

**Sentencing Factors in Convictions of Those Most Responsible for International Crimes
in Peru: A Comparative Analysis in Light of International Criminal Court Law and
Practice**

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Abstract

Peruvian courts convicted those most responsible for acts that constitute international crimes committed during Peru's internal conflict (1980-2000), namely, ex-leaders of the terrorist organization Shining Path-Peruvian Communist Party and ex-senior state officials, including ex-President Alberto Fujimori. The present article seeks to identify, systematize and discuss the sentencing factors applied in this case-law. The analysis is also conducted comparatively *vis-à-vis* the law and practice of the International Criminal Court (ICC). Sentencing factors in the examined Peruvian law and practice may be categorized into two groups: crime/culpability-related factors and offender's personal circumstances-related factors. The article concludes that Peruvian sentencing law and practice are generally similar to ICC sources.

Keywords: Sentencing Factors; Peru; International Criminal Court; International Crimes; Individualisation of Sentences.

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1 Introduction

Between 1980 and 2000, Peru endured a non-international armed conflict mainly between the terrorist organization Shining Path and the Peruvian state. Serious human rights and international humanitarian law violations, which constituted international crimes, were perpetrated. According to the Peruvian Truth and Reconciliation Commission, approximately 69000 people died.¹ Reparation programmes and national criminal cases were also undertaken.

Three massacres are representative of the atrocities perpetrated. These massacres led to the cases and sentences considered in this article. On 3 April 1983, Shining Path members in execution of reprisal orders given by the senior leaders of the Shining Path massacred 69 peasants in and around the town of Lucanamarca. Victims included 18 children and eleven women, including pregnant women. The perpetrators mainly used machetes and axe hacks. Some victims were shot dead and others were scalded with boiling water.

In the early nineties, state counter-terrorism measures targeted civilians who allegedly were Shining Path members. On 3 November 1991, six heavily-armed members of the military death squad 'Colina' burst into a building in the neighbourhood Barrios Altos in Lima and obliged a group of residents to lie on the floor. The assailants then fired at them indiscriminately, killing 15 persons (one child included) and seriously injuring four people. On 18 July 1992, the 'Colina' group abducted a university professor and nine students from La Cantuta University in Lima. They were tortured and killed. The perpetrators buried the bodies of the victims, which were recovered and identified in late 1993.

The main research question of this article is to identify, systematize and discuss the sentencing factors in Peruvian sentences of both senior state and non-state leaders responsible for the above-mentioned massacres in a comparative manner, namely, to empirically determine to what extent Peruvian law and practice are similar to the law and practice of the ICC. To

¹ TRC, *Final Report*, General Conclusions, 2004, para. 2.

deepen the analysis, only sentencing factors *sensu stricto*, sometimes called ‘case-related’ and ‘proceeding-related’ factors,² are discussed. Other sentencing elements, including sentencing goals, are not examined.

Comparative analyses of sentencing practices of international criminal tribunals *vis-à-vis* national practices are scarce.³ However, there are reasons that arguably justify the relevance of a comparison with the law and practice of the ICC in the identification, systematization and discussion of sentencing factors in Peruvian law and jurisprudence.

First, despite intrinsic differences which include their respective national or international character (Peruvian criminal courts and the ICC respectively), these criminal jurisdictions deal with mass atrocities of similar nature committed by senior offenders. Comparative analyses are precisely necessary to identify similarities and differences across criminal jurisdictions. As this article discusses, several sentencing factors are actually common to Peruvian and ICC law and practice.

Second, comparative analyses involving national and international criminal jurisdictions arguably fit well in the general debates about pluralism vs. uniformity/consistency of ICL. Pluralism in ICL is inevitable and ICL may cause tensions in national criminal systems.⁴ Consistency is not synonymous with identical sentencing ranges in cases of similar gravity.⁵ Moreover, the automatic transplantation of sentencing factors from international sources to national practice and vice-versa may be problematic. International and national criminal courts must apply their respective legal sources, which evidences pluralism and fragmentation in ICL and demands a balance between consistency and individualization of

² Silvia D’Ascoli, *Sentencing in International Criminal Law* (Hart Publishing, Oxford, 2011) pp. 130-134.

³ E.g., Barbora Holá and Hollie Nyseth-Brehm, ‘Punishing Genocide -A Comparative Empirical Analysis of Sentencing Laws and Practices at the International Criminal Tribunal for Rwanda (ICTR), Rwandan Domestic Courts, and Gacaca Courts’, 10(3) *Genocide Studies and Prevention* (2016) 59-80.

⁴ Alexander Greenawalt, ‘The Pluralism of International Criminal Law’, 86 *Indiana Law Journal* (2011) 1063-1130, 1068.

⁵ *Ibid.*, 1067.

sentencing.⁶ The unification of sentencing for international crimes may cause some problems and challenges within national systems.⁷ Nevertheless, an ideal of vertical consistent sentencing for international crimes across courts, which is related to legal equality and fairness, may be invoked.⁸ The notion of vertical consistency may be taken into consideration to achieve (more) coherent sentencing practices across national and international courts.⁹

Third, as a Party to the ICC-Statute, Peru is expected to implement this treaty. ICC sources largely codify and/or build on the sentencing practices of other international criminal tribunals. ICC law unlike instruments of other international criminal tribunals includes aggravating and mitigating factors and better suits the codified and civil-law Peruvian system. As discussed later,¹⁰ Peruvian courts have invoked ICL sources, including the ICC-Statute. The ICC case-law and Peruvian jurisprudence examined involve international crimes committed by senior perpetrators.

Fourth, the ICC may also benefit from an examination of relevant Peruvian sentencing practice as a subsidiary legal source under Article 21(1)(c) of the ICC Statute which refers to ‘general principles of law derived by the Court from national laws’. Moreover, by invoking relevant national sentencing principles and/or practices, ICC sentencing case-law may gain legitimacy and/or credibility among States Parties to the ICC-Statute.

In this context, the present article has five sections. First, the Peruvian legal framework is discussed. The second section outlines the legal framework on sentencing factors as applied in the selected case-law. Third, factors related to crimes/culpability are analysed. Fourth,

⁶ Barbora Holá, ‘Consistency and Pluralism of International Sentencing-An Empirical Assessment of the ICTY and ICTR Practice’, in Elies van-Sliedregt and Sergey Vasiliev (eds.), *Pluralism in International Criminal Law* (OUP, Oxford, 2014) pp. 187-188, 191.

⁷ Greenawalt, *supra* note 4, 1068.

⁸ Jens-David Ohlin, ‘Towards a Unique Theory of International Sentencing’, in Goran Sluiter and Sergey Vasiliev (eds.) *International Criminal Procedure* (Cameron May, London, 2009) pp. 381–413; Holá, *supra* note 6, 188.

⁹ *Ibid.*, p. 193.

¹⁰ See *infra* section 2.

factors related to the personal circumstances of the perpetrator are discussed. Fifth, a general comparative analysis is provided.

2 Legal Framework

This section examines Peruvian law in the context of the selected cases and the Peruvian justice system. In 1998, the Criminal Code of Peru (CPP) introduced the so-called ‘Section XIV-A-Offences against Humanity’. Nevertheless, Section XIV-A was introduced years after the commission of the crimes examined and, thus, it was not applied in the cases considered here. Moreover, genocide (Article 319), which was incorporated in Peruvian law via Section XIV-A and largely adopts the Genocide Convention definition, is the only core international crime incorporated in Peruvian law. Crimes against humanity and war crimes have yet to be included in Peruvian law.

Although acts of enforced disappearance and torture (Articles 320-322) are included, they are only criminalized as independent crimes rather than as crimes against humanity. Articles 320-322 adopt the definitions of enforced disappearance and torture from the Inter-American Conventions on Enforced Disappearance and Torture (human rights treaties) rather than those under the ICC-Statute. Therefore, the presence or acquiescence of state actors is a required element of these crimes.

Peru is a State Party to the ICC-Statute. However, other than genocide, crimes under this treaty have yet to be incorporated in Peruvian law. Thus, senior accused were convicted of serious domestic offences under Peruvian law that was in force when the atrocities occurred. Domestic offences included aggravated terrorism, namely, terrorism committed by leaders of

national terrorist organizations (ex-Shining Path leaders),¹¹ and aggravated murder, serious injuries and aggravated kidnapping (ex-senior officials).¹²

In light of international criminal law (ICL), the Chambers additionally characterized the atrocities committed as international crimes: war crimes (ex-Shining Path leaders), and crimes against humanity (ex-senior officials). As Peruvian law did not include international crimes, such characterization was potentially problematic. Nevertheless, this was arguably consistent with the principle of legality. First, the Peruvian jurisprudence examined here stated that the accused were tried for and convicted of serious domestic crimes (Peruvian law) rather than international crimes.¹³ Peruvian courts merely characterized the international nature and dimension of the crimes perpetrated, and there was no incorporation of the international crimes under the ICC-Statute into the Peruvian domestic order in a ‘self-executing’ manner.¹⁴ The ICC-Statute was not applied for conviction purposes. Peruvian courts mainly considered the substance of the ICC-Statute and other international sources to contextualize the massacres as serious human rights violations, and discuss internationally accepted elements/characteristics of international crimes. Similar to other national practices,¹⁵ such characterization only had effects on sentencing, reparations, and/or inapplicability of statutes of limitations and early releases.

