

‘Culture’ and Sentencing at the International Criminal Court

Michelle Coleman

I. Introduction

Formulating an appropriate sentence following a conviction necessarily implicates notions of justice and fairness with regard to the defendant, the victims, and the public at large. Justice and fairness are culturally relative concepts that are informed, at least to an extent, by the emphasis the relevant society places on ideas like retributivism, rehabilitation and restorative justice. However, if justice and fairness are culturally relative, questions arise as to what that means for a justice system that is supposedly not the product of any one specific, local cultural context. The International Criminal Court (ICC or the Court), created by international agreement and responsible for trying individuals from a variety of nations, must uphold justice and fairness across a vast geographical area with a wide variety of cultural values and practices. This creates an issue as to whether and how cultural considerations may be incorporated into the sentencing decision, so that it is perceived as fair.

The problem of how or whether ‘culture’ should be considered during sentencing could be partially addressed through sentencing rules. However, the ICC does not have guidelines on what sentences it may impose, other than a general prohibition against capital punishment.¹ The result is that the Court has a wide discretion when determining an appropriate sentence in a particular case. This discretion poses a real challenge for the Court because of the gravity of the crimes, but it leaves the Court free to create its own legal culture of sentencing, or to incorporate the legal culture(s) of other jurisdictions.

Following a brief discussion of ‘culture’ itself, this chapter examines how the sentencing decisions to date at the ICC have been impacted by such cultural considerations. It looks at the Rome Statute (the Statute), the Rules of Evidence and Procedure (ICC RPE), and sentencing rules, and evaluates how considerations of ‘culture’ are incorporated into those rules.² It outlines the purposes of sentencing at the Court and determines how those purposes limit or expand upon the rules. The chapter then reviews the individual sentencing decisions and determines whether the judges specifically accounted for questions that arose regarding the cultural contexts in which the crimes were committed and how much weight it was given. Finally, the chapter reflects on whether and how considerations of cultural questions are used in the sentencing decisions and how this might impact the sense of justice and the Court’s legitimacy that results from those decisions.

II. What is ‘Culture’ and its Relevance for the ICC?

¹ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) UN Doc A/CONF.183/9 (Rome Statute) arts 77 and 78.

² *ibid*; Rules of Procedure and Evidence, International Criminal Court (as amended 2013) (ICC RPE).

A clear definition of ‘culture’ is necessary before determining whether it’s relevance in sentencing determinations at the ICC. While there is no settled definition of culture, it can be understood broadly in accordance with the description of ‘culture’ in the introduction of this volume. In short, the idea of ‘culture’ is a concept that describes the defining features of a social group and can include, for example, values, traditions, laws, religion, language, and arts.³ As result, what qualifies as ‘culture’ is complex, dependent on context, and constantly evolving.⁴

The features that define a particular group’s ‘culture’ help the group know and express their attitude toward life and creates the framework for how they perceive the world around them. Thus, cultural understandings and values are important factors when a group is determining whether something is fair or just. On a surface level, these values and understandings can affect whether one feels that the purpose of punishment should be restorative, retributive, rehabilitative, or something else entirely, which in turn can impact whether a particular punishment is considered ‘fair’. Additionally, ‘legal culture’ develops around legal groups which can include national, or individual courts that have distinct rules, regulations and a ‘way of doing business’.⁵ This chapter engages with both conceptualizations – culture as it comes into the Court through situations and individuals, and culture as in the ‘legal culture’ of the Court itself.

There are many angles from which ‘culture’ and legal culture can potentially affect the Court or the perception of the Court, as seen in this volume. The ICC has a legal culture, which has developed in part from the ad hoc tribunals, and from its statute, rules and practices. The individuals who participate in the Court’s proceedings, such as the ICC staff, the accused, counsel, and victims, also bring their own cultural ideas. Sentencing adds a layer of complexity to the relevance of cultural considerations. The legal culture of the Court is relevant with regard to sentencing, but so too are the individual cultural backgrounds of the judges, victims and the accused persons. Further, the cultural background of those observers reading the sentencing decision could impact how that decision is received by them, and whether the decision – and the Court itself – is seen as legitimate.

III. The ICC’s Legal Culture Regarding Sentencing

A jurisdiction’s rules and guiding principles may provide a sense of the relevant legal culture by explicitly or implicitly describing the values of the court, roles played by different individuals, and required procedures. While this does not embody the entire legal culture, it provides an idea of what is important to the court and how it operates.

³ Introduction of this volume, p 3 For example the preamble of the UNESCO Universal Declaration on Cultural Diversity, adopted by 31st Session of the General Conference of UNESCO in Paris (2 November 2001); UNESCO Mexico City Declaration on Cultural Policies, adopted at World Conference on Cultural Policies Mexico City (26 July-6 August 1982); Fribourg Declaration on Cultural Rights (Adopted in Fribourg, 7 May 2007); Makau Mutua, *Human Rights: A Political and Cultural Critique* (University of Pennsylvania Press 2002) 22.

⁴ Introduction of this volume p 3.

⁵ See for example Sally Engle Merry, ‘What is Legal Culture? An Anthropological Perspective’ (2010) 5 *Journal of Comparative Law* 40; See David Nelkin ‘Using the Concept of Legal Culture’ (2004) 29 *Australian Journal of Legal Philosophy* 1; Roger Cotterrell, ‘Comparative Law and Legal Culture’ in Matias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2019).

