

THE SENTENCING PROVISIONS OF THE INTERNATIONAL CRIMINAL COURT: COMMON LAW, CIVIL LAW, OR BOTH?

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The sentencing provisions of the Rome Statute of the International Criminal Court combine features of both common law and civil law systems. This paper compares the sentencing provisions of representative common law and civil law jurisdictions with those of the International Criminal Court ('ICC') as a means of determining how the as yet untested ICC sentencing provisions will operate and determining what potential deficiencies they may have. This article also considers how the ICC sentencing provisions will be perceived by participants in the process (common and civil lawyers sitting as judges or acting for prosecuting or defence) and by the wider public. Some recommendations are made in the conclusion of this article in respect of addressing shortcomings in the ICC sentencing provisions.

I INTRODUCTION

A Scope of this Article

The sentencing provisions of the International Criminal Court ('ICC') are found in the governing documents of the ICC: the Rome Statute of the International Criminal Court¹ ('ICC Statute') and International Criminal Court Rules of Procedure and Evidence² ('ICC Rules'). These provisions contain features of both common law and civil law systems. It is not entirely clear, however, exactly how they will actually function in sentencing offenders. An understanding of common and civil law underpinnings of the ICC Statute will allow participants in this area to determine how the, as yet untested, provisions will operate. Given that there are likely to be common lawyers and civil lawyers either sitting as judges or acting as prosecuting or defence lawyers, a basic understanding of the common and civil law systems will provide some indication as to potential differences in approach to sentencing and how they may be played out in the ICC. As well as discussing the common law and civil law influences on the ICC sentencing provisions, this article also discusses some of the limitations of the sentencing provisions of the ICC, particularly with respect to ensuing consistency and transparency.

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1 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002) ('ICC Statute') <http://www.icc-cpi.int/library/officialjournal/Rome_Statute_120704-EN.pdf> at 9 November 2007.

2 *Rule of Procedure and Evidence of the International Criminal Court*, (entered into force 9 September 2002) ('ICC Rules') <http://www.icc-cpi.int/library/officialjournal/Rules_of_Proc_and_Evid_070704-EN.pdf> at 9 November 2007.

A number of writers have undertaken comparative studies exploring the common law and civil law influences on the ICC Statute, ICC Rules and ICC procedures generally.³ These comparative studies, while often purporting to discuss the criminal process of the ICC, have tended to focus almost entirely on the investigation, pre-trial and trial stages of process and not considered sentencing in any detail. This article aims to remedy this lacuna by comparing the sentencing provision of the ICC with those of the Australian State of Victoria and of France, respectively representative of common law and civil law jurisdictions.⁴

The reader may query why the State of Victoria, has been selected as a representative common law jurisdiction and not the federal jurisdiction of the Australian Commonwealth. The Australian government is, after all, the jurisdiction in which the power to enter into international treaties resides.⁵ There are two main reasons for selecting Victoria. Firstly, the Commonwealth sentencing legislation has been suggested by Australian courts to be less than ideal in its workability.⁶ Secondly, Australian Commonwealth legislation, perhaps because it deals with offences which are less brutal (the great majority of criminal offences, particularly those involving violence, are within state rather than federal jurisdiction) and with less direct victims, does not contain many sentencing features usually found in most common law jurisdictions. For example, there is no express provision under Australian federal law for victims to give evidence regarding the effect of crimes upon them, or for courts to properly take account of such evidence in sentencing.⁷ It is submitted that the Victorian provisions are both a more functional and more representative model of common law sentencing provisions.

B Background

Sentencing is inherently problematic. When sentences do not accord with the opinion of the wider community, criticisms may be levelled by the public, the press and/or politicians. In domestic jurisdiction, parliaments (and, to a limited extent, courts) may be able to effectively address such criticisms either by remedying flaws in the sentencing process, or by clarifying sentencing outcomes.

- 3 See, for example: Kai Ambos, 'International Criminal Procedure: "Adversarial", "Inquisitorial" or Mixed' (2003) 3 *International Criminal Law Review* 1; Orié, below n 14, 1439-96; and Megan Fairlie, 'The Marriage of Common and Continental Law at the ICTY and its Progeny, Due Process Deficit' (2004) 4 *International Criminal Law Review* 243.
- 4 For an in depth discussion of the ICC sentencing provisions and a comparison of them with the International Criminal Tribunal for the former Yugoslavia ('ICTY'), the International Criminal Tribunal for Rwanda ('ICTR'), and the Nuremberg Tribunal, see Adrian Hoel, 'The Sentencing Provisions of the International Criminal Court' (2005) 1(1) *International Journal of Punishment and Sentencing* 37 (see erratum notice in subsequent issue: (2005) 1(2) *International Journal of Punishment and Sentencing* 5).
- 5 *Commonwealth of Australian Constitution Act 1900* (UK) s 51(xxix).
- 6 For a slightly dated discussion of this see Richard Fox and Arie Freiberg, *Sentencing – State and Federal Law in Victoria* (2nd ed, 1999) 8. For a more up to date discussion of the same see Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (2006).
- 7 *The Crimes Act 1914* (Cth) s 16A(2)(d) does allow courts in sentencing to take account of the 'personal circumstances of any victim of the offence' but contains no mechanism for victims to directly make submissions to the court.

This problem is exacerbated in respect of the ICC on account of the markedly different domestic processes of States Parties in the mode and function of sentencing and correspondingly different expectations of sentencing outcomes. The existence and functions of the ICC, like that of many international bodies, relies upon the acquiescence of States Parties. There is thus potential for States or their citizens to be alienated where sanctions of the ICC do not conform to local cultural or legal practices, particularly where this difference is not objectively explicable. The nature of the crimes that the ICC has jurisdiction to hear, ranging from war crimes to crimes against humanity, make it particularly likely that the ICC's sentencing will be closely scrutinised and that there will be differing expectations as to the process and outcomes of the court.

There are currently 105 States Parties to the ICC Statute, of which 29 States are African, 13 Asian, 16 Eastern European, 22 Latin American and the Caribbean, and 25 West European and other States,⁸ all of which have markedly varying domestic systems of law. Of the 105 countries, 75 are civil law or civil law derived systems, 27 are common law or common law derived systems, and three are best characterised as mixed common law and civil law systems.⁹

The ability of the ICC to reflect principles of justice and processes consistent with that of States Parties and to engage positively with such governments will play a major part in determining the long term workability of the ICC now that it is about to try its first case.¹⁰

8 See <<http://www.icc-cpi.int/asp/statesparties.html>> at 9 November 2007.

9 This categorisation of legal systems is based on that of the Central Intelligence Agency, *World Factbook* (Central Intelligence Agency, 2007) <<https://www.cia.gov/library/publications/the-world-factbook/fields/2100.html>> at 9 November 2007. The countries classed as common law systems were: Antigua and Barbuda; Australia; Barbados; Canada; Cyprus; Dominica; Fiji; The Gambia; Ghana; Guyana; Ireland; Kenya; Liberia; Marshall Islands; Nauru; New Zealand; Nigeria; Saint Kitts and Nevis; Saint Vincent and Grenadines; Samoa; Senegal; Sierra Leone; United Kingdom; Tanzania; and Zambia. The countries classed as civil law systems were: Afghanistan; Albania; Andorra Argentina; Austria; Belgium; Belize; Benin; Bolivia; Bosnia and Herzegovina; Botswana; Brazil; Bulgaria; Burkina Faso; Burundi; Cambodia; Central African Republic; Chad; Columbia; Comoros; Congo; Costa Rica; Croatia; Democratic Republic of the Congo; Denmark; Djibouti; Dominican Republic; Ecuador; Estonia; Finland; France; Gabon; Georgia; Germany; Greece; Guinea; Honduras; Hungary; Iceland; Italy; Japan; Jordan; Latvia; Liechtenstein; Lithuania; Luxembourg; Malawi; Mali; Mauritius; Mexico; Mongolia; Montenegro; Namibia; Netherlands; Niger; Norway; Panama; Paraguay; Peru; Poland; Portugal; Republic of Korea; Romania; San Marino; Serbia; Slovakia; Slovenia; Spain; Sweden; Switzerland; Tajikistan; Macedonia; Timor-Leste; Trinidad and Tobago; Uganda; Uruguay; and Venezuela. The countries classed as mixed systems were: Lesotho; Malta; and South Africa. While some of the countries listed here may incorporate religious doctrines, such as Sharia law, within their systems, the above classifications only seeks to set out the civil law or common law influences on the relevant country. As such, 'mixed' refers to mixed common law and civil law systems and does not refer to whether a given country incorporates aspects of non-common law or non-civil law doctrines within its law.