Second, when the Peruvian courts characterized the massacres committed as international crimes, they relied on *inter alia* judicial qualifications of the Inter-American Court

¹¹ *Guzmán et al.*, 13 October 2006, National Criminal Chamber, Judgment, <http://www.asser.nl/upload/documents/DomCLIC/Docs/NLP/Peru/GuzmanReinoso_Decision_13-10-2006.pdf>, File-560-03, pp. 240-244. NB: All the on-line documents were last accessed on 25 August 2018.

¹² *Fujimori*, 7 April 2009, Supreme Court (SC), Judgment, <https://www.unifr.ch/ddp1/derechopenal/jurisprudencia/j_20101107_05.pdf>, File-AV-19-2001, paras. 678-717, 823; *Montesinos et al.*, 1 October 2010, High Court-Lima, Judgment, <http://perso.unifr.ch/derechopenal/assets/files/jurisprudencia/j_20101107_02.pdf>, File-28-2001-1-SPE/CSJLI, p. 134.

¹³ See *supra* notes 11-12.

¹⁴ Kai Ambos, ‘The Fujimori Judgment’, 9 *JICJ* (2011) 137-158, 144.

¹⁵ Kai Ambos and Ezequiel Malarino (eds.), *Jurisprudencia Latinoamericana sobre Derecho Penal Internacional* (Konrad Adenauer, Montevideo, 2008).

of Human Rights (IACtHR) and the Peruvian Constitutional Tribunal and/or findings of the Peruvian Truth and Reconciliation Commission.¹⁶ These bodies had exercised their respective mandates over the same atrocities. For instance, the IACtHR had qualified the Barrios Altos and La Cantuta massacres as crimes against humanity of extra-judicial execution, forced disappearance and/or torture; found Peru internationally responsible; and ordered Peru to punish those criminally responsible.¹⁷ Indeed, under the Inter-American Conventions against Torture and Forced Disappearance, punishment must be proportional to serious offences.¹⁸

Concerning the Shining Path leaders, the National Criminal Chamber, in application of Peruvian law, found that the elements of terrorist crimes are: attacks against life, integrity, or property; means to cause catastrophic effects; and intent to provoke terror.¹⁹ Additionally, the Chamber characterized terrorist acts as serious violations of international humanitarian law as follows.²⁰ It found that Shining Path leaders ordered Shining Path members to target both civilians and civilian objects. These attacks consisted of acts of extermination such as the Lucanamarca massacre and car bombs against public and private civilian buildings. By invoking the principle of distinction and other international humanitarian law principles, the Geneva Conventions (Article 3), and their Additional Protocol II (Article 4(2)), the Chamber stated that international humanitarian law strictly rules out attacks against unarmed civilians and that terrorist attacks constitute serious violations of international humanitarian law. The Chamber importantly added that these violations constitute war crimes and that internal armed conflicts do not justify extreme violence or terrorism.

¹⁶ *Fujimori*, *supra* note 12, para. 717; *Montesinos et al.*, *supra* note 12, pp. 127-128; *Guzmán et al.*, *supra* note 11, pp. 135-138.

¹⁷ *Barrios Altos v. Peru*, 14 March 2001, IACtHR, Series C No. 75, paras. 5, 41; *La Cantuta v. Peru*, 29 November 2006, IACtHR, Series C No. 162, paras. 9, 225.

¹⁸ Respectively Arts. 6, III.

¹⁹ *Guzmán et al.*, *supra* note 11, pp. 142-158.

²⁰ *Ibid.*, pp. 61-62, 117-120, 130-134.

In the cases against former President Alberto Fujimori and other ex-senior officials (senior intelligence service and army officials), i.e., *Fujimori* and *Montesinos et al.*, Peruvian courts applied Peruvian law to convict the accused of aggravated murders and serious injuries perpetrated in the Barrios Altos and La Cantuta massacres.²¹ Additionally, these courts characterized those offences as crimes against humanity under ICL, particularly, Article 7 of the ICC-Statute.²² Under ICL, the Supreme Court found that crimes against humanity present these elements and/or characteristics: their special nature as serious human rights violations differentiates them from mere domestic crimes; state agents or members of non-state criminal organizations commit crimes against humanity; criminal acts must be part of a widespread or systematic attack; the attack must target civilians; perpetrators must know of the general context and the relation between a criminal act and the attack; and underlying criminal conducts include aggravated murder and serious injuries.²³

Under Peruvian law,²⁴ Shining Path and state leaders were found responsible as indirect/mediate perpetrators in control of an apparatus of power. This means that ‘the ‘man in the background’ dominates the direct perpetrator’s will and acts by means of an organizational apparatus of hierarchical power’.²⁵

To provide justice and ensure respect for the rights of the defence, the Peruvian justice system incorporated a specialized human rights system. This consisted in judicial and prosecutorial organs in charge of the investigation, prosecution and trials related to the atrocities.²⁶ Competences of judicial and prosecutorial organs were re-distributed and

²¹ *Fujimori*, *supra* note 12, para. 823; *Montesinos et al.*, *supra* note 12, pp. 836-843.

²² *Ibid.*, pp. 779-780; *Fujimori*, *supra* note 12, paras. 710-717, 823.

²³ *Ibid.*, paras. 711-717.

²⁴ CCP, Art. 23.

²⁵ *Ambos*, *supra* note 14, 145-146.

²⁶ IDEHPUCP, *Procesamiento de Violaciones de Derechos Humanos en el Perú*, (IDEHPUCP, Lima, 2006) pp. 29-30.

specialized bodies and chambers were created to efficiently handle judicial cases of human rights violations.²⁷

High Peruvian courts rendered the respective convictions and sentences in first instance and appeals. In *Guzmán et al.*, the National Criminal Chamber convicted Shining Path leaders of *inter alia* terrorism in 2006. The Second Criminal Chamber of the Supreme Court confirmed this in 2007. Sentences ranged from 24 years to life imprisonment. In April 2009, the Special Criminal Chamber of the Supreme Court convicted ex-President Alberto Fujimori of serious domestic crimes and sentenced him to 25 years imprisonment. In December 2009, the First Transitory Criminal Chamber of the Supreme Court confirmed his conviction and sentence. In 2010, the First Special Chamber of the High Court of Lima in *Montesinos et al.* convicted ex-senior military and civilian officials of the same crimes that led to the conviction of Fujimori and sentenced them to 25 years imprisonment. In 2013, the Supreme Court confirmed this.

3 Legal Framework on Sentencing Factors

After a brief explanation of the categorization of sentencing factors, this section analyses the general legal framework on sentencing factors applied in the selected Peruvian case-law. General aspects of the ICC law on sentencing factors are also discussed.

3.1 General Considerations

ICL literature *mutatis mutandis* recognizes the two broad categories of sentencing factors considered in this article, namely crime/culpability-related factors and individual circumstances-related factors, alongside the notion of proportionality.²⁸ As scholars conclude,

²⁷ *Ibid.*

²⁸ William Schabas, *The International Criminal Court - A Commentary on the Rome Statute* (2nd edn, OUP, Oxford, 2016) pp. 1169-1178; Kai Ambos, *Treatise on International Criminal Law, Vol. II* (OUP, Oxford, 2014) pp. 285-302.

ICL and comparative national criminal law distinguish between offence- and offender-related circumstances.²⁹

Crime/culpability-related factors consist in impersonal (*in rem*) and factual characteristics that are part of the factual commission of the offense.³⁰ In turn, offender-related factors are part of the perpetrator's identity in a broad sense, namely, his/her personal (*in personam*) characteristics.³¹

The gravity of the crime constitutes the most important factor at international criminal tribunals ('litmus test') or one of the most important factors (ICC).³² However, the gravity of the crime is not defined in ICC instruments and needs to be determined based on a complex set of factors that must be defined and interrelated.³³

In comparative national law and doctrine, gravity involves harm caused (objective element) and offender's culpability (subjective element),³⁴ and is normally expressed in sentencing ranges, including minimum mandatory sentences.³⁵ Certain aggravating circumstances under the ICC-Rules of Procedure and Evidence (ICC-Rules) are relevant to the gravity of the crime.³⁶

Pre-offence and post-offence personal circumstances, or even circumstances that are contemporaneous with the crimes, are normally mitigating circumstances and do not diminish the gravity of the crime or the perpetrator's culpability.³⁷ Sentencing factors must reflect the

²⁹ *Ibid.*, p. 300; Gabriel Hallevy, *The Right to be Punished-Modern Doctrinal Sentencing* (Springer, Berlin, 2013) pp. 57-101.

³⁰ *Ibid.*, p. 57.

³¹ *Ibid.*

³² *Ambos*, *supra* note 28, pp. 284-285.

³³ *Ibid.*, p. 291.

³⁴ *Ibid.*, p. 293.

³⁵ Schabas, *supra* note 28, p. 1169.

³⁶ Karim Khan, 'Article 78', in Otto Triffterer and Kai Ambos (eds.), *Commentary on the Rome Statute of the International Criminal Court* (3rd edn, C.H.Beck/Nomos/Hart, Munich/Oxford/Baden-Baden, 2016) p. 1806.

