Interpreting Perlocutionary Speech Acts on Aggravation and Mitigation Circumstances: The Case of the former ICTR

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Abstract

This article attempts to interpret the interactivity between force of utterance and aggravating and mitigation circumstances during the ICTR sentencing process. This process which is essential in determining whether the judges' evaluative comments aimed to address aggravation and mitigation circumstances are predictive of the ensuing sentences. The data for this article were accessed from the 1995-2000 Basic Documents and Case Law CD-ROM of the then International Criminal Tribunal for Rwanda (ICTR) in Arusha, Tanzania, focusing on the then thirteen (13) completed cases retrievable from http://www.ictr.org. Informed by the Speech Act Theory and using Wordsmith to determine the frequency of linguistic terms at airing aggravation, the study was done on seventy-two thousand words, paying attention to interpreting the language used to address aggravating and mitigating circumstances. Findings show that emotive evaluations are not a major characteristic in sentencing, and where in use, they do not predict the harshness of punishments given.

Keywords:
Aggravation, International Criminal Tribunal for Rwanda (ICTR), Mitigation, Sentencing, Speech Act Theory
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Introduction

The then International Criminal Tribunal for Rwanda (ICTR) in Arusha Tanzania, which forms the basis for this study "created a continued interest in the jurisprudence of the international courts, and much of this interest has focused specifically on the sentencing

decisions of the judges" (Pruitt 2014, p.149). For linguists and those interested in interpretation, however, this interest trickles down to the perlocutionary effects produced when addressing aggravation and mitigation circumstances. An aggravating factor is a consideration that is not contained within the elements of the offence, which worsens the offence or otherwise justifies a heavier penalty; a mitigating factor, on the other hand, is a consideration that justifies a more lenient penalty (Bagaric 2014). Collectively, we may say that aggravation and mitigation are circumstances that may justify the imposition of a harsher or more lenient sentence. They are normally utilised by the two contesting sides in a criminal proceeding to determine or individualise sentences. Now that we wish to examine perlocutionary effects from aggravation and mitigation factors, we are going to revisit the Speech Act Theory to understand perlocutionary effects.

The perlocutionary act is the effect that begets the hearer from the speaker uttering something, in other words, the perlocutionary act is producing some effects on hearers (Brown & Yule 1983, p. 232). For example, the defendant and the audience who are sympathetic to the defendant will feel uneasy and afraid when aggravating facts are discussed to show that the offender deserves a heavier penalty. Thus, the negative emotions people experience are referred to as the perlocutionary act or effects. The defendant and those who are in favour of them will feel good when mitigation is discussed to recommend mercy for the offender. This is the effect which the illocutionary act is, the production of an effect through locution and illocution (Rankema 1993, p. 22). The perlocutionary act include effects such as persuading, embarrassing, intimidating, boring, irritating, and inspiring. We all expect, therefore, that when the court addresses aggravation and mitigation they produce perlocutionary acts in defendants and those supporting them. Studies of illocutionary acts and perlocutionary acts have gone beyond face-to-face encounters to involve movies, such as an analysis by Sefriana (2020) of *Monte Carlo*; Nadeak et al. (2017) on Judy Hopps'

utterances in *Zootopia*; Faradila (2013) in *The Blind Side*; and Lisnani et al. (2017) on Grug's utterances in *The Croods* movie.

I have not been able, despite efforts, to find a study of perlocutionary effects at addressing aggravation and mitigation circumstances. The interest to study is also heightened by the fact that somewhere courts have moved toward a mandatory death penalty by limiting the use of mitigating circumstances and by permitting expansive aggravating factor statutes (Kirchmeier 1998, p. 348). Additionally, some claim that the mitigation requirement "quite obviously destroys whatever rationality and predictability the requirement [that states channel the sentence's discretion with clear and objective standards] was designed to achieve" (Kirchemier 1998, p. 362). Since the ICTR Trial Chamber found that the court was not limited to sentencing factors mentioned in the Statute or Rules of procedure (Beresford 2001, p. 53), and it was instructed to take the gravity of the offence into consideration when determining sentencing (UN, Article 23[2]), and to consider the defendant's individual circumstances, it is important to examine the weight given to aggravating and mitigating sentencing factors (Pruitt 2014, p.150). Studying perlocutionary effects in aggravation and mitigation is also important because these circumstances are part of the development of principles of guided discretion and individualised sentencing in capital cases. From a linguistic point of view, one still wonders how much perlocutionary acts on aggravation and mitigation match and reflect the ensuing sentences.

This work begins with courtroom sentencing as the stage at which the two elements of this study reside, i.e., aggravation and mitigation circumstances. This section is followed by goals and principles of sentencing; the individualisation of sentences through aggravation and

mitigation; aggravation in ICTR sentencing; mitigation in ICTR sentencing; methods and theoretical issues; Speech Act Theory; perlocutionary acts as aggravation and mitigation; data interpretation: aggravation and mitigation circumstances; discussion and, finally, the Conclusion.

