Cambridge Law Review (2019) Vol IV, Issue ii, 83–104

The Enabler Theory and Atrocity Crimes

Shahram Dana*

I. Introduction

International criminal law (ICL) practitioners and scholars have observed that individuals convicted of atrocity crimes of similar gravity are sentenced to punishments of vastly different severity.[1] This raises questions whether "gravity" is indeed the primary consideration and differential factor in determining the quantum of punishment for atrocity crimes.[2] Is gravity of the offence operating as a meaningful differential principle in punishing atrocities? Is there an explanation that might reasonably justify substantially different sentences for persons convicted of crimes of similar gravity? Moreover, from a systemic perspective, has the notion of "gravity" been overplayed as a differential criterion for the purpose of punishing atrocities? And, has this come at the expense of developing sentencing criteria *sui*

* Senior Lecturer at Griffith Law School and Director, Law Futures Scholarly Roundtable Series at the Law Futures Centre, Griffith University, Australia. Former United Nations legal officer in the Office of the Prosecutor at the International Criminal Tribunal for the former Yugoslavia, Commissioner on the Torture Inquiry and Relief Commission, and law professor in Chicago, USA.
I am grateful to Nancy Combs, Mark Drumbl, and Robert Sloane for their comments on earlier drafts.

1 See Pascale Chifflet and Gideon Boas, "Sentencing Coherence in International Criminal Law: The Cases of Biljana Plavsic and Miroslav Bralo" (2012) 23 Criminal Law Forum 135, 147, 154; Jean Galbraith, "The Good Deeds of International Criminal Defendants" (2012) 25 Leiden J Int'l L 799, 800; Ines Monica Weinberg de Roca, "Sentencing and Incarceration in the Ad Hoc Tribunals" (2008) 44 Stanford J Int'l L 1, 6–12; Mark A Drumbl, *Atrocity, Punishment and International Law* (CUP 2007) 11, 15, 56–7; Mark B Harmon and Fergal Gaynor, "Ordinary Sentences for Extraordinary Crimes" (2007) 5 J Int'l Crim Justice 683, 684, 710; Andrew Keller, "Punishment for Violations of International Criminal Law" (2001) 12 Indiana International & Comparative Law Review 53, 65–6.

2 Robert Sloane, "Sentencing for the 'Crime of Crimes'" (2007) 5 J Int'l Crim Justice 713, 734 (rejecting the idea that gravity of the offence is a principle determinant of sentencing for atrocity crimes).

generis to atrocity crimes? This article explores these questions and responds with an original claim: the enabler theory.

In order to answer these questions, the research sought to identify individuals convicted of the same crimes. This methodology allowed the analysis to hold constant gravity of the crime as a sentencing factor permitting an evaluation of the influence of other factors on the quantum of punishment. It also provided a pathway to evaluate whether gravity genuinely operates, with consistency, as the *primary* factor influencing sentencing outcomes. This approach made significant the jurisprudence of the Special Court for Sierra Leone (SCLS) due to the prosecutor's distinctive approach to charging atrocity crimes. The SCSL Prosecutor conducted a single trial for each warring party in the armed conflict and prosecuted multiple co-perpetrators of varying rank within the same armed group under a single indictment with the same underlying facts and violations of law. Thus, in each trial, the same criminal charges were laid against all defendants, regardless of rank held within the group's hierarchy. This afforded a rare opportunity to analyse sentencing outcomes where perpetrators occupying different positions in the hierarchy of an organization are held criminally responsible for the same underlying crimes.

Furthermore, very few studies focus on the SCSL and its sentencing jurisprudence, in particular, has been largely ignored in academic literature.[3] By selecting the SCSL's jurisprudence as the subject of study, this article makes a significant and new contribution to ICL literature. This study underscores the importance of research analysing the rich jurisprudence of the SCSL, its significant contribution to the development of ICL, and its enduring relevance to the work of the International Criminal Court (ICC). The ICC has cited the SCSL sentencing decisions giving it continuing immediate relevance to ICL.[4] Additionally, among the *ad hoc* and hybrid tribunals, the SCSL enjoys the distinction of being the only international court to sentence a former Head of State. Thus, its jurisprudence includes the rare opportunity to examine the application of ICL sentencing law, norms, and principles to a head of state.

Drawing on the jurisprudence of the SCSL, this article offers an original claim regarding atrocity sentencing. I theorise that judges consider an atrocity criminal's role in enabling the context, that is conflict, in which atrocity crimes erupt when allocating an appropriate punishment. I call this the "enabler factor". Although ICL jurisprudence does not explicitly identify "enabling" as a specific sentencing factor, the notion is present in judicial narratives about the role of the

[3] But see Shahram Dana, "The Sentencing Legacy of the Special Court for Sierra Leone" (2014) 42 Georgia J Int'l & Comp L 615.

[4] *Prosecutor v Thomas Lubanga Dyilo,* ICC-01/04-01/06, Decision on Sentence pursuant to Article 76 of the Statute (10 July 2012) (hereinafter, "*Lubanga* Sentencing Judgment").

accused in the atrocities.[5] I argue that when ICL judges view an individual as an enabler, even if not explicitly articulated as a sentencing factor, they will punish that individual more severely than others that have committed similar crimes but were not enablers. ICL judgments in cases involving very powerful war criminals sometimes discuss the accused's role in enabling atrocities or the context of armed conflict that spawned atrocities crimes. This may appear in the court's judgment on guilty rather that in the sentencing judgment.[6]

The enabler theory closes the explanatory gap in sentencing outcomes left unexplained by the gravity narrative.[7] This article advances the enabler theory to explain perceived inconsistencies in the quantum of punishment between different trials, for example between the sentence of Charles Taylor and persons in the Civil Defense Force (CDF), a loosely organized fighting force loyal to President Kabbah and the ousted, democratically elected government of Sierra Leone. It also explains the distribution of punishment among co-perpetrators within a single trial. For example, in the RUF trial, the enabler factor explains why Issa Sesay received more than double the prison sentence of his co-defendant Augustine Gbao (52 years versus 25 years) even though both were convicted of the same crimes. This article also employs the enabler factor to explain the sizable differences between the punishment of individuals who fought against the government of Sierra Leone versus the comparatively light sentences of government supporters. Additionally, the enabler theory offers a pathway towards congruency between judicial narratives and actual sentencing allocations. The expressive function of atrocity trials and punishment is presently undermined by a singular focus on a narrative of extreme "gravity" that outpaces the actual quantum of punishment. The final sentences are underwhelming when compared to this hightened gravity rhetoric. It is also instructive to future sentencing determinations by the ICC and other international tribunals. In addition to closing the explanatory gap in sentence allocations, it

[5] See, *e.g.*, Tadic Appeals Sentence, [55]–[58] (instructing trial judges to "consider the need for sentences to reflect the relative significance of the role of the Appellant in the broader context of the conflict"); *Prosecutor v Rukundo* (ICTR-2001-70 Trial Chamber), Judgment (27 February 2009) [605]; See also, *Prosecutor v Taylor*, Case No. SCSL-03-01-T, Judgment (18 May 2012) (hereinafter, "*Taylor* Trial Judgment") [5834]–[5835], [5842], and [6913]–[6915] (finding that "Taylor's acts and conduct had a substantial effect on the commission of the crimes because they: (i) enabled the RUF/AFRC's Operational Strategy; (ii) supported, sustained and enhanced the RUF/AFRC's capacity to implement its Operational Strategy.")