³⁷ *Ambos*, *supra* note 28, pp. 295-296; Khan, *supra* note 36, p. 1899.

principle of individualised sentences and, thus, they must be adapted to the individual circumstances of the offender.³⁸

3.2 *Applicable Law*

Unless otherwise stated, this article discusses the sentencing legal framework in force in Peru when the sentences were rendered, i.e., the 1991 CCP. Counter-terrorism legislation complemented the CCP in *Guzmán et al.* Due to the respect for the principle of non-retroactivity and/or the moment when sentences were passed, legislative amendments were not applied.

Under Article 46 ('Individualization of the sentence') of the CCP:

[...] the judge shall consider culpability and seriousness of the crime, as far as they neither are specific elements of the crimes nor modify culpability, paying special attention to:

1. Nature of criminal acts;
2. Employed means;
3. Importance of breached duties;
4. Extent of harm caused or threats;
5. Circumstances of time, place, manner and situation;
6. Motives and goals;
7. Unity or plurality of perpetrators;
8. Age, education, economic situation, and social context;
9. Voluntary reparation provided by the perpetrator to redress harm;
10. Sincere confession before the crime is discovered;
11. Personal circumstances and circumstances related to the perpetrator's personality.

Thus, Article 46 contains an open-ended list of sentencing factors, interpreted and applied in the selected Peruvian case-law. Under Article 45, judges should complementarily

³⁸ *Ibid.*, p. 1900.

consider social deprivation, culture and habits of perpetrators as well as the interests of victims and their families/dependants.

The sentencing factors listed in Article 46 of the CCP can be categorized into factors related to: crime/culpability and the perpetrator's individual circumstances. Peruvian case-law recognises this bipartite categorization.³⁹ Whereas Article 46 states that 'the judge shall consider culpability and seriousness of the crime' (crime/culpability-related factors), Article 45 refers to the perpetrator's individual circumstances. Furthermore, Article 46 factors may largely be categorized in either group albeit with some overlap. Culpability and seriousness of the crime are mentioned in Article 46 as umbrella sentencing factors, which are detailed via the illustrative list of sentencing factors under Article 46. Unlike ICC jurisprudence, Peruvian case-law does not discuss gravity/culpability as such but (indirectly) through Article 46 factors. Crime/culpability-related sentencing factors in the CCP are linked to the gravity of the crime.

Similarly, Article 78(1) ('Determination of the sentence') of the ICC-Statute provides that, when determining the sentence, the ICC shall under the ICC-Rules 'take into account such factors as the gravity of the crime and the individual circumstances of the convicted person'. Rule 145(1)(c) includes an open-ended list of sentencing factors related to Article 78(1). Furthermore, illustrative lists of mitigating and aggravating circumstances, which relate to and/or overlap with factors under Article 78, are respectively included under Rules 145(2)(a) and 145(2)(b).

Sentencing factors under Article 78(1) and Rule 145(1)(c) may interact in different manners concerning the 'gravity of the crime'. As the ICC-Appeals Chamber determined in *Lubanga*, factors under Rule 145(1)(c) may be independent from, partially subsumed, or totally subsumed by factors under Article 78(1).⁴⁰ The 'individual circumstances of the convicted'

³⁹ *Fujimori*, *supra* note 12, para. 755.

⁴⁰ *Prosecutor v. Lubanga*, 1 December 2014, ICC, Appeals Chamber, Judgment on the appeals of the Prosecutor and Mr Thomas Lubanga Dyilo against the "Decision on Sentence pursuant to Article 76 of the Statute", ICC-01/04-01/06-3122, paras. 61, 64.

under Article 78(1) cannot completely differ from Rule 145(1)(c).⁴¹ Whereas Rule 145(1)(c) factors were primarily relevant to assess Article 78(1) factors in *Lubanga* and *Katanga*,⁴² Rule 145(1)(c) factors were mainly used to assess Rule 145(2) mitigating and aggravating circumstances in *Bemba* and *Al-Mahdi*.⁴³ Nevertheless, the issue is whether all relevant factors are considered and there is no error in the weighing and balancing exercise of these factors.⁴⁴ The ICC-Trial Chambers in *Lubanga* and *Katanga* analysed sentencing factors under gravity, aggravating and mitigating circumstances.⁴⁵ However, in *Al-Mahdi* and *Bemba* the gravity of the crimes, gravity of culpable conduct, and convicted person's individual circumstances were the main categories.⁴⁶ This evidences some methodological differences in systematization of sentencing factors. Nevertheless, ICC-Trial Chambers have overall followed similar substantive interpretations of sentencing factors.

Sentencing factors listed in Article 46 of the CCP are of a general nature because their consideration as aggravating or mitigating circumstances depends on the specific case, and they are illustrative (open-ended list).⁴⁷ In 2015, Article 46 was without retroactive effects modified to categorize mitigating and aggravating sentencing factors. Unlike its original version, the current Article 46 contains an exhaustive list. By identifying mitigating and aggravating circumstances, Article 46 now resembles the list of aggravating and mitigating factors contained in ICC-Rule 145. Additionally, amended Article 46A introduced the abuse of official status as an aggravating circumstance. Nevertheless, like the original Article 46, Article 78 of the ICC-Statute and Rule 145 list sentencing factors as examples. While open-ended lists may

⁴¹ *Ibid.*, para. 64.

⁴² *Prosecutor v. Lubanga*, 10 July 2012, ICC, Trial Chamber-I (TC-I), Decision on Sentence Pursuant to Article 76 of the Statute, ICC-01/04-01/06-2901, para. 44; *Prosecutor v. Katanga*, 23 May 2014, ICC, TC-II, Decision on Sentence Pursuant to Article 76 of the Statute, ICC-01/04-01/07-3484-tENG, paras. 46-49.

⁴³ *Prosecutor v. Bemba*, 21 June 2016, ICC, TC-III, Decision on Sentence pursuant to Article 76 of the Statute, ICC-01/05-01/08-3399, para. 13; *Prosecutor v. Al-Mahdi*, 27 September 2016, ICC, TC-VIII, Judgment and Sentence, ICC-01/12-01/15-171, para. 69.

⁴⁴ *Lubanga*, *supra* note 40, para. 66.

⁴⁵ *Lubanga*, *supra* note 42, paras. 36-91; *Katanga*, *supra* note 42, paras. 42-140.

⁴⁶ *Bemba*, *supra* note 43, paras. 20-90; *Al-Mahdi*, *supra* note 43, paras. 75-105.

⁴⁷ *Fujimori*, *supra* note 12, para. 754.

add certain element of uncertainty, they provide judges with sufficient flexibility and it is virtually impossible to normatively foresee all sentencing factors.⁴⁸ However, broad analogies should not be used.

In Peru, sentence determination involves application of factors listed in Article 46 of the CCP, penalty thresholds for perpetrated crimes, and criminal liability modalities.⁴⁹ Consideration of minimum/maximum legal thresholds established per crime is followed by an assessment of sentencing factors applicable in the concrete case and, thus, all crime-related material and personal circumstances, and applicable aggravating and mitigating circumstance must be considered for sentence quantification within the said thresholds.⁵⁰ In application of the Peruvian sentencing legal framework, for example, the Supreme Court in *Fujimori* found no mitigating circumstances and applied several aggravating circumstances.⁵¹ The judges imposed 25 years imprisonment. Under Peruvian sentencing law, this was the highest applicable sentence in *Fujimori* and *Montesinos et al.* In *Guzmán et al.*, sentence determination involved consideration of factors such as the nature of the crimes, personal/material damages, threats posed to the population, responsibility of the perpetrators, and multiple perpetrators.⁵² Sentences were imposed proportionally to responsibility levels:⁵³ the four highest national leaders of the Shining Path, including Abimael Guzmán (Shining Path's founder and maximum leader) received life imprisonment.⁵⁴ Under Peruvian counter-terrorism legislation, this was the highest applicable sentence for national leaders of terrorist organizations.

⁴⁸ D'Ascoli, *supra* note 2, 18, 20, 270, 290-291; Ambos, *supra* note 28, pp. 280-281; Khan, *supra* note 36, p. 1892.

⁴⁹ *Fujimori*, 30 December 2009, SC-Appeals, Judgment, <<http://www.justiciaviva.org.pe/especiales/barrios-altos/43.pdf>>, File-AV-19-2001, p. 243.

⁵⁰ *Montesinos et al.*, 20 March 2013, SC, Judgment, <<https://www.pj.gob.pe/wps/wcm/connect/8659d38040aa6bbe8734d73e05a158dc/RN4104-2010-xx.pdf?MOD=AJPERES&CACHEID=8659d38040aa6bbe8734d73e05a158dc>>, File-R.N-4104-2010, para. 983; *Guzmán et al.*, 26 November 2007, Supreme Court, Judgment, R.N.-5385-2006, <https://www.unifr.ch/ddp1/derechopenal/jurisprudencia/j_20080616_33.pdf>, p. 44.

⁵¹ *Fujimori*, *supra* note 49, p. 250.

⁵² *Guzmán et al.*, *supra* note 11, pp. 235-236.

⁵³ *Ibid.*

⁵⁴ *Ibid.*, p. 236.

Sentencing factors identified in Peruvian law (mainly Article 46 of the CCP) and the examined Peruvian jurisprudence are analysed under two broad categories in the following sections: sentencing factors related to crimes/culpability (section 4), and sentencing factors related to the convicted individual's personal circumstances (section 5). This analysis involves a comparison with ICC law and practice (sections 4-6).