Courtroom Sentencing

This section pays attention to sentencing as the stage for addressing aggravation and mitigating circumstances in criminal hearings. Sentencing is "the imposition of a punishment on an offender following conviction for a criminal offense. [Sentences] may involve incarceration in a prison or jail, or they may involve placement in community corrections facilities" (Champion 2008, p. 2). The sentencing process is normally quite distinct from the procedure of determining the criminal responsibility of the offender. Whereas the latter procedure is rather structured, sentencing is not. At the trial "strict rules of procedure and evidence apply and issues to be decided are well formulated and accepted by the court, the prosecution and defence" (Martin 1997, p. 162). By comparison with other sections of the trial, the sentencing process tends to be a relatively crude affair (Hall 2016, p. 55; Martin 1997, p.162). In fact, it constitutes the concluding component of the judicial processes (in the absence of an appeal) where having found the offender guilty; the court passes the punishment to the convicted person and orders appropriately what should be done concerning the punishment itself.

Sentencing involves the intentional infliction of pain to the offender. It is the legal domain where the state acts in its most forceful manner against offending individuals, so it is important that the sentencing system is fair and effective. It is necessary to differentiate when penalties should be adjusted from those that are deemed to be proportionate to the gravity of the crime and which incorporate adjustments for any relevant sentencing

objectives. It is at this point that aggravating and mitigating factors come into play. Aggravating factors operate to increase the severity of punishment, while the effect of mitigating factors is to reduce the harshness of the appropriate sanction (Bagaric 2014, p.1165). Aggravating and mitigating factors are often the most influential and important considerations regarding the choice and length of penalty (Bagaric 2014).

Goals and Principles of Sentencing

The aims of sentencing are drawn from modern retributivism (Ashworth 1983, p.18). These aims include punishment or retribution, deterrence, custodial monitoring or incapacitation, and rehabilitation (Champion, 2008, pp. 4-6). With retribution (just deserts), offenders should be punished because they deserve it, and the severity of their punishment should be proportional to their degree of blameworthiness (Frase 2013, p.8). The belief here is believed that society is normally balanced; an offender has disturbed this balance and therefore he deserves punishment. It is "…unfair that the offender should be allowed to 'get away' with that advantage, and it is therefore right that he should be subjected to a disadvantage to cancel out (at least symbolically) his ill-gotten gain" (Ashworth 1983, p.18). A sentence should "communicate society's condemnation of the particular offender's conduct. The sentence "represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values" (Hall 2016, p. 94). This communication of society's condemnation, while received by a wider audience, is, in a very particular way, directed at the offender as the primary audience. In this line we can, therefore, say that punishment is both permissible and desirable; it is inherent in law and necessary in society for the maintenance of law.

At sentencing, "courts must weigh a wide range of offence and offender-related factors to determine the severity of the sentence. Some factors influence the sentence by affecting the seriousness of the crime, others because they reflect a higher or lower level of culpability on the part of the offender" (Roberts 2011, p.1). Some of the more important goals of sentencing are as follows:

> (1) to promote respect for the law, (2) to reflect the seriousness of the offense, (3) to provide just punishment for the offence, (4) to deter the defendant from future criminal conduct, (5) to protect the public from the convicted offender, and (6) to provide the convicted offender with educational or vocational training, or other rehabilitative assistance (Champion 2008, pp. 2-4).

With regard to punishment, there are two determining principles namely Parsimony and the Humanitarian principles. Parsimony demands that one should not receive more punishment than is necessary to meet the aims for which the punishment is given to do away with any tendency to inflict more misery to society through heavier punishments.

Parsimony, according to Tonry and Rex (2002), is one of the means of checking or limiting retributivism, which is not a moralistic way of punishing offenders. The other checking mechanism to retributivism is establishing *outer limits* beyond which any punishment should not be allowed. When the two, parsimony and outer limits are applied, parsimony demands that when a limit is set, the lower limit is the one that should apply, unless a more severe punishment shows to have more benefit for both the offender and the public (Tonry & Rex, 2002). The humanitarian principle is related to parsimony in saying that society should eschew inhumane punishments even if these may seem effective in some way. Amputation of limbs is one such punishment.

Regardless of the differing views concerning sentencing, one may say that "the level of punishment should be no more than is deserved and no more than is necessary for purposes of crime control" (Ashworth 1983, p. 20). It is at this point that we can say that the level of punishment remains a subjective issue. The fact that Rwandan courts passed a death sentence whereas the Tribunal did not may stem from this relativity. In Rwanda, a death sentence in some cases was necessary for purposes of crime control but at the ICTR life imprisonment was the highest necessary punishment for purposes of crime control.