10 On 20 March 2006 Thomas Lubanga, a Congolese militia leader accused of abducting children and turning them into child soldiers and sex slaves, became the first suspect to be delivered up to the ICC. See 'Court for Congo Warlord' *The Age* (Melbourne), 20 March 2006, 8. The ICC has since ruled that there is sufficient evidence for Lubanga to be tried. See Chris McGreal, 'Congo Militia Chief to Face Trial' *The Guardian* (online) (UK), 30 January 2007, <<http://www.guardian.co.uk/congo/story/0,,2001618,00.html>> at 9 November 2007. See also 'Pre-Trial Chamber I Commits Thomas Lubanga Dyilo for Trial' *ICC Press and Media* (ICC-CPI-20070129-196-EN) (The Hague), 29 January 2007, <<http://www.icc-cpi.int/press/pressreleases/220.html>> at 9 November 2007.

II THE CRIMINAL PROCESS

While the procedure of the ICC at the pre-trial, trial and sentencing stages shares features of both common law and civil law systems, some aspects of the ICC sentencing procedure do not accord with common law and civil law procedure at all. In some cases this is because some aspects of one system have been adopted while other aspects have not. In other cases, the ICC has adopted procedures which are simply not found in either legal family. Three potentially contentious aspects of the ICC sentencing process will be considered here.

A Admissions of Guilt

The ICC Statute provides for a modified process where a party proffers an admission of guilt.¹¹ This process is reminiscent of the common law approach to guilty pleas where a judge or Magistrate will hear a précis of the facts together with the evidence arising out of the defendant's admission of guilt and notionally find guilt to be proven without hearing further evidence. In common law systems, the same judicial officer will then conduct a sentencing hearing in which the parties will be able to make sentencing submissions. The general rationale for such a process is to shorten proceedings and to obviate the need for excessive investigation and preparation of evidence by the prosecution in bringing such matters to trial. The common law guilty plea process runs completely contrary to French criminal procedure. Whilst being very persuasive evidence, a guilty plea will not displace the need for a trial to confirm that it is based on proper factual and legal foundations; the pursuit of truth requiring more than simply the securing of a conviction.

The admission of guilt process in the ICC is similar to the common law approach to guilty pleas, both in nomenclature¹² and in substance. The provisos that are attached to it suggest that the ICC will be more wary than common law courts of accepting admissions of guilt pleas alone as sufficient proof of guilt. The provision of an express discretion for the ICC to ignore agreements between the prosecution and defence regarding admissions, withdrawal of charges and sentence (as well as a separate discretion to seek further evidence and/or proceed with a full trial where 'a more complete presentation of the facts of the case is required in the interests of justice, in particular the interests of the victims'¹³) tends to bolster this assertion. While common law courts are also not *bound* to accept agreements of this nature between the prosecution and defence, in practice, common law courts generally view such admissions as desirable.

It has been suggested that the ICC's discretion to ignore such plea arrangements may make defendants less disposed to risk an admission of guilt where the advantages

11 *ICC Statute*, opened for signature 17 July 1998, 2187 UNTS 3, art 65 (entered into force 1 July 2002).

12 *ICC Statute*, opened for signature 17 July 1998, 2187 UNTS 3, art 65 (entered into force 1 July 2002).

13 *ICC Statute*, opened for signature 17 July 1998, 2187 UNTS 3, art 65(4) (entered into force 1 July 2002).

are not assured¹⁴ and their use may be constrained by the court.¹⁵ Conversely, it has been suggested that this quasi-incorporation of the common law guilty plea process by the ICC:

[A]dopts the practical advantages of the common-law tradition and at the same time enables the Court to fulfil its task of publicly establishing the truth in whatever detail necessary, which is in the spirit of the civil-law tradition.¹⁶

This deference to both legal families, however, may render the process for handling admissions of guilt in the ICC unworkable. It has been suggested that this ‘overregulation’ of the guilty plea might, with its attendant provisos, largely frustrate the whole rationale for the process: to expedite proceedings.¹⁷ It is also worthy of note that the ICC Statute expressly disallows sentencing hearings to take place after an admission of guilt is accepted by the court.¹⁸ This runs completely contrary to the common law practice in this area.

B The Absence of a Jury

Both Victorian and French courts make use of juries to determine criminal culpability in grave criminal matters.

Victorian courts do not make use of juries in sentencing; this stage of the criminal process is left to the judge alone and as a separate and discrete phase of the proceedings. A jury will not be empanelled in Victoria where a guilty plea is made.

The French system, like most civil law jurisdictions, did not make use of a jury at all in the past, only instituting them comparatively recently. French juries are also said to rely heavily on the non-lay members.¹⁹ French juries do play a role at the sentencing stage although in conjunction with the presiding judges; French juries being constituted by three judges as well as nine lay jurors. The trial process in French courts is not divided into separate ‘guilt’ and ‘sentencing’ phases. All evidence relevant to sentence is furnished to the court in the same hearing as evidence bearing on guilt.²⁰ A court will be given details of a defendant’s prior criminal history to assist with both the determination of guilt *and* sentencing;²¹ the French believing ‘it is better to judge the whole person including his past

14 Alphons Orié, ‘Accusatorial v. Inquisitorial Approach in International Criminal Proceedings Prior to the Establishment of the ICC and in the Proceedings Before the ICC’ in Antonio Cassese, Paola Gaeta and John Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1481.

15 Ambos, above n 3, 17.

16 Orié, above n 14, 1481.

17 Ambos, above n 3, 17-8.

18 *ICC Statute*, opened for signature 17 July 1998, 2187 UNTS 3, art 76(2) (entered into force 1 July 2002).

19 Richard Frase, ‘France’ in Craig Bradley (ed), *Criminal Procedure – A Worldwide Study* (1999) 143, 170.

20 *Ibid* 170.

21 Catherine Elliott, *French Criminal Law* (2001) 48.

behaviour and character, not just his current charges – “One judges the man, not the acts”²² When determining the sanction for offender, each member of the jury individually submits a proposed sanction with his or her ballot. For a sanction to be imposed, it must receive a simple majority of the votes. The imposition of the maximum sanction, however, requires at least eight votes. Ballots will continue until a majority sanction is arrived at. On the third and any subsequent ballots, the severest sanction proposed on the preceding ballot will be removed from the list of available penalties.²³

The ICC does not make use of a jury at all in its trial and sentencing processes. The international tribunals preceding the ICC also never made use of juries. The ICC is presided over by three judges²⁴ who determine guilt as well as sentence. Where possible the decision as to guilt will be made unanimously, however, the ICC is empowered under article 74(3) to determine guilt by a majority verdict.²⁵ The ICC will presumably sentence by a unanimous, or in the absence of this, by a majority decision.²⁶

It is unlikely that the absence of a jury in the ICC will offend either legal family. Apart from there being no historical precedent for using juries in international criminal tribunals, there would, in any event, be some very real functional difficulties were the ICC to use juries in the trial process. There would also be some major problems with both finding and retaining an internationally representative body of jurors for what would almost inevitably be a lengthy trial and in shielding jurors from publicity adverse to the defendants.

C Reasons

A decision of the Trial Chamber of the ICC must be accompanied by a ‘reasoned opinion’ containing both the evidential findings and conclusions.²⁷ The prosecution bears the burden of adducing evidence establishing guilt²⁸ and guilt must be proven beyond reasonable doubt.²⁹ The Trial Chamber must attempt to come to a unanimous decision but, as previously stated, may make a finding of guilt with

22 Frase, above n 19, 170.

23 Ibid 173.

24 *ICC Statute*, opened for signature 17 July 1998, 2187 UNTS 3, art 39(2)(b)(ii) (entered into force 1 July 2002).

25 *ICC Statute*, opened for signature 17 July 1998, 2187 UNTS 3, art 74(3) (entered into force 1 July 2002).

26 It is not entirely clear whether the ICC must attempt to reach a unanimous or majority decision or not in sentencing. Article 74(3) refers to the ‘the decision’ in the singular which could logically only refer to culpability alone. Sentencing is dealt with separately under articles 76-8 which, despite mentioning a range of factors to be taken into account, do not actually state how the sentencing decision is to be reached. The ICC Rules do not provide any guidance on this issue. Though it is not stated, given that the court can determine culpability by a majority decision, we can assume a majority decision on sentence would be sufficient.

27 *ICC Statute*, opened for signature 17 July 1998, 2187 UNTS 3, art 74(5) (entered into force 1 July 2002).

28 *ICC Statute*, opened for signature 17 July 1998, 2187 UNTS 3, art 66(2) (entered into force 1 July 2002).