4 Sentencing Factors Related to Crimes/Culpability

These factors are discussed as follows. Each sub-section begins by examining Peruvian and ICC case-law and/or law. Further analysis then follows, focusing on analytical comparisons at two levels: across Peruvian sentences and/or between Peruvian and ICC sources.

4.1 Nature of the Criminal Acts (Article 46(1))

The Supreme Court in *Fujimori* considered that the aggravating or mitigating effects of the nature of the criminal act is related to the impact or dimension of crimes, which is in turn determined by the elements of the crimes, *modus operandi*, and crime-related psychosocial effects on the victims and their families.⁵⁵ As explained, Peruvian courts characterized the atrocities perpetrated by senior state actors as crimes against humanity and serious human rights violations, not mere domestic offences.⁵⁶

These serious crimes meant that senior officials breached their constitutional and international duties of human rights protection, restrained use of force and respect for the rule of law.⁵⁷ In *Montesinos et al.*, the 'rule of excess of duties' was discussed. This entails potential mitigation if crimes were committed in the exercise of official duties of restoration of public order in counter-terrorism. However, aggravating rather than mitigating effects were applied

⁵⁵ *Fujimori*, *supra* note 12, para. 756.1.

⁵⁶ *Ibid.*, para. 823.

⁵⁷ *Montesinos et al.*, *supra* note 12, pp. 780-782.

due to the seriousness of the crimes as determined by the importance of the rights affected (life, liberty, security), plurality of agents, motives, and factual circumstances.⁵⁸

Concerning ex-Shining Path leaders, the nature of the perpetrated crimes was also considered.⁵⁹ Terrorist actions that led to the conviction of ex-Shining Path leaders were qualified as serious international humanitarian law violations (war crimes).⁶⁰

Under ICC-Rule 145(1)(c), judges are asked to consider the ‘nature of the unlawful behaviour’, which is equivalent to ‘nature of the criminal acts’ under Peruvian law. Additionally, the ‘gravity of the crime’ (ICC-Statute, Article 78(1)) is crucial to sentencing, which should be proportional to the crime (ICC-Statute, Article 81(2)(a)) and reflect the convicted person’s culpability (Rule 145(1)(a)).⁶¹ Sentences must reflect the gravity of the crimes, which are ‘the most serious crimes of concern to the international community as a whole’ and ‘deserve the heaviest sentence’ as determined in *Katanga*.⁶² For sentencing, not all crimes that formed the grounds for criminal conviction are necessarily at the same level of gravity because this is determined quantitatively and qualitatively, which includes considering the convicted person’s nature and degree of participation.⁶³ The nature of the unlawful behaviour was noted in *Bemba* (especially concerning rape and pillaging) and *Al-Mahdi* to assess the gravity of the crimes.⁶⁴

As discussed previously,⁶⁵ Peruvian courts characterised the massacres perpetrated as international crimes/serious human rights violations for sentencing rather than conviction purposes. Under the ICC-Statute, the ICC exercises jurisdiction over international crimes. Unlike the ICC, Peruvian courts still face important normative deficits: crimes against

⁵⁸ *Ibid.*, pp. 780, 782.

⁵⁹ *Guzmán et al.*, *supra* note 50, p. 17.

⁶⁰ *Guzmán et al.*, *supra* note 11, pp. 61-62, 117-119.

⁶¹ *Lubanga*, *supra* note 42, para. 36.

⁶² *Katanga*, *supra* note 42, para. 42.

⁶³ *Ibid.*, para. 43.

⁶⁴ *Bemba*, *supra* note 43, para. 24; *Al-Mahdi*, *supra* note 43, para. 76.

⁶⁵ See *supra* section 2.

humanity and war crimes have yet to be incorporated. Thus, the said characterisation enabled Peruvian judges to fully reflect the seriousness of the crimes committed. This was crucial to impose sentences proportional to the gravity of the crimes and largely dismiss mitigating circumstances. Indeed, the sentences of the ICC and Peruvian courts involve crimes that share the same heinous and serious nature. Regardless of the applicable law, the examined crimes perpetrated in Peru constituted international crimes. Concerning the nature of the crimes, the examined Peruvian case-law is therefore similar to the ICC practice in which the ‘nature of the unlawful behaviour’ is an important factor to assess the gravity of the crime.

4.2 *Employed Means (Article 46(2))*

In *Fujimori*, this factor involved the nature and effectiveness of the means employed to leave victims defenceless or cause serious harm, and is mainly related to the dimension of the crime and culpability for wrongful acts.⁶⁶ The secretive criminal *modus operandi*, which guaranteed crime execution and the defencelessness of the victims, constituted an aggravating circumstance.⁶⁷ In *Montesinos et al.*, crimes of aggravated kidnapping, injuries and murder involved a military subordination relationship and the use of state goods (weaponry, vehicles, etc.) trusted to military personnel.⁶⁸

In *Guzmán et al.*, the means employed to commit crimes were not examined for sentencing. Nevertheless, these means were discussed as an element of terrorist crimes. Explosives and machine guns used to execute terrorist attacks against defenceless civilians caused catastrophic damages.⁶⁹

Under ICC-Rule 145(1)(c), the means employed to execute crimes is a sentencing factor. In *Lubanga* and *Bemba* (concerning murder), it was part of the assessment of the ‘gravity of

⁶⁶ *Fujimori*, *supra* note 12, paras. 756.2, 766.

⁶⁷ *Ibid.*, para. 766.

⁶⁸ *Montesinos et al.*, *supra* note 12, p. 782.

⁶⁹ *Guzmán et al.*, *supra* note 11, p. 151.

the crime'.⁷⁰ In *Al-Mahdi*, it was a mitigating circumstance because Al-Mahdi advised against using bulldozers to destroy mausoleums to avoid collateral damages.⁷¹ Since Peruvian case-law connected the employed means with 'defenceless victims', the aggravating circumstance under ICC-Rule 145(2)(b)(iii), namely, the 'victim is particularly defenceless', is also relevant. In *Lubanga*, this factor as applied to the age of child soldiers was considered under the gravity of the crime.⁷²

Thus, Peruvian courts unlike the ICC have approached this factor in different manners. In *Montesinos et al.* and *Guzmán et al.* (in the latter concerning conviction), 'employed means' was understood *sensu stricto*, namely, means used to execute crimes. This is consistent with ICC case-law. However, in *Fujimori*, a pro-victim approach was adopted: consideration of defenceless victims. Nevertheless, this factor should be interpreted *sensu stricto*, namely, interpretation focused on the material means used to perpetrate crimes. Proper understanding of each factor helps avoid unnecessary repetitive consideration of the same circumstance. Additionally, the use of the same approach to a factor in different cases keeps sentencing practices consistent and ensures legal certainty. By including victimization of children/adolescents, the disabled, terminal patients, and isolated indigenous peoples, current Article 46(2)(d) of the CCP properly addresses this factor as an independent aggravating circumstance.

4.3 Extent of Harm Caused or Threats (Article 46(4))

According to the Supreme Court in *Fujimori*, this factor concerns the material impact of the crime on protected legal values (life included), may be measured in terms of criminal outcomes, and relates to the penalty applicable to each crime.⁷³ Psychological harm inflicted on relatives

⁷⁰ *Lubanga*, *supra* note 42, para. 44; *Bemba*, *supra* note 43, paras. 24, 32.

⁷¹ *Al-Mahdi*, *supra* note 43, para. 91.

⁷² *Lubanga*, *supra* note 42, paras. 77-78.

⁷³ *Fujimori*, *supra* note 12, para. 756.4.

was also considered in *Montesinos et al.*⁷⁴ Concerning Fujimori, the extent of harm and multiple victims were the most important factors.⁷⁵ Extent of harm is linked to the gravity of the crime as the presence of multiple victims proves.⁷⁶ The IACtHR and the Supreme Court followed similar considerations in their assessments of harm for compensations (reparations) for victims.⁷⁷

In *Guzmán et al.*, personal/material damages and danger posed to the population were considered for sentencing but not further discussed as a sentencing factor.⁷⁸ The extent of harm was important to determine compensations (reparations) against Shining Path leaders in favour of victims and the state.⁷⁹ By invoking findings of the Truth and Reconciliation Commission, the Supreme Court noted that the Shining Path caused 55% of victim fatalities in the conflict.⁸⁰

ICC-Rule 145(1)(c) is the equivalent provision: ‘extent of the damage caused, in particular the harm caused to the victims and their families’. Among other factors, this factor was referred to consider the crimes committed in *Bemba* (murder, rape, pillage) and *Al-Mahdi* (destruction of religious/cultural sites) as grave.⁸¹ Additionally, ‘Commission of the crime with particular cruelty or where there were multiple victims’, which is an aggravating circumstance (ICC-Rule 145(2)(b)(iv)), was applied in *Al-Mahdi* (multiple victims) and *Bemba* (multiple rape victims and quite cruel rapes).⁸²

Compared to the sentences of ex-senior Peruvian officials and ICC sources, the extent of harm caused was not further discussed in *Guzmán et al.* sentencing. As for consideration of multiple victims by Peruvian courts in *Fujimori* and *Montesinos et al.*, the analysis/application

⁷⁴ *Montesinos et al.*, *supra* note 12, p. 783.

⁷⁵ *Fujimori*, *supra* note 12, para. 766.

⁷⁶ *Fujimori*, *supra* note 49, p. 250.