Looking at sentencing in general, we can say that it contributes significantly to accomplishing the two primary functions of law, i.e. "the ordering of human relations and the restoration of social order when [the social order] breaks down" (Danet 1985, p. 273). Most interesting in the study of sentencing is the interrelationship between law and punishment, on the one hand, and society, on the other. This relationship shows that when punishment is passed, it is deserved (therefore the offender needs not complain) and that it is passed for the good of society and by the society itself. The judge, therefore, passes a sentence not in his own powers, but the powers conferred on him or her by society itself (Ashworth 1983; Fitzmaurice & Pease 1986). Now, having all these powers how does the judge exercise them? The judge may pronounce one of the following: (a) discharge (including other nominal sentences), (b) fine (financial), (c) probation (supervisory), and (d) imprisonment (custodial) (Walker 1969, p.105; Champion 2008, p. 2). According to sentencing modes, sentences are either tariff (based on offence characteristics) or individualised sentences (based on offender characteristics). Cases under this study are individualised in a sense that judges look at personal circumstances of the

offender and consider aggravating and mitigating circumstances to individualise sentences.

Individualisation of Sentences through Aggravation and Mitigation

Aggravation and mitigation are circumstances that may justify imposition of a harsher or more lenient sentence. They are normally utilised by the two contesting sides in a criminal proceeding in an attempt to determine or individualise sentences. Champion says, for instance:

> Defence counsel may present friends and relatives of the offender who can testify about the offender's past, his good qualities, and his likelihood of behaving in a law-abiding fashion in the future. The defence attempts to influence the judge to hand down a light sentence, and friends and family members may be called in to offer favourable remarks about the offender. However, the prosecution may call the victims as witnesses against the offender, as well as relatives and friends who can give testimony about why the judge should impose a heavy sentence (Champion 2008, p. 25).

These are presentations of mitigation (for the defence counsel) and aggravation (for the prosecution) addressed when the accused has been found guilty. Aggravation and mitigation are "matters of great importance in the determination of sentence. Such factors may substantially affect the severity of the sentence and raise complex ethical and practical questions" (Roberts 2011, p. xiii), but "there is no formal weighing process" (Cunningham 2010, p. 6).

Aggravation in ICTR Sentencing

Aggravation can be constituted by prevalence (which should merit a harsh sentence in order to keep others from committing the prevalent offence),

abuse of trust, age and situations of the victims, and absence of remorse. Walker (1999) contends that absence of remorse reflects the character of the offender and the likelihood that he will re-offend. Other factors that can be considered to be aggravating are prior disciplinary offences; dishonest or selfish motive; a pattern of misconduct; multiple offences; bad faith; obstruction of the disciplinary proceeding by intentionally refusing to comply with rules or orders of the disciplinary agency; submission of false evidence, false statements, or other deceptive practices during the disciplinary process; refusal to acknowledge wrongful nature of conduct; vulnerability of victims; substantial experience in the practice of law; and indifference to making restitution. In the ICTR cases, aggravating circumstances include the offender being in a position of authority; misusing their powers; betraying the confidence and trust placed in the offender's person (breach of trust); the way in which one commits the crimes; one's conduct after commission of crimes and the role played by the accused in committing crimes for which he has been found guilty.

The most common aggravating factors include breach of trust and prior criminal history. However, there is not even a loose consensus regarding the operation of most mitigating and aggravating considerations, even though the presence of an aggravating or mitigating consideration can profoundly impact on a penalty. For example, prior criminality can add ten years or more to the length of a prison term for some offenses in the United States (Bagaric 2014, pp.1160-1161). Most of the factors that serve to raise or reduce penalties have emerged in an ad hoc manner, not underpinned by a clear objective, and, normally, the weight and emphasis placed on them in determining penalty is unclear (Bagaric 2014, p.1161). Generally, the aggravating factors support a more retributive sentencing approach (Hola et al.

2009, p. 82). Table 1 presents a full list of aggravating circumstances in ICTR sentencing:

Table 1: Aggravation circumstances in ICTR sentencing

	Aggravating Factor	**Cases (number)**	**Cases (percentage)**
1	Gravity of offense	41	68.3
2	Abuse of authority	37	61.7
3	Number of victims	16	26.7
4	Superior responsibility	11	18.3
5	Active participation	10	16.7
6	Position/status	9	15.0
7	Zealousness	8	13.3
8	Premeditation	6	10.0
9	Attack on sanctuaries	5	8.3
10	Provided material support	5	8.3
11	Failure to prevent killing	5	8.3
12	Encouragement to commit violence	5	8.3
13	Failure to punish subordinates	4	6.7
14	Vulnerability of victims	4	6.7
15	Did not show remorse	4	6.7
16	Did not admit guilt	3	5.0
17	Educated	3	5.0
18	Did not cooperate	2	3.3
19	Did not acknowledge genocide	1	1.7
20	Identity of victims	1	1.7
21	Fled after genocide	1	1.7

