

Article

# Sentencing of International Crimes at the ICTY and ICTR

Consistency of Sentencing Case Law

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Abstract

One of the fundamental principles of justice is consistency - like cases should be treated alike. Consistency of sentencing can be approached on several levels – the two fundamental ones being consistency in approach and consistency in outcome. The former refers to a principled way of sentence determination while the latter concerns the actual sentencing outcomes in a sense of numerical comparisons of sentence length across individual cases. This article analyses ‘consistency in approach’ of sentencing at the International Criminal Tribunals for the Former Yugoslavia and Rwanda (ICTY and ICTR). The conclusions demonstrate that on a general level, a set of sentencing principles is consistently emphasised in the ICTY and ICTR cases. The inconsistencies and disparities across cases are, however, identified with respect to particularities, such as what factors are relevant for the gravity assessment and whether a particular mitigating/aggravating factor indeed aggravates/mitigates the sentence in a particular case. The main problem of the ICTY and ICTR judges’ sentencing reasoning seems to be a lack of transparency and clarity. On the basis of a critical examination of the ICTY and ICTR case law the article offers suggestions on how to develop more transparent and understandable sentencing practices.

## I. Introduction

Over the last 15 years, the judges of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have produced an extensive body of sentencing case law. Given a little precedential guidance stemming from their predecessors (the International Military Tribunals in Nuremberg and Tokyo) and a very vague positive legal framework, the ICTY and ICTR judges have been vested with a large degree of discretion with regard to sentencing. This article aims to describe the current sentencing of international crimes at the ad hoc Tribunals by analysing the judges’ sentencing reasoning and assessing the consistency of their sentencing argumentation.

One of the fundamental principles of justice is consistency - like cases should be treated alike.<sup>1</sup> Consistency of sentencing can be approached on several levels – the two fundamental ones being consistency in approach and consistency in outcome. The former refers to a principled way of sentence determination while the latter concerns the actual sentencing outcomes in a sense of numerical comparisons of sentence length across individual cases. Both levels are closely interrelated and it is hardly conceivable that one could exist without the other. Consistency in approach requires that there is a uniform, consistent approach

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<sup>1</sup> A.J. Ashworth, *Sentencing Reform Structures*, *Crime & Justice* 1992-16, p. 183.

towards sentence determinations across all cases. Therefore, the sentencing discretion should be exercised in a principled manner. There should be a coherent judicial approach to the exercise of discretion in sentencing, which requires all decisions to be based on common standards – general underlying principles – that are uniformly applied to the facts of each case.<sup>2</sup>

An extensive amount of literature has been dedicated to the doctrinal and normative analysis of the Tribunals' sentencing case law.<sup>3</sup> The question whether the ICTY and ICTR sentencing reasoning is consistent has been discussed at length in academic circles. Many studies have evaluated selected aspects of the Tribunals' sentencing jurisprudence, such as rationales of international sentencing, mitigating and aggravating factors, the principle of proportionality or recourse to domestic sentencing practices. Scholars have often noted discrepancies in the Tribunals' sentencing case law and the sentencing practice of the ICTY and ICTR was subjected to heavy criticism. Drawing on previous literature, this article discusses the approach of the Tribunals' judges to sentence determinations and analyses its consistency. It demonstrates that on a general level consistent patterns have emerged in the ICTY and ICTR sentencing case law. The main problem seems to be a lack of clarity and transparency of sentence determinations.

Outside the introduction and conclusion, the text is divided into two main parts. Section 2 describes the legal framework of the sentencing at the Tribunals. Section 3 analyses ICTY and ICTR sentencing case law. Section 3 is further divided into three sub-sections, corresponding to different levels of analysis. Starting with the broadest level, the ICTY and ICTR judges' pronouncements regarding the objectives of international punishment are discussed (Section 3.1). Then, the attention turns to the so-called general principles of sentence determination, i.e. principles that are more concrete than the abstract sentencing rationales, yet abstract enough to be generally applicable across cases (Section 3.2). These general principles could be perceived as guidelines for selection and weighing of factors relevant in sentence determination. Finally, operationalisation of these general principles in individual cases, such as assessment of gravity of crimes (Section 3.2.1) or particular aggravating or mitigating circumstances (Section 3.2.2) are analysed. Section 4 summarises conclusions regarding the consistency of judges' sentencing argumentation at the ICTY and ICTR and offers suggestions for future development of a more principled sentencing approach at international criminal tribunals.

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<sup>2</sup> A. Ashworth, *Towards European Sentencing Standards*, *European Journal on Criminal Policy and Research*, 1994-2-1, p. 9.

<sup>3</sup> Cf. M. Drumbl, *Atrocity, Punishment and International Law*, New York: Cambridge University Press 2007; S. Beresford, *Unshackling the Paper Tiger: The Sentencing Practices of the Ad Hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda*, *International Criminal Law Review* 2001-1, pp. 33-90; M. Bagaric & J. Morss, *International Sentencing Law: In Search of a Justification and Coherent Framework*, *International Criminal Law Review* 2001-6, pp. 191-225; M.B. Harmon & F. Gaynor, *Ordinary Sentences for Extraordinary Crimes*, *Journal of International Criminal Justice* 2007-5, p. 683; J.D. Ohlin, *Towards a Unique Theory of International Sentencing* in G. Sluiter, S. Vasiliev (Eds.): *International Criminal Procedure: Towards a Coherent Body of Law*, USA: Cameron May 2009, pp. 373-404; S. D'Ascoli, *Sentencing in International Criminal Law, The UN Ad Hoc Tribunals and Future Perspectives for the ICC*, Oxford: Hart Publishing 2011.

## II. Sentencing in Positive Law

The positive law provisions regulating sentencing are almost identical for both Tribunals.<sup>4</sup> Applicable penalties are limited to imprisonment. Articles 24/23 ICTY/ICTR Statute contain very general instructions as to what factors should be taken into account in imposing sentences, namely the gravity of the offence and the individual circumstances of the convicted person. What is actually meant by the 'gravity of the offence' or which 'individual circumstances' are relevant is unclear. Furthermore, when determining the terms of imprisonment, judges shall have recourse to the local courts' practices regarding prison sentences (Yugoslavian or Rwandese).<sup>5</sup> The provisions of the Statutes are supplemented by the Rules of Procedure and Evidence (RoPEs). Only one rule, Rule 101, of the 165/154 ICTY/ICTR rules governing the proceedings before the Tribunals is dedicated to factors relevant to sentencing. Rule 101 clarifies the regulation of the sentencing process only to a very limited extent. It limits the range of applicable sentences – the maximum sentence available to the judiciary is life imprisonment. It also instructs judges to take into account any aggravating and/or mitigating circumstances when determining the sentence. However, no list of aggravating and mitigating factors is provided. Only two potential mitigating factors are explicitly mentioned: 'superior orders' and 'substantial cooperation with the Prosecutor'. Effectively, judges are left to determine on a case-by-case basis what factors justify an increase or reduction in sentence length.

Consequently, the positive law gives judges large amounts of sentencing discretion and is not sufficient to ensure a development of consistent jurisprudence. However, it is possible that judges in their case law developed an approach that is consistently followed across all the decisions. It is, therefore, necessary to examine the Tribunals' sentencing case law to see whether there indeed is consistency in approach in the ICTY and ICTR sentencing. Formally, the common law doctrine of '*stare decisis*' or 'precedent' does not apply at the Tribunals. The judges, however, frequently refer to prior judgments in their sentencing argumentation. These references, for the most part, pertain to points of law and factors to consider in sentencing.<sup>6</sup> In *Aleksovski* the Appeals Chamber generally approved the practice of precedent.<sup>7</sup> It was held that under normal circumstances Trial Chambers and Appeals Chamber shall follow the previous Appeals Chamber's decisions unless there are cogent reasons in the interest of justice calling for the Appeals Chamber to depart from its previous decision.<sup>8</sup>

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<sup>4</sup> ICTY Statute, U.N. Doc. S/Res/827, Art 24; ICTR Statute UN Doc S/RES/955, Art 23; ICTY/ICTR Rules of Procedure and Evidence, Rule 101.

<sup>5</sup> Art 24(1) ICTY Statute; Article 23(1) ICTR Statute. These provisions were inserted in the Statutes in particular out of concerns stemming from the *nulla poena sine lege* principle and prohibition of retroactive punishment. See e.g. W. Schabas, Perverse Effects of Nulla Poena Principle: National Practice and the Ad Hoc Tribunals, *European Journal of International Law* 2000-11-3, p. 522.

<sup>6</sup> M. Drumbl 2007, *supra* note 3, p. 59.

<sup>7</sup> *The Prosecutor v Aleksovski*, Judgment, Case No. IT-95-14/1-A, Appeals Chamber, 24 March 2000, paras. 92-115

<sup>8</sup> *Idem*, paras. 107, 113.

### III. Sentencing Jurisprudence

#### III.1 Purposes of International Sentencing

The answer to the question of why we punish perpetrators of international crimes is provided neither in the positive law nor in the Tribunals' case law. The Statutes of the ICTY and ICTR do not mention any objectives of punishment that should guide judges in meting out penalties in individual cases. Therefore, the ICTY and ICTR judges are generally free to switch from one self-chosen rationale to another as they see fit.<sup>9</sup> The general aims, in a sense of restoration and maintenance of international peace and security, are provided in the resolutions establishing the Tribunals.<sup>10</sup> However, this rhetoric was employed primarily to justify the creation of the Tribunals under Chapter VII of the UN Charter. It is unclear whether and how these relate to the meting out of penalties to individuals standing trial before the Tribunals. Some principles specific to sentencing have emerged in ICTY and ICTR case law. In this respect, judges clearly found inspiration in classic 'domestic' penal theories.<sup>11</sup> Over the years, the following purposes have been listed by judges as relevant for international sentencing: retribution, justice, deterrence (general and specific), rehabilitation, expressivism, reprobation, stigmatisation, affirmative prevention, incapacitation, protection of society, social defence and finally restoration/maintenance of peace and reconciliation.<sup>12</sup> Different combinations of some of these principles are usually listed at the beginning of the sentencing part of a judgment. There is a considerable amount of confusion across the ICTY and ICTR cases regarding the purposes of punishment. The confusion can be identified on several levels. Firstly, as already noted above, there is no uniform approach among different benches regarding what objectives the ICTY and ICTR sentencing actually pursues and what weight should be ascribed to the respective objectives. Secondly, judges are not clear about what the exact role of the purposes of punishment in sentence determination is and how exactly individual sentencing aims inform sentence determination.