⁷⁷ *Fujimori*, *supra* note 12, paras. 785, 825; *La Cantuta*, *supra* note 17, para. 254.16-18; *Barrios Altos v. Peru*, 30 November 2001, IACtHR, Series C No. 75.

⁷⁸ *Guzmán et al.*, *supra* note 50, p. 17.

⁷⁹ *Ibid.*, pp. 109-111.

⁸⁰ *Guzmán et al.*, *supra* note 11, p. 82.

⁸¹ *Bemba*, *supra* note 43, paras. 32, 40; *Al-Mahdi*, *supra* note 43, para. 78.

⁸² *Ibid.*, para. 87; *Bemba*, *supra* note 43, paras. 26, 47.

of the extent of harm for sentencing is overall similar to the ICC practice. Unlike Peruvian case-law, the ICC-Rules provide for two autonomous sentencing factors: extent of damage and multiple victims. However, these are interrelated under the ICC-Rules. Moreover, ICC and Peruvian practices evidence a close relationship between these factors. Determination of the number of victims and harm inflicted on victims are important to flesh out the ‘extent of harm’.

4.4 *Circumstances of Time, Place, Manner and Situation (Article 46(5))*

In *Montesinos et al.* and *Fujimori*, spatiotemporal conditions were aggravating because officials took advantage of these conditions to commit crimes.⁸³ *Fujimori*’s breach of his presidential duty, and the criminal *modus operandi*, namely, planned crime execution, crimes committed during the night, crimes against victims (a child included) caught off guard and armless, and events outside armed clashes were considered.⁸⁴ This factor is linked to culpability for wrongful acts.⁸⁵ However, the above-mentioned judicial reference to *Fujimori*’s breach of his presidential duty better fits into the ‘importance of breached duties’ factor. When the manner and planning of crime execution, including that there were several perpetrators and defenceless victims, seek to eliminate risks to the successful commission of crimes, the gravity of the crime increases.⁸⁶

Guzmán et al. contains no explicit analysis of this factor. Nevertheless, the National Criminal Chamber found the means used in terrorist attacks to be suitable to produce catastrophic effects because, for example, fire weapons, machetes, etc. were employed against defenceless civilians in the Lucanamarca massacre.⁸⁷

⁸³ *Montesinos et al.*, *supra* note 12, p. 783; *Fujimori*, *supra* note 12, paras. 756.5, 766.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*, para. 766.

⁸⁶ *Fujimori*, *supra* note 49, p. 250.

⁸⁷ *Guzmán et al.*, *supra* note 11, p. 132.

Under ICC-Rule 145(1)(c), ‘circumstances of manner, time and location’ constitute a sentencing factor. ICC-Trial Chambers have considered this as part of ‘the gravity of the crime’⁸⁸ or as an aggravating circumstance.⁸⁹ ‘Defenceless victims’, which Peruvian case-law associated with spatiotemporal conditions, can be an aggravating circumstance (ICC-Rule 145(2)(b)(iii)). In *Bemba*, this was applied concerning the rape of defenceless civilians and children.⁹⁰

Therefore, like ICC law and practice, the examined Peruvian legal sources incorporated and/or applied spatiotemporal conditions for sentencing. However, Peruvian case-law shows some inaccuracies and deficits. Whereas in *Fujimori* and *Montesinos et al.* this sentencing factor was applied but to some extent blended with other factors, in *Guzmán et al.* it was neglected.

4.5 Motives and Goals (Article 46(6))

According to the Supreme Court in *Fujimori*, psychological motives and goals that determine crimes are decisive when establishing the level of culpability of and blame on the perpetrator; are predominantly subjective; and may be futile, altruistic or selfish.⁹¹ The more opposed to values shared by society the motive and goals are, the more aggravating they are.⁹² In *Montesinos et al.*, defences of struggle against terrorist groups and due obedience to superior orders were dismissed.⁹³ Claims of altruistic goals or duties of protection of democracy, security and peace were rejected.⁹⁴ Conversely, the grave crimes perpetrated seriously breached these values.⁹⁵

⁸⁸ *Lubanga*, *supra* note 42, para. 44; *Katanga*, *supra* note 42, para. 40.

⁸⁹ *Bemba*, *supra* note 43, footnote 74.

⁹⁰ *Ibid.*, para. 43.

⁹¹ *Fujimori*, *supra* note 12, para. 756.6.

⁹² *Ibid.*

⁹³ *Montesinos et al.*, *supra* note 12, p. 783.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

In *Guzmán et al.*, one of the Shining Path leaders invoked, as mitigating circumstances, her alleged altruistic motives of serving Peruvians and creating a just society as well as that both the Peruvian state and Shining Path share responsibility for the armed conflict.⁹⁶ However, the Supreme Court appropriately rejected these claims. Terrorist attacks that involved cruelty, multiple damages, premeditation, negative long-term effects completely outweighed altruistic motives.⁹⁷ No conflict or political end justifies or mitigates extreme violence.⁹⁸ As the National Criminal Chamber remarked, this explains the existence of international crimes, international criminal tribunals, and the inapplicability of statutes of limitations.⁹⁹

Whereas ICC-Rule 145(1)(c) includes ‘degree of intent’, ICC-Rule 145(2)(b)(iv) lists ‘Commission of the crime with particular cruelty’ as an aggravating circumstance. Rape/sexual violence were not separate charges in *Lubanga*. However, ICC-Trial Chamber-I found that sexual violence could evidence particular cruelty.¹⁰⁰ In *Katanga*, ICC-Trial Chamber-II considered the degree of participation/intent and particular cruelty as evidenced by discriminatory and violent attacks, and the targeting of vulnerable victims like children.¹⁰¹ In *Bemba*, this aggravating circumstance was applied because rape was committed for self-compensation, punishment of enemies, and with particular cruelty.¹⁰²

Thus, the manners in which Peruvian and ICC legal instruments have approached this sentencing factor present some differences. Whereas under the former ‘motives and goals’ constitute one factor, under the latter there are two factors (‘degree of intent’ and ‘crime with particular cruelty’). In Peruvian case-law, this factor has been useful to dismiss claims of

⁹⁶ *Guzmán et al.*, *supra* note 50, p. 56.

⁹⁷ *Ibid.*, p. 60.

⁹⁸ *Guzmán et al.*, *supra* note 11, p. 71.

⁹⁹ *Ibid.*

¹⁰⁰ *Lubanga*, *supra* note 42, para. 67.

¹⁰¹ *Katanga*, *supra* note 42, paras. 49, 69, 71.

¹⁰² *Bemba*, *supra* note 43, paras. 47, 57, 93.

mitigating circumstances. In turn, ICC-Trial Chambers have used it as part of the assessment of the gravity of the crime/aggravating circumstances.

Unlike ‘Commission of the crime for any motive involving discrimination’ (ICC-Rule 145(2)(b)(v)), which is an aggravating circumstance and was applied in *Bemba*,¹⁰³ Article 46 of the CCP lacked a similar factor. However, the Peruvian Chambers should have considered this aggravating circumstance. Those victimized by officials were normally targeted due to their alleged political/ideological affiliation. Under the current Articles 46(2)(d) and 46(2)(n), commission of crimes ‘pursuing intolerance or discriminatory motives’ and victimization of certain vulnerable groups are aggravating circumstances.

4.6 Unity or Plurality of Perpetrators (Article 46(7))

In *Fujimori*, it was found that plurality of perpetrators increases the gravity and damaging potential of the crime because there is a higher degree of danger and insecurity for victims, and agreed co-perpetration of crimes contributes towards the planned execution of the crime.¹⁰⁴ This factor applies when it is not part of the elements of the crime.¹⁰⁵ In *Fujimori*, the organized participation of many persons in the crimes, which increased the threat and made victims defenceless, was an aggravating circumstance.¹⁰⁶ This factor is linked to culpability/responsibility for wrongful acts.¹⁰⁷ In *Montesinos et al.*, the perpetrators belonged to an illicit and hierarchical armed military group.¹⁰⁸

In *Guzmán et al.*, the number of perpetrators was considered for sentencing.¹⁰⁹ The Shining Path had a nation-wide and hierarchical structure under the control of its Central

¹⁰³ *Ibid.*, paras. 44, 53-54.

¹⁰⁴ *Fujimori*, *supra* note 49, p. 250; *Fujimori*, *supra* note 12, para. 756.7.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Ibid.*, para. 766.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Montesinos et al.*, *supra* note 12, p. 783.

¹⁰⁹ *Guzmán et al.*, *supra* note 50, p. 17.

Committee led by Guzmán-Reynoso and consisted of around 33000 ‘combatants’.¹¹⁰ Thus, Shining Path leaders as indirect/mediate perpetrators controlled a large apparatus of power that used replaceable direct/material perpetrators to execute ordered crimes.¹¹¹

Among the Peruvian sentences examined here, only in *Fujimori* were the plurality of perpetrators and defenceless victims explicitly connected. Unlike Peruvian sources, ICC instruments neglect the plurality of perpetrators. However, if the presence of multiple perpetrators is considered to be indicative of the increase in the defencelessness of victims, ‘defenceless victims’ under ICC-Rule 145(2)(b)(iii) is relevant. In any event, the list of sentencing factors under ICC instruments is open-ended. Under the analysis of aggravating circumstances, rape and pillage committed by a plurality of soldiers against unarmed victims was examined in *Bemba*.¹¹² Nevertheless, plurality of perpetrators was not examined as a discrete factor but under ‘particular cruelty’.