29 *ICC Statute*, opened for signature 17 July 1998, 2187 UNTS 3, art 66(3) (entered into force 1 July 2002).

a majority of judges.³⁰ Once guilt is proven, the Trial Chamber then undertakes a sentencing hearing, on its own motion or that of the prosecution or offender.³¹

The standard of proof for criminal culpability in common law systems is 'beyond reasonable doubt'. The standard of proof in common law systems for sentencing facts is beyond reasonable doubt for aggravating factors and the 'balance of probabilities' for mitigating factors.³² The standard of proof in the representative civil law system both for culpability and sentencing facts (whether aggravating or mitigating) is 'inner belief' which allows the jury to base its finding 'on any aspect of the trial irrespective of the weight of any contrary evidence'.³³

It is unclear from the ICC Statute and ICC Rules what standard of proof will be applied in proving aggravating and mitigating factors. It is very likely that ICC will adopt the standards used in common law countries and which have been adopted by the International Criminal Tribunal for the former Yugoslavia ('ICTY') and the International Criminal Tribunal for Rwanda ('ICTR').³⁴ It is difficult to ascertain how this might be regarded by civil lawyers. The common law approach appears more restrictive because the sentencer, whether required to expressly state it or not, must determine whether any aggravating and mitigating factors raised have been proven to a requisite standard of proof and then determine how they should affect the sentence. The civil approach (with its use of the ballot) would seem to allow the court more in both determining the existence of sentencing facts and favouring them over other facts. Adoption of the common law approach, although very different from that of the civil law, and possibly structuring the court's sentencing discretion to a greater degree, will arguably produce a greater degree of transparency in the process and a level of protection for the interests of defendants being sentenced by the ICC. However, such transparency and protection is largely contingent upon the ICC being required to give reasons for sentences.

The Trial Chamber must pronounce the sentence in public and, where possible, in the presence of the offender.³⁵ While the Trial Chamber, as noted above, must give reasons for decisions regarding culpability, 'there is no obligation for the reasons or an account of the process whereby the *sentencing* [original emphasis] decision was reached to be made public'.³⁶ Neither the ICC Statute, nor the ICC Rules make any provision for the disclosure of reasons for sentence. The absence of a requirement here would seem to mirror that in civil law jurisdictions, courts being required to give reasoned decisions but not being required to give reasons for sentence. Given

30 *ICC Statute*, opened for signature 17 July 1998, 2187 UNTS 3, art 74(3) (entered into force 1 July 2002).

31 *ICC Statute*, opened for signature 17 July 1998, 2187 UNTS 3, art 76(2) (entered into force 1 July 2002).

32 *Prosecutor v Kunarac* (Judgment) (Case No IT-96-23-T&IT-96-23/1-T), 22 February 2001, para 847 (see also Stuart Beresford, 'Unshackling the Paper Tiger – The Sentencing Practices of the Ad Hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda' (2001) 1 *International Criminal Law Review* 33, 55).

33 Richard Vogler, 'Criminal Procedure in France' in John Hatchard, Barbara Huber and Richard Vogler (eds), *Comparative Criminal Procedure* (1996) 29.

34 Beresford, above n 32, 55.

35 *ICC Statute*, opened for signature 17 July 1998, 2187 UNTS 3, art 76(4) (entered into force 1 July 2002).

36 Ralph Henham, *Punishment and Process in International Criminal Trials* (2005) 94.

the subjectivity of the ‘inner belief’ standard and the use of the ballot system to determine sentence, it is difficult to see how detailed reasons could be effectively mandated in any case. In practice, however, it would seem unlikely that some explanation of the Trial Chamber’s reasoning would not be given.

The ICTY and ICTR, like the ICC, are not required to give reasons for sentence, but as a matter of practice, they do give quite detailed reasons for sentences. Nevertheless, the failure to prescribe that reasons for sentences be given arguably does not foster a transparent approach to sentencing. A failure to give reasons for a sentence would constitute grounds to review the sentence as in the case in most common law jurisdictions.³⁷ The requirement for reasons for sentences is an important transparency measure. It is difficult to envisage how the majority of the sentencing concepts and principles discussed below could be properly and consistently understood and applied and *seen to be* understood and applied in the absence of detailed reasons for sentence.

III SENTENCING

A Types of Sanctions

Under Victorian law there are two categories of offences classified by reference to the seriousness of the sanctions available upon conviction for the offence. The most serious category of offences is *indictable offences* which include all the most serious classes of offence within the Victorian jurisdiction³⁸ and are tried in either the Supreme Court of Victoria or County Court of Victoria (normally before a judge and jury of twelve lay people); the latter court trying the less serious indictable offences. The less serious category of offences is *summary offences*³⁹ which are heard summarily before the Magistrates’ Court (the Magistrate presiding without a jury). These will not be discussed in any depth in this article.⁴⁰ Victoria has no generalised system of mandatory imprisonment; nor mandatory sanctions; nor minimum terms in respect of indictable offences. The relevant Act under which an offence is created will normally prescribe a maximum sentence for the offence.⁴¹

37 The view of many common law jurists is that important considerations of transparency and accountability dictate that the exercise of courts’ sentencing discretions ought to be so constrained (as noted in respect of *Markarian v R* [2005] HCA 25 (Kirby J)).

38 Including homicide; rape; offences against the person; serious drug offences; and property offences.

39 Including less serious drug offences such as possession of small amounts of drugs; traffic offences; less serious offences against the person; and property offences.

40 There is also a subcategory of less serious indictable offences, ‘indictable offences triable summarily’, which may be tried summarily with the consent of both the accused and the Magistrates’ Court. Any indictable offence which is tried summarily, in return for this relatively expedited process, will be subject to lower maximum penalties upon a conviction for the subject offence. See Richard Fox, *Victorian Criminal Procedure* (12th ed, 2005) 9-11.

41 *Sentencing Act 1991* (Vic) s 113C provides that where an offence created under statute punishable by imprisonment prescribes no maximum sentence, the maximum term of imprisonment that may be imposed by the court is two years.

The *Sentencing Act 1991* (Vic) provides the framework for the determination of sentences, prescribing the primary sanctions available to the court, as well as outlining principles of sentencing to be advanced in this process. The *Sentencing Act 1991* (Vic) arranges the sanctions which may be imposed by courts into a hierarchy indicating the order (from least to most severe) which the legislature prefers them to be used.⁴² In addition to this, it contains a scale of maximum penalties for most Victorian offences,⁴³ creating penalty levels designated by a number 1-12 (to which the majority of offences under Victorian law are correspondingly ascribed) detailing the maximum prison terms; the maximum fine which is determined by reference to the number of 'penalty units' (a gazetted amount per unit, currently \$107.43⁴⁴); and maximum hours of community work (if applicable). The prescribed maxima of fines and community work in this scale are either in addition to *or* as an alternative to imprisonment.⁴⁵ The *Sentencing Act 1991* (Vic) enshrines the proportionality principle in a number of ways. It includes 'just punishment' as one of the purposes of the Act itself.⁴⁶ It also requires a sentence to reflect both the nature and gravity of an offence, and the culpability and degree of responsibility of the offender.⁴⁷

The French legal system has three categories of offences. The most serious are *crimes* (comparable to indictable offences which will be referred to hereafter as 'grave offences') include genocide, crimes against humanity, murder, rape and high level drug trafficking.⁴⁸ They are tried by the *cour d'assises* which is composed of three professional judges and nine lay jurors.⁴⁹ The next category is *délits* (comparable to more serious summary offences and to indictable offences triable summarily and which will be referred to hereafter as 'major offences') which range in seriousness from aggravated assaults to minor thefts.⁵⁰ Major offences are tried before a single judge in the *tribunal correctionnel* or, where the offences are particularly serious, before a sitting of three judges presiding in the *tribunal correctionnel*.⁵¹ The least serious category of offence is *contraventions* (comparable to minor summary offences which will be referred to hereafter as 'petty offences') which are minor legal transgressions⁵² and are tried before a

42 *Sentencing Act 1991* (Vic) ss 5(4)-(7), 7.

43 The scale was intended to incorporate all Victorian offences with it. This has not occurred, although most of common and all major criminal offences are contained within it.

44 *Victorian Government Gazette* G14, 6 April 2006, 680 (pursuant to the *Monetary Units Act 2004* (Vic) s 6). This is revised each year; the 2006/7 figure has been provided.

45 *Sentencing Act 1991* (Vic) s 109. See generally, Fox, above n 40, 311-2.

46 *Sentencing Act 1991* (Vic) s 1(d)(iv).

47 *Sentencing Act 1991* (Vic) ss 1(d)(iv)(A)-(B), 5(2)(c), 5(2)(d).

48 Richard Frase, 'Sentencing Laws and Practices in France' (1995) 7(6) *Federal Sentencing Reporter* 275, 276.

49 Elliott, above n 21, 49.

50 Frase, above n 48, 276.

51 Catherine Elliott and Catherine Vernon, *French Legal System* (2000) 72-3. See also *Code of Criminal Procedure of 1958* art 398(3).

52 Frase, above n 48, 276.

single judge in the *tribunal de police*. This article will focus on the sentencing provisions applying to grave offences.