Source: Adopted from Pruitt (2014)

Of the 21 aggravating elements, the leading was *gravity of offence* (in 41 cases), followed by *abuse of authority* (in 37 cases), *having affected a large number of victims* (in 16 cases), *having held a superior position* (in 11 cases), and *the defendant's active participation in the crime*, in 10 cases. As these results are from the 63 defendants, the aggravating circumstances suggest that ICTR defendants had been people of high status in Rwanda.

Mitigation in ICTR Sentencing

Mitigation is an attempt to keep the sentence to a minimum. Mitigating factors tend to best fit under a rehabilitation approach or clemency (Sloane 2007, p.713). On addressing mitigation, "the sentencer has in mind a third sort of consideration: that the offender has behaved in a meritorious way which, though it affects neither his culpability nor his sensitivity to the penalty, should count in his favour…he may wish [even] to lubricate the wheels of justice by rewarding the defendant's cooperation" (Walker 1999, p. 95). Rule 101[b] instructs the court to consider any mitigating factor present (ICTR Rules of Procedure and Evidence, at Rule 101[b]). The ICTR Trial Chamber says that mitigating circumstances may include cooperating with the prosecutor (as mentioned before); surrendering to authorities; admitting guilt and demonstrating remorse for victims (see *Prosecutor vs. Kayishema/Ruzindana*). Here one specific factor is mentioned that of substantial cooperation with the prosecutor (ICTR Rules of Procedure and Evidence, at Rule 101[b]). The sentencer does not have a limit with regard to considerations of mitigating circumstances. Following are some of the instances likely to count as mitigating circumstances before a sentence:

> *Pleading guilty, motivation* (e.g. self-defence or duress and grief), *Temptation* (if the victim is the one that tempted the offender), *Entrapment* (mitigation would be very high when entrapment was done by a journalist, it would be low if it was the police that entrapped the offender), *Ignorance* "even when a strict interpretation does not allow ignorance of the law as a defence, it can mitigate", *Necessity and duress* (but duress is not acceptable as defence to murder or attempted murder even when the threat was death), *Meritorious conduct* (e.g. having fought well for society in the war, having rescued a drowning kid or even starting a youth club), and lastly, *remorse* (Walker 1999, p. 96).

Widely accepted mitigating factors include cooperating with authorities and having a minor role in the crime (Bagaric, 2014:1160-1161). Table 2 presents a full list of the mitigating circumstances utilised in ICTR sentencing:

Table 2: Mitigating circumstances in ICTR sentencing

	Mitigating Factor	**Cases (number)**	**Cases (percentage)**
1	Selective assistance to Tutsis	16	26.7
2	Prior good character	15	25.0
3	Expressed remorse	13	21.7
4	None	13	21.7
5	Public service	12	20.0
6	Pleaded guilty	8	13.3
7	Age	8	13.3
8	Health	6	10
9	Voluntary surrender	6	10
10	Cooperated with prosecutor	6	10
11	Family situation	6	10

12	No previous criminal history	5	8.5
13	Good behaviour during retention	3	5.0
14	Apologized to victims	2	3.3
15	Admitted genocide occurred	2	3.3
16	Political moderate	2	3.3
17	Support for Arusha Accords	2	3.3
18	Cooperated with UNAMIR	2	3.3
19	Indirect participation	2	3.3
20	Did not play leading role	2	3.3
21	Duress	2	3.3
22	Acknowledge Tribunal	1	1.7
23	Prosecutor violated rights	1	1.7
24	Took some action against genocide	1	1.7

Source: Adopted from Pruitt (2014)

Scholars such as Walker (1999) show us efforts that courts take to individualise sentences through an assessment of aggravation and mitigation circumstances. It matters to individuals attending the sentencing process that these circumstances are addressed well and responded to. Since sentencing is interpretive, processual and performative (Tata 2020, p. 5), it contributes to the ordering of human relations and the restoration of social order, and establishes the interrelationships between law and society, one wonders whether, language used at addressing aggravating and mitigating factors can be said to be as comprehensible to the 'common man' as to be predictive of the ensuing sentence.

The chosen court (tribunal) was not limited to sentencing factors mentioned in the Statute or Rules of procedure (Beresford 2001, p. 53) and it was instructed to take the gravity of the offense into consideration when determining sentencing (UN Article 23[2]) and was further instructed to consider the defendants' individual circumstances. Thus, it is vital to measure the weight given to aggravating and mitigating sentencing factors (Pruitt 2014, p.150). From a linguistic and interpretative point of view, one still wonders how much perlocutionary acts on aggravation and mitigation match and reflect the ensuing sentences.

