Case Note

The Prosecutor v Vincent Rutaganira

1. Introduction

On 14 March 2005, the International Criminal Tribunal for Rwanda delivered its judgment finding Vincent Rutaganira guilty on one count of crimes against humanity (extermination).[1] The Trial Chamber subsequently sentenced Rutaganira to imprisonment for six years pursuant to article 3 of the Statute of the Court.[2] The shortest sentence imposed by the Court to date, the judgment proffers an interesting insight into the Tribunal's sentencing considerations, specifically the role of mitigating circumstances. The Tribunal has, in effect, been producing a 'common law' regarding international crimes, and thus this note offers some insight into the application of sentencing principles at the international level and some preliminary reflections on the law of sentencing as it has evolved at the Tribunal.

2. Background Facts

Rutaganira, born in 1944, was elected *Conseiller* for Mubuga, Gishyita commune, Kibuye préfecture, Rwanda in 1985, and acted in this capacity until 1994. He therefore held this post at the time of the genocide and at the time of the events that led to the charges against him.

During 1994, Rutaganira had come to know of earlier clashes in the préfecture, wherein the Tutsi population had taken refuge in churches, and knew that, in a similar vein, between 8–15 April 1994 thousands of Tutsi were seeking protection in Mubuga church. Rutaginira observed a mob of attackers, but did not act to protect this group from them. Subsequently, between 14–17 April 1994, thousands of those who had gathered in the church were killed or injured by the mob.

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1 *The Prosecutor v Vincent Rutaganira* [2005] ICTR-95-1C-T <http://69.94.11.53/default.htm> as at 23 April 2007.

2 *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994*, adopted by Security Council Resolution 955 (1994) of 8 November 1994, as amended by Security Council Resolutions 1165 (1998) of 30 April 1998, 1329 (2000) of 30 November 2000, 1411 (2002) of 17 May 2002, and 1431 (2002) of 14 August 2002, <http://www.un.org/ictr/statute.html> as at 23 April 2007.

3. Procedural Background

In November 1995, an Indictment was issued by the Prosecutor for several accused, including Rutaganira, regarding the events in Mubuga. The Indictment was confirmed by Judge Navanethem Pillay on 28November 1995 and an arrest warrant and transfer request were subsequently issued in December 1995 to the Minister of Justice of Zaire, where Rutaganira was presumed to be residing.

In May 1996, the Chamber granted the Prosecutor's request for leave to amend the Indictment and subsequently the charges against Rutaganira included conspiracy to commit Genocide (Count 1); Genocide (Count 14); Crime against Humanity (Murder) (Count 15); Crime against Humanity (Extermination) (Count 16); Crime against Humanity (Other inhumane acts) (Count 17); Violation of article 3 common to the 1949 Geneva Conventions (Count 18); and Serious Violations of Additional Protocol II of the 1949 Geneva Conventions (Count 19).

Having not yet located and arrested Rutaganira, in February 2002, a new warrant for arrest was forwarded to all United Nations member States. Consequently, on 4 March 2002, Rutaganira turned himself in to the Tribunal and was transported to its detention facility.

At the initial appearance in March 2002, Rutaganira pleaded not guilty to all of the charges, but in a December 2004 status conference the Chamber was informed that a plea agreement had been reached the previous day. At a hearing held that same day, the Prosecution requested the Chamber accept a guilty plea on Count 16, but acquit on the remaining six counts in the Indictment. The Chamber, finding the guilty plea to be 'sincere and valid', consequently set a date for hearing, at the same time granting a Defence request to call several witnesses to testify to the Accused's character.[3]

At a subsequent hearing in January 2005, the Prosecution applied to sever the Accused from the other people listed in the original Indictment and renewed the request regarding the plea. The Chamber ordered the severance and also granted a Defence request for the doctor at the Detention Unit to issue a confidential medical certificate. At that time, the Chamber also admitted into evidence the documentary evidence from the three previously approved witnesses.

4. Finding of the Charges

The Chamber held that Rutaganira was criminally responsible on Count 16, finding that the attack detailed previously amounted to a crime against humanity (extermination), as it amounted to the massacre of a predominantly Tutsi population, and was part of a 'widespread and systematic attack' in the préfecture during 1994. They then found that Rutaganira had by inaction facilitated this crime against humanity (extermination) and was complicit by omission (aiding and abetting).

Specifically, the Chamber found that the actus reus of the crime had been fulfilled in that Rutaganira participated by omission in a crime against humanity (Extermination), as he failed to use his status as *Conseiller* and power over the population to protect the Tutsi sheltering in his *secteur* from attack, despite the fact that

3 *Rutaganira*, above n 1 at [17].

he had the capacity to do so. Also, the chamber found that Rutaganira had a duty to act as a State employee, pursuant to section 256 of the Rwandan Penal Code, to protect the population of his *secteur*, and had failed to provide assistance to those persons in danger. Finally, the Chamber identified that Rutaganira was merely metres away from the attacks and therefore knew that violence was occurring. Thus by failing to act, it found that he had participated in the crime by omission.

Additionally, the Chamber found that the mens rea of the crime had been fulfilled as Rutaganira, as *Conseiller*, 'must have known about the serious events that were occurring in his *secteur*', and considering the scale and location of the crimes, Rutaganira must have known that his inaction contributed to the commission of the crime.[4]

On Counts 1, 14, 15, 17, 18 and 19, the Chamber, having recalled its duty to ensure the fairness of proceedings and to respect the rights of the Accused, acquitted Rutaganira.