The ICC's legal culture with regard to sentencing is found in the Rome Statute and the ICC RPE.⁶ While these sources are silent as to whether culture should be a consideration in sentencing, the rather vague rules that the ICC must follow when determining an appropriate sentence do grant the Court wide discretion which enables the Court to consider cultural context. Thus, it might be concluded that the Court can consider the cultural context to an almost unlimited extent. This apparent freedom to incorporate deliberations on questions of a cultural nature into the sentencing decisions is somewhat tempered, but not precluded, by the purposes of sentencing at the ICC.

a. The Sentencing Rules at the ICC

Unlike many national jurisdictions, which have sentencing rules or guidelines, the Rome Statute and ICC RPE provide little guidance as to what sentences to impose post-conviction.⁷ Articles 76, 77, and 78 of the Rome Statute control sentencing and punishment at the ICC. Article 76 states that '[i]n the event of a conviction, the Trial Chamber shall consider the appropriate sentence to be imposed' and may 'hear any additional evidence or submissions relevant to the sentence'.⁸ Articles 77 and 78 limit the possible penalties to a maximum of thirty years or, when justified by extreme gravity, life imprisonment.⁹ Further, the Court may also sentence an individual to pay a fine or forfeit property or assets 'derived directly or indirectly from that crime'.¹⁰

The drafters of the Rome Statute seemed relatively unconcerned about how the penalties would be assigned and what specific factors should be taken into account.¹¹ There is no indication about what makes up the gravity requirement, what constitutes 'aggravating and mitigating circumstances', and no commentary on whether cultural considerations could be taken into account when imposing a sentence. Of course, the drafters did bring their own cultural backgrounds and legal cultures to the negotiations which is evident in the discussions on other articles of the Statute. However, the discussion surrounding the permissibility of the death penalty was the only sentencing issue where the drafters' cultural backgrounds were particularly relevant.¹²

The ICC RPE are also relatively silent about how sentencing is meant to work. The applicable rules are 143 through 147. Rules 143 and 144 provide for a sentencing hearing to take place and give the responsibility of determining the sentence to the Trial Chamber. Rules 145, 146, and 147 provide some guidance on how judges are meant to determine what penalty a convicted person should receive. Rule 145(1) provides that the totality of the sentence must reflect the convicted person's culpability in the crime; including a balance of aggravating and mitigating circumstances as well as the specific circumstances of the crime and the convicted person.¹³ Rules 146 and 147 pertain to the judges' ability to levy fines as part of the sentence.

⁶ Rome Statute (n 1); ICC RPE (n 2).

⁷ William A Schabas, *An Introduction to the International Criminal Court* (5th edn, CUP 2017) 319.

⁸ Rome Statute art 76 paras 1-2.

⁹ Rome Statute arts 77(1)(a) & (b), 78.

¹⁰ Rome Statute arts (2)(a) & (b).

¹¹ Nadia Bernaz 'Sentencing and penalties' in William Schabas and Nadia Bernaz (eds), *Routledge Handbook of International Criminal Law* (Routledge 2011) 289.

¹² *ibid* 289-93; Schabas (n 7) 321-22.

¹³ ICC RPE r 145(1).

Rule 145(2) requires the Court to look at any mitigating and aggravating circumstances that might be present in the case. The mitigating circumstances can include ‘circumstances falling short of grounds for exclusion for criminal responsibility such as substantially diminished mental capacity or duress;’ and ‘the convicted person’s conduct after the act which includes any offer to compensate the victims and cooperate with the Court’.¹⁴ The aggravating circumstances are more concretely given: relevant prior convictions; abuse of power or official capacity; commission of the crime on a particularly defenceless victim; commission of a crime with a motive involving discrimination; and other circumstances similar to those mentioned.¹⁵

Overall, the sections of the Statute and Rules regarding sentencing are written in a manner that does not explicitly reflect any particular ‘culture’ and there is no specific indication that ‘culture’ was taken into account during the drafting process. This leaves the Court with a very wide range of discretion.¹⁶ While the Rules suggest aggravating and mitigating circumstances, those recommendations are not all-inclusive. There is no guidance on how the gravity is to be assessed, nor on how it differs from the aggravating circumstances. Limits on discretion are largely imposed by the Court itself.¹⁷ The Court has stated that its discretion in determining a sentence must be guided by the convicted person’s culpability and the sentence must be proportionate to the crime of which the individual was convicted.¹⁸ Further, in order to prevent ‘double counting,’ the Court has noted that any factor that is counted in the gravity assessment cannot be taken into account when assessing any aggravating circumstances.¹⁹ Even with these self-imposed limitations the Court’s discretion is quite wide. This means that it is possible for the Court to take cultural backgrounds into account when making a sentencing determination.

b. The purposes of punishment at the ICC

The purposes that punishment is meant to serve in a particular jurisdiction help to determine whether justice is perceived as being done. Some jurisdictions - and indeed legal cultures - have a more retributive outlook with regard to sentencing and punishment, while some allow for more restorative or rehabilitative goals.²⁰ The importance each cultural context places on these different purposes of punishment can significantly impact an individual’s perception about the legitimacy of the sentence imposed. For example, victims from a cultural community with a more retributive view of punishment could feel that a rehabilitative sentence does not provide justice for the harms they suffered.

¹⁴ *ibid* r 145(2)(a).

¹⁵ *ibid* r 145(2)(b).

¹⁶ *Prosecutor v Lubanga* (Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against ‘Decision on Sentence pursuant to Article 76 of the Statute’) ICC-01/04-01/06 A 4 A 6, A Ch (1 December 2014) (*Lubanga Appeals Sentencing Judgment*) para 40; Schabas (n 7) 319-20.