Grave offences in France incur a mandatory sentence of imprisonment, although the minimum term is as low as two years for an offence with a maximum sentence of life imprisonment and one year for other offences.⁵³ Additionally, sentences may be wholly or partially suspended,⁵⁴ or may be served by periodic or electronic detention,⁵⁵ depending on the term imposed. The legislation outlining each offence will prescribe a maximum term of imprisonment ranging from life to 30 years or less. Some offences will be punishable by other sanctions such as fines. While some grave offences prescribe maximum levels for fines, many do not. The French *Criminal Code of 1994* ('*Criminal Code*') enshrines the principal of proportionality⁵⁶ but contains no comprehensive scale of offences and punishments.

The ICC Statute prescribes imprisonment as a mandatory sanction for all offences within its jurisdiction⁵⁷ (excepting offences against the ICC administration itself),⁵⁸ although the period of imprisonment, at least for a single offence, is not circumscribed in any way.⁵⁹ Apart from offences against the ICC itself, the ICC Statute does not prescribe any maxima or minima for offences, nor does it categorise offences in any way in terms of seriousness. Each offence is theoretically punishable by the maximum penalty, being life imprisonment, or minimum penalty, being a sentence of imprisonment for any fraction of time.

The ICC can also impose fines,⁶⁰ forfeiture orders,⁶¹ or reparation orders⁶² in conjunction with, but not instead of, imprisonment. The representative common law and civil law jurisdictions both provide for sanctions of this kind either with, or instead of, imprisonment. Victorian law prescribes specific maximum fines for given offences themselves and general guidance is provided regarding levels of fines (either as additional and/or equivalent sanctions to imprisonment) in the scale of sanctions in the *Sentencing Act 1991* (Vic).⁶³ French law leaves maximum fines 'at large' for many grave offences other than the general requirements of proportionality. The ICC sentencing discretion is closer to that of French courts in that fines are left at large in all instances except the offences against the ICC,

53 *Criminal Code of 1994* arts 131(1), 131(2), 132(18). (English language version available at <<http://195.83.177.9/code/liste.phtml?lang=uk&c=34>> at 9 November 2007).

54 *Criminal Code of 1994* arts 131, 132. See also Elliott, above n 21, 51.

55 *Criminal Code of 1994* arts 132(25), 132(26).

56 *Code of Criminal Procedure of 1958* art 1-P. See also *Criminal Code of 1994* arts 132(25), 132(24).

57 *ICC Statute*, opened for signature 17 July 1998, 2187 UNTS 3, art 77(1) (entered into force 1 July 2002).

58 See *ICC Statute*, opened for signature 17 July 1998, 2187 UNTS 3, arts 70, 71 (entered into force 1 July 2002) which deals with offences such as giving false testimony and misconduct before the ICC and which have prescribed maxima for both imprisonment and fines. See also Hoel, above n 4, 49.

59 Multiple offences are discussed in Part IV of this article.

60 *ICC Statute*, opened for signature 17 July 1998, 2187 UNTS 3, art 77(2) (entered into force 1 July 2002).

61 *ICC Statute*, opened for signature 17 July 1998, 2187 UNTS 3, art 77(2) (entered into force 1 July 2002).

62 *ICC Statute*, opened for signature 17 July 1998, 2187 UNTS 3, art 75 (entered into force 1 July 2002).

63 *Sentencing Act 1991* (Vic) s 109.

subject to the principle of proportionality which is also incorporated into the ICC Statute.⁶⁴ The ICC Statute does not provide for a scale of offences and punishments. Although proportionality has been endorsed in the ICC Statute, in the absence of a settled scale of offences and punishments, there is likely to be a level of confusion concerning the meaning and relative seriousness of offences in the ICC. This has already been identified in the proceedings of the ICTY.⁶⁵ Disproportionality will be similarly difficult to prove.⁶⁶ Given that this is a separate ground for appeal on sentence, this may lead to further confusion in ICC proceedings.

The sentencing discretion of the ICC is flexible enough to allow it to impose similar levels of imprisonment and fines to those available to French and Victorian courts. Although Victorian courts are not bound to impose imprisonment at all, nor any level of mandatory minimum term for grave offences, it is very likely that they would imprison an offender upon a conviction for the types of conduct that these offences entail. Although the ICC Statute addresses offences which are some of the most heinous offences imaginable, the absence of prescribed maximum sentences of imprisonment for specific offences runs counter to both Victorian and French law (both of which, it should be noted, may exercise jurisdiction over similarly serious conduct). Given that there are also some less serious offences triable by the ICC, it is somewhat anomalous that even very general sentence maxima were not included in the ICC Statute.

B The Nature of the Sentencing Discretion

The ICC's sentencing discretion is, in most respects, very similar to that of a civil law court. Like a French court (where the latter is imposing a sanction for a grave crime), the ICC *must* impose a sentence of imprisonment, but retains a very broad discretion as to its length. The ICC also has the discretion to impose fines, forfeiture and/or reparations in conjunction with imprisonment.

Like a French court, the ICC may consider previous judicial decisions,⁶⁷ but is not bound in any way to apply those decisions or the principles contained within them. There is no strict doctrine of precedent and only limited scope for guideline judgments, although, as is the practice in the French system,⁶⁸ it is likely that the ICC will attach considerable significance to its prior decisions.

Victorian legislation prescribes mandatory imprisonment only for very select offences. Interestingly, the vast majority of offences, even extremely grave ones such as murder, do not carry mandatory sentences of imprisonment. Despite this, it is unlikely that the mandatory nature of imprisonment as a sanction by the ICC

64 *ICC Statute*, opened for signature 17 July 1998, 2187 UNTS 3, art 78(1) (entered into force 1 July 2002).

65 Rod Morgan, 'International Controls on Sentencing and Punishment' in Michael Tonry and Richard Frase (eds), *Sentencing and Sanctions in Western Countries* (2001) 379, 382-3.

66 Ralph Henham, 'Some Issues for Sentencing in the International Criminal Court' (2003) 52 *International and Comparative Law Quarterly* 81, 94.

67 *ICC Statute*, opened for signature 17 July 1998, 2187 UNTS 3, art 21(2) (entered into force 1 July 2002).

68 René David and Henry de Vries, *The French Legal System* (1958) 124-33.

will, of itself, offend common law lawyers because the ICC has a wide discretion to impose both shorter and longer sanctions of imprisonment to adequately reflect the degree of culpability of the offender.

The ICC's discretion to impose fines is substantially unqualified in relation to the offence itself apart from the general limiting factor of proportionality. However, there are qualifications in respect of the offender's personal circumstances. To impose a fine, the ICC would need to be satisfied that the relevant crime, in all its circumstances, warranted a fine in addition to a term of imprisonment. Once the decision to impose a fine has been made, the discretion of the ICC in terms of setting the level of the fine is still guided by the principle of proportionality, but is also limited by some specific constraints on the level of fines.⁶⁹ The ICC Statute sets a maximum level by reference to the assets of the accused. It should be noted, however, that the level set is quite high, being 75 per cent of the defendant's assets with allowances for dependants, which may mean that these constraints will not really limit the discretion of the ICC in fining offenders. Although both require a court to consider the means of a defendant, neither Victorian law nor French law have any prescribed system for determining maximum fines in relation to individual financial circumstance, fines being largely qualified by reference to either the specific offence itself or the offence's classification in terms of seriousness.

The structure for the imposition of fines by the ICC may result in potentially widely disparate sentences for defendants convicted of otherwise analogous crimes. This is run contrary to the idea of proportionality and equality before the law (ie like offenders being given like sentences). It may be that the often indigent nature of defendants will make this a non-issue. Alternatively, this may itself exacerbate the issue – some offenders being fined smaller amounts while other offenders of better means may be fined substantially more where the subject offence and surrounding factors are otherwise the same. Despite this, the provisions themselves *do* offer a level of assistance to States Parties and the general public in understanding the reasons for the differing levels of fines which may lessen the potential for controversy in this area. Given that fines will only be used as an adjunct to imprisonment, it likely that fines themselves will be less contentious, unless the ICC resolves to weight fines over imprisonment in sanctioning offenders by imposing small terms of imprisonment but much larger levels of fines to reflect the gravity of the conduct. The grave nature of the offences to be heard by the ICC and the indigence of many offenders make it unlikely that this sort of sentencing practice will be adopted.⁷⁰ If the ICC were to be given jurisdiction to try corporations, the provisions dealing with fines would undoubtedly be of much greater significance.⁷¹

It is unclear whether the ICC is required or even properly able to pay regard to the principle of parsimony. There is no express or implied reference to it in the ICC Statute or ICC Rules. Parsimony is clearly encapsulated within Victorian law as a governing principle applied to both the type and quantum of sanctions as a

69 *ICC Rules*, date of adoption 9 September 2002, r 145 (entered into force 9 September 2002).

70 For a discussion of the limitations surrounding the use of forfeiture and reparations, see Hoel, above n 4, 49-51.

71 For a discussion of the ICC's lack of jurisdiction over non-natural persons see *ibid* 47-8.

necessary consideration in a court's imposition of a sanction for an offender.⁷² This principle can be implicitly identified in aspects of the French system (eg the French jury's method of sanction selection; see above). The non-inclusion of parsimony in the governing documents of the ICC as a significant sentencing principle may concern both common law and civil lawyers.

