  - Recurring and systematic nature of the crimes
- *Kunarac, Kovac and Vukovic*
  - The youthful age of the victims

## **Other Aggravators**

- *Kunarac, Kovac and Vukovic*

- Period during which the offences were committed
- *Mucic*
  - Refusal of the accused to testify – no inference can be drawn

## **Mitigators: ICTY**

- **Article 101(B)(ii)**
  - Cooperation with prosecution is the only mitigating factor mentioned by the ICTY legislation
- ***Plavsic***
  - The ICTY may consider any other mitigating factors

## **Cooperation**

- Assisting the prosecution
- *Jelusic*
  - Substantiality of cooperation will be determined by the Court
- *Blaskic*
  - The evaluation will be based on the quantity and quality of information provided

## **Guilty pleas**

- *Simic*
  - In principle guilty plea will give give rise to reduction in sentence
- *Sikirica*
  - Guilty plea prior the trial – full credit will be granted
- *Simic*
  - The express of remorse should be sincere

## **Additional factors**

- *Erdemovic*
  - Duress may be taken into account as a mitigating factor
- *Krstic*
  - Indirect or forced participation in a crime
- *Vasiljevic*
  - Diminished mental responsibility may be relevant to the sentence

## **Additional factors**

- *Blaskic*
  - Voluntary surrender of the accused
  - Young age
  - Personal circumstances
- *Plavsic*
  - Post conflict conduct
  - Advanced age

## **Additional factors**

- *Mucic*
  - Character of the accused and conduct during the trial
- *Simic*
  - Poor health: only in exceptional cases
- *Sikirica*
  - Assistance to detainees or victims

## **Not a mitigator**

- *Krnojelac*
  - Lack of strength of character

## **Victims and Witnesses**

- Victims and Witnesses
  - New and old ideas
  - Witness Protection
  - Reparations
  - Victims' Participation and Representation Unit
  - Office of Public Counsel for Victims
  - Trust Fund for Victims

## **New concepts**

- Involvement of victims
- Common law ideas
- Civil law 'partie civile'

## **Witness Protection**

- Pre-trial

- Art.54(1): Investigation phase
- Art.68(5): Withholding evidence
- Art.57(3): PTC duties
- Trial
  - Art.64(6)(e)
  - Art.68

## **Witness Protection**

- Victims and Witnesses Unit
  - Art.43(6)
  - Protective measures and security
  - Counselling
  - Trauma, including sexual trauma

## **Witness Protection**

- Rules of Procedure
  - Rule 16: Responsibilities of Registrar
  - Rule 17: Functions of the unit
  - Rule 18: Responsibilities of Unit
  - Rule 19: Expertise in the Unit

## **Rule 85 - Victims**

- Natural Persons
  - Suffered harm
  - Result of commission of crime
- Organisations or Institutions
  - Direct harm to their property
  - Religion, education, art, science, charity
  - Historic monuments, hospitals

## **Reparations**

- Art.75
  - (1): Establishes the principles
  - Can be on request or on own motion
  - (2): Against defendant or Trust Fund
  - (3): Fair Trial guarantees
  - (4): Locating assets

- (5): Enforcement

## **Reparations**

- Procedures
  - Rule 94: Contents of Request
    - See Regulation 88
  - Rule 95: Motion of the Court
  - Rule 96: Requirements for publication
  - Rule 97: Assessment of award
- Victims Participation and Reparation Unit
  - Responsible for publicity and administration

## **Trust Fund for Victims**

- Art.79
  - Established by Assembly of States Parties
  - Established in September 2002
  - More ambitious plans failed
  - Indigent defendants

## **Trust Fund for Victims**

- Board of Directors
  - Queen Rania of Jordan
  - Dr Oscar Arias Sanchez, Costa Rica
  - Mr Tadeusz Mazowiecki
  - Simone Veil
  - Archbishop Desmond Tutu
- Meeting April 2004 to establish procedures

## **Office of Public Counsel**

- Office of Public Counsel for Victims
  - Regulation 81
- Role
  - As per OPC for Defence
  - Independent of Registry
  - Employs lawyers and assistants
  - Legal Research
  - Advocacy on specific issues

## **Representation**

- Rule 89: Application to participate
  - Regulation 86: Contents
  - To Registrar, copied to Pros and Def
  - Chamber decides level of participation
  - Includes opening and closing
  - May reject if not a victim or prejudices a fair trial
  - May apply on behalf of another
  - Chamber may consolidate applications

## **Representation**

- Rule 90: Legal Representatives
  - Victims' Participation and Representation Unit
  - Chamber can request common representative
  - Need to respect rights, and avoid conflicts
  - List of approved Counsel: Rule 22(1)

## **Representation**

- Rule 91: Participation
  - Attend and participate
  - Can restrict to written submissions
  - Right to respond by Prosecution and Defence
  - Questions on application to Court, and circulated to parties
  - No restrictions for a reparations hearing

## **Representation**

- Rule 92: Notification of
  - Decision not to investigate
  - Decision not to prosecute
  - Confirmation of charges
  - Hearings and postponements
  - All written filings
  - Decisions of the Court

## **Participation**

- Preliminary Investigations
  - Pursuant to Art.15

- Can send information
- Must be confidential: Rule 46
- Record of anyone interviewed: Rule 111

## Participation

- Request to PTC to authorise investigation
  - Pursuant to Art.15(3)
  - Pros must inform victims
  - Victims can make representations: Art.15(3), Rule 50(3)
  - PTC can request more info or a hearing: Rule 50(4)
  - PTC must give notice of decision: Rule 50(5)

## Participation

- Pros concludes no basis for investigation
  - Pursuant to Art.15(6)
  - Pros must inform victims: Art.15(6)
  - Safely: Rule 49(1)
  - Possibility of providing further info: Rule 49(2)

## Participation

- Referral by State Party or UNSC
  - Pursuant to Art.14
  - Pros commences Investigation
  - Unless decides no reasonable basis: Art.53
  - Publicity required: Rule 92

## Participation

- Jurisdiction and admissibility
  - Challenges by accused or others
  - Victims can submit observations: Art.19(3)
  - Registrar must inform Representatives of any such challenges: Rule 59(1)
  - Must also provide a summary of grounds of challenge: Rule 59(2)

## Participation

- Pre-trial

- Confirmation of indictment hearing
- Must notify Representatives of the hearing: Rule 92(3)
- Give publicity to the hearing: Rule 92(8)

## **Participation**

- Trial
  - Where personal interests affected
  - Permit their views to be considered
  - Where not prejudicial
  - Notification of hearings etc: Rule 91

## **Participation**

- Appeal and revision
  - Same rules on hearings and procedure as in Trial Chamber
  - Where ‘leave to appeal’ is required, notification to participants in trial: Rule 155(2)
  - Where no leave required, inform participants of the appeal: Rule 156(2)

## **Participation**

- Reparations
  - Lead role for victims
  - Request made under Rule 94
  - Notification at commencement of trial