¹⁷ Of course, Rome Statute art 21 and human rights both provide some limits as to what the Court can do while sentencing.

¹⁸ *Prosecutor v Bemba, et al.* (Decision on Sentence pursuant to Article 76 of the Statute) ICC-01/05-01/03, T CH III (22 March 2017) (*Bemba Corruption Sentence Decision*) para 36.

¹⁹ *Prosecutor v Lubanga* (Decision on Sentence pursuant to Article 76 of the Statute) ICC-01/04-01/06, T Ch I (10 July 2012) (*Lubanga Sentence Decision*).

²⁰ Silvia D’Ascoli, *Sentencing in International Criminal Law* (Hart 2011) 32-33. Some arguments have been made to reorient the purposes of punishment toward victims’ interests. Elena Maculan and Alicia Gil Gil, ‘The Rationale and Purposes of Criminal Law and Punishment in Transitional Contexts’ (2020) *Oxford Journal of Legal Studies* <<https://doi.org/10.1093/ojls/gqz033>> accessed 9 February 2020.

The purposes of punishment have not been specifically described in the Rome Statute or Rules. The Statute's Preamble provides that 'the most serious crimes of concern to the international community as a whole must not go unpunished' and that States Parties were '[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.'²¹ In the *Lubanga* Sentencing Decision, which was the Court's first opportunity to elaborate upon the purpose(s) of sentencing at the ICC, the Court felt that the Preamble suggests that the purposes of punishment could be deterrence, because it mentions prevention, and retribution, because the crimes should be punished. The Preamble, however, does not explicitly state the purposes of punishment and nor does the Chamber provide this analysis. Nevertheless, the sentencing decisions following *Lubanga* all agree that retribution and deterrence are the primary purposes of punishment at the ICC.

The Court has specifically defined both retribution and deterrence. Retribution should not be understood as vengeance but as 'an expression of the international community's condemnation of the crimes'.²² A proportionate sentence informed by this approach to retribution allows the harm suffered by the victims to be acknowledged while pursuing the 'restoration of peace and reconciliation.'²³ The Court has identified two types of deterrence: specific deterrence and general deterrence.²⁴ 'With respect to deterrence, a sentence should be adequate to discourage a convicted person from recidivism (specific deterrence), as well as to ensure that those who would consider committing similar crimes will be dissuaded from doing so (general deterrence).'²⁵ Rehabilitation is also relevant to sentencing, but should not be given 'undue weight' as the crimes litigated at the ICC are 'of concern to the international community as a whole.'²⁶ Citing the International Criminal Tribunal for the former Yugoslavia, the ICC has determined that '[t]he objectives underlying sentencing are fulfilled with 'the imposition of a just and appropriate sentence, and nothing more.'²⁷

A third, less important, purpose was identified in the *Katanga* Sentencing Decision and the *Al Mahdi* Judgment and Sentence. In these decisions the Court explains that it is important that the sentence reflects the individual's culpability so that it may address 'the desire to ease that person's reintegration into society'.²⁸ This clearly shows concern for reintegration, but seems to be hinting at rehabilitation as well. Reintegration, however, 'cannot be considered primordial and should therefore not be given any undue weight.'²⁹ The *Bemba* Sentencing Decision goes a step further and states that

²¹ Rome Statute (n 1) Preamble paras 4, 5; Schabas (n 7) 319.

²² *The Prosecutor v Jean-Pierre Bemba Gombo*, (Decision on Sentence pursuant to Article 76 of the Statute) ICC-01/05-01/08, T CH III (21 June 2016) para 11 (*Bemba* Sentencing Decision); *Prosecutor v Ahmad Al Faqi Al Mahdi* (Judgment and Sentence) ICC-01/12-01/15-171, T Ch VII (27 September 2016) para 67 (*Al Mahdi* Sentencing Decision).

²³ *Bemba* Sentencing Decision (n 22) para 11.

²⁴ *ibid* para 11; *Al Mahdi* Sentencing Decision (n 22) para 67.

²⁵ *Bemba* Sentencing Decision para (n 22) 11.

²⁶ *ibid*.

²⁷ *ibid* para 12.

²⁸ *Al Mahdi* Sentencing Decision (n 22) para 67; *Prosecutor v Germain Katanga* (Decision on Sentence pursuant to article 76 of the Statute) ICC-01/04-01/07, T Ch II (23 May 2014) para 38 (*Katanga* Sentencing Decision).

²⁹ *ibid*.

‘[r]ehabilitation is also a relevant purpose’ but reiterates that it ‘should not be given undue weight’ because of the seriousness of the crimes at issue.³⁰

Rather than specifically delineating the purposes of punishment, the drafters of the Rome Statute largely left it to the ICC’s Trial Chambers to determine when imposing punishment. To date, those purposes have been limited to retribution and deterrence, with brief mention of rehabilitation and reintegration. The two main purposes are sourced in the Statute’s Preamble, while rehabilitation and reintegration seem to be a creation of the Chambers. The Court has the discretion to consider the cultural backgrounds of the victims or accused in determining whether other punishment purposes should apply in sentencing. This, for example, could involve looking to the purposes of punishment in the victims’ cultural backgrounds. Reflecting these purposes when sentencing might allow for victims to feel that justice is being done in their particular case.