[6] Compare *Taylor* Trial Judgment with *Prosecutor v Taylor*, Case No. SCSL-03-01-T, Sentencing Judgment (30 May 2012) (hereinafter, "*Taylor* Trial Sentencing Judgment").

[7] Chifflet and Boas, *Sentencing Coherence in ICL* (n 1) 147, 156, and 158 (suggesting that gravity does not explain a large number of ICL sentencing outcomes).

also integrates sentencing outcomes with sentencing narratives and the goals of international prosecutions.

Section II launches straight into applying the enabler theory to explain the sentencing outcomes at the Special Court for Sierra Leone. It is examined in three distinct contexts. First, it is offered to explain the sentence of an individual atrocity perpetrator at the highest level of power and authority, such as a head of state. The enabler theory re-shapes the debate surround the punishment of Liberian President Charles Taylor, offering considerations that force rethinking of prevalent criticisms of his sentence. Second, through the prism of the enabler factor, I will illuminate the sentencing of three co-perpetrators of the same crimes in a way that "gravity" alone cannot explain. Third, the enable factor closes the explanatory gap between the sentences of perpetrators across the different trials and armed groups. Next, the article examines and responses to possible criticisms of the enabler theory. Section IV reflects on how existing ICL statutory provisions and sentencing factors can be interpreted to account for the enabler theory. The article concludes by examining some of the advantages of the enabler theory.

II. Enablers and mass atrocities in sierra leone

When heads of states or heads of armed groups enable mass conflict and criminality, an ominous environment for atrocities is created. The number of victims increases exponentially. Punishment in international criminal law must capture this extremely dangerous criminality. This can be done, for example, by giving weight the use of authority or power by head of a state or an armed group to enable atrocities, *i.e.*, to create or facilitate conditions that sustain atrocity criminality. This section applies the enabler factor to atrocities committed during a brutal war that fatally consumed the people of Sierra Leone for more than a decade.[8] In order to establish sufficient context, the section begins with a brief overview of the civil war in Sierra Leone.[9] This provides the factual context necessary for understanding the role of particular perpetrators and the application of the enabler factor. It then applies the enabler factor to the trials and punishments of: (1) Charles Taylor,

[8] For further reading on the conflict in Sierra Leone, see Ian Smillie, Lansana Gberie and Ralph Hazleton, *The Heart of the Matter: Sierra Leone, Diamonds & Human Security* (January 2000) <https://cryptome.org/kimberly/kimberly-016.pdf> (discussing the devastating nature of the conflict); Nicole Fritz and Alison Smith, "Current Apathy for Coming Anarchy: Building the Special Court for Sierra Leone" (2001) 25 Fordham Int'l LJ 391, 394 (*discussing* a campaign of terror against civilians that included abducting children, forced prostitution, and the amputation of limbs).

[9] This factual background borrows heavily from my earlier scholarship. See further, Shahram Dana, "The Sentencing Legacy of the Special Court for Sierra Leone" (2014) 42 Georgia J Int'l & Comp L 615, 619–22.

then sitting Head of State and President of Liberia; (2) three members of the Revolutionary United Front (RUF); and (3) two members of the Civil Defense Force (CDF).

In Sierra Leone's 1996 democratic elections, Alhaji Ahmad Tejan Kabbah, an ethnic Mandingo, was elected President of Sierra Leone, becoming his country's first Muslim Head of State.[10] Soon after the elections, armed conflict between the new government and the RUF resumed.[11] The RUF claimed that Kabbah's government was overrun with corruption, justifying an armed rebellion by the people.[12] From neighbouring Liberia, Charles Taylor long supported and enabled the RUF's war in Sierra Leone against the government of President Kabbah and past ruling regimes.[13] In December 1996, President Kabbah and RUF leader Foday Saybana Sankoh signed a peace agreement, the Abidjan Peace Accord, bringing a temporary halt to the atrocities and granting blanket amnesty to RUF fighters. However, peace did not last long. Within months, war consumed the country again. In March 1997, Sankoh was placed under house arrest in Nigeria for alleged weapons violations.[14] Although this gave Sierra Leone President Kabbah a small victory over the RUF, the ascendancy was short lived. A few months later, a group of senior military officers in the Sierra Leone Army (SLA) overthrew a weakened Kabbah in a *coup d'etat* and unlawfully seized power from the newly elected government with a brutal military assault on Freetown in which Liberian President Charles Taylor had "a heavy footprint" in planning, enabling,

[10] Charles C Jalloh, "Contributions of the Special Court for Sierra Leone on the Developments of International Law" (2007) 15 Afr J Int'l & Comp L 165, 169 ("Jalloh Contributions"). *Prosecutor v Sesay*, Trial Chamber Sentencing Judgment (8 April 2009) (hereinafter, "RUF Trial Sentencing Judgment") [146].

[11] Nsongurua J Udombana, "Globalization of Justice and The Special Court of Sierra Leone's War Crimes" (2003) 17 Emory Int'l Rev 55, 71 (*stating* that the atrocities were occasioned by the desire to control of the country's natural resources).

[12] See Babafemi Akinrinade, "International Humanitarian Law and the Conflict in Sierra Leone" (2001) 15 Notre Dame J L Ethics & Pub Pol'y 391, 392; Jalloh Contributions (n 10) 169; RUF Trial Sentencing Judgment (n 10) [146].

[13] Jamie O'Connell, "Here Interest Meets Humanity: How to End the War and Support Reconstruction in Liberia, and the Case for Modest American Leadership" (2004) 17 Harvard Hum Rts J 207, 213; Fritz and Smith (n 8) 394 (discussing how after the RUF entered Sierra Leone and controlled the Eastern region of the country, it implemented Charles Taylor's a campaign of terror by abducting children, forcing prostitution, and amputating limbs).

[14] *Prosecutor v Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Trial Chamber Judgment (2 March 2009) (hereinafter, "RUF Trial Judgment") [19].

and overseeing.[15] Establishing themselves as the Armed Forces Revolutionary Council (AFRC), these mutinous officers installed one of their own, Johnny Paul Koroma, as Sierra Leone's new Head of State.