Regarding the former, throughout the case law different purposes of punishment are emphasised in different cases and judges are also not consistent in their proclamations as to what is the primary aim of international sentencing. In general, deterrence and retribution are emphasised in the majority of cases.<sup>13</sup> There have, however, been cases where only deterrence is mentioned<sup>14</sup> or no sentencing objectives are mentioned at all.<sup>15</sup> There are also differences in prioritising between these two rationales. As Drumbl summarises:

<sup>9</sup> M. Bagaric & J. Morss 2001, supra note 3, p. 208.

<sup>10</sup> Res. 827, Res. 955, supra note 4, Preambles.

<sup>11</sup> For the overview of 'domestic' sentencing theories see J.W. de Keijser, *Punishment and Purpose, From Moral Theory to Punishment in Action*, Amsterdam: Thela Thesis 2000, pp. 11-31.

<sup>12</sup> The suitability/applicability of these various sentencing objectives to international crimes has been discussed at length in legal doctrine. Bagaric & Morss 2001, supra note 3, p. 255; J. Ohlin 2009, supra note 3; Beresford 2009, supra note 3, pp. 39-45; Harmon & Gaynor 2007, supra note 3, pp. 692-696.

<sup>13</sup> *Prosecutor v. Milutinovic et al.*, Judgment, Case No. IT-05-87-T, Trial Chamber, 26 February 2009, para.1144.

<sup>14</sup> *Prosecutor v. Kajelijeli*, Judgment, Case No. ICTR-98-44A, Trial Chamber II, 1 December 2003, para. 945; *Prosecutor v. Gacumbitsi*, Judgment, Case No. ICTR-2001-64, Trial Chamber III, 17 June 2004, para.335; *Prosecutor v. Kamuhanda*, Judgment, Case No. ICTR-99-54A, Trial Chamber II, 22 January 2003, para. 755; *Prosecutor v. Muhimana*, Judgment, Case No. ICTR-95-1B, Trial Chamber III, 28 April 2005, para. 588.

<sup>15</sup> *Prosecutor v. André Ntagura, Emmanuel Bagambiki, Samuel Imanishimwe*, Judgment, Case No. ICTR-99-46-T, Trial Chamber III, 25 February 2004; *Prosecutor v. Rugambarara*, Judgment, Case No. ICTR-0059-T, Trial Chamber II, 16 November 2007; *Prosecutor v. Sikirica et al.*, Judgment, Case No. IT-95-8-S, Trial Chamber III, 13 November 2001; *Prosecutor v. Krstic*, Judgment, Case No. IT-98-33, Trial Chamber, 2 August 2001;

“The ICTY has issued judgments that cite retribution and general deterrence as ‘equally important’, judgments that cite retribution as the ‘primary objective’ and deterrence as a ‘further hope’, warning deterrence ‘should not be given undue prominence’, and judgments that flatly state ‘deterrence is probably the most important factor in the assessment of appropriate sentences’”.<sup>16</sup>

Aside from retribution and deterrence, the third most frequently cited sentencing objective by the ICTY and ICTR judges is rehabilitation. Nonetheless, in the majority of cases it is emphasised that given the seriousness of the committed crimes, rehabilitation should not be given undue weight.<sup>17</sup>

The role the sentencing purposes play in meting out individual sentences is also not very clear. In some cases the sentencing purposes are enumerated along the other sentencing factors such as gravity of the crime or motivation of a perpetrator.<sup>18</sup> In others they are deemed to form “the context within which an individual accused’s sentence must be determined”<sup>19</sup>, they “form the backdrop against which the accused’s sentence has been determined”<sup>20</sup> or “constitute the matrix in which the proportionate sentence is meted out”<sup>21</sup>. It is not possible to assess how the sentencing objectives guide determination of a particular sentence. In the majority of cases it seems that the purposes are only *pro forma* listed at the beginning of the sentencing part of the judgment with no explanation what they entail and no clear link to the rest of the sentencing argumentation.

Consequently, the ICTY and ICTR case law lacks a consistent approach regarding the purposes of punishment and their role in sentence determination. The question remains, however, whether this lack of clear argumentation also manifests itself in the rest of judges’ reasoning in individual cases. It often seems that judges only list individual purposes of punishment without any explicit linking to the rest of their argumentation. Accordingly, it is possible that despite this ‘chaos’ on a level of general sentencing aims, a consistent reasoning regarding the factors relevant for sentence determination evolved in the case law. On the face of it, the differences among individual cases regarding the enumerated sentencing objectives and their role do not seem to affect the structure of sentencing argumentation and the factors judges emphasise in meting out individual sentences. As demonstrated in the next section, some common principles of sentence determination are consistently discussed and emphasised across the case law.

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*Prosecutor v. Rukundo*, Judgment, Case No. ICTR-2001-70-T, Trial Chamber II, 27 February 2009;

*Prosecutor v. Kvočka et al.*, Judgment, Case No. IT-98-30/1-T, Trial Chamber, 2 November 2001.

<sup>16</sup> M. Drumbl 2007, *supra* note 3, p. 65.

<sup>17</sup> *Milutinovic* 2009, *supra* note 13, para. 1146; *Prosecutor v. Deronjic*, Judgment on Sentencing Appeal, Case No. IT-02-61-A, Appeals Chamber, 20 July 2005, para. 136. In a handful of cases, however, judges seem to ascribe more importance to rehabilitation. Cf. *Prosecutor v. Jokic*, Sentencing Judgment, Case No. IT-01-42/1-S, Trial Chamber I, 18 March 2004, para. 36, *Prosecutor v. Obrenovic*, Sentencing Judgment, Case No. IT-02-60/2-S, Trial Chamber I, Section A, 10 December 2003, para. 53.

<sup>18</sup> *Prosecutor v. Mucic et al.*, Judgment, Case No. IT-96-21-T, Trial Chamber, 16 November 1998, paras.1231-1235.

<sup>19</sup> *Prosecutor v. Plavsic*, Sentencing Judgment, Case No. IT-00-39&40/1-S, Trial Chamber, 27 February 2003, para.22.

<sup>20</sup> *Prosecutor v. Krnojejac*, Judgment, Case No. IT-97-25-T, Trial Chamber II, 15 March 2002, para.508; *Prosecutor v. Simic*, Sentencing Judgment, Case No. IT-95-9/2-S, Trial Chamber II, 17 October 2002, para.33.

<sup>21</sup> *Prosecutor v. Krajisnik*, Judgment, Case No. IT-00-39-A, Appeals Chamber, 17 March 2009, para. 808.

### III.2 General Principles of Sentence Determination

The general principles of sentence determination are broad principles judges claim to pursue in individual cases. They provide guidance and determine what factors are relevant and what weight should be ascribed to individual sentencing factors in sentence determination. The ICTY and ICTR judges consistently emphasise several sentencing principles such as the principle of primacy of gravity, and the principles connected to the gravity evaluation: totality, proportionality and gradation. These gravity-related principles are complemented by the principle of individualisation calling for personalised sentencing.

#### III.2.1 Principle of Primacy of Gravity and Principle of Totality

The gravity of the crime is one of the sentencing factors explicitly dictated by the positive law. Accordingly, in the ICTY and ICTR case law the gravity is uniformly emphasised as the most important sentencing consideration. The gravity of the offence has been labelled as “*the starting point for consideration of an appropriate sentence*”<sup>22</sup>, “[*b*]y far the most important consideration, which may be regarded as the litmus test for the appropriate sentence”<sup>23</sup>, “*the most important factor to be considered*”<sup>24</sup>, “*the principal guideline for sentencing*”<sup>25</sup> or “*a factor of paramount importance in the determination of sentence*”<sup>26</sup>. Therefore, “*the overriding obligation in determining sentence is that of fitting the penalty to the gravity of the criminal conduct*”<sup>27</sup>. Since, however, neither the Statute nor the Rules define the concept of gravity, it is also important to examine what ‘gravity’ actually means in the ICTY and ICTR case law. This analysis is conducted in Section 3.3.1 below.

The principle of totality is closely related to the principle of primacy of gravity. It stipulates that a final sentence should reflect the totality of criminal conduct a defendant is convicted of. Since almost all of the ICTY and ICTR defendants are convicted and sentenced on multiple counts and in the majority of cases only one global sentence is handed out, the principle of totality dictates the final sentence to reflect each of the convictions and their combination. The origins of the totality principle can be traced back to the RoPE’s Rule 87(C) that regulates sentencing in cases of multiple convictions and offers Trial Chambers two options: (i) impose a sentence in respect of each finding of guilt and indicate whether such sentences shall be concurrent or consecutive or (ii) impose a single sentence reflecting the totality of the criminal conduct of the accused.<sup>28</sup> Increasingly, both ICTY and ICTR judges have been handing out single sentences. Therefore, the principle of totality has gained importance and is consistently referred to. In case of cumulative convictions (i.e. convictions for several different offences based on the same criminal conduct) the principle of totality must be carefully applied since it is important to avoid ‘double-counting’: “*In the case of two legally distinct crimes arising from the same incident, care would have to be taken that the sentence does not doubly punish in respect of the same act which is relied on as satisfying the elements common to the two crimes, but only that conduct which is relied on only to satisfy the distinct elements of the relevant*

<sup>22</sup> Aleksovski 2007, supra note 7, para.182.

<sup>23</sup> *Prosecutor v. Mucic et al.*, Judgment, Case No. IT-96-21-A, Appeals Chamber, 20 February 2001, para.731; *Prosecutor v. Akayesu*, Judgment, Case No. ICTR-96-4-A, Appeals Chamber, 1 June 2001, para.131.

<sup>24</sup> *Prosecutor v. Jelusic*, Judgment, Case No.IT-95-10-T, Trial Chamber, 14 December 1999, para.121.

<sup>25</sup> *Prosecutor v. Brdjanin*, Judgment, Case No. IT-99-36-T, Trial Chamber II, 1 September 2004, para.1093.

<sup>26</sup> *Prosecutor v. Limaj et al.*, Judgment, Case No. IT-03-66-T, Trial Chamber II, 30 November 2005, para.724.

<sup>27</sup> *Prosecutor v. Banovic*, Sentencing Judgment, Case No. IT-02-65/1-S, Trial Chamber, 28 October 2003, para.36.