5. Sentencing

In sentencing, the Chamber examined the aims of sentencing in the light of its mandate and resolved that punishment, deterrence and rehabilitation were the most important considerations during the sentencing process. Furthermore, in imposing a sentence, the Chamber found that it could take into account a number of factors, including: the individual and family circumstances of the Accused, age, health, general behaviour, previous criminal record, behaviour whilst in custody, and aggravating and mitigating circumstances.

First, the Chamber looked to the gravity of the criminal conduct, which it found to be the primary consideration in sentencing. It found that as an 'accomplice by omission', Rutaganira did not actively participate, but by failing to act with regard to preventing the massacre, he was, as Rutaganira acknowledged, culpable for aiding and abetting the attacks.[5]

Secondly, the Chamber considered Rutaganira's personal circumstances. It was found that his wife's position in the Government led to a strong likelihood of rehabilitation and an ability to contribute to the Rwandan community. Further, it was found that his demonstrated 'upstanding character' (as testified to by the three witnesses) would be considered in his sentence, along with his good conduct whilst in the detention facility, the absence of a criminal record, his old age, and his ongoing illness and disability.

Next, the Chamber considered aggravating circumstances. It was found that whilst the Accused's actions went to his criminal conduct rather than to aggravation, the fact that many women and children were killed did amount to an aggravating circumstance.

The Chamber then went on to consider as mitigating circumstances. It was found that the case law allowed for his voluntary surrender and guilty plea to be considered

4 Id at [95]–[99].

5 Id at [118].

mitigating circumstances. The Chamber noted that, whilst the guilty plea does lead to a sentence reduction, it would emphasise that such a plea 'serves public interest better if it is entered before the commencement or at the initial phase of the trial, thus enabling the Tribunal to save time and resources', and thus Rutaganira's plea before the commencement of the trial 'must redound to his benefit'.[6] Additionally, the Chamber found that the ongoing expression of sincere remorse was a mitigating circumstance. Finally, it found that a threat against Rutaganira's family member, whilst not excusing responsibility with regard to the attack, did amount to a mitigating circumstance.

The Chamber's last consideration was the sentencing practice in Rwanda. Whilst sentencing by the Gacaca system in Rwanda would have resulted in a commuting of the sentence, the Tribunal identified that it could not consider such a commutation because the only option available to the Tribunal was imprisonment, but it could take this into account in determining the sentence.

Considering all of these factors and the recommendation of the parties that the sentence should be between six and eight years of imprisonment, the Chamber sentenced Rutaganira to six years imprisonment. The Chamber also held that there would be credit for the three years already served in detention.

6. Reflection

The *Prosecutor v Rutaganira* did provide a clear outline of the principles for application in sentencing. It applied the previous accepted principle that gravity will be the primary consideration in sentencing; a principle articulated previously in the guilty verdicts at both the Tribunal and the International Tribunal for the Former Yugoslavia. In this way, it does provide important clear precedent on the considerations in sentencing guilty pleas, which it must be noted have been rare at both the Tribunals.

Whilst the weight given to factors considered in sentencing will vary by case — a principle articulated in the judgment and other cases at both the Tribunals — the Chamber did not capitalise on its opportunity to provide a clear statement on the weight it gave to the early pre-trial guilty pleas, to mitigating circumstances, and to aggravating circumstances. Whilst the sentence takes these various factors into account, the judgment provides little more than a mention that such consideration has been undertaken. The judgment provides little substantive guidance, and thus little persuasive precedent for future cases, on applying these factors in reaching a decision to impose a term of imprisonment.

Additionally, the judgment took into account a wide range of mitigating factors, but failed to articulate why they are relevant and to what extent they are relevant. Thus, not only does it remains unclear to what extent each of these factors affected the final determination of the imprisonment sentence, but this lack of reflection results in the judgment having an air of superficiality.

6 Id at [152].

Analysis of the Tribunal generally has commented on this unfortunate trend. As Sloane suggests, the Tribunal has paid insufficient attention to sentencing, manifesting in 'perfunctory sentencing analyses and jurisprudential confusion over the proper role of ostensible sentencing factors including "gravity of the offence", "zeal", "heinous means", "prior good character", and "voluntary commission"', which has in turn led to it imposing 'quantitatively incorrect sentences'.[7] This has unfortunate consequences for the International Criminal Court, which could have benefited from the clear articulation of principles in sentencing.

Whilst the International Criminal Court has the capacity to impose a broader range of penalties — being able to fine and seize proceeds of crime[8] — it is required to look to the same considerations in sentencing as both the Tribunals.[9] In this way, there is a pressing need for the Tribunals to justify the criteria that are being employed.

SARAH L. STEELE

7 Robert Sloane, 'Sentencing for the "Crime of Crimes": Appraising the Penal Jurisprudence of the International Criminal Tribunal for Rwanda' (2006) Columbia Public Law & Legal Theory Working Papers No 06101, abstract <http://lsr.nellco.org/cgi/viewcontent.cgi?article=1025&context=columbia/pllt> at 23 April 2006.

8 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002), art 77.

9 Id at art 78.