III. Cultural considerations and the sentencing decision

When considering how the cultural context could come into the sentencing decision it might be expected that the Court would look to the national jurisdiction of the place where the crimes were committed. This would allow the Court to determine that jurisdiction’s basis for criminal sentencing and the types of sentences typically imposed. Employing an approach to sentencing that is familiar to those affected by the perpetrator’s crimes might enable them to feel that justice has been served. One challenge in incorporating cultural considerations into sentencing judgments is that the relevant national jurisdictions may not have criminalised the behaviour of which the accused has been convicted. Additionally, even if that behaviour is criminalised, there may not have been any successful prosecutions for the crime, meaning that there are no examples of sentences to draw from. This is particularly true of genocide, which is criminalised in most, if not all jurisdictions, but is rarely prosecuted on a national level. Even in the rare situation where a State has prosecuted, convicted and sentenced someone on the same charge, it is such a rare occasion that what is ‘usually’ done cannot be derived.³¹

To date, the ICC has issued six sentencing decisions in: *Katanga*, *Lubanga*, *Al Mahdi*, one each in the two *Bemba* cases, and *Ntaganda*. With the exception of the *Bemba* corruption case, these decisions all consider the cultural context in a limited manner, as discussed below.³² An analysis of the ICC’s sentencing decisions reveals that cultural contexts are considered during sentencing in one of three ways; a) as part of the gravity assessment; b) as an aggravating or mitigating circumstance; or c) when looking at the

³⁰ *Bemba* Sentencing Decision (n 22) para 11. Interestingly, rehabilitation is the only accepted purpose of punishment in the Inter-American Court of Human Rights and the European Court of Human Rights. See for example *Vinter and Others v United Kingdom* (Judgment) Grand Ch, App Nos 66069/09, 130/10, 3896/10 (9 July 2019); *Murray v The Netherlands* (Judgment) Grand Ch, App No 10511/10 (26 April 2016); *Mendoza et al. v Argentina* (Judgment) Inter-American Court of Human Rights Series C No 246 (14 May 2013).

³¹ See Mark Drumbl, ‘Punishment and Sentencing’ in William A Schabas (ed), *Cambridge Companion to International Criminal Law* (CUP 2016) 73-74.

³² The sentencing decision in the *Bemba* corruption case does not engage in a consideration of whether ‘culture’ is relevant because the crimes that this decision addresses are very specifically related to the Court itself. *Bemba* Corruption Sentence Decision (n 18).

personal characteristics of the convicted person. How questions around culture are considered in each context is assessed in turn to determine the impact both the ICC's legal culture and the cultural context of case situations and individuals has on sentencing at the ICC.

a. Gravity

For sentencing purposes, the consideration of the crimes' gravity is different from the Article 17 gravity assessment that occurs during the case admissibility determination.³³ The Article 17 gravity assessment looks to the gravity of the situation in general and the charged crimes in particular. The gravity assessment for sentencing purposes only applies to the crimes of which the accused person was convicted, a narrower consideration.³⁴ The Court considers gravity to be a 'principle consideration' when imposing a sentence and must be 'assessed *in concreto*, in light of the particular circumstances of the case, the gravity of the crimes committed by the subordinates, and the convicted person's culpability.'³⁵ This standard specifically applies in command responsibility cases, but as all of the cases resulting in conviction at the ICC have included some component of command responsibility it has been applicable in every instance. Because the Judges are able to make the assessment by looking at the evidence presented at trial and the additional evidence presented in a sentencing hearing, the Court has the opportunity to consider the cultural context when assessing the gravity of the crimes for sentencing purposes. The Court has taken this opportunity to examine specific cultural elements in some instances when determining the gravity of the crimes, but has not always taken it into account when imposing a sentence.

When discussing the gravity of Mr Lubanga's crimes, the Chamber did not take the opportunity to discuss how the victims may have suffered additional harm when the crimes were considered in the context of the local cultural norms. Rather, the Chamber explained that the use of child soldiers is a crime that 'affect[s] the international community as a whole.'³⁶ The decision goes on to discuss the particular harms that using child soldiers may cause generally, i.e. that it damages the physical and psychological well-being of each child involved as well as having a carry-over effect on future generations.³⁷ Judge Odio Benito's dissenting opinion discusses this negative impact in more detail by specifically considering how people of different genders may experience different harms. However, even this discussion stops short of cultural considerations.³⁸ At no point did the Trial Chamber attempt to understand whether the effect of being a child soldier in the context of the ongoing conflict in the eastern part of the Democratic Republic of Congo differs from being a child soldier anywhere else in the world. While the Appeals Chamber upheld the sentence, including the gravity consideration, they too did not discuss cultural issues.³⁹

³³ For a discussion of the Article 17 gravity requirement see William A Schabas, *The International Criminal Court: A commentary on the Rome Statute* (2nd edn, OUP 2016) 462-67.

³⁴ *Bemba* Sentencing Decision (n 22) para 15.

³⁵ *Katanga* Sentencing Decision (n 28) para 61; *Bemba* Sentencing Decision (n 22) para 16; *Lubanga* Appeals Sentencing Judgment (n 25) para 77.

³⁶ *Lubanga* Sentence Decision (n 28) para 37.

³⁷ *ibid* paras 38-44.

³⁸ *ibid* Dissenting Opinion of Judge Odio Benito.

³⁹ *Lubanga* Appeals Sentencing Judgment (n 25).

In both the *Katanga* and *Bemba* sentencing decisions, the Court's cultural considerations are limited with regard to the gravity determinations. However, both do discuss how the survivors were deprived of the opportunity to properly take care of deceased victims. Burial and funeral traditions are deeply rooted in local traditions, and for many people there are strong cultural norms surrounding the way the dead are to be handled.⁴⁰ In *Katanga*, Trial Chamber II observed that when victims who had been forced to flee were able to return to their villages, 'they tried to find the bodies of their relatives who had been killed during the attack but very few succeeded and few were able to hold mourning ceremonies.'⁴¹ By mentioning that 'mourning ceremonies' were not held implies a consideration of the violation of a strong cultural norm. However, the lack of specificity with regard to what these victims lost as a result of not being able to bury their dead makes the consideration more about victims in general than about how these victims were specifically impacted as a result of not being able to participate in a cultural tradition.