<sup>28</sup> ICTY RoPE, ICTR RoPE, supra note 4, Rule 87(C).

crimes”.<sup>29</sup> In practice, however, it is extremely difficult to appraise how the principle of totality actually works since the global sentencing makes the ICTY and ICTR sentence determination non-transparent. Trial Chambers usually neither indicate sentence severity for individual offences nor do they detail weight ascribed to individual aggravating and mitigating factors. They usually hand out one global sentence at the end of the sentence argumentation claiming that it reflects the totality of a defendant’s criminal conduct. How this ‘totality’ was assessed is however rarely indicated.

### III.2.2 Principle of Proportionality

The principle of proportionality forms another sentencing principle closely related to the assessment of the gravity of crimes.<sup>30</sup> At first glance the principle of proportionality seems straightforward – the sentence should be proportional to the gravity of the crime. In many domestic jurisdictions, the contours of proportionality evaluation are indicated in criminal codes that provide for sentencing ranges for individual offences. This is not the case at the ICTY and ICTR. What the proportional sentence in case of genocide, crimes against humanity and war crimes entails is not entirely clear. On the one hand, the ICTY and ICTR judges made clear that proportionality in their case law is limited to ‘the offence relative proportionality’ (i.e. punishment should be proportional to the gravity of the offence) and excluded ‘the defendant relative proportionality’ from their assessment (i.e. punishment should be proportional relative to the other defendants, more culpable defendants should be punished more severely than less culpable defendants).<sup>31</sup> On the other hand, it is extremely difficult to grasp the functioning of the proportionality principle in case of international crimes.<sup>32</sup> Crimes tried by the Tribunals are extremely serious compared to ordinary domestic offences. Offenders are usually convicted of multiple instances of serious mistreatment or killing of their victims and one would expect, therefore, that penalties would be heavier than those imposed by domestic courts. This is, however, not the case and the Tribunals have been criticised for leniency.<sup>33</sup>

### III.2.3 Principle of Gradation

The principle of gradation is another principle related to the gravity of crimes and its main purpose is to differentiate between crimes of different degrees of seriousness. It is closely related to the position a defendant occupied and the role he/she played in the overall conflict situation. In *Tadić* the Appeals Chamber reduced the trial sentence because “*the Trial Chamber failed to adequately consider the need for sentences to reflect the relative significance of the role of the*

<sup>29</sup> *Prosecutor v. Kunarac et al.*, Judgment, Case No. IT-96-23-T and 23/1-T, Trial Chamber, 22 February 2001, para. 855; *Mucic et al.* 2001, supra note 23, para. 769.

<sup>30</sup> *Prosecutor v. Rutaganda*, Judgment, Case No. ICTR-96-3-A, Appeals Chamber, 26 May 2003, para. 591.

<sup>31</sup> *Prosecutor v. Kamuhanda*, Judgment, Case No. ICTR-99-54A-A, Appeals Chamber, 19 September 2005, para. 359; *Prosecutor v. Nikolic*, Judgment on Sentencing Appeal, Case No. IT-94-2-A, Appeals Chamber, 4 February 2005, para. 21.

<sup>32</sup> The difficulty of operationalising the proportionality principle are also apparent in the appeal decision-making at the ICTY and ICTR. A frequent ground of appeal of both, defense and prosecution, is that a sentence handed down by the Trial Chamber is manifestly disproportionate to the severity of crimes committed. These appeals are, however, rarely successful (exceptions: Appeals Chambers in *Galic* [ *Prosecutor v. Galic*, Judgment, Case No. IT-98-29-A, Appeals Chamber, 30 November 2006] and *Gacumbitsi* [ *Prosecutor v. Gacumbitsi*, Judgment, Case No. ICTR-2001-64-A, Appeals Chamber, 7 July 2006]). The Appeals Chamber usually relies on a considerable amount of discretion of Trial Chambers to reject these claims.

<sup>33</sup> Cf. *Bagaric & Morss* 2001, supra note 3, p. 253. who noted that “penalties imposed by the Tribunals are breathtakingly light compared to similar offences when committed in any other domestic jurisdiction”; *Drumbl* 2007, supra note 3, p. 15, *D’Ascoli* 2011, supra note 3, p. 50.

*Appellant in the broader context of the conflict in the former Yugoslavia*".<sup>34</sup> The Appeals Chamber emphasised that "[a]lthough the criminal conduct ... was incontestably heinous, his level in the command structure, when compared to that of his superiors, i.e. commanders, or the very architects of the strategy of ethnic cleansing, was low".<sup>35</sup> Over time a general principle evolved in the ICTY and ICTR case law that sentences should be gradated relative to the authority of a defendant in the state structure and the significance of his/her role in the crimes. Consequently, and as often reiterated by the ICTR judges, life imprisonment as the severest sentence available to judges should be reserved for the most serious offenders,<sup>36</sup> being those at the upper end of the sentencing scale, such as those who planned, led or ordered atrocities. Accordingly, judges often note that offenders receiving the most severe sentences tend to have been in senior positions of authority, such as ministers or governmental officials.<sup>37</sup> The relative position of the accused, however, has to always be balanced against the seriousness of committed crimes. It is not the steadfast rule that all low-ranking defendants automatically receive low sentences and all authorities are automatically punished the most. Very severe sentences can also be imposed on those at lower levels who zealously orchestrated or participated in crimes.<sup>38</sup> In this sense, the principle of gradation resembles the defendant-relative proportionality whereby judges compare the criminal conduct of a defendant to that of other defendants, taking into account in particular his significance in the overall conflict and the heinousness of his crimes.

### III.2.4 Principle of Individualisation

In addition to the gravity of the crime and the principles revolving around its assessment, the individualisation of sentences is another principle uniformly emphasised and discussed by ICTY and ICTR judges. Since under the positive law judges are asked to individualise a sentence and almost no further guidelines regarding relevant factors are provided, they exercise a considerable amount of discretion.<sup>39</sup> The individualisation of a sentence is closely connected to the evaluation of personal circumstances of a defendant. In the majority of ICTY and ICTR cases, the individual circumstances are discussed under the heading of aggravating and mitigating factors. Several principles related to the assessment of aggravating and mitigating factors are consistently emphasised in the case law. Aggravating factors are circumstances directly related to the offence for which the person has been charged and to the offenders themselves when they committed the offence. Therefore, they are linked to the assessment of the gravity of the crime in that they increase the seriousness of offences committed. They must be proven by the prosecution beyond any reasonable doubt. The standards applying to mitigating factors are looser. Mitigating factors need to be established on the balance of probabilities and need not relate directly to the offences for which the person has been charged.<sup>40</sup> The weight to be accorded to mitigating circumstances lies within the discretion of a Trial Chamber.<sup>41</sup> A finding of mitigating circumstances relates to the assessment of the sentence and in no way derogates from the gravity of the crime nor diminishes the responsibility of convicted persons or lessens the degree of condemnation of

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<sup>34</sup> *Prosecutor v. Tadic*, Judgment in Sentencing Appeals, Case No. IT-94-1A, Appeals Chamber, 26 January 2000, para. 55-58.

<sup>35</sup> *Idem*, para. 56.

<sup>36</sup> *Prosecutor v. Nahimana et al*, Judgment, Case No. ICTR-99-52-T, Trial Chamber I, 3 December 2003, para. 1097.

<sup>37</sup> *Prosecutor v. Setako*, Judgment and Sentence, Case No. ICTR-04-81-T, Trial Chamber I, 25 February 2010, para. 500.

<sup>38</sup> Mucic et al. 2001, supra note 23, para. 847; Kunarac et al. 2001, supra note 29, para. 858.

<sup>39</sup> Milutinovic et al. 2009, supra note 13, para. 1142; Akayesu 2001, supra note 23, para. 407.

<sup>40</sup> *Prosecutor v. Nindabahizi*, Judgment and Sentencing, Case No. ICTR-01-71-I, Trial Chamber I, 15 July 2004, para. 502.

<sup>41</sup> *Prosecutor v. Kajelijeli*, Judgment, Case No. ICTR-98-44A, Appeals Chamber, 23 May 2005, para. 294.

their actions. Such a finding mitigates the punishment, not the crime.<sup>42</sup> A defendant can be sentenced to life imprisonment if the gravity of the offence requires the imposition of the maximum sentence, even if judges identify mitigating circumstances.<sup>43</sup>

Consequently, on a general level ICTY and ICTR judges seem to follow a similar algorithm when determining sentences. Sentence severity at the ICTY and ICTR seems to be primarily determined by factors relating to the gravity of the crime (by applying the principles of proportionality, totality and gradation and assessing aggravating factors), and the sentence is then adjusted by taking into account the individual circumstances of the offender, i.e. mitigating factors ('principle of individualisation').

### III.3 Application of General Principles to Individual Cases

This section analyses how the general principles of sentence determination are operationalised and applied to facts in individual cases. Since almost all the above principles come down to the gravity evaluation, the concept of gravity of crimes is discussed first. Thereafter, aggravating and mitigating circumstances accepted by the ICTY and ICTR judges to individualise sentences are discussed.

#### III.3.1 Concept of Gravity and its Assessment

In theory, the gravity can be determined *in abstracto* and *in concreto*. The gravity *in abstracto* is based on an analysis, in terms of criminal law, of the subjective and objective elements of the crime. The gravity *in concreto* depends on the harm done and on the culpability of the offender.<sup>44</sup> The ICTY and ICTR judges arguably take into account both the gravity *in abstracto* and *in concreto*. However, the gravity *in abstracto* is usually only briefly noted - judges state that all crimes under the Tribunals' jurisdiction are very serious - and the emphasis is clearly put on the concrete gravity of crimes in the sense of evaluating exactly what a defendant did.

##### III.3.1.1 Gravity in Abstracto and Structure of Penalties

Regarding the gravity *in abstracto*, the Tribunals' judges usually limit the assessment only to brief notes regarding comparisons among separate categories of international crimes. They just state that there is no hierarchy among genocide, crimes against humanity, and war crimes and that all these categories are very serious violations of international (humanitarian) law.<sup>45</sup>

Genocide, crimes against humanity and war crimes could all be committed through a wide variety of punishable acts listed in the respective articles of the Statutes. These so called 'underlying offences' differ in character and range from killings involving torture, rape, and inhuman treatment to property-related offences such as pillaging or destruction of property. At the domestic level, individual offences are usually distinguished on the basis of their gravity *in abstracto* in terms of a range of applicable sentences stated in law. This is not the case at the ICTY and ICTR. Sometimes judges note that the legal nature of the offence forms

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<sup>42</sup> *Prosecutor v. Elizaphan and Gerard Ntakirutimana*, Judgment and Sentence, Case No. ICTR-96-10 & ICTR-96-17-T, Trial Chamber I, 21 February 2003, para. 781.