4.7 Real Concurrence of Crimes as an Aggravating Factor

Concerning ex-senior officials, the most severe applicable penalty (25 years imprisonment) was imposed. Article 46 does not list real concurrence of crimes as a sentencing factor. However, in *Fujimori*, this concurrence was an aggravating circumstance.¹¹³ Under Article 50, when several events constitute independent crimes, ‘the sentence of the gravest crime shall apply’. Regarding *Fujimori*, the sentence corresponding to the most severe offence (aggravated murder) subsumed the other crimes (serious injuries and aggravated kidnapping) and, under the ‘aggravation’ principle, these other crimes were aggravating circumstances, but the sentence remained within the maximum imprisonment term for the gravest crime.¹¹⁴ Since no

¹¹⁰ *Ibid.*, p. 28.

¹¹¹ *Ibid.*, pp. 28-29.

¹¹² *Bemba*, *supra* note 43, paras. 47, 53.

¹¹³ *Fujimori*, *supra* note 49, pp. 248-249.

¹¹⁴ *Fujimori*, *supra* note 12, paras. 757-759, 766.

mitigating circumstance was identified, 25 years imprisonment was imposed on Fujimori. Similar considerations were applied in *Montesinos et al.*

In *Guzmán et al.*, concurrence of crimes was not an aggravating factor since there was just an ‘apparent’ concurrence of crimes.¹¹⁵ Thus, the crime of being a national leader of a terrorist organization subsumed other crimes: terrorist organization membership, incitement to terrorism, and treason against Peru.¹¹⁶

Unlike sentences imposed on ex-senior Peruvian officials, concurrence of crimes was not considered as an aggravating circumstance in *Guzmán et al.* This inconsistent practice may be criticised. However, under special counter-terrorism legislation, i.e., Decree-Law 25475, applied in *Guzmán et al.*, there was only ‘apparent’ concurrence. Decree-Law 25475 established a specific relationship among terrorist offences: the most serious offence (national terrorist leadership) subsumed the others. In sentences imposed on ex-senior officials, since CCP general provisions were the only norms applied, the judges had to judicially construe such a relationship between aggravated murder and lesser offences.

Under ICC-Rules, real concurrence of crimes is not a sentencing factor. Nevertheless, ICC-Rule 145(2)(b)(vi) provides for ‘Other circumstances which, although not enumerated above, by virtue of their nature are similar to those mentioned’. Under Article 78(3) of the ICC-Statute, when the accused is convicted for more than one crime, ‘the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced’. In *Lubanga*, the three charges that led to conviction meant 13, 12, and 14 years imprisonment; however, the joint sentence was 14 years imprisonment.¹¹⁷ In *Katanga*, although there were sentences of 12 years and 10 years imprisonment, a joint sentence of 12 years imprisonment was applied.¹¹⁸ In

¹¹⁵ *Guzmán et al.*, *supra* note 11, p. 180.

¹¹⁶ *Ibid.*, pp. 129.130; *Guzmán et al.*, *supra* note 50, p. 51.

¹¹⁷ *Lubanga*, *supra* note 42, paras. 98-99.

¹¹⁸ *Katanga*, *supra* note 42, paras. 146-147.

Bemba, there were cumulative convictions for war crimes/crimes against humanity of murder (16 years imprisonment) and rape (18 years imprisonment); however, 18 years imprisonment was imposed.¹¹⁹

ICC sources do not consider real concurrence as a sentencing factor. However, the approach adopted in *Fujimori* and *Montesinos et al.* arguably corresponds to the fact that real concurrence may be located in the borders of imputation, crimes and sentencing.¹²⁰ As outcomes, the Peruvian courts imposed the highest applicable imprisonment term rather than cumulative terms. The ICC Chambers have not accumulated imprisonment terms either. ‘Absorbing’ sentencing is mainly present in civil-law countries such as Peru rather than in common-law countries where both ‘absorbing’ and cumulative sentencing are identified.¹²¹

4.8. Summary

Article 46 of the CCP lists almost all the sentencing factors related to crimes/culpability. The exception is ‘real concurrence of crimes’, which was a judicially construed factor that was only applied in sentences of state leaders. To an important extent, Peruvian courts have applied the same factors related to crimes/culpability in sentences of both senior non-state and state leaders. Nevertheless, Peruvian courts have presented some diverse approaches to factors of employed means, spatiotemporal conditions, multiple perpetrators, and real concurrence of crimes.

Under ICC law and/or practice, while factors such as the nature of the unlawful behaviour may be particularly relevant to assess the gravity of the crime, factors such as crimes committed against particularly defenceless victims or perpetrated with cruelty are (primarily) aggravating circumstances. Factors such as spatiotemporal circumstances have served one or

¹¹⁹ *Bemba*, *supra* note 43, paras. 94-95.

¹²⁰ *Ambos*, *supra* note 28, p. 246.

¹²¹ *Ibid.*, pp. 260-264.

the other function. The ICC has only applied factors explicitly listed in its instruments and, thus, multiple perpetrators and concurrent crimes were not considered.

5 Sentencing Factors Related to the Convicted Individual's Personal Circumstances

These factors are discussed as follows. Each sub-section begins by discussing Peruvian and ICC case-law and/or law. Further analysis then follows, focusing on analytical comparisons at two levels: across Peruvian sentences and/or between Peruvian and ICC sources.

5.1 Importance of Breached Duties (Article 46(3))

In *Fujimori*, this factor was related to the seriousness of the crime and perpetrator's personal and social status.¹²² By taking advantage of his/her public position, the official more consciously decides to breach the law and his/her special duties: a higher degree of culpability which increases the impact of the crime.¹²³ Violations of duties of human rights protection were considered under spatiotemporal circumstances.¹²⁴ However, such violations are closer to 'importance of breached duties' because of Fujimori's presidential position. Due weight was given to Fujimori's presidential status, power and abuse thereof to commit and cover up crimes.¹²⁵ In *Montesinos et al.*, the judges remarked upon the perpetrators' legal status as senior state officials who shall fulfil status-related legal duties.¹²⁶ Thus, violations of legal duties were aggravating factors.

At the ICC, the equivalent aggravating circumstance is 'abuse of power or official capacity' (ICC-Rule 145(b)(2)(ii)). What matters is not the political/military position alone but also whether the offender abused his/her position.¹²⁷ While Lubanga's abuse of power was

¹²² *Fujimori*, *supra* note 12, para. 756.3.

¹²³ *Ibid.*, para. 756.3 and footnote 1197.

¹²⁴ *Ibid.*, para. 766.

¹²⁵ *Fujimori*, *supra* note 49, p. 350.

¹²⁶ *Montesinos et al.*, *supra* note 12, pp. 782-783.

¹²⁷ *Lubanga*, *supra* note 40, para. 82.

assessed under the gravity of the crime and as an aggravating circumstance,¹²⁸ Bemba's position as part of his culpable conduct constituted an aggravating circumstance.¹²⁹ Conversely, Katanga and Al-Mahdi did not abuse their positions of power and, thus, this aggravating circumstance was not applied.¹³⁰

The Peruvian case-law on 'importance of breached duties' examined here concerned ex-senior officials but not ex-leaders of the Shining Path. The latter were non-state actors and lacked state/official duties. However, an equivalent factor tailored to non-state leaders should have been judicially construed. Current Article 46(2)(h) of the CCP considers 'abuse of power' as an aggravating circumstance. In turn, ICC sentences have considered 'abuse of power' rather than 'abuse of official capacity'. This matches the fact that convicted persons at the ICC have been leaders of non-state groups.

5.2 Age, Education, Economic Situation and Social Context (Article 46(8))

In *Fujimori*, these circumstances were related to the perpetrator's ability to internalize and follow normative mandates and social demands and, thus, concern the degree of culpability of and blame on the perpetrator.¹³¹ Article 45(1) prescribes that judges may consider 'social limitations endured by the offender'. Thus, the perpetrator's real possibilities of interaction with and integration into his/her social environment and positive patterns of conduct may be considered.¹³² In *Montesinos et al.*, this factor was mitigating concerning only one co-accused who was 20 years old when the crimes took place, was charged with lesser crimes, and was not a senior official.¹³³

¹²⁸ *Ibid.*, para. 85.

¹²⁹ *Bemba*, *supra* note 43, para. 66.

¹³⁰ *Katanga*, *supra* note 42, paras. 74-75; *Al-Mahdi*, *supra* note 43, para. 86.

¹³¹ *Fujimori*, *supra* note 12, para. 756.8.

¹³² *Ibid.*

¹³³ *Montesinos et al.*, *supra* note 12, paras. 783, 791.

By invoking Article 45(1), the defence in *Guzmán et al.* claimed state liability for poverty, inequality, etc., which allegedly caused the Peruvian conflict.¹³⁴ However, the National Criminal Chamber clarified that Article 45(1) applies only to the convicted person's socio-economic limitations, but not to limitations that affected the whole population.¹³⁵ Indeed, several Shining Path leaders came from middle class families, completed higher education studies, and faced no socio-economic limitations.¹³⁶ Thus, no mitigating circumstance was found.