Likewise, when considering the gravity of murder in the *Bemba* sentencing decision, Trial Chamber III hints that the importance of cultural norms and traditions were taken into consideration when it states that 'some murder victims were deprived of the comforts that funeral services and burial rituals provide in periods of grief.'⁴² However, by couching it as an issue of 'comfort', and not going into detail about how the lack of funerals or burial might affect the particular victims of the case, Trial Chamber III seems to be contemplating how this deprivation would affect victims in general, rather than how it might affect these victims specifically because of their particular cultural norms with regard to burial or mourning.

With regard to the crime of rape in the *Bemba* sentencing decision, the Chamber considers the cultural impact that rape has on the victims. The sentencing decision specifically notes the testimony of Dr André Tabo, an expert on post-traumatic stress disorder and sexual violence in armed conflict, who testified that:

In the C[entral] A[frican] R[epublic] (CAR), rape is considered to be tantamount to adultery, leading to victims being abandoned by their husbands and having their children taken away. Further, he testified that in the CAR anal rape, particularly of men, carries certain connotations and resulted in extreme humiliation for the victims.⁴³

In addition, the Court noted 'that some of the victims lost their virginity as a result of rape, a harm that cannot be underestimated, particularly in the cultural context in which the crimes were committed.'⁴⁴ When the rapes became known within the victims' communities, victims were 'ostracised, socially rejected, and stigmatized', resulting in victims no longer being able to go to school or marry.⁴⁵ This consideration goes beyond the general suffering of victims of rape and the personal suffering of these particular victims and demonstrates how their status as a victim of rape is affected by being a

⁴⁰ See, for example, Colin Murray Parkes, Pittu Laungani, Bill Young (eds), *Death and Bereavement Across Cultures* (2nd edn, Routledge 2015).

⁴¹ *Katanga* Sentencing Decision (n 28) para 50.

⁴² *Bemba* Sentencing Decision (n 22) para 30.

⁴³ *ibid* paras 36-37.

⁴⁴ *ibid* para 38.

⁴⁵ *ibid* para 39.

member of their communities. It is in part a result of this cultural consideration that led the Chamber to determine that Mr Bemba's conviction for rape is of serious gravity.

In *Ntaganda*, however, Trial Chamber IV had the opportunity to consider 'culture' with regard to the gravity of the rape and sexual slavery crimes, but declined. The Chamber considered the fact that the victims suffered 'physical, psychological, psychiatric and social consequences, both in the immediate and longer term' to be important to the gravity determination.⁴⁶ But in this case as well, they relied on evidence from a psychological expert who testified about 'common and universal consequences suffered by victims of sexual violence' and the specific psychological evaluations of three victims to determine the psychological harm suffered as a result of these crimes.⁴⁷ Although there were specific psychological evaluations the consideration appears to be on general consequences, rather than an evaluation of the crime within the cultural context.

The *Al Mahdi* sentencing decision is particularly interesting with regard to cultural considerations because the crime that he pled guilty to was the destruction of protected objects under Article 8(2)(e)(iv).⁴⁸ This Article describes the crime as '[i]ntentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives.' Mr Al Mahdi was charged with destroying ten of the most important sites in Timbuktu consisting of nine mausoleums and one door, which were 'an integral part of the religious life of its inhabitants' and 'constitute a common heritage for the community.'⁴⁹ It does not seem that the cultural significance of these sites could be over-estimated. Nine of the sites were protected UNESCO World Heritage sites, and the Court recognised that 'Timbuktu is at the heart of Mali's cultural heritage, in particular thanks to its manuscripts and to the mausoleums of the saints.'⁵⁰

Despite the cultural significance of Mr Al Mahdi's crimes, the Court did not take the cultural context much into account in their sentencing determination. The discussion, to the extent that it considers questions of culture, is limited in the determination of the gravity of the crime. While culture is considered with regard to gravity, the discussion merely leads the Court to determine that the cultural and discriminatory aspects of the crime allow the Chamber to conclude that the crime 'for which Mr Al Mahdi is convicted is of significant gravity.'⁵¹

In *Ntaganda*, Trial Chamber IV had an opportunity to consider cultural aspects when making the gravity determination with regard to murder charges. While the Court focused on the number of murders, the condition of those who were murdered, and the long term physical and psychological condition of those who survived.⁵² The Court specifically examined the impact of *Ntaganda*'s murder of *Abbé Bwanalunga*, a priest

⁴⁶ *Prosecutor v Bosco Ntaganda* (Sentencing Judgment) ICC-01/04-02/06, T Ch VI (7 November 2019) paras 105-107 (*Ntaganda* Sentencing Decision).

⁴⁷ *ibid* paras 102, 105.

⁴⁸ *Al Mahdi* Sentencing Decision (n 22).

⁴⁹ *ibid* paras 34, 38. For a comprehensive discussion of the *Al Mahdi* case as it relates to cultural heritage, see Breemen and Breemen, and Lily and Martine in this volume.

⁵⁰ *ibid* para 78.

⁵¹ *ibid* para 82.