<sup>43</sup> *Prosecutor v. Muhimana*, Judgment, Case No. ICTR-95-1B-A, Appeals Chamber, 21 May 2007, para. 234.

<sup>44</sup> Allison M. Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, *Virginia Law Review* 2001-87, p. 609.

<sup>45</sup> *Prosecutor v. Mrksic & Sljivancanin*, Judgment, Case No. IT-95-13/1-A, Appeals Chamber, 5 May 2009, para. 375. The question of hierarchy among genocide, crimes against humanity and war crimes, however, was not so clear cut in the past. In the early case law judges endorsed the idea of hierarchy among genocide, crimes against humanity and war crimes. Cf. *Prosecutor v. Tadic*, Sentencing Judgment, Case No. IT-94-1-T, Trial Chamber, 14 July 1997, para. 73.

one of the factors to be considered when assessing the gravity of crime.<sup>46</sup> However, they neither discuss or evaluate the abstract gravity of individual offences in more detail, nor compare offences to assess their relative seriousness (with the exception of crimes such as persecution, that is sometimes singled out by the ICTY judges as “one of the most vicious of all crimes against humanity”<sup>47</sup> and “on account of its distinctive features (‘discriminatory intent’), it justifies a more severe penalty”<sup>48</sup>; or torture that “constitutes one of the most serious attacks upon a person’s mental or physical integrity. The purpose and the seriousness of the attack upon the victim set torture apart from other forms of mistreatment”).<sup>49</sup> The ICTR judges seem to dedicate slightly more attention to the *per se* gravity of different offences and even try to determine sentencing ranges for individual offences on the basis of previous ICTY and ICTR practice. This exercise is, however, intricate. The practice of awarding a single sentence for the totality of an accused’s conduct makes it difficult to determine the range of sentences for specific crimes.<sup>50</sup>

### III.3.1.2 Gravity in Concreto

The ICTY and ICTR judges put primary emphasis in sentence determination on the gravity *in concreto* assessment, i.e. particular circumstances of the case at hand.<sup>51</sup> The factors relevant to the ‘concrete’ gravity assessment, however, differ across cases. This confusion arises for two reasons. Firstly, the positive law does not prescribe what factors should be relevant for the gravity assessment and what circumstances further aggravate or mitigate a sentence. Secondly, this matter has also never been authoritatively settled by the Appeals Chamber. Aggravating factors are generally circumstances related to the gravity of the crime increasing its seriousness level. Many domestic jurisdictions provide acceptable factors concerning aggravation of a sentence in the positive law.<sup>52</sup> However, this is not the case in the Tribunal’s legal framework. The Appeals Chamber acknowledged the discretion of trial judges in this respect and noted that “*though gravity of the crime and aggravating circumstances are two distinct concepts, Trial Chambers have some discretion as to the rubric under which they treat particular factors*”.<sup>53</sup> This practice is, however, confusing and obfuscates the boundaries between the notions of gravity of crimes and aggravating factors. According to the Statutes and RoPEs, these shall be separate considerations influencing a sentence determination. The Appeals Chamber has also noted on several occasions that it is preferable to distinguish between the notions of gravity of crimes and aggravating factors.<sup>54</sup> However, the Appeals Chamber has never authoritatively and exhaustively stated what factors are relevant for the gravity assessment and what factors further aggravate a sentence.<sup>55</sup> The most important principle in this respect is that no factor is counted twice in sentence determination to the detriment of

<sup>46</sup> Cf. *Prosecutor v. Rajic*, Sentencing Judgment, Case No. IT-95-12-S, Trial Chamber I, 8 May 2006, para.82; Mrkšić & Sljivancanin 2009, supra note 45, para. 400.

<sup>47</sup> *Prosecutor v. Kupreškić et al.*, Judgment, Case No. IT-95-16-T, Trial Chamber, 14 January 2000, para.751.

<sup>48</sup> *Prosecutor v. Todorović*, Sentencing Judgment, Case No. IT-95-9/1-S, Trial Chamber, 31 July 2001, para. 113.

<sup>49</sup> Simić 2002, supra note 20, para. 34.

<sup>50</sup> *Prosecutor v. Semanza*, Judgment and Sentencing, Case No. ICTR-97-20-T, Trial Chamber, 15 May 2003, para.562.

<sup>51</sup> Mrkšić & Sljivancanin 2009, supra note 45, para. 375.

<sup>52</sup> Cf. D’Ascoli 2011, supra note 3, p. 189.

<sup>53</sup> *Prosecutor v. Hadžihasanović & Kubura*, Judgment, Case No. IT-01-47-A, Appeals Chamber, 22 April 2008, para. 317.

<sup>54</sup> Deronjic 2005, supra note 17, para. 106; Krajisnik 2009, supra note 21, para 787.

<sup>55</sup> In Simba, for example, the Appeals Chamber ruled that zeal and sadism are factors to be considered, where appropriate, as aggravating factors rather than in the assessment of the gravity of an offence. Next to this precedent, however, clear guidelines or principles as to what circumstances shall be constitutive of gravity of crimes and what circumstances work as aggravating have not crystallized in the jurisprudence yet. *Prosecutor vs. Simba*, Judgment, Case No. ICTR-01-76-A, Appeals Chamber, 27 November 2007, para. 320.

the accused: factors which a Trial Chamber takes into account as aspects of the gravity of the crime cannot additionally be taken into account as separate aggravating circumstances, and *vice versa*.<sup>56</sup>

In the latest case law, the concept of gravity has been interpreted as encompassing two aspects: i) the particular circumstances of the case, i.e. the magnitude of harm caused by the offender and represented by, for example, the scale of the crime, the number of victims, the extent of victims' suffering, or the impact of the criminal conduct on victims and their relatives; and ii) the form and degree of the accused's participation in the crime - the offender's culpability. In some cases, however, the gravity assessment was limited to the former aspect, i.e. the assessment of harm, while all factors relevant to the form and degree of a defendant's participation were discussed under the heading of aggravating/mitigating factors.<sup>57</sup> In this way some trial chambers considered all factors pertaining to the accused, including his way of participation, as separate factors not included within the gravity assessment. This interpretation of gravity was corrected by the Appeals Chamber in some of these cases<sup>58</sup>, while in other cases the Trial Chamber's ruling was left undisturbed.<sup>59</sup>

#### **a. Harm**

The assessment of harm caused by a defendant forms an important aspect of the gravity evaluation. Extent and duration of the crime, brutality, number of victims, the vulnerability of victims and the extent of their suffering and impact of crimes on victims, their relatives and broader targeted groups are the relevant considerations in this respect.<sup>60</sup> As discussed below, in some cases these factors are considered within the gravity evaluation, in others they are accepted in aggravation of a sentence. No consistent approach has been developed by the Tribunals in this respect.

#### **b. Involvement**

The second aspect of the crime's gravity assessment relates to the way the offender participated in crime. Considerations such as the mode of individual liability under which a defendant is convicted, his relative significance in the overall conflict, importance of his role in committed crimes or particular cruelty have been considered by various Trial Chambers. Again, however, confusion about the concepts of gravity of crimes and aggravating and mitigating factors is apparent in the case law. For example, a defendant's position of authority is usually considered to be an aggravating factor; however, some trial chambers included it within the gravity assessment.<sup>61</sup>

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<sup>56</sup> Deronjic 2005, supra note 17, paras. 106-107; there have been a number of appeals relating to an alleged double-counting of certain factors for the purposes of sentence determination by a trial chamber. Cf. *Prosecutor v. Nikolic*, Judgment on Sentencing Appeal, Case No. IT-02-60/1-A, Appeals Chamber, 8 March 2006, paras. 60, 61.

<sup>57</sup> *Prosecutor v. Galic*, Judgment and Opinion, Case No. IT-98-29-T, Trial Chamber I, 5 December 2003, para. 758; *Prosecutor v. Krstic*, Judgment, Case No. IT-98-33-T, Trial Chamber, 2 August 2001, para 701.

<sup>58</sup> Galic 2003, supra note 57, para. 409; Krstic 2001, supra note 57, para. 268.

<sup>59</sup> E.g. *Prosecutor v. Kvočka et al.*, Judgment, Case No. IT-98-30/1-A, Appeals Chamber, 28 February 2005, where the Appeals Chamber did not discuss the Trial Chamber's interpretation of gravity of crimes at all.

<sup>60</sup> Milutinovic et al. 2009, supra note 13, para. 1147; Mrksic & Slivancanin 2009, supra note 45, para. 400, *Prosecutor v. Popovic et al*, Judgment, Case No. IT-05-88-T, Trial Chamber II, 10 June 2010, para. 2134.

<sup>61</sup> Milutinovic et al. 2009, supra note 13, para. 1147, Popovic et al. 2010, supra note 60, para. 2134; *Prosecutor v. Dordevic*, Public Judgment with Confidential Annex, Case No. IT-05-87-/1-T, Trial Chamber II, 23 February 2011, para. 2210.