Although the AFRC and RUF joined forces, their union was an uneasy one. Together they fought against the CDF, which was led by Samuel Hinga Norman, an enormously popular figure and war hero among Sierra Leoneans.[16] With the intervention and support of the Economic Community of West African States Monitoring Group (ECOMOG), forces loyal to Kabbah, including the CDF, managed to regain control of Freetown and reinstate Kabbah as Sierra Leone's president. The civilian population of Sierra Leone, however, saw no respite from deliberate brutalization and horrific attacks against them. All parties to the conflict, including ECOMOG and Nigerian armed forces, continued to mercilessly attack, kill, and terrorize civilians. The retreating AFRC and RUF fighters looted and pillaged villages, killed or imprisoned civilians, and otherwise terrorized the population, including widespread mutilations and amputations. The hostilities and accompanying atrocities were intense, extreme, and prolonged.[17] After two more years of fighting, another peace agreement was signed and again RUF war criminals were granted full amnesty despite the horrible atrocities they committed. The 1999 Lome Peace Agreement, signed by President Kabbah and the RUF represented by Sankoh, not only gave Sankoh amnesty for atrocity crimes and pardoned his treason, but also installed him as Sierra Leone's Vice-President, and gave him control of the country's lucrative diamond mines.[18]

Two peace agreements and two full amnesties failed to deliver lasting or even short-term peace to the country, or respite to Sierra Leoneans from the horrors and hell they suffered. More hostilities followed and so too did graver atrocities. Throughout the war, Charles Taylor provided material support to the RUF/AFRC

[15] *Taylor* Trial Sentencing Judgment (n 6) [76], [77], and [98]; *Prosecutor v Moinina Fofana, Allieu Kondewa*, Case No. SCSL-04-14-T, Trial Judgment (9 October 2007) (hereinafter, "CDF Trial Sentencing Judgment") [44]. See also Human Rights Watch, "Sierra Leone: Getting Away with Murder, Mutilation, and Rape" (1999) 11(July) Human Rts Watch 3(A) 12; James Rupert, "Diamond Hunters Fuel Africa's Brutal Wars" *Washington Post Foreign Service* (16 October 1999); Ian Stewart, "Rebels Set Freetown Ablaze, President Opens Talks" *Associated Press* (7 January 1999).

[16] Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (OUP 2009) 677.

[17] See further, *The Heart of the Matter* (n 8); Fritz and Smith (n 8) 394 (2001) (discussing a campaign of terror against civilians that included abducting children, forced prostitution, and the amputation of limbs).

[18] Tony Karon, "The Resistible Rise of Foday Sankoh" *Time Magazine* (12 May 2000) <http://www.time.com/time/arts/article/0,8599,45102,00.html> (accessed 3 July 2013); Obituaries, Foday Sankoh *The Telegraph* (31 July 2003) <http://www.telegraph.co.uk/news/obituaries/1437579/Foday-Sankoh.html> (accessed 18 March 2013).

armed groups that enabled them to continue the hostilities and atrocities, including supplying arms, weapons, munitions, and military personnel.[19] After the failures of the "peace with amnesty" strategy, movement towards accountability and justice gained traction, perhaps encouraged by the international tribunal model in response to the atrocities in Rwanda and Yugoslavia. In June 2000, President Kabbah requested that the United Nations Security Council establish a "special court for Sierra Leone" to prosecute RUF and AFRC leaders for planning and executing terrible atrocity crimes that brutalized and terrorized the people of Sierra Leone for more than 10 years.[20] The United Nations and Sierra Leone created a "special court" to prosecute persons bearing the "greatest responsibility" for the atrocities.[21]

The Special Court for Sierra Leone prosecuted and punished, *inter alia*, Charles Taylor, who was a sitting head of state when indicted; Alex Tamba Brima, Santigie Borbor Kanu, and Brima Bazzy Kamara, members of the AFRC Supreme Council and senior military commanders in the Sierra Leone Army that staged a successful *coup d'etat* that ousted the Sierra Leone government; Issa Sesay, senior military officer and commander of the RUF and later the combined AFRC/RUF forces in their insurrection against Sierra Leone; and Samuel Hinga Norman, founder and leader of the CDF who was appointed Deputy Minister of Defence by President Kabbah during the conflict.

In contextualising the enabler theory to the atrocities in Sierra Leone, it is helpful to first lay out the quantitative picture emerging from the sentencing practice of the SCSL. The Court has imposed nine sentences ranging from 15 years to 52 years with an average sentence of 36 years and median of 45 years. This picture changes dramatically if we examine separately the punishments of vanquished opponents of the Sierra Leone government and the punishments of the victorious pro-Sierra Leone forces. The average sentence for the vanquished opponents (*i.e.* Charles Taylor, the RUF and AFRC fighters) is 46 years; whereas the average sentence for supports of President Kabbah (*i.e.* the CDF defendants) is 17.5 years after appeal (the average sentence of these defendants at trial was 7 years), a mere fraction of the punishment met out to those that rebelled against the government. The CDF defendants also received the lowest individual sentences. Among the opposition groups, the AFRC, *i.e.*, the defecting military officers, were punished most severely with an average sentence of 48.3 years, comprising of

[19] *Taylor* Trial Judgment (n 5) [5834]–[5835], [5842], and [6913]–[6915].

[20] President of the Republic of Sierra Leone, Annex to the Letter dated 9 August, 2000, from the Permanent Representative of Sierra Leone to the United Nations addressed to the President of the Security Council, U.N. Doc S/2000/786 (10 August 2000).

[21] Jalloh, *Achieving Justice* (n 2) 398–404 (discussing the creation of the court).

individual sentences of 50 years for Brima and Kanu, and 45 years for Kamara.[22] The average punishment for the RUF defendants was 39 years.[23] Sesay received a prison sentenced of 52 years, the highest individual punishment rendered by the SCSL.[24] His RUF co-defendants Morris Kallon and Augustine Gbao received 40 and 25 years respectively.[25]

A. Enabler factor as applied to charles taylor

Several authors have criticised Taylor's fifty-year (50) prison sentence as excessive. Mark Drumbl, for example, argues that the judges were obsessed with Taylor's status as Head of State.[26] He concludes that this judicial obsession with accountability for a Head of State disproportionately increased Taylor's sentence.[27] Drumbl invites us to consider whether Head of State status should matter so much when it comes to punishing atrocities.[28] Likewise, Kevin Jon Heller argues that the mode of liability underlying Taylor's conviction, aiding and abetting, does not justify his sentence.[29] Heller's dissatisfaction stems largely from what he characterizes as poor reasoning and scant explanation for departing from basic principles that the judges themselves proffered as controlling the quantum of punishment.

Although subsequently overturned by the Appeals Chamber,[30] the trial judges took the position that aiding and abetting warrants a lesser punishment and furthermore proclaimed this to be a general principle of criminal law.[31] But then

22 See *Prosecutor v AFRC*, Case No. SCSL-04-16-A, Appeals Chambers Judgment (22 February 2008) (hereinafter, "AFRC Appeal Judgment") 105–6 (Sentencing Disposition).

23 See *Prosecutor v Sesay*, Case No. SCSL-04-15-A, Appeals Chambers Judgment (26 October 2009) (hereinafter, "RUF Appeal Judgment") 477–81 (Sentencing Disposition).

24 *ibid*.

25 *ibid*.