Methods and Theoretical Issues

The ICTR lists 63 defendants with completed cases or cases on appeal (Pruitt 2014) but data used in this article were accessed in 2003 from the 1995-2000 Basic Documents and Case Law CD-ROM of the then International Criminal Tribunal for Rwanda (ICTR) and some of the 13 then completed cases on http://www.ictr.org. The study worked on all the decided cases at that time, making the sample size and the population the same. These are *the Prosecutor vs. Clement Kayishema* (ICTR-95-1); *the Prosecutor vs. Georges Rutaganda* (ICTR-96-3); *the Prosecutor vs. Jean Paul Akayesu* (ICTR-96-4); *the Prosecutor vs. Obed Ruzindana* (ICTR-96-10); *the Prosecutor vs. Alfred Musema* (ICTR-96-13); *the Prosecutor vs. Georges Ruggiu* (ICTR-97-32); *the Prosecutor vs. Jean Kambanda* (ICTR-97-23); *the Prosecutor vs. Elizaphan Ntakirutimana* (ICTR-96-10); *the Prosecutor vs. Gerard Ntakirutimana* (ICTR-96-17) and *the Prosecutor vs. Omar Serushago* (ICTR-98-39).

The ICTR was one of two such bodies to be established by the United Nations Security Council. The other of its kind is the International Criminal Tribunal for former Yugoslavia (ICTY). The applications and procedures of the tribunal did not significantly differ from any other judicial body. Of the

representation of the judges from parts of the world, the statute states that the Secretary General,

> shall forward the nominations received to the Security Council. From the nominations received the Security Council shall establish a list of not less than twelve and not more than eighteen candidates, taking due account of adequate representation on the International Tribunal for Rwanda of the principal legal systems of the world (Article 12[3] [C] ICTR Statute).

And of their qualifications and election by the General Assembly the statute states that

> [the] judges shall be persons of high moral character, impartiality and integrity who possess the qualifications required in their respective countries for appointment to the highest judicial offices. In the overall composition of the Chambers due account shall be taken of the experience of the judges in criminal law, international law, including international humanitarian law and human rights law (Article 12[1] ICTR Statute).

The tribunal was, therefore, run by persons of high quality, appointed by the Security Council of the United Nations from relatively all over the world, and it operated under a United Nations Statute and Rules of Procedure and Evidence. It was likely to be richer as a sample of adjudicators than would be the case if the study were carried on a court in any chosen country, run by judges of or from the same jurisdiction.

Speech Act Theory

As John Gibbons says, "…trials are linguistic events…and law is inconceivable without language" (Gibbons 1994, p. 3). The courtroom is one of those places where we see language in action, i.e. it is here (more especially at the sentencing stage than even in the examination of witnesses) where some utterances made by the more powerful body count as actions themselves. It is here that the saying is unmistakably the doing of a thing. The Speech Act Theory presumes that producing some utterances under appropriate circumstances counts as doing or performing some act, i.e. the act is done upon saying. Discussing this concept allows one to come across notions of *performative utterance* and *performativity*, which this article looks at in relation to addressing aggravation and mitigation circumstances.

There are three kinds of speech acts namely *locution, illocution* and *perlocution*. The locutionary act is the textual meaning of an utterance produced by a speaker. The illocutionary act (an act of doing something) sets the function to perform the intended meaning in utterances. This is the function of the word, the specific purpose that the speaker has in mind. It is here that the saying is the doing itself. Austin argues that a performative utterance is that which cannot be tested on its truth-value, it is not used to describe things but to do things (Austin, 1962). Clarke adds that a performative utterance is that which does social work i.e. it has the work of doing some action in its being produced (Clarke, 1983). Utterances, which help to perform actions, are called performatives as opposed to those which make statements about events, which Austin calls constatives. The two can be distinguished with examples like 'I'm sorry' (which is constative) and 'I apologise' which is performative. One can say, 'I'm sorry' without being sorry at all but in saying 'I apologise', one is performing the act of seeking for apology (Stubbs 1983).

Perlocutionary Acts at ICTR Sentencing

When one utters something that produces an effect on the hearer (or addressee), he or she has performed a *perlocutionary act*. Austin proffers that in saying something we produce consequential effects upon the feelings and thoughts of our listeners. These feelings and/ or thoughts may or may not have been intended and, thus, we perform a perlocutionary act (Austin, 1962). This perlocutionary act is an utterance "which achieves its function by being said but not necessarily in being said" (Clarke 1983, p. 277).