Article 7(6) of the ICTY (ICTR) Statute distinguishes between superior responsibility<sup>62</sup> and other modes of individual liability - a person is responsible for a crime when he/she plans, instigates, orders, commits or otherwise aids and abets its planning, preparation or execution. Participation in a joint criminal enterprise (“JCE”) must be added to this list as a specific liability mode used especially by the ICTY.<sup>63</sup> Neither the Statutes nor the Rules, however, indicate any principles governing a sentence determination in relation to individual modes of liability. The issue of the relationship between modes of liability and sentence severity has not been raised systematically in the Tribunals’ case law either. Over time, some fragmentary principles addressing this issue have been developed by the judges. The ICTY judges addressed the sentencing principles in relation to superior responsibility. In the latest case law, judges emphasised a *sui generis* nature of superior responsibility in the sense that an individual is not convicted for the crimes committed by his subordinates, but for failing to intervene and therefore warrants lesser punishment.<sup>64</sup> Other modes of individual liability may either ‘augment’ (*e.g.*, commission of the crime with direct intent) or ‘lessen’ (*e.g.*, aiding and abetting a crime with awareness that the crime will probably be committed) the gravity of crime.<sup>65</sup> The following principles have been established in case law: (1) aiding and abetting is a lower form of liability than ordering, committing, or participating in a joint criminal enterprise and warrants a lower sentence<sup>66</sup>; (2) a sentence of life imprisonment is generally reserved for those who planned or ordered atrocities<sup>67</sup>; and (3) under certain circumstances a participant in a JCE might deserve a higher sentence than the hands-on perpetrator.<sup>68</sup>

### III.3.2 Individualisation of Sentence – Aggravating and Mitigating Factors

In the case law ‘individual circumstances’ almost entirely overlap with aggravating and mitigating circumstances. Ideally major aggravating and mitigating factors should be clarified in law or legal practice and should be compatible with the declared rationales for sentencing. In ICTY and ICTR case law, some aggravating and mitigating circumstances are consistently referred to by judges; some are very case-specific, limited only to individual cases. Trial Chambers exercise discretion in this respect and in principle they can accept any fact as aggravating and/or mitigating as long as they find the fact relevant to sentence determination.<sup>69</sup> A wide range of factors has been accepted by the Tribunals in aggravation/mitigation of a sentence. Whether a certain factor constitutes a mitigating or aggravating circumstance depends largely on the particular circumstances of each case. Thus, for example, factors such as education or respected status of a defendant were in some cases accepted in mitigation yet in others in aggravation of a sentence.<sup>70</sup>

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<sup>62</sup> Superior responsibility is a specific mode of liability where a superior/commander is held liable for not preventing and/or punishing crimes of individuals under his/her control/ his/her subordinates. For more details see G. Mettraux, *The Law of Command Responsibility*, New York: Oxford University Press 2009.

<sup>63</sup> For further analysis of each responsibility mode cf. E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law*, The Hague: T.M.C. Asser Press 2003.

<sup>64</sup> *Prosecutor v. Oric*, Judgment, Case No. IT-03-68-T, Trial Chamber II, 30 June 2006, para.724.

<sup>65</sup> *Prosecutor v. Nindabahizi*, Judgment, Case No. ICTR-01-71-A, Appeals Chamber, 16 January 2007, para.122.

<sup>66</sup> *Prosecutor v. Simic et al.*, Judgment, Case No. IT-95-9-A, Appeals Chamber, 28 November 2006, para.265.

<sup>67</sup> *Prosecutor v. Bagosora et al.*, Judgment and Sentence, Case No. ICTR-98-41-T, Trial Chamber I, 18 December 2008, para.2270.

<sup>68</sup> *Prosecutor v. Krnojevic*, Judgment, Case No. IT-97-25-A, Appeals Chamber, 17 September 2003, para.75.

<sup>69</sup> Cf. *Prosecutor v. Vasiljevic*, Judgment, Case No. IT-98-32-A, Appeals Chamber, 25 February 2004, paras.161-162.

<sup>70</sup> Hadzihasanovic & Kubura 2008, *supra* note 53, para. 328.

There are no objective standards regarding the weight ascribed to individual mitigating and aggravating factors in the Statutes and/or RoPEs and judges only very rarely indicate what weight was ascribed to a particular aggravating/mitigating factor. In the majority of cases, factors accepted in aggravation and mitigation of a sentence are only listed with no detailed discussion as to their particular effect on sentence severity. Numerous appeals concerning the erroneous weighing of aggravating and mitigating factors have been lodged at both Tribunals. These appeals are, however, almost always rejected due to the broad discretion of trial judges.<sup>71</sup>

### III.3.2.1 Aggravating Factors

Aggravating factors are factors that justify an extension of a sentence. As demonstrated above, the principles applicable to aggravating factors set much more stringent standards compared to mitigating factors – they must be proven beyond any reasonable doubt and related to the committed offences. These strict conditions limit substantially the range of possible circumstances that are accepted in aggravation of a sentence by judges. All aggravating factors ever accepted by the ICTY and ICTR judges could be divided into four broad categories; i) attack-related (context- and attack-specific), ii) offender's role-related, iii) victims-related and iv) miscellaneous.

#### a. Attack-Related Aggravating Factors

The circumstantial and attack-specific aggravating circumstances encompass those factors relating to the general context within which crimes were committed and those describing in more detail how individual attacks were executed. For example, 'circumstances under which crimes were committed' were considered by the ICTY judges not only in mitigation as discussed below, but in a few cases this particular factor was accepted in aggravation of a sentence. In this particular connection, judges focused on the fact that a perpetrator's conduct exacerbated the already horrific conditions of victims.<sup>72</sup> With respect to the attack-specific aggravating factors, there are some circumstances of a more general nature that are recurrently accepted by judges in aggravation such as "particular cruelty of an attack"<sup>73</sup>, "protracted criminal activity of a defendant"<sup>74</sup>, "scope of crimes"<sup>75</sup> or "participation in attacks on places considered to be a safe haven"<sup>76</sup>. Next to aggravating circumstances of a general nature theoretically applicable to any case, the attack-related aggravating factors have also been strictly case-specific. There have been a handful of case-specific circumstances limited just to a single individual or more defendants such as "repeated use of modified air bomb"<sup>77</sup>, "use of rifle during attack"<sup>78</sup> or "joining in jubilation over killings".<sup>79</sup>

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<sup>71</sup> The Appeals Chamber ruled in *Seromba* that also the practice of not indicating a particular weight ascribed to factors in aggravation/mitigation lies within discretion of trial judges and declined to review this practice. *Prosecutor v. Seromba*, Judgment, Case No. ICTR-2001-66-A, Appeals Chamber, 12 March 2008, para. 235.

<sup>72</sup> *Prosecutor v. Tadic*, Sentencing Judgment, Case No. IT-94-1-Tbis-R117, Trial Chamber, 11 November 1999, para. 19; Simic 2002, supra note 20, para. 63.

<sup>73</sup> Jelusic 1999, supra note 24, para. 130; *Prosecutor v. Kayishema & Ruzindana*, Judgment, Case No. ICTR-95-1-T, Trial Chamber II, 21 May 1999, para. 18.

<sup>74</sup> Brdjanin 2004, supra note 25, para. 1111-1112; Ntakirutimana 2003, supra note 42, para. 798.

<sup>75</sup> *Prosecutor v. Krajisnik*, Judgment, Case No. IT-00-39-T, Trial Chamber I, 27 September 2006, para. 1153.

<sup>76</sup> This aggravating factor is in most cases identified only by the ICTR judges. Kamuhanda 2003, supra note 14, para. 764; Ntakirutimana 2003, supra note 42, para. 791.

<sup>77</sup> *Prosecutor v. Milosevic*, Judgment, Case No. IT-98-29/1-A, Appeals Chamber, 12 November 2009, para. 305.

<sup>78</sup> *Prosecutor v. Musema*, Judgment and Sentence, Case No. ICTR-96-13-A, Trial Chamber I, 27 January 2000, para. 1002.

## b. Offender's Role-Related Aggravating Factors

The second group of aggravating factors consists of factors particular to certain defendants and their involvement/particular role in crimes. This group could be further divided into three sub-groups:

- a) Circumstances describing the defendant's position and role within the overall state hierarchy, such as "(abuse of) superior position, position of authority/influence"<sup>80</sup>, "abuse of trust of local population"<sup>81</sup>, or "encouragement of overall atmosphere of terror/encouragement of crimes of others on account of position of authority".<sup>82</sup>

Abuse of leadership position and relating authority and/or influence has been consistently accepted by the ICTY and ICTR judges in aggravation of a sentence.<sup>83</sup> The importance of a defendant's position in the overall conflict in assessing crime seriousness can be traced back to the above-discussed principle of gradation. The ICTY has held that a leadership position increases the relative seriousness of crimes if a person abuses or wrongfully exercises the power stemming from that position.<sup>84</sup>

- b) Circumstances relating to a defendant's participation in individual attacks, such as "enthusiastic/active participant"<sup>85</sup>, "leading role in some attacks"<sup>86</sup> and "commission of some of the offences by more than one perpetrator at the same time"<sup>87</sup>, "direct participation in crimes by a high ranking accused"<sup>88</sup>, "acting as accomplice in addition to committing a crime".<sup>89</sup>

This group of aggravating factors is controversial. Arguably, the majority of these factors relate to 'the form and degree of participation' of an accused in committed crimes, which are, according to most of the judgments, one aspect of the gravity assessment. Therefore, the principle of prohibition of double jeopardy (double-counting) might have been violated in these cases. For example, in some cases 'direct and active criminal participation under the Art 7(1) by figures in authority' has been accepted in aggravation.<sup>90</sup> Arguably, however, direct criminal participation is already expressed by the mode of liability a defendant is convicted of and evaluated as part of the gravity assessment. However, the question whether these Trial Chambers engaged in double counting of these factors is not so straightforward.

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<sup>79</sup> *Prosecutor v. Niyitegeka*, Judgment and Sentence, Case No. ICTR-96-14-T, Trial Chamber I, 16 May 2003, para. 499.

<sup>80</sup> Bagosora et al. 2008, supra note 67, para. 2272; Plavsic 2003, supra note 19, para. 57.

<sup>81</sup> *Prosecutor v. Seromba*, Judgment, Case No. ICTR-2001-66-I, Trial Chamber, 13 December 2006, para. 390.

<sup>82</sup> Sikirica, supra note 15, para. 140; *Prosecutor v. Karera*, Judgment and Sentence, Case No. ICTR -01-74-T, Trial Chamber I, 7 December 2007, para. 579.

<sup>83</sup> As noted above, however, in some cases the position of the accused within the overall conflict has been discussed within the gravity assessment and not as a separate aggravating factor.

<sup>84</sup> *Prosecutor v. Babic*, Judgment on Sentencing Appeal, Case No. IT-03-72-A, Appeals Chamber, 18 July 2005, para. 61; Cf. Simic et al., supra note 66, para. 1082.

<sup>85</sup> Jelusic 1999, supra note 24, para. 131; *Prosecutor v. Serugendo*, Judgment and Sentence, Case No. ICTR-2005-64-I, Trial Chamber I, 12 June 2006, para. 47.

<sup>86</sup> *Prosecutor v. Rutaganda*, Judgment and Sentence (ICTR-96-3-T, Trial Chamber, 6 December 1999, para. 470; *Musema 2000*, supra note 78, para. 1002.

<sup>87</sup> Kunarac et al. 2001, supra note 29, para. 866.

<sup>88</sup> Milutinovic et al 2009, supra note 13, para.1151; Krstic 2001, supra note 57, para. 708; *Prosecutor v. Akayesu*, Sentence, Case No. ICTR-96-4, Trial Chamber, 2 October 1998.