Under ICC-Rule 145(1)(c), 'age, education, social and economic condition of the convicted' constitute a sentencing factor. Lubanga was found to be well-educated and able to understand the seriousness of the crimes.¹³⁷ Bemba's position (the highest leader of the *Mouvement de Libération Congolais*), education and experience increased the gravity of his culpable conduct.¹³⁸ Bemba's family and personal circumstances were rejected as mitigating circumstances because they were common to many convicted persons.¹³⁹ No weight was given to Al-Mahdi's religious expertise, his positive role in his community before the crimes, his age and his economic background.¹⁴⁰ His lack of prior convictions was no a mitigating circumstance because this is common at international criminal tribunals.¹⁴¹ However, other international criminal tribunals have cited lack of criminal records.¹⁴² Katanga's young age, his situation as the father of six children, and his kind/protective disposition towards his community received limited mitigating weight.¹⁴³

¹³⁴ *Guzmán et al.*, *supra* note 11, p. 235.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ *Lubanga*, *supra* note 42, para. 56.

¹³⁸ *Bemba*, *supra* note 43, para. 66.

¹³⁹ *Ibid.*, paras. 77-78.

¹⁴⁰ *Al-Mahdi*, *supra* note 43, para. 96.

¹⁴¹ *Ibid.*

¹⁴² *Schabas*, *supra* note 28, p. 1176.

¹⁴³ *Katanga*, *supra* note 42, para. 88.

Therefore, the Peruvian case-law examined here considered this sentencing factor as an aggravating factor almost without exception. However, ICC case-law has approached this factor heterogeneously: aggravating circumstance (*Lubanga, Bemba*), no effect (*Al-Mahdi*), and mitigating circumstance (*Katanga*). When this factor was aggravating in the Peruvian and ICC jurisprudence, it was connected with the prominent profiles/backgrounds of the offenders. These perpetrators were expected to be aware of the gravity of the crimes committed. When this factor was mitigating (*Montesinos et al., Katanga*), *inter alia* the perpetrator's young age was considered. Should claims related to this factor receive no effect, the competent court must justify it, which did not happen in *Al-Mahdi*. This would prevent potential appeals for and/or allegations of abuse of judicial discretion.

5.3 Voluntary Reparation Provided by the Perpetrator to Redress Harm (Article 46(9))

In *Fujimori*, this factor was linked to the perpetrator's post-crime conduct.¹⁴⁴ A positive attitude constitutes a mitigating circumstance and impacts the quantification of punishment.¹⁴⁵ Nevertheless, for mitigating effects, the reparation must be voluntary, provided prior to sentence, and given by the perpetrator (not by third parties).¹⁴⁶

Under ICC-Rule 145(2)(a)(ii), the equivalent mitigating circumstance is: 'convicted person's conduct after the act, including any efforts by the person to compensate the victims'. This is open-ended.¹⁴⁷ Limited weight was given to *Al-Mahdi's* irreproachable behaviour in detention, his statement appreciating his treatment at the ICC, and his admission of guilt and cooperation with the Prosecution because these actions show likely reintegration into society.¹⁴⁸

¹⁴⁴ *Fujimori*, *supra* note 12, para. 756.9.

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

¹⁴⁷ *Lubanga*, *supra* note 42, para. 34.

¹⁴⁸ *Al-Mahdi*, *supra* note 43, para. 97.

Among the Peruvian sentences, this factor was discussed only in *Fujimori*. Since Fujimori was the highest Peruvian official and the IACtHR had ordered Peru to grant reparations for victims of the *Barrios Altos* and *La Cantuta* massacres, there was arguably a special need to judicially discuss this factor in *Fujimori*. Unlike Peruvian law and practice, ICC-Rules and ICC case-law consider reparation provided by the convicted individual not as an independent factor but as an example of the perpetrator's post-crime conduct.

5.4 Sincere Confession Before the Crime is Discovered (Article 46(10))

In *Fujimori*, the Supreme Court determined that this factor is mitigating because it involves the perpetrator's post-crime regrets, repentance, assumption of responsibility, and will to assume crime-related legal consequences.¹⁴⁹ This factor aims to avoid benefiting offenders who flee because they are different from perpetrators who turn themselves into the authorities to confess.¹⁵⁰ A sincere confession makes it unnecessary to impose more severe sentences to achieve prevention or rehabilitation.¹⁵¹ The Peruvian system distinguishes between a sincere confession (CCP, Article 46(10)), and a guilty plea given before a judge/court (Code of Criminal Proceedings, Article 136).¹⁵² The latter is a 'special' mitigating circumstance that allows an imprisonment term below the minimum legal threshold. A sincere confession as a general sentencing circumstance has lower legal and evidentiary effectiveness.¹⁵³ It has mitigating effects but within the minimum threshold. In *Montesinos et al.*, the co-perpetrators denied rather than confessed their crimes.¹⁵⁴

¹⁴⁹ *Fujimori*, *supra* note 12, para. 756.10.

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ *Montesinos et al.*, *supra* note 12, p. 783.

In *Guzmán et al.*, one Shining Path leader confessed and assumed his criminal responsibility.¹⁵⁵ His statement met the conditions of uniformity, spontaneity and coherence required for a sincere confession and, thus, was a mitigating circumstance: 24 years imprisonment rather than potentially life imprisonment.¹⁵⁶

This factor is similar to the ‘convicted person’s conduct after the act, including any cooperation with the Court’ (ICC-Rule 145(2)(a)(ii)). Guilty pleas, sincere remorse, and cooperation with the Prosecution constitute mitigating circumstances.¹⁵⁷ Good behaviour in court and compliance are only exceptionally mitigating.¹⁵⁸ Al-Mahdi’s admission of guilt constituted a mitigating circumstance because he accepted his responsibility and detailed his actions, which led to prompt case resolution, saved ICC time and resources, relieved witnesses and victims from proceedings, and may further peace, reconciliation, and deterrence.¹⁵⁹ Al-Mahdi’s admission, cooperation with the Prosecutor and good behaviour during detention showed likely reintegration, but these were considered against overwhelming incriminating evidence, and received limited mitigating weight.¹⁶⁰ Bemba showed the opposite situation and, thus, no mitigating circumstance was found.¹⁶¹

Whereas *Fujimori* followed a ‘subjective’ approach to this factor (‘regrets’, ‘sincerity’, ‘repentance’), *Guzmán et al.* adopted an ‘objective’ approach (‘uniformity’, ‘coherence’, ‘spontaneity’). Although examined Peruvian and ICC case-law have applied a sincere confession/guilty plea as a mitigating factor, there are differences. A sincere confession is an autonomous factor under examined Peruvian sources. In turn, guilty pleas fall within the broad factor of a perpetrator’s post-crime cooperation at the ICC. Additionally, the analysed Peruvian

¹⁵⁵ *Guzmán et al.*, *supra* note 50, p. 46.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Katanga*, *supra* note 42, para. 32.

¹⁵⁸ *Bemba*, *supra* note 43, para. 81.

¹⁵⁹ *Al-Mahdi*, *supra* note 43, paras. 99-100.

¹⁶⁰ *Ibid.*, paras. 97-109.

¹⁶¹ *Bemba*, *supra* note 43, para. 70.

case-law focuses on the sincere confession requirements. Conversely, the ICC case-law considers guilty pleas in a broader context, i.e., guilty pleas *vis-à-vis* benefits for and/or interests of the ICC, victims, Prosecutor, etc. The above-mentioned differences between sincere confessions and guilty pleas may explain the different approaches.

5.5 *Personal Circumstances and Circumstances Related to the Perpetrator's Personality (Article 46(11))*

In *Fujimori*, this open-ended factor was useful to assess circumstances not listed under Article 46.¹⁶² Penalty determination requires a close approach to the perpetrator to render justice that better fits his/her personal circumstances/personality.¹⁶³ However, to protect the principle of legality and avoid arbitrariness, the invoked sentencing factor and an equivalent among the listed factors must be specified.¹⁶⁴ In *Fujimori*, the need for reasonable judicial justification of the identified factor was emphasised.¹⁶⁵ This is also important at the ICC. ICC-Trial Chambers can discretionally weigh a mitigating factor unless this weighing is unreasonable (abuse of discretion).¹⁶⁶

Under Article 78(1) of the ICC-Statute, the offender's individual circumstances are a sentencing factor. ICC-Rule 145(1)(c) lists the convicted person's 'age, education, social and economic condition'. ICC-Rule 145(2)(b)(i) contains a pertinent aggravating circumstance: 'Any relevant prior criminal convictions for crimes under the jurisdiction of the Court or of a similar nature'. Among non-listed factors, serious violations of defence rights may lead to automatic sentence reduction; however, Trial Chamber I did not apply this to the two stays of the *Lubanga* proceedings.¹⁶⁷ The ICC dismissed the lack of prior convictions as a mitigating

¹⁶² *Fujimori*, *supra* note 12, 756.11.

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

¹⁶⁶ *Lubanga*, *supra* note 40, para. 111.

¹⁶⁷ *Ibid.*, paras. 109-110.

factor because this is common at international criminal tribunals.¹⁶⁸ Considering that the profiles/backgrounds of those most responsible for international crimes at international and national jurisdictions are similar, national courts may *mutatis mutandis* consider this ICC finding.

5.6 Offender's Status as a National Leader of a Terrorist Organization

Counter-terrorism legislation, namely, Article 3(a) of Decree-Law 25475, applied in *Guzmán et al.*, laid down life imprisonment for the offender's status as a national leader of a terrorist organisation. This status is a crime, not a sentencing factor. However, this status may be analysed as a sentencing factor under the following considerations.