C Sentencing Purposes

The ICC Statute does not articulate which sentencing purposes are to guide the ICC in sanctioning and how such purposes are to affect the choice or quantum of sanctions.⁷³ This contrasts the Victorian sentencing provisions, which are explicit in enunciating the sentencing purposes⁷⁴ and in directly linking, albeit loosely, the sentencing purpose or purposes to the choice and quantum of the sanction. The five purposes from which the court may choose one or more in sentencing are: retribution; deterrence (both specific and general); rehabilitation; denunciation; and incapacitation. Despite the reference to consequentialist sentencing purposes, retribution remains the dominant sentencing purpose in Victoria. French law, as much as can be identified from the oblique references it makes to sentencing purposes, is not prescriptive in terms of requiring courts to explicitly identify sentencing purposes and directly link them to the choice and quantum of sanctions imposed. The absence of a requirement for reasons for sentence bears this assertion out. The concept of retribution has, however, been implicitly approved by the inclusion of proportionality as a sentencing principle within French sentencing legislation.⁷⁵

It might be said that the current ICC framework, which itself clearly favours retribution, is unlikely to trouble common law or civil law lawyers. The ICC can, however, give weight to other sentencing purposes which means there is potential for there to be sentencing disparities. It would be preferable for the ICC sentencing provisions to be prescriptive in the interests of clarity and transparency, particularly where aspects of the ICC process are going to be foreign to both common and civil lawyers. The ICC will be constituted by judges of a wide cross-section of legal systems, with their own ideas about sentencing purposes. The work of these judges will be watched by an even larger world audience.

The lacuna in the area of sentencing purposes for sanctioning international criminal is not a new one; those tribunals that preceded the ICC being similarly deficient in this respect.⁷⁶ It should be noted that more contemporary efforts to address this problem in the more (in terms of legal systems) homogenous, albeit also supranational, context of the European Union ('EU') have also been

⁷² *Sentencing Act 1991* (Vic) s 5(3).

⁷³ See a general discussion on sentencing purposes, Hoel, above n 4, 54-61 and Ralph Henham, 'The Philosophical Foundations of International Sentencing' (2003) 1(1) *Journal of International Criminal Justice* 64.

⁷⁴ *Sentencing Act 1991* (Vic) s 5(1).

⁷⁵ *Criminal Code of 1994* art 132(24).

⁷⁶ See generally, Hoel, above n 4, 53.

unsuccessful. The Council of Europe met in 1987 to discuss the issue of disparity in sentencing.⁷⁷ Ashworth, who presented a report at this colloquium, noted that there was divergence amongst EU States regarding sentencing purposes.⁷⁸ He also noted that while this has often been identified, there has been a reticence on the part of reformers to actively deal with this issue, so it has been left as a matter for the practice of the domestic courts of EU States.⁷⁹ In his Council of Europe report, he wrote:

Without a clear declaration of priority or a statement of the categories of offence or offender to which each aim is to apply, the crucial piece of guidance is missing and the system constitutes a veritable invitation to subjective disparity ...⁸⁰

In making recommendations in this area, the Council of Europe failed to adduce what rationales should be advanced by EU States in sentencing. The Council of Europe did, however, recommend that disproportion between the seriousness of offences and sentences should be avoided.⁸¹ Given that the crucial issue of sentencing purposes is left at large, it is not entirely clear how this recommendation is to be properly given effect to by sentencers.

The EU represents a much smaller number of States Parties than the ICC and, although including both common law and civil law countries, necessarily encompasses a smaller range of legal systems. How likely then are the ICC States Parties to arrive at some kind of consensus about sentencing purposes? It should be noted, however, that the inability of the EU to adequately address these issues is simply the failure of a supranational body to provide guidance *to the domestic sentencers* of the various EU States Parties. There is no core institution analogous to the ICC that stands to be diminished by this and as such the EU itself is at least not directly undermined. Can the same be said of the ICC in this respect? These matters cannot be simply set aside as being too hard. The ICC will be expected to sentence people appropriately and consistently and an inability to deliver on these expectations will directly undermine its credibility and therefore its viability.

77 Henham, above n 36, 28-9.

78 See Andrew Ashworth, 'European Sentencing Traditions' in Cyrus Tata and Neil Hutton (eds), *Sentencing and Society: International Perspectives* (2002) 219, 220-3.

79 Ibid.

80 Henham, above n 36, 28 (quoting Andrew Ashworth, 'Techniques for Reducing Subjective Disparity in Sentencing' in Council of Europe, *Disparities in Sentencing: Causes and Solutions*, Collected Studies in Criminological Research, Vol. XXVI (1989) 107.

81 Ibid 29 (citing Council of Europe, *Consistency in Sentencing*, Recommendation No. R (92)(1993)).

IV DETERMINING THE SENTENCE

A *Aggravating and Mitigating Factors*

The ICC Statute and ICC Rules are broadly similar to the sentencing provisions of both Victoria and France, in that they give an inclusive list of a number of the more important aggravating and mitigating factors leaving the ICC free to have regard to other factors falling outside those provisions. It is, however, unclear whether the ICC is required to quantify either specifically, or generally, whether and how much an aggravating or mitigating factor has influenced the choice and duration of a sanction. Victorian law, though not requiring a precise quantification of this, does require the court to indicate both that a factor has been considered and its impact on the sentence. French courts are not required to do this; the prevailing legislative view being that not requiring this of the courts helps to lessen the excessive recognition of mitigating factors by courts.⁸² If the ICC does not make mention of the factors it has considered relevant to sentencing, and/or give an indication regarding whether it has affected a sanction, it is likely that common lawyers will find it difficult to rationalise sentences of the ICC from one case to the next, even where the matters deal with similar criminal conduct. It is likely that the ICC itself may have the same problem. On the other hand, if the ICC does give such indications, though it is not expressly required to, it may not accord with civil law practice in this area. It may be, however, that this will be seen as less problematic than a system which has the potential to impose seemingly disparate penalties and, in doing so, cause a greater level of disjunction between the ICC parties.

As distinct from the position under Victorian and French law, the ICC sentencing provisions do not contain any specific mechanisms for dealing with recidivists. Victoria has some very specific provisions dealing with serious recidivists and other special offenders which empower the courts with the discretion to impose disproportionately harsh sentences and non-parole periods.⁸³ These provisions still do not, however, provide for mandatory minimum sentences of any kind. French legislation similarly allows courts to impose higher maximum sentences and longer security periods for recidivists.⁸⁴

The ICC Statute does include prior criminality as a relevant aggravating factor.⁸⁵ The ICC's broad sentencing powers may allow it to substantially increase a sanction as a result of proven prior criminality, although the scope for this would appear to be less than provided for under respective Victorian and French provisions because the ICC would nevertheless be bound to have regard to proportionality and totality even where the offender has relevant prior convictions.

82 Edward Tomlinson, *The French Penal Code of 1994 as Amended as of January 1, 1999 / Translated by Edward A. Tomlinson; with an Introduction by Edward A. Tomlinson* (1999) 9.

83 *Sentencing Act 1991* (Vic) pt 2A (in respect of 'serious offenders'), pt 2B ('continuing criminal enterprise offenders'), pt 3(1A) ('indefinite sentences'), s 11(1).

84 *Code of Criminal Procedure of 1958* art 132(8).

85 *ICC Rules*, date of adoption 9 September 2002, r 145(1) (entered into force 9 September 2002).

The ICC has jurisdiction to try defendants for inchoate offences.⁸⁶ There is no express requirement for the ICC to impose reduced sanctions on offenders in these circumstances. In Victoria the statutory maxima of sanctions for inchoate offences are lowered, in some cases specifically by reference to the maximum sanction of the offence in question, or where not specifically provided for, to 60 per cent of the maximum sanction available for that of the completed offence.⁸⁷ In France, theoretically, attempts to commit offences can draw the same maximum sanction (or sanctions) as the full offence. In practice, the court will generally show greater leniency to offenders convicted of attempts.⁸⁸ Like French courts, the ICC could theoretically impose the same sanctions for an inchoate offence as for a complete offence (and noting that there are no prescribed maximum sentences in ICC Statute and ICC Rules other than for offences against the ICC). It is likely, however, that, as is the practice of France for such offences, the ICC will impose sentences that are an attenuated version of that which would be applied for a completed offence.