Perlocutionary acts include persuading, convincing, deterring, surprising, frightening or amusing (Austin 1962; Stubbs 1983). A perlocutionary act "brings about or achieves some other condition or effect by its utterance" (Wardhaugh 1983, p.174). For example, one cannot say to another person, 'I hereby amuse you', but can say or do something which will amuse the other person. Perlocutionary acts can, therefore, be achieved either verbally or non-verbally. Now, looking at our data, one can say that when the chamber addresses aggravating and mitigating circumstances, participants (addressees and hearers) can feel either elated or disheartened (depending on where they stand) but without the chamber having to say something like 'Trial Chamber One now wishes to make the accused happy by addressing his mitigating circumstances'. We are going to look at this in detail later but at this point it suffices to say that the feelings the hearers or addressees get are acquired without the addresser having to make the intention explicit. Whereas the judge is likely to predict the feelings his or her words put into the addressees (though producing these feelings or not is never the reason for addressing aggravation or mitigation), in some instances the addresser may not even be aware of the feelings the words uttered send to those likely to be affected by them. This is the core of this article, when, say, the

sentencer says that 'X selectively assisted the Tutsis', which suggests that X was a good person, the audience would expect to see this comment on goodness reflected in the ensuing sentence. Are the judge's evaluative comments reflected in the ensuing sentences?

Data Interpretation

This article examined the judge's evaluative phrases at addressing aggravating and mitigating circumstances. These circumstances are vital in determining a sentence (Article 23[2] ICTR Statute). Shrinking data occurred because most of the items in the proceedings were repetitive in the judgments presented as part of the background to justify the decisions reached, which would duplicate the items, and even exaggerate their importance. There were 21 aggravating circumstances and 24 mitigating circumstances. Aggravating factors were gravity of the offence committed, abusing authority, number of victims, superior responsibility, active participation in the crime, offender's position or status, offender's zealousness, premeditation, attack on sanctuaries, providing material support, failure to prevent killing, encouragement to commit violence, failure to punish subordinates, vulnerability of victims, not showing remorse, not admitting guilt, being educated, not cooperating, not acknowledging genocide, the identity of victims, and fleeing after genocide.

Mitigating factors were offering selective assistance to Tutsis, prior good character, expressing remorse, offender's public service, pleading guilty, age, health, voluntary surrender, cooperating with the prosecutor, family situation, no previous criminal history, good behaviour during detention, apologizing to victims, admitting that genocide occurred, political moderate, supporting Arusha Accords, cooperating with UNAMIR, indirect participation, not playing leading role, duress, acknowledging the Tribunal, prosecutor violating rights, and taking some action against

genocide. Those factors by themselves are negative enough (aggravating) for a harsher punishment or positive enough (mitigating) for clemency, but this study goes farther to examine evaluative phrases on these circumstances. The *Wordsmith* programme facilitated the determining of the frequency of these evaluative phrases. The frequencies were done on aggravating circumstances by choosing performative phrases and seeing whether and how many times they appear in the data. Mitigating circumstances were examined only by determining how, having been uttered, they were likely to convince one that a lesser sentence was coming.

Moreover, this article chose words and phrases likely to reflect extreme gravity (of the offences committed); show irresponsibility (of the offender); show betrayal suffered by the community – the victims especially due to the offender's conduct; suggest the presence of consciousness in the offender during the commission of their offences - that they knew they were doing the wrong thing (but that they chose to pursue their evil ends); and lastly, remembering that the offenders are supposed to have been holders of high positions before and or during the genocide, I chose words which would reflect that a person in authority is looked upon by those under him to help rather than destroy them. Here I chose 'abuse (of power, trust, and authority).'

i) Aggravating Circumstances

The examination showed presence of words such as *gravity* (17 times); *responsible* (10 times); *betray[ed]* (2 times); *knowingly* (4 times); *abuse[d]* (7 times); *heinous* (3 times); and *shocking,* which appears only once. Words such as *irresponsible, merciless[ly], ruthless[ly], horrible, barbaric* and *nuisance* do not appear in the data at all. The word *responsible,* for example, despite appearing 10 times, only three times is it used as a reproach to the

defendants, that one was supposed or expected to carry out a positive duty for the community (the victims particularly) but he did not. The words *gravity* and *responsible* are farther used to show that the crimes are of extreme or intrinsic gravity, as in "The offences with which the accused Omar Serushago is charged are, irrefutably, of extreme gravity…" (*Prosecutor vs. Serushago*). We also have *the offences for which XY is responsible carry an intrinsic gravity.* I find this admission of the facts to be emotive.