⁵² *Ntaganda* Sentencing Decision (n 46).

who was very well known in Ituri.⁵³ The murder had a big impact on the community and people still talk about it, however, the Court did not go into the reasons why this murder made such an impact.⁵⁴ Perhaps this is an area where some cultural context could have been considered.

b. Aggravating Circumstances

Rule 145(2) requires the consideration of any aggravating circumstances when determining a sentence for a convicted person.⁵⁵ While the ICC RPE provide some examples of aggravating circumstances, the Court has further determined that '[a]ggravating circumstances must relate to the crimes upon which a person was convicted and to the convicted person himself.'⁵⁶ Thus, aggravating circumstances are personal to the convicted person and particular to the crimes of which they were convicted. This leaves room for the cultural backgrounds of either the victims or the convicted person to be relevant. However, in the sentencing decisions to date, the cultural context has not been considered with regard to aggravating circumstances because it was already considered in the gravity determination.

In *Lubanga*, when discussing the crimes themselves and the potential aggravating circumstances, Trial Chamber I did not take a view toward the cultural background of the convicted person or the victims. In this case, the aggravating circumstances considered were the use of punishment as a part of the crimes committed against the child soldiers, the use of sexual violence, the defencelessness of the victims, and any discriminatory motive based on gender.⁵⁷ In the end, the Chamber held that none of these constituted aggravating circumstances, either because they were not proven beyond reasonable doubt or because they were already considered when assessing the gravity of the crimes.

When assessing these circumstances, Trial Chamber I could have evaluated the effects of any of these circumstances with regard to how the harms caused could have been affected by the victims' cultural context. These are areas in which the impact of the criminal behaviour might be better understood when contextualised within the particular cultural background of the victims or the accused. Specifically with regard to sexual violence, the Chamber stated that it:

is entitled to consider sexual violence under Rule 145(1)(c) of the Rules as part of: (i) the harm suffered by the victims; (ii) the nature of the unlawful behaviour; and (iii) the circumstances of manner in which the crime was committed; additionally, this can be considered under Rule 145(2)(b)(iv) as showing the crime was committed with particular cruelty.⁵⁸

Any of these circumstances could be informed by how people in a particular cultural context consider the behaviour and whether the victims would have suffered more (or

⁵³ *Ntaganda* Sentencing Decision (n 46) 24.

⁵⁴ *ibid.*

⁵⁵ ICC RPE (n 2) r 145(2).

⁵⁶ *Bemba* Sentencing Decision (n 22) para 18.

⁵⁷ *Lubanga* Sentence Decision (n 28) paras 57-81.

⁵⁸ *ibid* para 67.

less) as a result of the assessment of the violent behaviour and the cultural considerations involved.

In *Katanga*, the Prosecution argued that four aggravating circumstances should be taken into account: '(1) particularly defenceless victims; (2) particular cruelty of the commission of the crime; (3) motive involving discrimination; and (4) abuse of power or official capacity.'⁵⁹ Trial Chamber II determined that the first three aggravating circumstances were issues discussed in the gravity determination and thus only focused on the fourth factor of abuse of power.⁶⁰ The Chamber did not find that it was an aggravating circumstance because Mr Katanga did not actually abuse his position of power during the commission of his crimes.⁶¹ In reaching this conclusion, the Chamber did not consider cultural issues, but rather looked to Mr Katanga's position in particular and what actions he took in relation to it.

The Court did not find aggravating circumstances in the *Al Mahdi* sentencing decision, as the cultural arguments submitted were already considered when reaching the gravity determination.⁶² This is probably because the case is unique among the limited number of judgments at the ICC for several reasons. To date, this is the only case that has been resolved by guilty plea, which means that the entire trial process was largely avoided. It is possible that had there been a trial, the cultural significance of the crimes would have been discussed, and that the harms alleged during trial would have been in such detail that they could have been used in the discussion of gravity. This could have allowed the cultural relevance to have then been considered as a part of the aggravating circumstances.

In the *Bemba* sentencing decision, Trial Chamber III found that the particular defencelessness of the victims constituted an aggravating circumstance as to the crime of rape.⁶³ In so holding, the Chamber did not seem to consider the cultural backgrounds of the victims, but rather focused on the age of the victims and the fact that most of them were unarmed. The Chamber also found that the rapes were committed with particular cruelty as an aggravating circumstance.⁶⁴ This consideration was focused on the particular circumstances of the rapes, for example, that many victims were repeatedly raped and that the rapes often occurred in front of members of the victims' families, rather than how these circumstances might have affected the victims from a cultural standpoint. Although not explicitly stated in the decision, this might be explained because so much of the cultural impact of the rapes was discussed in the gravity assessment. When assessing the aggravating circumstance of particular cruelty with regard to the pillaging charge, Trial Chamber III similarly relied on the numbers of victims of pillage, and that the victims were defenceless, rather than specifically addressing how pillage could have been understood within the specific cultural context.⁶⁵

⁵⁹ *Katanga* Sentencing Decision (n 28) para 70.

⁶⁰ *ibid* para 71.

⁶¹ *ibid* para 75.

⁶² *Al Mahdi* Sentencing Decision paras (n 22) 86-88.

⁶³ *Bemba* Sentencing Decision (n 22) paras 41-43.

⁶⁴ *ibid* paras 44-47.

⁶⁵ *ibid* paras 52-58.

In *Ntaganda* Trial Chamber IV determined the particularly harsh treatment and cruelty with which the crimes were committed, the defencelessness of the victims, that Ntaganda himself personally killed people and encouraged others to commit crimes, and that there was a discriminatory intent to be aggravating circumstances.⁶⁶ These considerations however, seem to be as a result of the harms resulting from these crimes in general, rather than because of any specific cultural consideration.