<sup>89</sup> *Prosecutor v. Stakic*, Judgment, Case No. IT-97-24-A, Appeals Chamber, 22 March 2006, para. 413.

<sup>90</sup> *Ibid.*

In these cases, the Trial Chambers usually limited the concept of the gravity of the crimes only to ‘the harm assessment’ while all factors relating to the form and degree of a defendant’s participation were discussed under the heading of aggravating/mitigating factors. Therefore, it is possible that judges in these cases actually did not violate the principle prohibiting double jeopardy.<sup>91</sup>

- c) Circumstances particular to a defendant’s motive/state of mind such as “voluntary participation in crimes/zeal”<sup>92</sup>, “premeditation”<sup>93</sup>, “discriminatory intent/feelings of revenge”<sup>94</sup>, and “pleasure derived from committing crimes”<sup>95</sup>.

All these aggravating factors relate to subjective feelings and motives of a defendant about his/her crimes. In the early case law, judges accepted a defendant’s willingness/voluntary participation in crime as aggravating. This practice, however, is controversial, and this factor should never have been accepted in aggravation. The fact that a defendant committed crimes voluntarily with a requisite *mens rea* and not under any pressures or duress is a precondition of a criminal liability. It is clearly not an aggravating factor. As noted by the Trial Chamber in *Popovic*, “willingness in the sense of voluntariness is a necessary component of the crimes and therefore [...] not [...] an aggravating factor”.<sup>96</sup> In later cases, judges interpreted this practice as referring to the fact that an accused committed crimes with a certain amount of zeal or enthusiasm.<sup>97</sup>

### c. Victim-Related Aggravating Factors

The most frequent victim-related aggravating factors include “high number of victims”<sup>98</sup>, “extra suffering of victims/extra harm suffered by victims”<sup>99</sup> or “special vulnerability of victims”<sup>100</sup>. As discussed above, the main problem with this group of aggravating factors stems from the fact that judges sometimes consider these facts as part of the gravity assessment, while at other times they assign them extra weight in aggravation. Another problematic aspect relates to the treatment of ‘selective assistance to victims’ that was accepted in some cases in aggravation as a further proof of the fact that a defendant abused the trust of his victims<sup>101</sup> while in others this factor was used to mitigate a sentence. Judges, however, offered almost no arguments why in certain cases this goes to the detriment of the

<sup>91</sup> Cf. D’Ascoli 2011, supra note 3, p. 153. Where the author concludes that in these cases judges actually violated the principle of prohibiting double jeopardy.

<sup>92</sup> *Prosecutor v. Kayishema & Ruzinanda*, Appeal Judgment, Case No. ICTR-95-1-A, Appeals Chamber, 1 June 2001, para. 351.

<sup>93</sup> *Prosecutor v. Lukic & Lukic*, Judgment, Case No. IT-98-32/1-T, Trial Chamber III, 20 July 2009, para. 1067; *Prosecutor v. Serushago*, Sentence, Case No. ICTR-98-39-S, Trial Chamber I, 5 February 1999, para. 30.

<sup>94</sup> *Prosecutor v. Vasiljevic*, Judgment, Case No. IT-98-32-T, Trial Chamber II, 29 November 2002, para. 278.

<sup>95</sup> Lukic & Lukic 2009, supra note 93, para. 1087.

<sup>96</sup> Popovic et al. 2010, supra note 60, para. 2154; See also *Prosecutor v. Jokic*, Sentencing Judgment, Case No. IT-01-42/1-S, Trial Chamber I, 18 March 2004, para. 849.

<sup>97</sup> Kayishema & Ruzinanda 2001, supra note 92, para. 351. See also D’Ascoli 2011, supra note 3, p. 190.

<sup>98</sup> Lukic & Lukic 2009, supra note 93, para. 1063; *Prosecutor v. Rutaganira*, Judgment and Sentence, Case No. ICTR-95-1C-T, Trial Chamber III, 14 March 2005, para. 143.

<sup>99</sup> Jelusic 1999, supra note 24, para. 132; Kayishema & Ruzinanda 1999, supra note 73, para. 16.

<sup>100</sup> *Prosecutor v. Nikolic*, Sentencing Judgment, Case No. IT-94-2-S, Trial Chamber II, 18 December 2003, para. 137; *Prosecutor v. Mrda*, Sentencing Judgment, Case No. IT-02-59-S, Trial Chamber I, 31 March 2004, para. 46-48.

<sup>101</sup> *Prosecutor v. Muvunyi*, Judgment and Sentence, Case No. ICTR-2000-55A-T, Trial Chamber II, 12 September 2006, para. 540.

accused while in others assistance to some victims is deemed beneficial and mitigates the sentence.

#### d. Miscellaneous

In the final category, various aggravating circumstances accepted by judges only in a limited number of cases are grouped. They can be divided into three subgroups: a) personal circumstances; b) post-crime conduct and finally c) proceedings-related aggravating factors. Personal circumstances are sometimes considered by the Tribunals in aggravation of sentences – in a limited number of cases “defendant’s respected position/status” and/or “his/her education”<sup>102</sup> are deemed to aggravate the gravity of committed crimes and justify a heightened sentence. However, these factors are highly context-specific and dependent on particular circumstances of each case. In these cases judges should properly explain why they consider the status and education of a defendant in sentence aggravation. This is, however, not done in the majority of these instances and it is not clear why in certain cases education and status are accepted as mitigating factors, while in others they are considered aggravating circumstances. It is also disputable how these factors are linked to the committed crimes as required for all the aggravating factors under the case law.<sup>103</sup> A similar controversy applies to the factors relating to post-conflict conduct of a defendant such as “deceptive actions by a defendant”<sup>104</sup>, “no remorse”<sup>105</sup> or “denial of genocide”<sup>106</sup>.

Finally, in some cases judges aggravated sentences on account of factors relating to the smooth conduct of the proceedings. This practice is in clear violation of the principle that aggravating factors should be related to committed crimes. “Negative attitude towards proceedings”<sup>107</sup>, “flight away from justice”<sup>108</sup>, “non-cooperation with OTP and denial of guilt”<sup>109</sup> or “obstruction of justice”<sup>110</sup> constitute examples of this type of aggravating factors.

### III.3.2.2 Mitigating Factors

Mitigating factors are factors that warrant the reduction of a sentence. They do not need to relate to the charged offences and theoretically could be constituted by a broad range of circumstances. The range and number of mitigating factors vary greatly across cases. One reason for this variation could be the fact that judges largely rely on the parties and expect them to present and argue factors in mitigation. In particular, the burden of proof that mitigating factors exist rests on the defendant and his/her defence.<sup>111</sup> In some cases, however, a defence counsel is not very active, presents only general submissions regarding sentencing,<sup>112</sup> or does not even present sentencing arguments at all.<sup>113</sup> The factors that were

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<sup>102</sup> *Prosecutor v. Simic et al.*, Judgment, Case No. IT-95-9-T, Trial Chamber II, 17 October 2003, para. 1108; *Prosecutor v. Bisengimana*, Judgment and Sentence, Case No. ICTR-00-60-T, Trial Chamber II, 13 April 2006, para. 120.

<sup>103</sup> One of possible links could be that a defendant committed crimes because of his education/status. Then, however, arguably status of a defendant and abuse of position of authority are difficult to distinguish.

<sup>104</sup> *Prosecutor v. Mrksic & Sljivancanin*, Judgment, Case No. IT-95-13/1-T, Trial Chamber II, 27 September 2007, para. 704.

<sup>105</sup> Rutaganda 1999, supra note 86, para. 473.

<sup>106</sup> *Prosecutor v. Nchamihigo*, Judgment and Sentence, Case No. ICTR-01-63-T, Trial Chamber III, 12 November 2008, para. 392.

<sup>107</sup> Mucic et al. 2001, supra note 23, para. 786.

<sup>108</sup> Seromba 2006, supra note 81, para. 391.

<sup>109</sup> Tadic 2000, supra note 45, para. 58.

<sup>110</sup> Popovic et al. 2010, supra note 60, para. 2199.

<sup>111</sup> Stakic 2006, supra note 89, para. 406.

<sup>112</sup> Nchamihigo 2008, supra note 106.

considered by the Tribunals' jurisprudence in mitigation of sentences were divided into six general categories: i) attack-related, ii) offender's role-related, iii) victims-related, iv) post-crime conduct-related, v) proceedings-related and finally, vi) those falling under the broad category of personal circumstances.

### a. Attack-Related Mitigating Factors

The attack-related mitigating factors are those connected to the context within which the crimes were committed such as "overall circumstances prevailing at the time crimes were committed (e.g. chaos caused by armed conflict, atmosphere of political intolerance, interethnic tensions)"<sup>114</sup> or "duress"<sup>115</sup>. This type of mitigating factors is not frequently argued by defence teams or accepted by judges.

### b. Offender's Role-Related Mitigating Factors

The group of mitigating factors relating to the offender's role comprises not only factors connected to the specific way in which a perpetrator participated in crimes, such as "no actual hands-on perpetrator/killer"<sup>116</sup> or "limited participation in crimes"<sup>117</sup>, but also factors designating the role of an offender in the overall conflict/state hierarchy such as "no high ranking/subordinate/inferior position"<sup>118</sup> or "secondary role in totality of circumstances"<sup>119</sup>.

### c. Victim-Related Mitigating Factors

"Assistance to victims"<sup>120</sup>, "expression of sympathy to victims"<sup>121</sup> or "measures to reduce human suffering"<sup>122</sup> fall under the category of victim-related mitigating factors that in general pertain to positive steps/actions an offender performed towards victimised groups or individual victims.

Again, with respect to this group, there are inconsistencies across cases. Especially with respect to the (selective) assistance to victims, judges in some cases accept this factor in mitigation<sup>123</sup>, whereas in others they indicate that this fact carries "limited, if any, weight in mitigation"<sup>124</sup>. In other cases judges refuse to assign any weight to the assistance to victims<sup>125</sup> and sometimes they even indicate that it could aggravate a sentence as further proof of the

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<sup>113</sup> Cf. Kamuhanda 2003, supra note 14; Ndindabahizi 2004, supra note 40; *Prosecutor v. Kalimanzira*, Judgment, Case No. ICTR-05-88-T, Trial Chamber III, 22 June 2009.