Knowingly is used four times. Two of the productions that carry it are identical and the other two are also identical. So, we may say that we have it used in two different ways, each way twice. *Knowingly and with premeditation* is used twice and …*knowingly and consciously participated [in the murders...]* is used twice as well. It is found in *Omar Serushago committed the crimes knowingly and with premeditation* (*Prosecutor vs. Serushago*); *Kambanda committed crimes knowingly and with premeditation* (Prosecutor vs. Kambanda); *He knowingly and consciously participated in the commission of such crimes…* (*Prosecutor vs. Rutaganda*). Few people will like a person who has committed a serious offence *knowingly.* The addition of the words *and with premeditation* aggravates the offender's badness. *Abuse* appears in its past form seven times; being on abusing powers, authority and trust. It appears in constructions like *[the] Chamber finds that the fact that a person in a high position abused his authority and committed crimes is to be viewed as an aggravating factor* (*Prosecutor vs. Kambanda*). With these aspects go the repeated request of the prosecutor, that due to the gravity of the offences committed, the chamber should pass a sentence for each of the offences one is found guilty of, which should be done in order to reflect the gravity of each offence.

ii) Mitigating Circumstances

Looking at the data on mitigation, one can divide the circumstances into working and non-working mitigating circumstances or strong and weak

mitigating circumstances. Working or strong mitigating circumstances are those that the chamber finds weightier and seem to have affected the sentence passed, whereas non-working or weak are those which the trial chamber has looked into but is of the opinion that they are not potential. They are non-working only because however beautifully they are addressed, they do not help the convicted person to get a lesser sentence. An example of the non-working mitigating circumstances occurs when one gets a life sentence (the heaviest punishment by the Tribunal) after words like, *The trial chamber considers the guilty plea of Jean Kambanda because it has 'occasioned judicial economy, saved victims the trauma and emotions of trial and enhanced the administration of justice* (*Prosecutor vs. Kambanda*).

The chamber passes life sentences for Akayesu, Kayishema, Kambanda, Musema and Rutaganda despite finding and beautifully addressing some mitigation on their part. The chamber in the end says that these mitigating circumstances were not as strong as the gravity of the offences committed. A life sentence being the highest by the tribunal, one is justified to say that mitigating circumstances here did not work in favour of the accused persons. For these defendants and those people supporting them, the illocutionary act (of addressing these circumstances) produced perlocutionary effects of elation and other positive feelings. When these feelings do match the sentence (i.e., they do not lead to less than the life sentence), addressing these factors seems vain.

Nowfor mitigation to be seen to have worked, we are to turn to the other group that got less than the life sentence. And to be sure that mitigation has worked; we are going to refer to the ICTR sentencing guidelines. Let us afford more flexibility and divide this group (of those who got less than a life sentence) into two categories. One in which the chamber simply states

in their evaluation (conclusion) that aggravating circumstances outweigh mitigating circumstances; and the other in which this traditional conclusion is omitted and something slightly different is put in its place. For the first category we have Ruzindana and Ntakirutimana, G, both of whom get a twenty-five-year prison sentence each. In the second category the conclusion is normally something like:

> Having reviewed all circumstances in the Accused's case, individual, mitigating and aggravating, the Chamber declares itself sympathetic to the individual and mitigating circumstances of Elizaphan Ntakirutimana. Special weight has been given, in reaching its decision on the sentence, to *his age, his state of health, his past good character and public service* (Prosecutor vs. Ntakirutimana, E [emphasis mine]).

In this category we have Ruggiu, Serushago and Ntakirutimana, E. For Ruggiu and Serushago the chamber is of the opinion that circumstances surrounding their cases warrant them some clemency. All these get a prison sentence of less than twenty-five years. Serushago gets fifteen years; Ruggiu gets twelve years; and Ntakirutimana, E gets ten years. We can see, however, that these mitigation factors come uncoated with phrases.

Let us now turn to the sentencing guidelines, i.e. the Statute and the Rules of Procedure and Evidence to see whether mitigation has really given people less than deserved. The relevant parts are Articles 22, 23, 26 and 27 of the statute and rules 100, 101, 102, 103, 104 of the Rules of Procedure and Evidence. Nowhere in these parts does one find a definite number of years for imprisonment. However, Article 23 of the Statute and Rule 101 of the Rules instruct the Tribunal to have recourse to the general sentencing practice in Rwanda, with an exception only to the death penalty. In Rwanda, the accused are divided into four groups as follows:

> Category 1:
>
> a) Persons whose criminal acts or those whose acts place them among planners, organizers, supervisors and leaders of the crime of genocide or of a crime against humanity.
> b) Persons who acted in positions of authority at the national, prefectural, communal, sector or cell, or in a political party, the army, religious organisations, or militia and who perpetrated or fostered such crimes; c) Notorious murderers who by virtue of the zeal or excessive malice with which they committed atrocities, distinguished themselves in their areas of residence or where they passed; d) Persons who committed acts of sexual violence.
>
> Category 2: Persons whose criminal acts or whose acts of criminal participation place them among perpetrators, conspirators or accomplices of intentional homicide or of serious assault against the person causing death.
>
> Category 3: Persons whose criminal acts or whose acts of criminal participation make them guilty of other serious assaults against the person.
>
> Category 4: Persons who committed offences against property. (*Prosecutor vs. Kambanda*).