B Multiple Offences

The ICC may impose aggregate sentences where there are multiple offences⁸⁹ but, in doing so, must pronounce the individual sentence for each offence and then the total period of imprisonment. The total period of imprisonment may not be less than the highest individual sentence pronounced,⁹⁰ effectively creating a minimum sentence. Neither Victorian nor French law have an equivalent provision. The ICC, like Victorian and French courts, is obliged to consider the totality principle in imposing sentences for multiple offences.⁹¹

The ICC Statute and ICC Rules do not incorporate or address the principle of parity. Victorian law endorses this principle, it being permissible for a court to have regard to the sentences of co-offenders to determine whether a sentence is appropriate.⁹² French legislation does not make reference to this principle, either directly, or obliquely, and the author has been unable to find any secondary texts which refer to it (the principle exists at common law in the Victorian system rather than under statute – given the legality principle, one must assume that its absence in French legislation is conclusive).

Theoretically, the absence of the parity principle in the governing documents of the ICC means that not only may the ICC impose different sentences on co-offenders without having had regard to this principle but, conversely, if the ICC

86 *ICC Statute*, opened for signature 17 July 1998, 2187 UNTS 3, art 25(3) (entered into force 1 July 2002).

87 *Crimes Act 1958* (Vic) s 321P.

88 Elliott, above n 21, 100.

89 *ICC Statute*, opened for signature 17 July 1998, 2187 UNTS 3, art 78(3) (entered into force 1 July 2002).

90 *ICC Statute*, opened for signature 17 July 1998, 2187 UNTS 3, art 78(3) (entered into force 1 July 2002). See also Kriangsak Kittichaisaree, *International Criminal Law* (2001) 322-3.

91 *ICC Rules*, date of adoption 9 September 2002, r 145(1) (entered into force 9 September 2002).

92 Fox and Freiberg, above n 6, 725-6.

does have regard to this principle it may leave its sentence open to appeal. If civil law countries do not endorse this principle and the principle itself is not formally incorporated into the ICC Statute or ICC Rules, it seems likely that there will be confusion in this area. It may be that the principle of like cases being treated alike is one that is universally recognised and need not be expressly spelt out to be applied. The practice in common law countries would appear to refute this view. The existence of a common law rule on this matter would suggest that presumably there would not have been a need to create such a rule were the principle to be universal or automatic in its application.

C Sentence Reduction

In Victoria and France, where a court imposes a term of imprisonment, the court will generally impose a ‘non-parole period’⁹³ (or, in France, a ‘security period’⁹⁴). This period constitutes the minimum time that the offender must serve before becoming eligible to apply to serve the remainder of the sentence in the community. Release will normally entail compliance with conditions such as surveillance.

The *Sentencing Act 1991* (Vic) does not prescribe any minimum length for non-parole period in relation to the head sentence. When the non-parole period elapses, an offender will be eligible to apply for parole, the appropriateness of which will be considered by an executive body and, if successful, will normally entail some level of supervision. Section 11 of the *Sentencing Act 1991* (Vic) provides that a court can properly refuse to fix a non-parole period if either the nature of offence or the history of the offender make it inappropriate to do so. The same section, however, states that the court must consider setting a non-parole period for all offenders sentenced to imprisonment and expressly makes mention of life sentences. The *Sentencing Act 1991* (Vic) clearly envisages that most, even very serious offenders, should be eligible to apply for parole at some stage during their sentence.

In the French system, security periods for prison sentences over 10 years must be one-half of the sentence, or in the case of imprisonment for life, 18 years.⁹⁵ The trial court can, however, by a special decision raise the security period to two thirds of the sentence (or 22 years in the case of a life sentence).⁹⁶ The *Criminal Code* also empowers trial courts to lower the security periods by a special decision.⁹⁷ Once the security period has elapsed, a dedicated French court will consider whether it is appropriate to release an offender.

The ICC’s system of sentence reduction differs in many respects from those in Victoria and France. The ICC is not empowered to unilaterally order a period after which the offender will be able to apply for what the ICC Statute refers to

⁹³ *Sentencing Act 1991* (Vic) s 11(1).

⁹⁴ *Criminal Code of 1994* art 132(23).

⁹⁵ *Criminal Code of 1994* art 132(23)[2].

⁹⁶ *Criminal Code of 1994* art 132(23)[2].

⁹⁷ *Criminal Code of 1994* art 132(23)[2].

as 'early release'.⁹⁸ Instead the ICC Statute prescribes a mandatory formula for determining such a period. The sentence reduction provisions of the ICC Statute are similar to the more severe part of the French regime; the sentences of offenders imposed by the ICC will be assessed after two thirds of the sentence has been served, or 25 years for a life sentence.⁹⁹ The ICC, however, unlike French courts, has no discretion to alter this period. It is possible then that the ICC will be moved to impose lower head sentences in order to avoid this issue. The ICC sentence reduction system also differs from those of Victoria and France because it does not allow the ICC itself to order any level of supervision or implement any steps to re-integrate an offender into society.¹⁰⁰

The articulation of guidelines regulating sentence reduction is a positive addition to the ICC Statute. The ICTY and ICTR have been required to follow the domestic law of the custodian States of an offender to determine the applicability of sentence reduction.¹⁰¹ If this scheme had been incorporated into the ICC Statute, it would potentially have led to disparities in the actual term served in prison by offenders sentenced to the same period of imprisonment, but serving them in different domestic jurisdictions. In these circumstances, the authority of the ICC in passing sentences on offenders could be compromised. The statutory formula prescribed by the ICC Statute has effectively avoided this problem.

D Effect of Conviction

The Victorian and French systems both provide for differing types of disqualification arising out of convictions, as well as procedures whereby findings of guilt will be separately recorded. Neither the ICC Statute nor the ICC Rules provide for any types of disqualification of this nature. It is possible that the legal systems of States Parties will pick up on findings of guilt by the ICC and impose correlative disqualifications on offenders within their home jurisdiction. There is certainly no express requirement for States Parties to implement such measures. This means that while an offender tried and convicted of a serious offence in a domestic jurisdiction, upon serving her sanction will face disqualifications (such as from holding many types of public office, or directing a company), an offender convicted of given crimes before the ICC, having served her sentence, will not necessarily be so disqualified.

It is unsatisfactory that there is no clear mechanism for disqualifying such an offender from occupying positions of power and/or influence within given domestic jurisdictions. It nevertheless remains unlikely that an offender will have an opportunity to re-offend or to gain any significant political office or economic prominence within the person's home jurisdiction after being convicted by the ICC.

98 *ICC Statute*, opened for signature 17 July 1998, 2187 UNTS 3, art 110 (entered into force 1 July 2002).

99 *ICC Statute*, opened for signature 17 July 1998, 2187 UNTS 3, art 110(3) (entered into force 1 July 2002).

100 For more on the conditions attached to release on parole in Victoria see *Corrections Act 1986* (Vic) s 74 and Fox, above n 40, 380.

101 *ICTY Statute*, established by Security Council resolution 827 (1993) of 25 May 1993, art 28.

The failure to expressly include potent disqualifying provisions in the ICC Statute to this end may reflect a misapprehension on the part of the many States Parties regarding how deeply the social, political and ethnic factors which give rise to many war crimes and crimes against humanity really lie. The ongoing support of, for example, fugitives from justice in respect of the ICTY, would seem to suggest that perpetrators of the types of crimes within the jurisdiction of the ICC may still enjoy considerable support within a given country. This silence of the ICC Statute and ICC Rules on this could theoretically allow offenders to continue to wield or maintain considerable political and economic power.

V VICTIMS' RIGHTS

Under French law victims may bring a civil claim as part of criminal proceedings or may make a separate civil claim against a defendant. French law recognises not only direct victims but also organisations representing particular interests (such as those combating race or sex discrimination).¹⁰² When joining criminal proceedings, victims enjoy all the rights that the defendant enjoys.¹⁰³ They have the ability, via making submissions to the court, to influence the direction of the trial and may also summon and have witnesses examined, to make submissions to the court concerning the guilt of the defendant.¹⁰⁴ Because the French system does not bifurcate the criminal process in terms of determining guilt and sentence, submissions made by victims may be taken into account both for determining culpability *and* the sentence. In France, victims may appeal against a decision regarding damages in criminal proceedings even where the other parties have not initiated an appeal process.¹⁰⁵ A disadvantage for victims who append their claims to criminal proceedings is that once a victim becomes a party to the proceedings, he or she can no longer give evidence because he or she is seen to be an interested party. This can harm the prosecution case, where victims are the sole or primary witness in a case. Victims may, for these reasons, decide not to bring a civil claim in the criminal courts.¹⁰⁶

In common law jurisdictions, victims of crimes are not regarded as parties to criminal proceedings and do not have separate standing to appear or be represented.¹⁰⁷ Traditionally, a victim could only participate in a trial in the capacity of a witness to a crime and only to the extent that their evidence was deemed sufficiently probative by the prosecution to be put before the court. Nowadays victims do have

102 Jacqueline Hodgson, 'Suspect, Defendants and Victims in the French Criminal Process: The Context of Recent Reforms' (2002) 51 *International and Comparative Law Quarterly* 781, 792.