26 Mark Drumbl, "The Charles Taylor Sentence and Traditional International Law" *Opinio Juris Blog* (11 June 2012) <http://opiniojuris.org/2012/06/11/charles-taylor-sentencing-the-taylor-sentence-and-traditional-international-law> (accessed 14 April 2018) (hereafter "Drumbl, Punishing Heads of State (2012)").

27 *ibid*.

28 *ibid*; see also, Wayne Jordash and Scott Martin, "Due Process and Fair Trial Rights at the Special Court: How the Desire for Accountability Outweighed the Demands of Justice at the Special Court for Sierra Leone" (2010) 23 Leiden Journal of International Law 585 (claiming that the quest for accountability of perceived leaders has trumped certain fair trial rights).

29 Kevin Jon Heller, "The Taylor Sentencing Judgment: A Critical Analysis" (2013) 11 J Int'l Crim Justice 835 (hereafter "Heller, *Taylor Sentence* (2013)").

30 *Prosecutor v Taylor*, Case No. SCSL-03-01-A, Appeals Chamber Judgment (26 September 2013) (hereinafter, "*Taylor* Appeal Judgment") [666] and [670].

31 *Taylor* Sentencing Judgment (n 6) [100].

they immediately tossed this declared principle aside, and decide that they will instead consider the "unique circumstances" of Taylor's case when determining his punishment. The ruling comes across as an unjustified "go around" a purportedly basic principle of criminal law acknowledged by the Trial Chamber itself. Heller and others are rightly discontent. The convicted person, the victims, and the broader communities deserve a sounder justification.

There is some debate about whether the asserted rule—that aiding and abetting as a matter of law deserves less punishment—is a universally accepted general principle of criminal law.[32] Of course, factually, the actual contribution of an aider and abettor may be rather minor so as to warrant a lesser penalty. In such cases, a lesser penalty for aiding and abetting is the justifiable result of analysis and evaluation of the actual criminal conduct. It is not an automatic outcome. This is quite different from claiming at aiding and abetting as a matter of law merits a lesser penalty, regardless of the significance or decisiveness of the perpetrator's contribution. Facts must drive the analysis, especially in the context of atrocity crimes where the aiding and abetting is done by a head of state or head of an organised armed group. Yet, this critique does not resolve the problem here because, whether or not this is actually a general principle of criminal law, the Trial Chamber believed this rule to be a general principle and proceeded to sentence Taylor on that basis. So, assuming that this principle applies, is there a better explanation for the Trial Chamber's departure from it than the proffered "unique" circumstances of Charles Taylor case? If not, then perhaps Drumbl is right: "unique circumstances" might be simply a cover for a "fetish" to punishing a head of state.

One response might be that the critics are underestimating how seriously the Trial Chamber viewed Taylor's *planning* of crimes against humanity and war crimes. After all, Taylor was convicted of two modes of liability: planning as well as aiding and abetting.[33] Still, this explanation does not get us home because Taylor was convicted of "planning" only one of his crimes; for all others, he was convicted as an aider and abettor. An explanation with greater legs is that the

[32] The SCSL Appeal Chamber decisively concludes that it is not. It holds that the Trial Chamber's position is inconsistent with the SCSL's statute, rules, and jurisprudence. See, *Taylor* Appeal Judgment (n 30) [666] and [670]. The Appeal Chamber further holds that the Trial Chamber's ruling here is not supported by customary international law, nor a general principle of law, citing and discussing numerous jurisdictions including the Sierra Leone, the United States, Austria, Brazil, Costa Rica, Puerto Rico, France, and Italy: see [667]. The SCSL also persuasively demonstrates the error of arguments that rely on ICTY jurisprudence to claim that aiding and abetting as a mode of liability warrants lesser punishment: [666]–[669].

[33] *Taylor* Trial Judgment (n 5) [37B].

judges considered Taylor's contribution to the atrocity crimes to be a particularly serious form of complicity. They considered Taylor to be an enabler.[34]

A closer examination of the trial judgment reveals that the judges consider Taylor to have not merely aided and abetted in the crimes but in fact *enable* the atrocities.[35] He enabled the RUF/AFRC's operational strategy, which included the committed atrocity crimes, by supporting, sustaining and enhancing the RUF/AFRC's capacity to carry out these activities.[36] Taylor supplied arms and ammunitions to the RUF and AFRC that were "indispensable" in empowering them to launch attacks.[37] The RUF repeatedly encountered the problem of depletion of its arms and military supplies and time and again Taylor responded by directly supplying them with more weapons.[38] Without the shipment of weapon's from Charles Taylor, the RUF could not have sustained their attacks on civilians.[39] During the same time, the United Liberation Movement of Liberia for Democracy (ULIMO) was supposed to disarm and surrender its weapons to the UN. Instead, Taylor enabled them to sell or barter their weapons to the RUF, and further provided the RUF with the financial means needed to purchase these arms and ammunitions from the ULIMO.[40] Taylor also directly supplied the AFRC with arms.[41] The trial judges found that "Taylor's acts and conduct had a substantial effect on the commission of the crimes because [he] enabled the RUF/AFRC."[42]

While the Trial Judgment is explicit that Taylor "was critical in enabling" the RUF and AFRC,[43] the Sentencing Judgment does not explicitly identify "enabling" as a sentencing factor. Nevertheless, I argue the enabler factor influenced and increased Taylor's sentence. Implicit in the judges' sentencing narrative is their grave concern that Taylor enabled the armed conflict and ensuing atrocities. When the Trial Chamber analyses the "role of the accused", it considers Taylor's "sustained operational support;" "the steady flow of arms and ammunition;" and

[34] *E.g. Taylor* Trial Judgment (n 5) [6914] (finding that Taylor "was critical in enabling" the RUF and AFRC). See also, *Taylor* Appeals Judgment (n 30) [683].

[35] *E.g. Taylor* Trial Judgment (n 5) [5834], [5835], [5842], [6913]–[6915] (finding that "Taylor's acts and conduct had a substantial effect on the commission of the crimes because they: (i) enabled the RUF/AFRC's Operational Strategy; (ii) supported, sustained and enhanced the RUF/AFRC's capacity to implement its Operational Strategy.")

[36] *ibid*.

[37] *E.g. Taylor* Trial Judgment (n 5) [5834], [6914].

[38] *ibid* [5837], [6914].

[39] *ibid* [6913]. See also, *Taylor* Appeals Judgment (n 30) [683].

[40] *Taylor* Trial Judgment (n 5) [5835].

[41] *ibid* [5837].

[42] *ibid* [5834], [5835], [5842], [6913]–[6915]

[43] *E.g. ibid* [6914].

"the extended duration of the conflict… and crimes."[44] The judges further found that without Taylor's involvement "the crimes might have end earlier."[45] These finding concerning Taylor's role in the atrocities strongly indicate that the judges considered Taylor to be an enabler, and they further imply this by placing him in "a different category of offenders for the purpose of sentencing."[46] Clearly, the fact that Taylor was responsible for knowingly enabling a dire situation encouraging the commission of atrocities, some of which he planned himself and others in which he was complicit and made a decisive contribution, weighed heavily on the judges during sentencing deliberations.