While the Court is not precluded from considering cultural aspects when determining aggravating circumstances, the decisions to date do not include an assessment of how the victims' or defendant's cultural backgrounds might be relevant as an aggravating circumstance. This is because the relevant trial chambers have found that the cultural aspects that might be considered in the aggravating circumstances determination were already scrutinised during the gravity consideration. Since issues used to determine the crimes' gravity cannot be 'double counted' for aggravating circumstances, once an issue of cultural context is considered during the gravity assessment it cannot be examined again to establish an aggravating circumstance. While this does not prevent future Chambers from using cultural considerations in determining potential aggravating circumstances it does limit how these considerations might be used.

c. Mitigating Circumstances

When assessing mitigating circumstances, the Court has a 'considerable degree of discretion, in light of the particular circumstances of a case, in determining what constitutes a mitigating circumstance and the weight, if any, to be accorded thereto.'⁶⁷ Rule 145(2) provides that relevant mitigating circumstances must be considered and provides some examples, but the list is not exhaustive.⁶⁸ The purpose of the mitigating circumstances is to reduce the sentence but not to lessen the crime's gravity.⁶⁹ The Court has determined that '[m]itigating circumstances need not be directly related to the crimes and are not limited by the scope of the charges or Judgment. They must however, relate directly to the convicted person.'⁷⁰ Because of the Court's wide discretion, and because mitigating circumstances are related to both the crime and the convicted person, cultural elements may be considered when assessing the existence of mitigating circumstances and the weight afforded to them. That being said, the Court has not considered 'culture' in assessing mitigating circumstances in the sentencing decisions to date.

In the *Lubanga* sentencing decision, the Chamber missed an opportunity to consider how the accused's cultural background might have affected his behaviour. The potential mitigating circumstances considered were necessity, Lubanga's motives to establish peace, and his cooperation with the Court despite the various delays caused by the Prosecutor.⁷¹ While not finding any mitigating circumstances, the Chamber also did not

⁶⁶ *Ntaganda* Sentencing Decision (n 46) 39, paras 127, 154

⁶⁷ *Bemba* Sentencing Decision (n 22) para 19.

⁶⁸ ICC RPE (n 2) r 145(2).

⁶⁹ *Katanga* Sentencing Decision (n 28) para 77 citing *Prosecutor v Erdemović*, (Judgment) IT-96-22, TC (29 November 1996) para 46; see also *Prosecutor v Jean Paul Akayesu* (Sentence) ICTR-96-4-T, TC (2 October 1998) para 38; *Prosecutor v Jean Kambanda* (Judgment and Sentence) ICTR-97-23-S, TC (4 September 1998) para 56.

⁷⁰ *Bemba* Sentencing Decision (n 22) paras 19, 70; *Katanga* Sentencing Decision (n 28) para 32; *Lubanga* Sentence Decision (n 28) para 34.

⁷¹ *Lubanga* Sentence Decision (n 28) paras 82-91.

use any cultural considerations in determining whether these potential mitigating circumstances existed. Both the victims' and convicted person's cultural background may be relevant in determining whether the crimes were committed out of necessity or whether a convicted person was committed to achieving peace in the region.

In *Katanga*, the Defence argued that when imposing its sentence, the Court should find that the defendant's age, 'type of role he played, the exceptional circumstance in which he found himself, his capacity for genuine reform, the manner in which he cooperated with the Court, and his private and family life' were mitigating circumstances.⁷² The Court followed this advice in part when finding that Mr Katanga's young age and his family situation were both mitigating circumstances of limited weight that would 'make rehabilitation and reintegration easier', and attributed more substantial weight to his active support for the process of ending the use of child soldiers in Ituri.⁷³ Trial Chamber II did not turn to cultural considerations when determining the existence of these mitigating circumstances, but cultural aspects could have played a role.

In the *Al Mahdi* sentencing decision, Trial Chamber IV considered some mitigating circumstances, including his apparent reluctance to commit the crime and his choice of method when destroying the cultural sites in question.⁷⁴ The Chamber attached some weight to this reluctance.⁷⁵ As to the method used, Mr Al Mahdi recommended methods other than a bulldozer to destroy the mausoleums in all cases but one.⁷⁶ This was driven by a desire to show respect for the buildings and sites next to the mausoleums.⁷⁷ The Chamber did not elaborate upon the cultural components of its decision, but it did state that Mr Al Mahdi's cultural awareness as reflected through his initial reluctance to act and his recommendation to not use bulldozers was a mitigating circumstance.⁷⁸

With regard to Mr Al Mahdi's personal circumstances, the Court also considered his age, education and background, social and economic condition and conduct in detention as possible mitigating circumstances. All of these were dismissed as irrelevant except for his cooperation with the Prosecution. The Chamber afforded this circumstance 'limited weight' as it demonstrated that he is 'likely to successfully reintegrate into society'.⁷⁹ Mr Al Mahdi's admission of guilt was a mitigating circumstance given 'substantial weight' and 'may have a deterrent effect on others tempted to commit similar acts in Mali and elsewhere'.⁸⁰ The Chamber did not discuss how this might occur or what role cultural consideration might play. With regard to furthering peace and reconciliation, the Court stated that the admission of guilt might help by 'alleviating the victims' moral suffering through acknowledgement of the significance of the destruction.'⁸¹ This seems to hint at the cultural impact of the case, however it does not explicitly link the two concepts.

Ultimately, the Chamber found:

⁷² *Katanga* Sentencing Decision (n 28) para 76.

⁷³ *ibid* para 144.