<sup>114</sup> *Prosecutor v. Blaskic*, Judgment, Case No. IT-95-14-T, Trial Chamber, 3 March 2000, para. 770; Rugambarara 2007, supra note 15, para. 47.

<sup>115</sup> *Prosecutor v Erdemovic*, Sentencing Judgment, Case No. IT-96-22-Tbis, Trial Chamber, 5 March 1998, para. 17.

<sup>116</sup> Kvocka et al. 2001, supra note 15, para. 717; Ntakirutimana 2003, supra note 42, para. 784.

<sup>117</sup> Krnolejac 2002, supra note 20, paras. 515-516 (The accused's limited participation in crimes was considered not as mitigating factor but as a factor countervailing the extent of aggravation caused by his senior position); *Prosecutor vs. Ndindabahizi*, Judgment and Sentence, Case No. ICTR-01-71-I, Trial Chamber I, 15 July 2004, para. 507.

<sup>118</sup> Akayesu 1998, supra note 88; Erdemovic 1998, supra note 115, para. 16.

<sup>119</sup> *Prosecutor v. Aleksovski*, Judgment, Case No. IT-95-14/1-T, Trial Chamber, 25 June 1999, para. 236.

<sup>120</sup> Mucic et al. 2001, supra note 23, para. 775; *Prosecutor vs. Renzaho*, Judgment and Sentence, Case No. ICTR-97-31-T, Trial Chamber I, 14 July 2009, para. 824.

<sup>121</sup> Akayesu 1998, supra note 88; Lukic & Lukic, supra note 93, para. 1094; Popovic et al., supra note 60, para. 2162.

<sup>122</sup> Milutinovic et al. 2009, supra note 13, para. 1187.

<sup>123</sup> Rutaganda 1999, supra note 86, para. 471.

<sup>124</sup> Rukundo 2009, supra note 15, para. 602.

<sup>125</sup> *Prosecutor v. Zigiranyirazo*, Judgment, Case No. ICTR-01-73-T, Trial Chamber III, 18 December 2008, para. 465.

fact that a defendant abused the trust of his victims.<sup>126</sup> No authoritative guidelines have been offered for such differential treatment across cases. It seems that when assistance is selective in the sense that victims are assisted because they are known to the accused (such as family members) or because they share similar characteristics with the accused (e.g. the same ethnicity) – in other words, they are being helped, not because they are innocent victims, but because the accused considers them to be ‘like’ him<sup>127</sup> – the weight assigned to such assistance will be very limited. In some instances, judges argue that if a defendant was in a position to take steps to control or prevent all acts of violence, sporadic benevolent acts or ineffective assistance to victims will be disregarded.<sup>128</sup>

#### d. Post-Crime Conduct-Related Mitigating Factors

The post-crime-conduct mitigating factors relate to (i) the offender’s attitude with respect to his/her crimes during trial or immediately after the crimes and/or (ii) his conduct alleviating consequences of committed crimes. Examples of the former are such mitigating factors as “remorse”<sup>129</sup>, “distress about death of so many people”<sup>130</sup> or “steps taken to atone for the crimes”<sup>131</sup>. Expression of remorse is a mitigating factor frequently accepted by ICTY and ICTR judges particularly in cases where a defendant pleads guilty. Almost with no exception in all these cases judges identify an expression of remorse as a factor in mitigation. In exceptional cases, judges also accept that a defendant who does not admit his guilt might be remorseful.<sup>132</sup>

The second group of these mitigating circumstances consists of factors such as “contribution to peace”<sup>133</sup>, “work in de-mining activities”<sup>134</sup> or “negotiation and signing of anti-sniping agreement”<sup>135</sup>. Usually these mitigating factors are largely case-specific. They relate to situations where a convicted person acted after the commission of the crime to rectify damage caused by a conflict and to alleviate the suffering of victims. For example in *Plavsic*, the Trial Chamber accepted Biljana Plavsic’s post-conflict conduct as a mitigating factor because after the end of hostilities she had offered considerable support for the 1995 General

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<sup>126</sup> Muvunyi 2006, supra note 101, para. 540.

<sup>127</sup> Kvočka et al 2005, supra note 59, para. 693.

<sup>128</sup> Krajisnik 2006, supra note 75, para. 1162.

<sup>129</sup> Todorovic 2001, supra note 48, para. 92; Judgment, *Nzabirinda* (ICTR-2001-77-TT) Trial Chamber, 23 February 2007, para. 70.

<sup>130</sup> Musema 2000, supra note 78, para. 1005.

<sup>131</sup> *Prosecutor v. Bralo*, Sentencing Judgment, Case No. IT-95-17-S, Trial Chamber, 7 December 2005, para. 72.

<sup>132</sup> *Prosecutor v. Blaskic*, Judgment, Case No. IT-95-14-A, Appeals Chamber, 29 July 2004, para. 705.

Originally, the Trial Chamber rejected to mitigate Blaskic’s sentence on account of his remorse. It considered his remorse insincere stating that “there is a flagrant contradiction between [his remorseful conduct during the proceedings] and the facts [the Trial Chamber] has established - having given orders resulting in the commission of crimes the accused cannot claim that he attempted to limit their consequences. His remorse thus seems dubious.” (TCH Judgment, para. 775). On appeal, however, the appellant presented new evidence that to a large extent rebutted the Trial Chamber’s findings of his guilt. He was acquitted on many counts and his sentence substantially reduced. With respect to the alleged remorse, the Appeals Chamber qualified the finding of the trial judges and considered his remorse sincere and genuine. It took into account its own assessment of trial record and the new evidence admitted on appeal and emphasized the fact that his criminal conduct (as modified on appeal) is only very limited and there is a substantial evidence that he issued “the so-called humanitarian orders”. (ACH Judgment, para. 705)

<sup>133</sup> Bagosora et al. 2008, supra note 67, para. 2273.

<sup>134</sup> Blagojevic & Jokic 2004, supra note 96, para. 858.

<sup>135</sup> *Prosecutor v. Milosevic*, Judgment, Case No. IT-98-29/1-T, Trial Chamber III, 12 December 2007, para. 1003.

Framework Agreement for Peace in Bosnia-Herzegovina (Dayton Agreement) and had attempted to remove obstructive officials from office in order to promote peace.<sup>136</sup>

#### e. Proceeding-Related Mitigating Factors

Proceeding-related mitigating factors are those relevant to the smooth conduct of the trial before the Tribunals such as “(substantial) cooperation with the Prosecutor”<sup>137</sup>, “voluntary surrender”<sup>138</sup>, “good conduct while in detention”<sup>139</sup> or “guilty plea”<sup>140</sup>. Again there are inconsistencies among cases regarding the treatment of this group of mitigating factors, especially with respect to ‘good conduct in detention’ and ‘voluntary surrender’. In the majority of cases both these circumstances, if proven, are considered and accepted by the judges in mitigation of a sentence. Some trial chambers, however, refused to accept a defendant’s good conduct in detention in mitigation of a sentence since ‘all accused are expected to behave appropriately while at the UN Detention Unit’.<sup>141</sup> Similarly, some trial chambers have not mitigated a sentence on account of defendant’s voluntary surrender.<sup>142</sup> This approach, however, causes inconsistencies among cases and unequal treatment of defendants since in some cases judges accept these facts and mitigate sentences on their account, while in others judges refuse to accept these factors in mitigation with no specific reasons provided.<sup>143</sup>

#### f. Personal Circumstances

In the final and in a sense broadest group - personal circumstances – factors related to the person and character of an offender (e.g. “good character prior or after the conflict”<sup>144</sup>, “rehabilitative potential”<sup>145</sup>, “old age while sentenced”<sup>146</sup>, “young age while committing crimes”<sup>147</sup> or “health problems”<sup>148</sup>), family circumstances<sup>149</sup> (e.g. “special hardship for his/her family”<sup>150</sup>) and his conduct prior to a period of violence (e.g. “no prior crimes”<sup>151</sup>, “no prior

<sup>136</sup> Plavsic 2003, supra note 19, para. 85.

<sup>137</sup> *Prosecutor v. Zelenovic*, Sentencing Judgment, Case No. IT-96-53/2-S, Trial Chamber I, 4 April 2007, para. 52; Serugendo 2006, supra note 85, para. 62.

<sup>138</sup> Seromba 2008, supra note 71, para. 397; Galic 2006, supra note 32, para. 426; For more detailed discussion concerning voluntary surrender as mitigating factor see S. Dana, Revisiting the Blaskic Sentence: Some Reflections on the Sentencing Jurisprudence of the ICTY, *International Criminal Law Review*, 2004-4, p. 334; D’Ascoli 2011, supra note 3, at 175.

<sup>139</sup> Bisengimana 2006, supra note 102, para. 164; Zelenovic 2007, supra note 137, para. 56.

<sup>140</sup> Plavsic 2003, supra note 19, para. 81; Rugambarara 2007, supra note 15, paras. 33-35.

<sup>141</sup> Oric 2006, supra note 64, para. 762; *Prosecutor v. Kordic & Cerkez*, Judgment, Case No. IT-95-14/2-A, Appeals Chamber, 17 December 2004, para. 1053; Brdjanin 2004, supra note 25, para. 1135.

<sup>142</sup> *Prosecutor v. Kordic & Cerkez*, Judgment, Case No. IT-95-14/2-T, Trial Chamber, 26 February 2001, paras. 845, 854-856.

<sup>143</sup> In some cases judges argue that the fact that the accused surrendered a long time after the indictment was issued or after he actually prepared his defence constitute reasons for declining to mitigate the sentence or to assign only very limited weight in this respect. Cf. Blaskic 2000, supra note 114, para. 776; Simic et al. 2003, supra note 102, para. 1086.

<sup>144</sup> Kalimanzira 2009, supra note 113, para. 752; Oric 2006, supra note 64, para. 759.

<sup>145</sup> Erdemovic 1998, supra note 115, para. 16.

<sup>146</sup> Plavsic 2003, supra note 19, para. 105-106.

<sup>147</sup> Blaskic 2000, supra note 114, para. 778 where the Trial Chamber noted possible inconsistencies regarding what is considered to be ‘young age’ between the ICTY and ICTR.

<sup>148</sup> Simic 2002, supra note 20, para. 116; In this case the Trial Chamber explicitly noted that it does not accept Simic’s poor health as a mitigating factor, however, as an exceptional circumstance for the reasons of humanity.

<sup>149</sup> Ntakirutimana 2003, supra note 42, para. 794; Erdemovic 1998, supra note 115, para. 16.