The enabler factor explains Taylor's sentence by considering his role in enabling and maintaining a milieu or situation of atrocities. The judges found that Taylor enabled the commission of atrocity crimes in another state.[47] In the context of atrocity crimes and the goals of international criminal justice, a Head of State using his power and state resources to *enable*, as the SCSL describes it, atrocities and conflict in the territory of another country is the archetype criminality that ICL is most concerned with. It is arguably the quintessence of atrocity crimes. This wrongdoing must be accounted for in the punishment. The harm here goes beyond public international law concerns regarding state sovereignty. As a Head of State, Taylor's criminality decisively enabled the commission of crimes against humanity and other horrific atrocity crimes against the civilians of another state. Thus, when such extraterritorial criminality is committed by a person in control of a foreign state's armed forces or military resources, the nature of this criminality must be linked to the quantum of punishment. The *Taylor* Trial Chamber sought to capture this harm—the extraterritorial nature and effect of his wrongdoing—as an aggravating factor.[48] Such a conceptualisation is reasonable, but arguably could have been sharpened by more direct accounting of how Taylor used his power as a head of state to enable atrocities and connecting that dire harm to the resulting increase in punishment. The danger lies not simply in extraterritorial criminality, but in a very powerful actor enabling atrocities in a neighbouring country. The punishment is better explained by the enabler factor.

B. Enabler factor as applied to the RUF case

Comparing the sentences of Sesay, Kallon, and Gbao gives further traction to the influence of the enabler factor. Given that all three defendants were convicted of the same underlying crimes (acts of terrorism, mutilations and cutting

[44] *Taylor* Sentencing Judgment (n 6) [76].
[45] *ibid*.
[46] *ibid* [100].
[47] *ibid* [98].
[48] *ibid*.

off of limbs, rape, sexual slavery, murder, enslavement, pillage, forced marriage, and attacks on peacekeepers), this trial allows us to compare crimes of the same gravity. When we compare the sentence of Sesay, the man who had the power to effectuate the disarmament of the RUF, with Gbao, also a senior military commander reporting directly to Sesay, we learn that "gravity" does not function as a differential sentencing principle as judges claimed. For some crimes, Sesay was sentenced to three times the prison term that Gbao received, as shown in the table below.[49] For example, both were convicted of rape as a crime against humanity under Count 6 of the indictment.[50] For this offense, Sesay was sentenced to 45 years of imprisonment, whereas Gbao received only 15 years. For sexual slavery as a crime against humanity under Count 7, Sesay was sentenced to 45 years; Gbao got 15.[51] For pillaging as a war crime under Count 14, Sesay was sentenced to 20 years; Gbao got six.[52] For other inhumane acts as a crime against humanity under Count 7, Sesay was sentenced to 40 years; Gbao got 11.[53]

CRIME	**SENTENCE**
Rape (CAH)	Sesay – 45 years Gbao – 15 years
Sexual Slavery (CAH)	Sesay – 45 years Gbao – 15 years
Pillaging (WC)	Sesay – 20 years Gbao – 6 years
Terrorism (WC)	Sesay – 52 years Gbao – 25 years
Attacks against Peacekeepers (WC)	Sesay – 51 years Gbao – 25 years
Other inhumane acts (CAH)	Sesay – 40 years Gbao – 11 years

Furthermore, comparing their punishments for other crime reveals a similar pattern. Crimes for which Sesay received 52 years (terrorism as a war crime) and 51 years (attacks against peacekeepers), Gbao received only 25 years for the same crimes,[54] which were in fact charged in the indictment under the same count against both defendants (Counts 1 and 15).[55] Yet, Sesay received more than double

[49] RUF Appeal Judgment (n 23) 477–81 (Sentencing Disposition).
[50] *Prosecutor v Sesay, Kallon and Gbao*, Case No. SCSL-2004-15-PT, Corrected Amended Consolidated Indictment (2 August, 2006) (hereinafter, "RUF Indictment").
[51] RUF Appeal Judgment (n 23) 477–81 (Sentencing Disposition).
[52] *ibid.*
[53] *ibid.*
[54] RUF Appeal Judgment (n 23) 477–81 (Sentencing Disposition).
[55] RUF Indictment (n 50).

the prison time that Gbao got for these crimes. Likewise, for extermination as a crime against humanity under Count 3, Sesay was sentenced to 33 years; Gbao got 15. Thus, the increase in the penalty for the same crime is more than 100%.

The Trial Chamber treated Sesay as the most influential and highest-ranking battlefield commander of RUF/AFRC; in other words, Sesay was the ultimate commander of the all rebel fighting forces.[56] Sesay's power to end the conflict was amply demonstrated when under his orders the entire rebel forces demobilized. Given Sesay's crucial role in sustaining the conflict and atrocities, and his 52-year sentence (the highest at the SCSL) compared to the 25 years Gbao received, the sentencing practice here indicates that the enabler factor will enhance punishment by more than 100%.[57] Thus, gravity of the offense, if understood as the seriousness of the harm, is not as controlling of quantum of punishment as the rhetoric of the SCSL and other international criminal courts suggests. In fact, gravity can hardly be considered a "litmus test" for a sentence when one defendant receives double or triple the sentence of his co-defendant when both were convicted of the very same crime—thus same gravity—alleging the same facts under the very same count in the indictment. For the same crimes, Sesay was sentenced to 27 years more than Gbao.[58] Attributing this increase of 27 years to the aggravating factor of Sesey's "position as a superior" does not convincingly account for the quantum of the increase. Gbao was also a senior commander.

The difference is also striking when we compare Sesay to Kallon. For the crime of acts of terrorism, Kallon got 39 years and Sesay received an additional 13 years, increasing his punishment to 52 years of imprisonment, a 33% increase in punishment.[59] Likewise, for the crime of attacking peacekeepers, Sesay's punishment was 51 years of imprisonment whereas Kallon received 40 years.[60] Thus, Sesay received 11 more years than Kallon for the same crime, making Sesay's prison sentence more than 25% longer than Kallon.

The sentences in RUF case demonstrates that even between high level perpetrators (Sesay, Kallon and Gbao), the punishment for the enabler among them increases quite substantially. The critical role of a very high-ranking accused in enabling and creating a milieu for systemised criminality is a weighty differential factor and can reasonably account for this sharp increase in penalty. The enabler factor is very significant in sentence allocations for atrocity crimes, even though it is often not clearly articulated in international judgments. So influential was the

[56] *ibid* [22] and [23].

[57] RUF Appeal Judgment (n 23) [1206] (finding that Sesay's highly influential role increased the gravity of the offences).

[58] RUF Appeal Judgment (n 23) 477–81 (Sentencing Disposition).

[59] *ibid*.