⁷⁴ *Al Mahdi* Sentencing Decision paras (n 22) 89-93.

⁷⁵ *ibid*.

⁷⁶ *ibid* para 91

⁷⁷ *ibid*.

⁷⁸ *ibid* para 93.

⁷⁹ *ibid* para 97.

⁸⁰ *ibid* para 100.

⁸¹ *ibid*.

‘five mitigating circumstances, namely: (i) Mr Al Mahdi’s admission of guilt; (ii) his cooperation with the Prosecution; (iii) the remorse and empathy he expressed for the victims; (iv) his initial reluctance to commit the crime and the steps he took to limit the damage caused; and (v) even if of limited importance, his good behaviour in detention despite his family situation.’⁸²

Although the Court discussed Mr Al Mahdi’s consideration of the cultural significance of the buildings in deciding whether to commit the crimes, the Chamber refrained from discussing whether the victims’ cultural background or that of the accused was relevant to determining mitigating circumstances.⁸³

It could be argued that, because the mitigating circumstances relate to the crime or to the convicted person in a personal manner, cultural aspects would not be relevant. However, one could foresee circumstances in which the convicted person’s cultural background could provide much-needed explanation. For example, if the convicted person is quite young or quite old, perhaps their cultural context could inform the Court that their age is a particularly strong or weak consideration for mitigation based on cultural expectations of how a person that age might be expected to behave. Fortunately, while the Court has not considered cultural aspects as relevant factors in determining mitigating circumstances in the sentencing decisions to date, it is not precluded from evaluating whether such aspects might be relevant to mitigating circumstances in future cases.

While the Court has wide discretion to consider mitigating circumstances, and the cultural background of either the victims or the accused could be relevant to the circumstances examined, the Court has not discussed such considerations in its determinations of mitigating circumstances. This might be because these cultural aspects were not raised as part of the Defences’ arguments, or because the Court did not consider them as relevant to those particular determinations. Regardless, the Court is not restricted in considering cultural factors when determining whether mitigating circumstances exist and could do so in future sentencing decisions.

IV. Conclusion

‘Culture’ was not explicitly considered in the development of the Rome Statute or the ICC RPE, but the lack of specificity in guiding the sentencing decision does allow for the Judges to have a wide discretion. Within this discretion, cultural issues arising from the background of defendants or victims could be relevant to the sentencing decision. The three main parts of the sentencing decision - gravity, aggravating circumstances and mitigating circumstances - all have room for cultural considerations, although in practice cultural aspects have been confined to the gravity determination.

As the ICC is meant to determine culpability for future international crimes, it is not surprising that cultural considerations did not really enter the conversation during the

⁸² *ibid* para 109.

⁸³ The *Bemba* (n 22) and *Ntaganda* (n 46) sentencing decisions were examined and the respective Trial Chambers did not find any mitigating circumstances. In these findings, the Chambers did not make relevant considerations.

drafting process. Without knowing the locality from which the Court's cases would come, it would have been difficult for the Statute's drafters to account for specific cultural contexts in any substantive way. However, there are some general cultural assumptions made with regard to the sentencing procedures described in the Court's foundational documents. The first is that punishment should serve the twin purposes of retribution and deterrence. Any type of sentencing regime could have been implemented when the Court was being established. Although the trial process was designed as a blend of common law and civil law ideas, the approach to sentencing did not necessarily need to follow these traditions. More restorative justice principles, for example, could have been incorporated. Such an approach would have enabled the goals of fostering peace and reconciliation and may have provided the victims with a greater sense that justice was being done.

Once the Rules were established, the Judges became somewhat constrained in how they might consider cultural issues whilst sentencing. The Rules are clear that the applicable sentences are limited to imprisonment and fines, and thus other forms of punishment are not permissible. The Judges exacerbated this problem by giving such a prominent role to the retributive and deterrent effects of sentencing. A wider understanding of the reasons underpinning the decision to impose a criminal sentence would create more room for cultural considerations to enter the sentencing process. For example, the Judges could have stated that one of the purposes of sentencing was to aid in peace and reconciliation, and could have, as a part of the prison sentence, required the convicted person to participate in reconciliation activities to help mend the social fabric of the affected communities.

Thus far, the Court has only taken questions that arise due to the cultural context of crimes into consideration in a limited manner during sentencing. Not every sentencing decision includes a reference to cultural aspects, and when a decision does argue that these are relevant it is largely confined to the determination of gravity. This is not so surprising with regard to aggravating circumstances because of the rule preventing 'double counting' of factors between gravity and aggravating circumstances. However, it is conceivable that the cultural background of either the victims or the accused could be relevant when considering an aggravating circumstance not already discussed in the gravity determination. What is more surprising is the lack of attention given to cultural considerations in the determination of mitigating circumstances. The cultural background of both the victims and the convicted person could be relevant to mitigation and does not have the 'double counting' limitation of the aggravating circumstances.

There are, of course, many questions raised when one considers incorporating considerations around culture into the sentencing decision. They include: whether such cultural aspects should be considered; whose cultural values and practices might be relevant; how such cultural aspects are relevant; and in what part(s) of the sentencing decision they might be relevant. The Court seems to use its wide discretion in sentencing to say that the cultural background of defendants, the affected community and the cultural context in which crimes occurred can be relevant to a sentencing decision. While thus far, cultural factors have been confined to the gravity determination, it is possible for the Court to include cultural considerations in the assessment of aggravating and mitigating circumstances. Doing so may increase the sense that justice is being done experienced by all of the participants as it could allow

the Court to have a fuller understanding of the activities of the convicted person and their impact on the affected community.