103 The *Code of Criminal Procedure of 1958* prescribes the rights of victims in terms of bringing claim against defendants and criminal proceedings. These rights are very expansive. See for example, *Code of Criminal Procedure of 1958* arts 2, 40(4). This is also discussed in Claude Jorda and Jérôme de Hemptinne, 'The Status and Role of the Victim' in Antonio Cassese, Paola Gaeta and John Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1387, 1401.

104 *Code of Criminal Procedure of 1958* art 312.

105 *Code of Criminal Procedure of 1958* arts 380(5). See also Hodgson, above n 102, 793.

106 Elliott, above n 21, 33.

107 Fox and Freiberg, above n 6, 166.

the right to make submissions to the court at the sentencing stage. There is a body of jurisprudence which guides courts' use of such submissions.¹⁰⁸ Submissions of victims can be properly given weight to by a court in sentencing as 'a factor relevant to the exercise of the sentencing discretion, but not the victim's view about the appropriate sentence'.¹⁰⁹ Where submissions make factual assertions, these assertions must themselves be properly proven to the relevant standard of proof for aggravating and mitigating factors.¹¹⁰ Victims may apply for compensation orders against offenders for pain and suffering and other costs arising out offences they have suffered.¹¹¹ There are also other means of redress available to victims outside the criminal process. Regardless of these mechanisms, a victim is nevertheless a non-party in criminal proceedings.

The rights of victims in the ICC Statute, at first glance, are more akin to the rights enjoyed by victims in civil law countries¹¹² than those in common law countries. The categories of people or entities that may be considered victims in the ICC Statute are similar to those under French law.¹¹³ Although the position of victims in the ICC is similar to that of victims in France, it is not the same. The level of input of victims in the trial is to be determined by the ICC at its discretion. Victims may apply to participate in the proceedings¹¹⁴ and the relevant Chamber of the ICC shall accept or reject that application subject to the considerations outlined article 68(3).¹¹⁵ Article 68(3), *inter alia*, provides:

Where the personal interests of the victims are affected, the Court shall permit their views and concerns to be presented and considered at stages of the proceedings determined to be appropriate by the Court and in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.

It is unlikely the ICC will allow victims, through their legal representative, to examine or cross-examine witnesses although Rule 91 of the ICC Rules does allow victims to pose questions in reparations hearings subject to the discretion of the

108 The *Sentencing Act 1991* (Vic), unlike some other Australian state jurisdictions, does not provide any guidance regarding the limitations on the courts' regard to victims' submissions leaving such guidance to the common law; see *ibid* 165.

109 Fox and Freiberg, above n 6, 165

110 *Ibid* 167.

111 *Sentencing Act 1991* (Vic) s 85A deals with compensation orders imposed as part of the offender's sentence. The *Victims of Crime Assistance Act 1996* (Vic) also provides that victims (or close relatives or intimate friends of victims), or witnesses to offences of violence who have suffered injury or death may be able to seek compensation from statutory schemes set up under that Act. Under s 50, the Victims of Crime Tribunal will decide on the merit of such applications and is able to grant limited amounts of compensation from the scheme's fund. Alternatively, victims may take separate civil action through the civil courts in tort to seek redress from offenders, although this may subject them to the further trauma of court proceedings and the indigence of many offenders may preclude such action.

112 See Jorda and de Hemptinne, above n 103, 1399, 1401-2.

113 For a discussion of French law in this area see Hodgson, above n 102, 792.

114 *ICC Statute*, opened for signature 17 July 1998, 2187 UNTS 3, art 68(3) (entered into force 1 July 2002).

115 *ICC Rules*, date of adoption 9 September 2002, r 89 (entered into force 9 September 2002).

ICC.¹¹⁶ It is not clear whether the ICC will allow victims to personally participate in the sentencing hearing (assuming one is held), or if this participation will be limited to the prosecution proffering statements to the court on their behalf.

It is also unclear whether victims participating in ICC proceedings are precluded from claims for reparations against the Trust Fund where a defendant is found not guilty.¹¹⁷ The ICC would most likely be precluded, however, from making a reparations order against a defendant under those circumstances. It is similarly unclear what level of participation victims will be able to have in the course of trials and/or sentencing proceedings. For this reason, some have said that victims before the ICC have only a 'potential right' to participate in the proceedings.¹¹⁸

There is no express requirement that the input of victims be assessed by the ICC in considering or giving effect to a plea bargain. In this context, it is unclear whether the personal interests of the victims (as quoted above in article 68) include having full and complete charges brought and heard by the ICC. The general requirement that the ICC consider 'the interests of justice, in particular the interests of the victims' as prescribed by article 65(4) of the ICC Statute, similarly does not unequivocally prescribe that the victim(s) be directly consulted, or the outcomes of any such consultations be paid heed to by the ICC. It is likely that victim participation, in general, will be limited to the sentencing hearing and to facilitate claims made by the victim for reparations.

Victim participation in trial proceedings beyond appearing as a witness and making submissions on sentence would fall foul of common law practice in this area. Similarly, France's curtailing of victim participation where the victim is making a civil claim via criminal proceedings¹¹⁹ would also tend to suggest that civil law States Parties would be in favour of restricting victim participation (at least where the person is seeking reparations) in the proceedings. It has been noted by jurists with respect to the ICC that, '[i]n order to fully safeguard the rights of the accused, it will be necessary to ensure that a victim may not simultaneously be a witness and a party in one and the same case'.¹²⁰ This raises the question: assuming that the ICC were to ensure such a right, could the personal financial interests of a victim come into conflict with the broader interests of the international community to successfully prosecute criminals?¹²¹

116 Sam Garkawe, 'The Victim-Related Provisions of the Statute of the International Criminal Court: A Victimological Analysis' (2001) 8 *International Review of Victimology* 269, 281.

117 It is unlikely but not impossible for a victim's claim to succeed where a prosecution has not been secured.

118 Jorda and de Hemptinne, above n 103, 1399.

119 Elliott, above n 21, 33.

120 Jorda and de Hemptinne, above n 103, 1409.

121 It has been suggested in the context of the French legal system that in such circumstances it may be better for victims to institute separate civil proceedings so as not to impair the chances of a conviction being secured. See Elliott, above n 21, 33. Clearly, victims of offences being tried before the ICC are not able to bring separate criminal proceedings against offenders at least outside the domestic civil jurisdiction of courts.

VI APPEALS

The Appeals Chamber of the ICC may only reduce or confirm sentences where appeals on sentence are made by or on behalf of defendants.¹²² This is different from the powers of appeal courts in many common law countries to impose a harsher sentence even in the absence of an appeal by the prosecution. In France, a reviewing court may not impose a sanction harsher than that imposed by the trial court¹²³ unless the prosecution itself appeals the sentence as being too lenient.¹²⁴ The ICC Statute appears to follow the civil law in this area. Additionally, the ICC Statute theoretically allows for appeals by the prosecution, albeit unlikely, on behalf of the accused which reflects a prosecution's role more akin to that of civil law than of common law countries.¹²⁵ The Appeals Chamber may also be able to hear prosecution appeals on acquittals which, although clearly in keeping with civil law countries,¹²⁶ would offend the common law principle of *res judicata*.¹²⁷

The procedure of the Appeals Chamber, at least on paper, would appear to give it similar powers to that of a French appeal court,¹²⁸ namely being able to engage in a large degree of fact finding where it sees fit to do so. It is unclear whether the Appeal Chamber will make use of these powers. If an Appeal Chamber did so, it would offend the common law view that a trial court is the most competent court to determine findings of fact.¹²⁹ Conversely, to a civil lawyer it would be enshrining a fundamental aspect of the civil law. In practice, however, in France, appeal courts often do not choose to hear matters *de novo*, relying on the *dossier* or findings of fact made by the trial court.¹³⁰ It is unclear how broadly the Appeals Chamber will exercise its power to review and amend sentences where they are argued to be disproportionate to the crime. A civil law approach would at least in theory allow for greater level of intervention on the part of the Appeals Chamber, while a common law approach would limit it considerably.

Victims, as non-parties, do not have comprehensive rights of appeal. Along with offenders and other bona fide owners of property affected by reparations orders, they 'may appeal against the order for reparations, as provided in the Rules of Procedure and Evidence [ICC Rules]'.¹³¹ Additionally, the ICC Rules provide that:

122 *ICC Statute*, opened for signature 17 July 1998, 2187 UNTS 3, art 83(2) (entered into force 1 July 2002).

123 Elliott, above n 21, 50.

124 Frase, above n 19, 179-82.

125 Robert Roth and Marc Henzelin, 'The Appeal Procedure of the ICC' in Antonio Cassese, Paola Gaeta and John Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1535-43.