[60] *ibid*.

enabler factor at sentencing that, in the RUF case, it nullified the fact that Sesay's responsibility for the attacks on the peacekeepers was less than Kallon's culpability for the same crime. This suggests that the enabler factor is a more significant factor for sentencing than the accused's mode of liability. Kallon ordered the attacks on peacekeepers and he even personally attempted to kill an UNAMSIL officer.[61] These constitute particularly grave modes of liability. Kallon bore direct criminal responsibility for direct participation, according to the Trial Chamber.[62] Sesay's responsibility however was further removed and less culpable relatively speaking. The Trial Chamber found Sesay to be only indirectly responsible for the attack because he failed to punish individuals like Kallon who ordered and carried out the attacks.[63] Thus, Sesay's only culpability was by omission, compared to Kallon ordering and personally participating in the crime. Nevertheless, for the same crime, Sesay was sentenced to 11 more years of imprisonment than Kallon.

Although Sesay was not a head of state, he did direct and enable all RUF activities in Sierra Leone after Sankoh was imprisoned.[64] Thus, for the relevant time periods, he was the head of an organised armed group engaged in armed conflict against a state. I theorize that accounting for the enabler factor is implicitly what some international judges are doing in their determination of what constitutes a just and appropriate punishment, even if their sentencing judgments fail to explicitly articulate enabler as a sentencing factor and even despite their magniloquence about "gravity of the offense" as the dispositive criteria for atrocity sentencing. The enabler factor better explains the reason for the very substantial increase in Sesay's punishment compared to his RUF co-perpetrators. Responsibility for enabling atrocities is a significant differential factor in sentencing allocations for international crimes.

C. Enabler factor as applied to CDF case

The CDF defendants, Moinina Fofana and Allieu Kondewa, received the lowest sentences of any atrocity perpetrator convicted by the SCSL. The Trial Chamber sentenced Fofana to a meagre, six (6) years of imprisonment and Kondewa to eight (8) years for very heinous crimes including murder, cruel treatment, pillage, and using children in hostilities.[65] Thus, their crimes are quite

[61] RUF Trial Judgment (n 14).

[62] *ibid*.

[63] *ibid*.

[64] RUF Indictment (n 50) [23].

[65] CDF Trial Sentencing Judgment (n 15) 34–5 (Sentencing Disposition). The SCSL Appeals Chamber increased their sentences to 15 and 20 years respectively for Fofana and Kondewa. See *Prosecutor v Moinina Fofana, Allieu Kondewa*, Case No. SCSL-04-14-A, Appeals Chamber Judgment (28 May 2008) (hereinafter, "CDF Appeal Judgment") 189.

grave, like the crimes committed by other perpetrators convicted by the SCSL.[66] Yet, the CDF war criminals' punishment is drastically lower than the average sentence (48 years) for other trials at the SCSL. Does the "gravity of the offence" factor adequately explain sentences of six (6) and eight (8) years for murder, cruel treatment, pillaging, and using children in hostilities? Can the enabler factor better explain why the CDF defendants received substantially lower punishments than the defendants in the RUF and AFRC trials?

How did the judges arrive at these sentences? As all ICL sentencing judgments do, the trial judges in the CDF case narrate their sentences in terms of "gravity".[67] And, like all other ICL sentencing analysis, the judges do not follow a doctrinal approach to gravity. Instead, they list a number of factors relevant to the gravity assessment: "scale and brutality of the offenses committed, the role played by the Accused in their commission, the degree of suffering or impact of the crime on the immediate victim, as well as its effect on relatives of the victim, and the vulnerability and number of victims."[68] If gravity is the litmus test, then punishments of six and eight years of imprisonment seem manifestly low for perpetrators convicted of murder, forcing children to kill for them, and acts of rape resulting in death.[69] If gravity demands a more severe punishment, how do the judges justify this comparatively low sentence? Part of the explanation lies in the judges' sympathy for the reasons the CDF Kamajor fighters entered the armed conflict, namely in "defence of their communities… with the sole objective of… preventing the brutal killings" of their families and to "protect their lands and properties."[70] Another prominent narrative also influenced the sentence.[71] According to the judges, a significant justification for the low sentence was that these war criminals fought for a "legitimate cause" by preventing a *coup d'etat* against the elected government.[72] The CDF defendants helped "re-establish the rule of law" by defeating a rebellion.[73] Fighting for a legitimate cause merited mitigation of punishment, in the eyes of the judges, even if the means to achieve that end included atrocity crimes.[74] The sentencing narrative exudes a distinctive tone of redemption, rather than condemnation as might be expected

66 For a complete discussion and analysis of all crimes and punishment of defendants before the SCSL *see* Shahram Dana, "The Sentencing Legacy of the Special Court for Sierra Leone" (2014) 42 Georgia J Int'l & Comp L 615.

67 CDF Trial Sentencing Judgment (n 15) [33].

68 *ibid*.

69 *ibid* [47] and [52].

70 *ibid* [84].

71 *ibid* [91] and [94].

72 *ibid* [82]–[94].

73 *ibid* [87].

74 CDF Trial Sentencing Judgment (n 15) [44] and [82]–[94].

in a judgment on criminality. The judges moralised that fighting to restore the "legitimate" government "atones" for their "grave and very serious" crimes.[75] Justifying reduction of punishment based on fighting for the good guys is deeply problematic, and the SCSL Appeals Chamber promptly overturned this ruling. Mitigating a sentence because the war criminal fought on the right side offends a core value of international humanitarian law, that all sides conduct hostilities in accordance with basic laws of humanity. To allow otherwise, destroys the *jus in bello, jus ad bellum* distinction. This justification for mitigation is liable to criticism of "victor's justice" and politicisation of international justice and runs counter to its underlying goals. The Trial Chamber's willingness to advance "legitimate cause" as grounds for mitigating punishment for atrocity crimes has been met with severe criticism.[76] The enabler factor, on the other hand, offers an explanation more congruent with the ethos of international criminal justice and the goals of international atrocity trials.

If gravity of the offence was indeed the primary factor influencing the trial sentence of the CDF defendants, then it would be reasonable to expect a higher sentence than six (6) and eight (8) years for murder, using children in hostilities, cruel treatment, and pillaging. Thus, the gravity factor does not explain these sentences. Could these sentences be better explained by the fact that Fofana and Kondewa were not enablers? Nowhere in the judgment of the CDF do you find the characterization of them as enablers as you do with, for example, Charles Taylor.[77] The Trial Chamber also noted "Fofana's commitment to and observance of the Lome Peace agreement", demonstrating commitment to non-conflict.[78] He also made substantial efforts to "ensur[e] that members of the CDF remained committed to the peace process."[79] The Trial Chamber commended Fofana's post-conflict efforts to foster the peace process.[80] These findings all indicate that the judges did not consider the CDF defendants to be enablers of the armed conflict that spawned the atrocities. The judges recognised that factors indicative of an accused's role as an enabler (or non-enabler) are significant in determining an appropriate sentence. They determined that Fofana and Kondewa merited a

[75] *ibid* [82]–[94].

[76] Human Rights Watch, Political Considerations in Sentencing Mitigation for Serious Violations of the Laws of War before International Criminal Tribunals (March 2008) <https://www.hrw.org/sites/default/files/related_material/Political%20Considerations%20in%20Sentence%20Mitigation%20for%20Serious%20Violations%20of%20the%20Laws%20of%20War%20before%20International%20Criminal%20Tribunals.pdf> (accessed 15 August 2019).