<sup>150</sup> *Prosecutor v. Strugar*, Judgment, Case No. IT-01-42-T, Trial Chamber II, 31 January 2005, para. 469.

<sup>151</sup> Krajisnik 2006, supra note 75, para. 1164; Bisengimana 2006, supra note 102, para. 165.

discriminatory behaviour”<sup>152</sup>) are included. In the majority of cases, judges also argue that such factors cannot play a significant role in mitigating international crimes and the weight to be accorded to them is limited.<sup>153</sup> Especially with respect to this group of mitigating circumstances there have been many instances of inconsistent treatment. For example factors such as ‘good character (prior to the conflict)’, ‘no criminal record’ or ‘family circumstances’ of a defendant are accepted in mitigation by some trial chambers with no qualification<sup>154</sup> and by others assigned only limited weight. Some trial chambers refuse to accept them in mitigation<sup>155</sup> and consider them ‘a common characteristic among many accused persons’.<sup>156</sup> Some trial chambers even indicated, as discussed above, that status and good character of a defendant could be accepted in aggravation. In none of these cases, however, a detailed reasoning or guideline is provided why in certain cases these circumstances warrant mitigation of a sentence and why not in others. Judges in each such case only refer to the need to consider and weight particular circumstances of each case.

Consequently, inconsistencies relating to the operationalisation of general principles of sentence determination have been identified in the ICTY and ICTR case-law. In particular, the ICTY and ICTR sentencing case law largely varies with respect to a selection of factors relevant for the gravity assessment and distinction between the notions of ‘gravity of crimes’ and ‘aggravating factors’. Secondly, there are inconsistencies across cases as to whether a certain factor aggravates/mitigates the punishment and the weight assigned to it, if indicated at all, remains unclear.<sup>157</sup>

#### 4. Discussion

This article analysed ‘consistency in approach’ of the sentencing at the ICTY and ICTR. Since the positive law sets only very loosely defined limits on the judges’ discretion in sentence determination, the analysis focused on sentencing argumentation in individual cases. The structure of sentencing reasoning and general principles of sentence determination seem to be mutually influential under both jurisdictions. Judges from one tribunal often refer to the case law of the other in their general sentencing considerations, thus developing a common ICTY-ICTR narrative. The Tribunals share a joint Appeals Chamber, which arguably contributes to the development of a ‘common’ jurisprudence. Indeed, the analysis has not identified any major differences in the sentencing reasoning of judges at the ICTY and ICTR.

On the one hand, it has been demonstrated that on a general level, a set of sentencing principles is consistently discussed and emphasised by the ICTY and ICTR judges: the most important being the primacy of gravity of crimes in sentence determination and the principles connected to the gravity evaluation: proportionality, gradation and totality. The principle of individualisation complements this general framework. On the other hand, however, the analysis detected some instances of disparity across cases. There persists a

<sup>152</sup> Nikolic 2003, supra note 100, para. 164; *Prosecutor v. Karera*, Judgment and Sentence, Case No. ICTR - 01-74-T, Trial Chamber I, 7 December 2007, para. 582.

<sup>153</sup> Nzabirinda 2007, supra note 129, para. 108; Mrda 2004, supra note 100, para. 92, 94; Bralo 2005, supra note 131, para. 48.

<sup>154</sup> *Prosecutor v. Stakic*, Judgment, Case No. IT-97-24- T, Trial Chamber II, 31 July 2003, para. 923; Rugambara 2007, supra note 15, para. 39.

<sup>155</sup> *Prosecutor v. Naletilic & Martinovic*, Judgment, Case No. IT-98-34-T, Trial Chamber, 31 March 2003, para. 754; Kamuhanda 2003, supra note 14, para. 757-758; *Prosecutor v. Babic*, Sentencing Judgment, Case No. IT-03-72-S, Trial Chamber I, 29 June 2004, para. 91.

<sup>156</sup> *Prosecutor v. Nahimana, Barayagwiza, Ngeze*, Judgment, Case No. ICTR-99-52-A, Appeals Chamber, 28 November 2007, para. 1069.

<sup>157</sup> Cf. D’Ascoli 2011, supra note 3, p. 189.

considerable amount of confusion in the ICTY and ICTR case law regarding the objectives of punishment. There is no uniform approach regarding what aims the ICTY and ICTR sentencing actually pursues and what weight should be ascribed to possibly conflicting objectives. Judges often list several sentencing rationales at the beginning of each sentencing judgment with no further discussion what these sentencing objectives entail and how they influence sentence determination in individual cases. These *pro forma* declarations do not seem to relate to any empirical outcome in meting out individual sentences. Differences among individual cases regarding enumerated sentencing objectives and their role do not affect the structure of a further sentencing argumentation nor the factors judges emphasise in meting out individual sentences. The sentencing reasoning of the ICTY and ICTR judges seems to follow mostly retributive logic with a focus on the seriousness of committed crimes. As noted above, a number of common principles of sentence determination linked to the gravity of crimes is consistently discussed and emphasised by the ICTY and ICTR judges. However, further inconsistencies in the ICTY and ICTR judges' reasoning were identified especially with respect to the detailed application of these general principles to the individual facts of each case. In particular, the ICTY and ICTR sentencing case law largely varies with respect to a selection of factors relevant to the gravity assessment and distinction between the notions of 'gravity of the crimes' and 'aggravating factors'. Secondly, differences between individual cases exist as to whether a particular mitigating/aggravating factor aggravates/mitigates a sentence and as to its significance to a sentence in a particular case. The way aggravating and mitigating factors are applied and weighted in individual cases is a very controversial aspect of ICTY and ICTR sentencing practices.

The presented analysis demonstrated that one of the main problems of the ICTY and ICTR sentencing seems to be a lack of clarity and transparency of sentence determination. The ICTY and ICTR defendants are usually convicted of multiple counts and only one global sentence is pronounced by the judges. Judges, however, never indicate the weight assigned to individual sentencing factors and how individual crimes and circumstances related to their commission contributed to the total sentence severity. This practice makes it extremely difficult to identify any patterns as to the sentencing ranges applicable to individual offences or the contribution of individual sentencing factors to sentence length. These problems are further fuelled by the approach of the Appeals Chambers that accepted a very deferential approach to the sentence review, primarily emphasising the discretion of trial judges. The ICTY and ICTR judges should, however, strive more to develop a clear, transparent and consistent sentencing narrative to enable defendants to actually 'see through' sentence determinations and understand the level of punishment they are subjected to. The judges should do their best to clearly explain and justify their sentencing decisions so that, at least, it would be clear what they are actually doing and how particular sentences came about.

Several suggestions could be offered in this respect. Firstly, judges should rely on a clear and consistent set of sentencing objectives for international crimes, try to explain their relevance to sentence determination in individual cases and indicate which is the most important. Secondly, judges should come up with a uniform definition of the gravity of crimes for the purposes of sentencing and link it to sentence severity. One possible solution could be to assume that the concept of gravity encompasses only the statutory elements of offences and modes of liability (a form of gravity *in abstracto* assessment). All the other (extra) factors such as multiplicity of victims, scope of crime, extra suffering for victims, extra brutality and cruelty should be considered as further aggravating factors. Thirdly, judges should try to clearly indicate how a sentence was actually built up in individual cases and, in cases of multiple-offence convictions, what weight was ascribed to separate offences. To make sentencing determination more transparent and understandable, it would be advisable to always indicate (for each guilty count) a sentence severity based on 'a basic gravity of the crime' combined with aggravating factors and then express how much weight was accorded

to factors accepted in mitigation. In this sense, calculations of judges with respect to a particular sentence would be more transparent and easier to review. In this way, sentencing ranges for individual offences would emerge from the sentencing practice and could serve as a point of reference in future cases. Furthermore, judges should develop a set of principles on the relation between sentence severity and individual modes of liability so that it would become clear how the judges in fact distinguish among different degrees of involvement in crime and how these influence sentence severity. Fourthly, individual aggravating and mitigating factors should be always related to the proclaimed sentencing objectives. Thus, for example, if the objective of sentencing is retribution, then only aggravating and mitigating factors related to committed crimes should be relevant for sentencing.<sup>158</sup> Furthermore, if a certain factor is authoritatively accepted by judges in mitigation in a particular case then it should become an entitlement for all defendants in similar situation to rely on such circumstance and judges should, in principle, accept it in sentence mitigation unless there is an exceptional reason not to do so (which should be clearly expressed).<sup>159</sup> Finally, Appeals Chambers should always provide clear reasons for why and how they modified a particular sentence and state all relevant facts and their weight to the new modified sentence following the above-described principles. Furthermore, appeals judges should not *a priori* reject, as happened several times in the early case law, the calls to issue guiding sentencing principles and discuss general sentencing issues within individual appeals.

Arguably, the sentencing case law of the Tribunals has already developed to such an extent that it is possible to derive and list authoritatively basic sentencing principles and maxims which Trial Chambers would be obliged to follow in their sentencing determinations. In this manner, the authoritative sentencing principles, sentencing ranges for individual offences, a clear/authoritative open-ended list of aggravating and mitigating factors and their relative significance as determined by the international judges would emerge from the sentencing jurisprudence and a more consistent approach to sentencing would be promoted at the ICTY and ICTR.

Given the very rudimentary positive legal framework, it is extremely important to develop (for the sake of defendants but also of the victims, general public and other international criminal courts and tribunals) clear sentencing case law. As pioneers of the re-established international criminal justice system after the Cold War, the ICTY and ICTR are setting a lot of important precedents and sentencing jurisprudence is by necessity one of them. International judges should try harder to present comprehensive and transparent sentence narrative so that not only defendants and the Prosecution in individual cases but also the general public are aware of why and how the amount of punishment in a particular case is as it is. If the ICTY and ICTR judges had been clearer in their sentencing argumentation from the start, the heavy criticism that has been raised against the Tribunals' sentencing might have been prevented and the sentencing practices of the ICTY and ICTR would have probably gained more legitimacy and support.

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<sup>158</sup> Cf. similar arguments with respect to domestic sentencing M. Bagaric & R. Edney, The Sentencing Advisory Commission and the Hope of Smarter Sentencing, *Current Issues in Criminal Justice* 2004-2005-16, p. 133.

<sup>159</sup> Cf. similar arguments with respect to domestic sentencing A. Ashworth & A. Ashworth, *Sentencing and Criminal Justice*, Fourth Edition, New York: Cambridge University Press, 2005, p. 179.