126 Hodgson, above n 102, 809 and Elliott, above n 21, 45.

127 Roth and Henzelin, above n 125, 1542-3.

128 Vogler, above n 33, 55.

129 Roth and Henzelin, above n 125, 1553.

130 Vogler, above n 33, 55.

131 *ICC Statute*, opened for signature 17 July 1998, 2187 UNTS 3, arts 82(4), 75 (entered into force 1 July 2002). See Henham, above n 36, 54-7. See also Roth and Henzelin, above n 125, 1551.

The Appeals Chamber may confirm, reverse or amend a reparation order made under article 75.¹³²

It would seem then that while victims may be able to appeal the *content* of reparation orders where the Trial Chamber has made them, victims will *not* be able to appeal *refusals* to make reparation orders. The ICC Statute does not appear to contemplate appeals by victims regarding forfeiture orders at all; thus disallowing both appeals regarding their content and regarding *refusals* by the ICC to make forfeiture orders. Victims under French law have the right to appeal decisions irrespective of whether they are appealed by the other parties and, theoretically, even where the defendant is acquitted.

VII EXECUTION OF SENTENCE

The ICC is responsible for the execution of sentences although not directly responsible for the incarceration of offenders. This differs markedly from the Victorian and to some extent the French law in this area.

When considering the level of sanction to impose (which necessarily includes a mandatory term of imprisonment), the ICC will not be seized of the eventual place of incarceration of the offender. The ICC Statute provides for a system of double consent under which States Parties, firstly, may consent generally to having themselves entered onto a list of potential candidate imprisoning States;¹³³ and secondly, must consent to being designated by the ICC to accept responsibility for incarcerating a particular individual.¹³⁴ The wording of article 103(4) of the ICC Statute makes it clear that the ICC will sentence an offender and only *then* proceed to designate a State within which to incarcerate the offender. The ICC will only be able to imprison offenders in jurisdictions which have proper regard for human rights. Additionally it has a limited ability to address problems relating to the conditions of imprisonment. Despite this, there is potential for prisoners to be treated differently by different holding States simply because conditions vary in those States even within the constraints of human rights standards.

Domestic courts are broadly aware of the conditions that prevail in prisons in their jurisdiction. They are also aware of variations in prison conditions by reference to the level of security of the relevant prisons. The eventual location of a prisoner, however, will reflect the view of the executive arm of government regarding the classification of the offender rather than that of the courts, by reference to his or her degree of dangerousness. Variations in conditions would not reflect such a reasoned decision of the ICC or any other body; being instead, an arbitrary

132 *ICC Rules*, date of adoption 9 September 2002, r 153(1) (entered into force 9 September 2002).

133 *ICC Statute*, opened for signature 17 July 1998, 2187 UNTS 3, arts 103(1), 103(2) (entered into force 1 July 2002).

134 *ICC Statute*, opened for signature 17 July 1998, 2187 UNTS 3, art 103(1)(c) (entered into force 1 July 2002). See Claus Kress and Göran Sluiter, 'Imprisonment' in Antonio Cassese, Paola Gaeta and John Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) 1757, 1787-91.

factor arising out of the peculiarities of the ICC designation and enforcement procedures.¹³⁵

The ICC Statute does not provide for a formal system of supervision of the enforcement of sentences. There is no regularised system of prisoner inspections as have been provided for in the ICTY Statute and ICTR Statute.¹³⁶ The ICC may seek information regarding the conditions of imprisonment and seek comment from the holding State¹³⁷ but is not empowered to give directions to the holding State on such treatment. The ICC does, however, retain the right to transfer prisoners either on its own motion or as a result of a prisoner making such an application¹³⁸ (the prisoner being guaranteed free and confidential communications with the ICC whilst incarcerated),¹³⁹ which would allow it to indirectly address any such concerns. These somewhat blunt powers of supervision of prisoner conditions contrast those of the ICTY and ICTR, in part perhaps reflecting the fact that the latter tribunals were brought into being by a much smaller group of States. Given that there is an overall requirement that prison systems of holding States must meet international human rights requirements, it may be that this will not lead to any undue amount of friction.¹⁴⁰ Nevertheless, because there is some scope for differences in treatment of prisoners within the bounds of human rights requirements, there is some danger of friction where co-offenders are tried and sentenced together but incarcerated in different holding States (and thus potentially indirectly offending the parity principle).

VIII CONCLUSION

The governing documents of the ICC reflect many of the differences and similarities between common law and civil law sentencing procedures. The ICC sentencing provisions also feature procedures which differ from those of both common and civil law jurisdictions. This article has highlighted and discussed a number of key areas of doubt in respect of how the ICC sentencing provisions will operate. In resolving these key areas of doubt, it may well be that the ICC will be influenced by the sentencing practices of domestic jurisdictions, common and civil law, when discharging this important function.

135 Indeed, the issue of disparate sentencing conditions between various Australian States and Territories in respect of federal offenders discussed at length in Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report No 103 (2006) Ch 22. There is an even greater potential for disparate conditions between international as opposed to domestic jurisdictions.

136 *ICTY Statute*, established by Security Council resolution 827 (1993) of 25 May 1993, art 27. *ICTR Statute*, established by United Nations Security Council resolution 955 (1994) adopted 8 November 1994, art 26. See also Kress and Sluiter, above n 134, 1779-81.

137 *ICC Rules*, date of adoption 9 September 2002, r 211 (entered into force 9 September 2002).

138 *ICC Statute*, opened for signature 17 July 1998, 2187 UNTS 3, art 104(2) (entered into force 1 July 2002).

139 *ICC Statute*, opened for signature 17 July 1998, 2187 UNTS 3, art 106(3) (entered into force 1 July 2002). See for a discussion of the foregoing Kress and Sluiter, above n 134, 1801-2.

140 *ICC Statute*, opened for signature 17 July 1998, 2187 UNTS 3, art 103(3)(b) (entered into force 1 July 2002).

Common and civil law jurisdictions, both States Parties and non-States-Parties, will be watching closely to see how the ICC will discharge this important aspect of its responsibilities and assessing how consistently, fairly and justly it sanctions the offenders that are convicted by it. The extent to which it succeeds in doing this may determine its ongoing viability as the world's supreme criminal tribunal.

In light of the above analysis, the following recommendations might be considered as a means of resolving these areas of doubt:

1. The ICC should be formally required to give reasons for sentences.
2. The ICC should formally endorse the use of sentencing hearings in all contested matters. It would be desirable for this to occur even in non-contested matters, although the current drafting of the ICC Statute expressly disallows sentencing hearings under such circumstances.
3. The sentencing purposes that may legitimately guide the ICC in determining sentences should be formally identified. Given that the sentencing provisions of the ICC have endorsed proportionality, it would seem to be uncontroversial that retribution will be endorsed as the prime sentencing purpose. The ICC, in determining a sentence, should be required to expressly identify which sentencing purposes were advanced by the court in determining the sentence and, in a general sense, how these sentencing purposes affected the sentence in terms of increasing or decreasing the sentence. It would be beneficial if the ICC were encouraged to specify the extent to which it was moved to advance given sentencing purposes (for example, by noting that there were strong or weak grounds upon which to advance a given sentencing purpose) and facts that compelled it to do so. This would be particularly useful where the court is asked to consider multiple and/or competing sentencing purposes.
4. The ICC should expressly attempt to characterise the objective seriousness of the offences for which an offender has been convicted. This characterisation need not be an exact starting point but would be enough to allow interested parties to understand where the offence fits relative to other instances of the same offence, or other offences brought before the ICC.
5. The ICC should be required to specify which aggravating and mitigating factors were proven. It would be desirable for the ICC to note which factors were raised by the parties and note which factors were *not* made out on the facts (although for reasons of time and resources, this may not always be possible). This would assist interested parties (including the offender) to understand which factors the court found as proven and also understand that the court properly considered all the relevant submissions. It would be beneficial if the ICC, where possible, gave some indication regarding how seriously the various aggravating and mitigating factors were viewed by it (such as guilty pleas and remorse).

This would be particularly useful in both explaining the reasons of the court and putting these matters on the historical record.

6. The ICC should clarify how it will deal with inchoate offences in sentencing offenders.
7. The position of victims in the sentencing process should be clarified by the ICC. The Office of the Prosecutor should be encouraged to develop guidelines with respect to seeking the view of victims prior to considering plea bargaining and counselling victims when it decides to enter into plea agreements with offenders.
8. The position of victims as civil litigants must be clarified either in the governing documents of the ICC or by the court itself as well as any attendant issues such as the effect this may have on the ability of victims to appear as witnesses.
9. The ICC should clarify whether the parity principle can be properly taken account of by the ICC in sanctioning co-offenders. Additionally, the ICC should require that, as much as possible, co-offenders should be incarcerated in host countries with similar penal regimes, in terms of harshness.
10. The ICC (or States Parties) should make provision for a system of supervision and/or reintegration for released offenders subsequent to having their sentences reduced or serving the entirety of their sentences. This could either be administered by the ICC, or for the sake of economic efficiency, could be administered by States Parties with some requirements to report to the ICC.