[77] See also, *Taylor* Trial Judgment (n 5) [5834], [5835], [5842], [6913]–[6915].

[78] CDF Trial Sentencing Judgment (n 15) [67].

[79] *ibid*.

[80] *ibid*.

sentence lower than what the gravity of the crime might otherwise demand. The fact that Fofana and Kondewa were not enablers, and in fact were viewed by the judges as persons committed to non-conflict, better explains their sentences than the gravity of their offences.

III. Possible critiques of the enabler factor

This article does not present the enabler factor as an exclusive explanation that completely responds to all that vexes the goal of justly punishing atrocities. I argue that it elucidates a real determinate of ICL sentencing that is not explicitly accounted for in the sentencing narratives, and thus the enabler theory brings greater clarity to punishment for atrocity crimes. It captures an atrocity perpetrator's responsibility for enabling and creating the context of armed conflict. This element is not yet accounted for in any explicit sentencing factor. Yet, atrocities generally do not occur absent the chaos and disorder of war or armed conflict. In addition to better explaining ICL sentences, the enabler factor also enriches the sentencing analysis, leading to greater coherence between judicial narratives and sentencing outcomes.

Nevertheless, I recognise some concerns and possible arguments against the enabler theory. First, some may argue that it is too narrow in its applicability. This critique points out that the enabler factor will only apply to a small percentage of war criminals and thus have limited utility. I argue that its limited applicability is actually a strength. The reality is that only a few war criminals have the capacity to be enablers of armed conflict.

Second, it may also be argued that the enabler factor unfairly backdoors responsibility for aggression, violating *nullum crimen sine lege*. This criticism misunderstands the scope of the enabler factor. It does not create an independent or separate grounds of individual criminal responsibility for the crime of aggression, or any other atrocity crime for that matter. The accused must still first be found guilty of an existing atrocity crime, thus respecting the principle of legality. Consideration as an enabler arises only after a finding of guilt for an existing crime for the purpose of determining an appropriate sentence.

Third, and related to second, is the criticism that the enabler factor appears to only capture the person or side that initiated the conflict. It is true that persons who initiate large scale armed violence are more likely to be captured by the enabler factor. I argue that such dire conduct is dangerous criminality that must and should be captured in the sentence. Moreover, nothing about the enabler factor necessarily limits it to initiators of armed conflict. It is quite possible that a non-initiator of the violence can be found to be an enabler. The analysis would be

driven by the facts on the ground, not labels. In the CDF case, the Kamajor were not viewed as enablers; the judges found that they did not enable the civil war in Sierra Leone but only engaged in the fighting in "defence of their communities" to protect their families from becoming victims of atrocities.[81] Based on these findings of fact, the Kamajor would not be considered enablers of Sierra Leone's civil war. Admittedly, the determination of who are enablers, and who are not, can be politicised. However, this does not undermine the enabler theory as a helpful tool for conceptualising the role of accused in sentencing narratives. It simply draws attention to the importance of objective application, which is true of any judicial determination. International judges are already called upon and indeed do make determinations on matters that are politicised and can impact domestic and international politics such as, for example, whether a war criminal contributed to national reconciliation.[82]

To be clear, the fact that a war criminal is not an "enabler" does not exonerate them from their crimes. They are still criminally responsible for their hand in the atrocities. A non-enabler can still be guilty of atrocity crimes and punished accordingly. The CDF defendants were found guilty of and punished for their crimes.

IV. How the enabler factor fits into ICL statutory provisions

How might international criminal courts incorporate the enabler factor into sentencing determinations? This question is beyond the scope of this article; it is explored in greater detail in a separate article that advances an innovative sentencing framework for punishing atrocities.[83] Nevertheless, it may be helpful to provide some brief reflections here on how existing ICL sentencing provisions and factors can be interpreted to account for the enabler factor. The relevant statutory language is found in the basic sentencing provisions of all international criminal tribunals, including the International Criminal Court. International judges are called upon to determine a sentence by considering "the gravity of the offence and the individual circumstances of the convicted person."[84] The latter consideration has thus far been underutilised in ICL judicial sentencing analysis. I propose that

[81] CDF Trial Sentencing Judgment (n 15) [84].

[82] *Prosecutor v Plavšić*, Sentencing Judgment, IT-00-39&40/1-S (27 February 2003); See further, Shahram Dana, "The Limits of Judicial Idealism: Should the International Criminal Court Engage with Consequentialist Aspirations?" (2014) 3 Penn State J Int'l Affairs 30.

[83] *See* Shahram Dana, "Reimagining Punishment for Atrocity Crimes: An Innovative Sentencing Framework" (2020) 5(1) Cambridge Law Review (forthcoming).

[84] SCSL Article 19(2); ICC Article 77; ICTR article 23; ICTY Article 24.

the statutory criterion of "individual circumstances of the convicted person" take into account "the role of the accused" as informed by the enabler theory.

ICL judges routinely discuss "the role of the accused" when weighing the appropriate punishment. The sentencing jurisprudence, however, offers a confused and varied treatment of "the role of the accused" as a sentencing factor.[85] Some judges reference "the role of the accused" in their general discussion of "gravity of the offense" and treat it as one of many enumerated "gravity" factors, but the decisions are not consistent in how they conceptualise, integrate, and account for this factor.[86] Other judgments treat "the role of the accused" as part of the accused's mode of liability and participation in the crime.[87] Still, other judgments treat the "role of the accused" as an aggravating factor. Thus, ICL jurisprudence offers three different conceptualisations of "the role of the accused": (1) as a gravity factor; (2) as a factor to assess the nature of individual's participation in a specific underlying crime; and (3) as an aggravating factor. Each of these approaches is problematic.[88] Despite these variations, one thing is clear: "the role of the accused" is an important sentencing factor. But questions relevant to determining its content and influence remain unresolved, making it an important, but unpredictable factor at sentencing.

These problems can be transcended by understanding the "role of the accused" through the prism of the enabler theory. If ICL's conceptualisation of "the role of the accused" is informed by the enabler factor, then "the role of the accused" solidifies as a predictable factor, distinct from the concepts of gravity, modes of liability, and aggravating factors. Moreover, this approach allows the enabler factor to infuse the concept of "the role of the accused" with substance significant and distinctive to mass atrocities, thereby capturing its salience to

[85] *ibid*.

[86] *C.f.*, *Taylor* Appeals Judgment (n 30); *Prosecutor v Blaškić*, Case No. IT-95-14-A, Appeal Judgment (29 July 2004) [683]; RUF Trial Judgment (n 14) [40]; CDF Trial Sentencing Judgment (n 15) [33]; *Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Appeal Judgment (24 March 2000) [182]; *Prosecutor v Brma*, Case No. SCSL-04-16-T, Trial Sentencing Judgment (July 19, 2007) [19]; *Prosecutor v Furundzija*, Case No. IT-95-17/1-A, Appeal Judgment (21 July 2000) [249]; *Prosecutor v Delalic* ("Ćelebići *Case*"), Appeal Judgment (20 February 2001) [731].