A detailed analysis of Decree-Law 25475 suggests that this status can be approached as an aggravating factor due to its direct effects on the quantification of imprisonment sentences. Whereas Article 2 defines terrorism and prescribes a minimum of 25 years imprisonment, Article 3 contains specific penalties that concern the perpetrator's status within terrorist organizations. Article 3 differentiates national terrorist leaders from other perpetrators because life imprisonment applies to the former. This triggers aggravating effects. Concerning other perpetrators, minimum imprisonment terms were 30 and 25 years (Articles 3(b), 3(c)).

Concerning practice, this status in *Guzmán et al.* justified heavier imprisonment terms than those applied to material perpetrators, because terrorist leaders controlled the Shining Path to order multiple terrorist acts perpetrated by material offenders.¹⁶⁹ The position (level of authority) within the overall organization seemed to have impacted the severity of the sentences in *Guzmán et al.* Whereas the top four Shining Path leaders received life imprisonment sentences, Shining Path mid-level leaders were condemned to 25 years imprisonment. Levels

¹⁶⁸ *Al-Mahdi*, *supra* note 43, para.96.

¹⁶⁹ *Guzmán et al.*, *supra* note 50, pp. 31-32.

of liability within the terrorist organization were considered.¹⁷⁰ Guzmán's status as a national Shining Path leader (autonomous crime) subsumed incitement to terrorist acts (autonomous crime).¹⁷¹ Conversely, one convicted lacked this status as she was only a link between Shining Path national leaders and mid-level members, and therefore her sentence was lower and amounted to terrorist organization membership.¹⁷²

A combination of 'personal circumstances' (Article 78(1) of the ICC-Statute) and 'degree of participation' (ICC-Rule 145(1)(c)) may *mutatis mutandis* correspond to the terrorist leader status. Alternatively, the aggravating circumstance in ICC-Rule 145(2)(b)(vi) is relevant: 'Other circumstances which, although not enumerated above, by virtue of their nature are similar to those mentioned'. Bemba's position as the highest-ranking official of the *Mouvement de Libération Congolais* increased the gravity of his culpable conduct.¹⁷³

Importantly, the Chambers in *Guzmán et al.* did not breach the prohibition of double counting. According to the ICC and scholars,¹⁷⁴ double counting consists in that: factors related to the applicable crime definition cannot be re-counted as aggravating circumstances; and factors considered when assessing the gravity of the crime cannot be also considered as aggravating circumstances. In any event, this factor corresponds to the specific personal status of national leaders of terrorist groups, which explains its inapplicability to ex-senior state officials. *De lege ferenda*, the said status should be considered as an aggravating factor rather than as a crime in order to remain within culpability or subjective criminal liability standards that better guarantee defence rights. The ICC-Rules do not include a factor similar to the one examined; however, this may be *mutatis mutandis* construed via the combined use of the above-examined listed factors or through an aggravating circumstance not listed.

¹⁷⁰ *Ibid.*, pp. 17, 31.

¹⁷¹ *Ibid.*, pp. 33-34.

¹⁷² *Ibid.*, p.105.

¹⁷³ *Bemba*, *supra* note 43, para. 66.

¹⁷⁴ *Lubanga*, *supra* note 42, paras. 35, 51; *Ambos*, *supra* note 28, p. 288; *D'Ascoli*, *supra* note 2, pp. 310-11, 322; *Khan*, *supra* note 36, p. 1894.

5.7 Summary

Article 46 lists all the factors related to the convicted individual's personal circumstances, apart from the terrorist leader status. Overall, Peruvian courts have consistently applied factors related to the perpetrator's personal circumstances in sentences of both non-state and state leaders. The two main differences, namely, importance of breached duties (state leaders) and national leader terrorist status (non-state leaders), logically correspond to state and non-state leadership.

Under ICC law and/or jurisprudence, factors examined here are mainly aggravating or mitigating circumstances. Whereas factors like abuse of power/official capacity are aggravating, factors like victim compensation or cooperation with the ICC are mitigating. Age, education and socio-economic status have been used to assess the gravity of the crimes or for aggravating/mitigating effects. The ICC seemingly has only applied factors listed in its instruments.

6 General Comparative Analysis

Overall, sentencing factors in Peruvian law and practice concerning senior figures responsible for acts constitutive of international crimes are similar to the law and practice of the ICC. There is an important number of similarities in terms of the main elements of and/or principles underlying the sentencing factors under Peruvian and ICC normative and jurisprudential sources. The differences are to an important extent determined by the particularities of the substantive and procedural law applicable respectively either at Peruvian courts or the ICC. An additional underlying aspect that may partially explain these differences is that while Peruvian courts have sentenced both senior state and non-state actors, the ICC has so far only sentenced the latter.

Sentencing factors contained in Article 46 of the CCP may largely be classified into two broad categories: crimes/culpability-related factors and the offender's personal circumstances-related factors. Nevertheless, some sentencing factors such as the offender's personal status as a national leader of a terrorist organization may additionally or alternatively fall in the other category. The comparative analysis with the law and practice of the ICC confirm these findings on categorization of sentencing factors.

It is crimes/culpability-related sentencing factors that mainly give content to the notion of the gravity of crimes, which constitutes an umbrella and/or underlying factor in Peruvian sources. At the ICC, the gravity of crimes is also one of the most important sentencing factors. In the two broad categories considered here, most sentencing factors listed in Article 46 of the CCP have *mutatis mutandis* equivalents in ICC instruments. This is also reflected in Peruvian and ICC jurisprudence which have interpreted and applied the respective normative provisions.

Unlike the ICC-Rules, the wording of the original Article 46 of the CCP, which was applied to the sentences examined here, is of a general nature. This means that sentencing factors can depending on the case be aggravating or mitigating, and there is no specific list of aggravating and/or mitigating circumstances. However, subsequent legislative amendments in Peru have filled this gap. Like the ICC law, the CCP as applied to the Peruvian case-law examined here illustratively lists sentencing factors.

Unlike ICC Chambers, Peruvian courts have also applied sentencing factors not explicitly listed in Peruvian law. Open-ended lists of sentencing factors are necessary to give judges enough room to, as properly justified, identify and apply unlisted sentencing factors that are both similar to those explicitly listed and relevant to cases against senior figures responsible for international crimes. However, this must be done within the limits of reasonable judicial discretion. Regardless of the existence of detailed lists of sentencing factors, open-ended provisions enable judges to fill in normative gaps and better consider the wide array of elements

related to crimes/culpability and the perpetrator's personal circumstances. In any event, judicial justification and reasonableness are necessary limits to avoid that judicial discretion becomes judicial arbitrariness, judicial activism, and/or judicial incoherence or inconsistency in sentencing at national and international criminal jurisdictions.

With regard to sentencing factors related to crimes/culpability, Peruvian law and judicial approaches to these factors in Peruvian jurisprudence have presented important similarities to the ICC's law and practice on sentencing factors. These similarities include the key sentencing factors of the nature of the criminal acts and the extent of the harm inflicted. However, there are also some important differences. These correspond to the absence of the plurality of perpetrators and real concurrence of crimes as sentencing factors at the ICC, and the lack of discriminatory motive in the original Article 46 of the CCP. Peruvian courts and the ICC have also followed some different (interpretative) approaches to certain sentencing factors, particularly, means employed to commit the crimes.

There are also important similarities between the ICC and Peruvian law when it comes to those factors related to the convicted person's individual circumstances. These include the factors of breach of duties or power, reparation or compensation provided to victims, and sincere confession/guilty plea. The terrorist leader status, which may be identified in Peruvian law and practice, constitutes the only major important exception and/or most important difference. Also, Peruvian courts and the ICC have overall adopted relatively similar approaches to the same or similar sentencing factors. Nevertheless, Peruvian courts and the ICC have partially differed in their approaches to certain factors such as age, education, economic situation and social context.

7 Conclusion

Related to broader academic debates on pluralism and unification in ICL, the identification, systematization and discussion of sentencing factors in Peru as compared to the law and practice of the ICC hold theoretical and illustrative importance. Despite certain and necessary differences, important common grounds and principles in sentencing were identified in the Peruvian law and practice *vis-à-vis* the law and practice of the ICC when it comes to punishing those most responsible for mass atrocities.

The ICC law is not flawless and the ICC emerging sentencing practice needs to be more consistent. Problems identified in the Peruvian sentencing practice examined include the lack of judicial application and/or (further) discussion of relevant sentencing factors and/or some of its important elements as well as legal inaccuracies such as ‘blending’ interrelated but discrete sentencing factors. ICC case-law *inter alia* evidences the importance of applying certain sentencing factors in an inter-related manner (with other factors) but without neglecting their autonomy.

Although the application of sentencing factors must consider case-by-case circumstances, sentencing practices concerning mass atrocities should in principle be consistent in order to foster legal certainty, predictability, and coherence. More detailed and systemic provisions such as those under the ICC-Rules or current Peruvian law arguably enable national and international criminal judges to better address those issues.

In turn, when searching for general sentencing principles and/or ‘best practices’, the ICC should consider relevant national sources, including Peruvian law and practice. This can also be useful in increasing convergence and consistency in sentencing for international crimes across the ICC and national jurisdictions, but with due attention to the applicable law and institutional frameworks.