In Rwanda, those in Category 1 get a death penalty; those in Category 2 get life imprisonment; and those in Category 3 (and 4) the sentences are shorter (*Prosecutor vs. Kambanda*). It does not say how short.

The Chamber would impose a life sentence where the Rwandan courts would pass a death penalty. I would like to assume that all things being constant, in the absence of mitigating circumstances, all those found guilty of offences that place them in the first category would do life. Now that one in this category goes with less than a life sentence, it is the discretionary powers of the Chamber that have been called upon to consider circumstances which in the end have given these people less than their otherwise deserved punishment. Now, looking at the sentences passed on those in the group I chose to call the working or strong mitigation, all of the convicted (but for Ruggiu Georges) were found guilty of genocide. Serushago, for example, was found guilty of genocide, murder, extermination and torture; and his position in the genocide seems to fit in Category 1 but he got away with fifteen years. I would place Ruzindana in Category 1(C) but because he was sentenced alongside Kayishema who got a life sentence, and he did not have as much influence as Kayishema; for the Chamber to show the difference in their degree of participation and responsibility Ruzindana gets away with twenty-five years, guilty of genocide. Both Ntakirutimana E and Ntakirutimana G (whom I would place in Category 2) are found guilty of genocide (Ntakirutimana G with murder as well) but they get less than life imprisonment. Ntakirutimana E remains an explicit expression of the grace that comes from mitigation as pointed out in one of the examples above.

Discussion

This article aimed to find whether evaluative comments or phrases by judges at airing aggravation and mitigation factors, are predictive of ensuing sentences. Aggravating circumstances were expected to carry language that would reflect the level of punishment. Addressing aggravating circumstances being a tool of the prosecution to have the judge (and jury) pass a heavy sentence on the offender would show the badness

of the accused. Examination of the data further show that very few utterances would count as emotive. Emotive evaluations do not seem to be a major characteristic in the ICTR sentencing despite five out of ten accused persons got no less than the highest sentence by the tribunal, which may be said to be a result of weight of aggravating circumstances on their part.

Five out of ten people got a life sentence despite receiving a convincing address of their mitigating circumstances. The Chamber said that it "considers a guilty plea because it is economic, it smoothens administrative activities and it encourages other offenders, known or unknown, to come forward and plead guilty" (*Prosecutor vs. Kambanda*). Despite the emphasis on the importance of a guilty plea, one of the accused persons that came forward got a life sentence, the highest sentence the tribunal could pass. In this case the language of mitigating circumstances is not so predictive of the punishment.

Mitigation, however, has been more on the working side than on the non-working side. Perhaps this is "because the factors recognized as aggravating or mitigating are thought to be uncomplicated or uncontroversial, or (in the terminology of the English judiciary) 'well known' and 'well established" (Ashworth 2005, p.151) or are best left to the discretion of individual judges (von Hirsch 2011, p. xv). Judges are left to make decisions using their personal judgment. Though this is not to say that discretion should be eliminated—because it is certainly important—the lack of guidance leads to drawbacks as well (Cheung 2017, p. 528). Some judges do not recognise what these comments do to the audience and their trust for the court. This article finds no fit between emotive evaluations and the ensuing jail sentences.

To ensure greater consistency among the sentencing decisions, the issue of discretion should be checked, otherwise airing mitigation and not acting on these circumstances would be promoting public scepticism towards sentencing. Judges should consider factors aggravating or mitigating a sentence only if they: (i) advance an objective of sentencing; (ii) are necessary to give effect to the proportionality principle; (iii) are justified by reference to broader objectives of the criminal justice system; or (iv) are supported by reference to the requirements of broader (concrete) principles of justice (Bagaric, 2014:1163). And addressing these factors should find a fit between evaluative comments and the ensuing sentence.

Conclusion

For those expecting the perlocution acts to address aggravation and mitigation to be in line with the ensuing sentence will still be looking for the reasons for having aggravation and mitigation as part and parcel of the sentencing process. This article used Speech Act Theory in the interpretation of language of the sentencing process, aiming to find out whether the language used at airing aggravation and mitigation circumstances—the evaluative comments—are predictive of the sentence. After addressing aggravation and mitigation circumstances making them hope in certain directions, the audience would not expect the sentence to go the other way. This will be perlocution begetting another perlocution. We have seen that emotive evaluations are not a major characteristic in sentencing, and where they are used, they do not predict the harshness of sentences. It seems like aggravation and mitigation standards are given a somewhat differing emphasis in the ICTR trials.

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