[87] This ambivalent treatment of "role of the accused" traces its origins to the early jurisprudence of the ICTY. See, *Furundzija* (n 144) [249]; *Blaškić* (n 144) [683]; *Aleksovski* (n 144) [182]; Ćelebići *Case* (n 144) [731].

[88] *See* Shahram Dana, "Reimagining Punishment for Atrocity Crimes: An Innovative Sentencing Framework" (2020) 5(1) Cambridge Law Review (forthcoming).

situations of systemic criminality. This approach requires a shift in the discourse currently found in sentencing judgments.[89]

V. Conclusion

In punishing atrocities, judicial sentencing narratives are too preoccupied with justifying their outcomes almost exclusively in terms of "gravity", a rhetoric that has arguably been overplayed and is at risk of having a watered-down effect. The dominance of "gravity of the offence" is crowding out deliberation of meaningful factors crucial to atrocity trials and is stifling the development of the law of atrocity punishment. This article argues for a departure from this approach to punishing atrocities, which has largely transposed domestic sentencing practices applied to ordinary crimes. It offers a novel approach to punishing atrocity crimes: *the enabler theory*. The role of the accused in enabling the milieu or situation in which atrocity crimes spawn has thus far been under-considered at sentencing. I argue that because atrocity crimes are typically the outcome of large-scale violence or armed conflict, ICL punishment must account for a convicted person's role as an enabler.

Even though the enabler factor appears to have a silent influence on sentencing at the SCSL, judges do not explicitly account for the enabler factor in their sentencing analysis. They should. The enabler factor will bring greater coherence and clarity to their reasoning and sentencing allocations. For example, judges justified Charlies Taylor's hefty 50 year prison sentence by simply asserting that his case was "unique." But what precisely is "unique" about Charles Taylor's criminality? The trial chamber never adequately explains this and consequently, several observers criticise Taylor's punishment as too harsh and unjustified go around the court's own sentencing principles.[90] The enabler theory closes this explanatory gap, elucidating why Taylor's sentence is not excessive for the atrocities he enabled while he was a sitting Head of State.[91] Rather than unsatisfyingly ending their sentencing analysis dependent on the "unique circumstances of a case", the judges could have returned to the findings in their judgment where they determined that Taylor had enabled the RUF/AFRC in the conflict and the

[89] The innovation required in interpreting existing ICL statutory criteria and sentencing factors is argued in detail *in* Shahram Dana, "Reimagining Punishment for Atrocity Crimes: An Innovative Sentencing Framework" (2020) 5(1) Cambridge Law Review (forthcoming).

[90] See *e.g.* Heller, *Taylor Sentence* (2013) (n 29) 835–40; Drumbl, Punishing Heads of State (2012) (n 26).

[91] See above Section III.A.

atrocities they committed.[92] A Head of State's wrongdoing that enables large scale violence and atrocities in another country is wrongdoing that must be captured in his punishment. The enabler theory here provides the judges with a justification well rooted in the purpose of atrocity trials and international law.

Likewise, the enabler theory explains differences in sentencing outcomes that gravity alone cannot account for. For example, the enabler factor explains why Sesay, the top RUF commander and an enabler of the conflict and atrocities, received double, or in some cases even triple, the punishment that his subordinates received for the same crimes, even though the subordinates directly committed the killings and Sesay's responsibility was based on an omission—his failure to prevent the subordinate from committing the crime or to punish him afterwards. For his omissions, Sesay received twice or three times the punishment that the direct perpetrators of the crime received. The enabler factor explains why his sentence is appropriate, notwithstanding the fact that his criminal liability is based on an omission. Furthermore, the enabler theory is also helpful in expressing why a group of defendants are receiving lower sentences even though they have committed serious crimes. The CDF fighters were sentenced to substantially less years of imprisonment that the RUF and AFCD soldiers (and Charles Taylor). The average trial sentence for the former group was seven (7) years of imprisonment; whereas the average sentence for the RUF and AFCD perpetrators was forty-four (44) years. The trial judges justified these very lenient sentences on the grounds that the CDF fighters were the "good guys" fighting a just war.[93] The justification, however, runs counter to the ethos of international humanitarian law and international criminal justice. The enabler theory, on the other hand, offers an explanation for the lower sentences that is more congruent with the principles and values of international law.

The enabler theory offers several advantages when punishing atrocity crimes. By departing from a sentencing discourse that narrates atrocity punishment entirely in terms of gravity, my approach allows a space for important nuances to be communicated and expressed in the ICL sentencing process. It also closes the gap between judicial narratives about atrocities and sentencing outcomes. Presently, the normative expressions are compromised under an exclusive reliance on hyper "gravity" imagery that far outpaces and overshadows the actual quantum of punishment. Judicial narratives tirelessly confront the reader about the gravity

[92] *Taylor* Trial Judgment (n 5) [5834], [5835], [5842], [6913]–[6915] (finding that Taylor "enabled the RUF/AFRC's Operational Strategy" and "supported, sustained and enhanced the RUF/AFRC's capacity to implement its Operational Strategy.")

[93] See above Section III.C.

of the offence and the monstrosity of the perpetrator's crimes.[94] Yet, the final sentences are underwhelming in the face of such explosive rhetoric. This method of expression surrenders too much. Gravity needs to yield its monopoly as an explanatory tool for punishing atrocities. The enabler factor allows the judges to speak the language of gravity to acknowledge the harms suffered by the victims and yet explain why every atrocity perpetrator is not being sentenced to life imprisonment or a lengthy prison term.

Thus, it brings clarity to the accused's moral culpability and makes punishment more communicative. For example, it can account for why individuals whose crimes are of comparable gravity, like Sesay, Kellon, and Gbao, received substantially different sentences. Victims can better understand why the perpetrator of crimes against them received a lesser penalty than another perpetrator, without ICL messaging to them that their suffering is not important or that the crimes against them were not of significant gravity. In this way, the enabler factor optimises the expressive capacity of ICL punishment by offering a clear pathway linking justice to the offender's criminal culpability, to the purposes of international trials, and finally to the sentence itself. Additionally, the enabler factor allows ICL judges to account for a convicted person's contribution to enabling a situation erupting in atrocity crimes. Thus far, moral culpability for this wrongdoing in mass atrocities is not adequately accounted for in the sentence, if at all.

When ICL sentences are understood through the prism of the enabler factor, greater congruency is achieved between judicial narratives about atrocity crimes and the quantum of punishment. This does not diminish the role of gravity but rather brings clarity and transparency to punishing atrocities. Unfortunately, these benefits and the opportunities to optimise the expressive capacity of atrocity trials remain unseized because gravity presently monopolises the narratives in sentencing judgements while the enabler factor, although influential, remains hidden. It is time for the enabler factor to surface.

[94] DeGuzman, "Harsh Justice for International Crimes" (n 101) 17–24.