PART I: CONSISTENCY IN APPROACH
Chapter 1: ‘Consistency in Approach’ of ICTY and ICTR Sentencing

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 chapter analyses ‘consistency in approach’ of sentencing at the International Criminal Tribunals for the Former Yugoslavia and Rwanda (ICTY and ICTR). It presents an integrated summary of literature review and the author’s own finding based on an analysis of the judges’ sentencing reasoning in individual cases decided by the ICTY and ICTR up to April 2011 (N=124). 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.

Keywords: International Criminal Tribunal for the Former Yugoslavia; International Criminal Tribunal for Rwanda; consistency; sentencing;

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 little precedential guidance stemming from their predecessors (the International Military Tribunals in Nuremberg and Tokyo) and a very vague positive law framework, the ICTY and ICTR judges have been vested with a large amount of discretion with regard to sentencing. This opening chapter 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.

As noted in the introduction to this thesis, one of the fundamental principles of justice is consistency - like cases should be treated alike.\(^1\) 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 there would be one without the other. Consistency in approach requires that there is a uniform, consistent approach 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; all decisions should be based on common standards – general underlying principles – that are uniformly applied to the facts of each case.

As noted by Ashworth, ‘consistency in sentencing is only likely to be achieved if there is a common judicial approach to the exercise of discretion in sentencing. Judges are right to insist that they should have the discretion to take account of the facts of individual cases. But others are equally right to insist on consistency of approach and on some accountability for the sentence chosen’.

In this chapter the consistency in sentencing reasoning of the ICTY and ICTR judges will be evaluated. An extensive amount of literature has been dedicated to the doctrinal and normative analysis of the Tribunals’ sentencing case law. The question whether the ICTY and ICTR sentencing reasoning is consistent has been extensively discussed in academic circles. Many

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2 See Chapter II and III for a more detailed analysis of ‘consistency in outcome’ of international sentencing.


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. All these scholars have often noted discrepancies in the Tribunals’ sentencing case law. This chapter offers an integrated summary of these findings and of the author’s own conclusions based on the analysis of the sentencing case law produced by the ICTY and ICTR judges up to April 2011. The case law of the ICTY and ICTR is examined together for several reasons (i) the positive law framework is almost identical for both Tribunals; and furthermore (ii) the Tribunals share the common Appeals Chambers which arguably contributes to the development of a common jurisprudence. Indeed, the ICTY and ICTR judges often refer to the case-law of the other Tribunal developing a very similar sentencing narrative.

Next to the introduction and conclusion, the main text is divided into two main parts. Section 2 describes the positive law framework that regulates the sentencing decision making at the Tribunals. In Section 3 the ICTY and ICTR case-law is analysed. Section 3 is further divided into three sub-sections/levels of analysis. Starting with the broadest level, the ICTY and ICTR judges’ pronouncements regarding the objectives of international punishment are discussed (Section 3.1.1.). Then, the attention turns to the so-called general principles of sentence determination, i.e. more concrete principles than the abstract sentencing rationales however abstract enough to have to be generally applicable across cases (Section 3.1.2). These general principles could basically be perceived as guidelines for selection and weighting of factors deemed to be relevant in sentence determination. Examples thereof include the principle of proportionality, totality or gradation. Finally, application/ operationalization of these general principles in individual cases (Section 3.2.), 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 summarizes 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.
2. **SENTENCING IN POSITIVE LAW**

The Statutes and Rules of Procedure and Evidence (RoPEs), the written law establishing the Tribunals and governing their functioning, lack the quality of promoting and ensuring the consistency in approach. The positive law of sentencing is very vague vesting in judges a broad discretion to determine sentences on a case-by-case basis. The law does not pronounce any sentencing rationales or general principles of sentence determination. It does not contain any penalty structure in the sense of minimum or maximum penalties for individual offences. The crimes under the Tribunals’ jurisdictions are not distinguished on the basis of their inherent gravity and corresponding sentence severity. No list of relevant aggravating and mitigating factors is provided. No techniques for enhancing consistency, in a sense of guideline judgments by Appeals Chambers or establishment of an independent commission to set further sentencing standards, are stipulated.

The positive law provisions regulating sentencing are almost identical for both Tribunals. Applicable penalties are limited to imprisonment. Arts 24/23 ICTY/ICTR Statute contain very general instructions as to what factors should be taken into account in imposing sentences: the gravity of the offence and the individual circumstances of the convicted person. What is actually meant by the “gravity of crime” 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). 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.

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6 This provision was 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, Vol. 11, No. 3, 521-539, at 522.
However, as noted above 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 framework of the sentencing process at the Tribunals appears to be neither very well developed nor 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 could be the case that general principles of sentence determination, penalty structure or a list of aggravating and mitigating factors and their application to individual cases evolved in the Tribunals’ sentencing case law. 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. In Aleksovski the Appeals Chamber generally approved the general practice of precedent in the ICTY practice: under normal circumstances Trial Chambers and Appeals Chamber shall follow the previous Appeals Chamber decisions unless there are cogent reasons in the interest of justice calling for the Appeals Chamber to depart from its previous decision. 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. The next sections analyse the ICTY and ICTR jurisprudence to determine whether judges developed a consistent approach to sentencing in their argumentation. First, general principles of sentence determination are examined and then their operationalization in individual cases is discussed.

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7 It has been argued that such a vague reference to aggravating circumstances is contrary to the principle of legality of penalties in international criminal law. D’Ascoli, supra note 4, at 113 citing S. Zappala: Human Rights in International Criminal Proceedings, Oxford University Press, Oxford, 2003, at 201.
8 M. Drumbl (2007), supra note 4, at 59.
9 Judgment, Aleksovski (IT-95-14/1-A) Appeals Chamber, 24 March 2000, paras. 92-115
10 Ibid., paras. 107, 113.
3. **SENTENCING JURISPRUDENCE**

3.1. *Purposes of Punishment and General Principles of Sentence Determination*

3.1.1. *Purposes of International Sentencing*

The answer to the question of why we punish perpetrators of international crimes and what are the goals of international sentencing is provided neither in the positive law nor in the Tribunals’ case law. The clarification of sentencing aims is important not only from a broad philosophical perspective but even more so from a practical point of view.\(^{11}\) ‘[H]aving a defined criminal policy means that judges can refer to this policy when they are considering the appropriate penalties in a particular case. This policy promotes greater equality and uniformity in judicial decision making, as judges cannot merely take into account any purposes that they themselves consider important. All judges should make reference to a uniform set of principles...’\(^{12}\) The sentencing aims could thus be perceived as a sort of ‘umbrella principles’ or background considerations whereby all factors accepted in sentence determination in a particular case should ideally be relevant according to the sentencing aims and a weight ascribed to particular circumstances in meting out a sentence should also reflect ordering among the sentencing purposes.

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.\(^{13}\) The general aims, in a sense of a restoration and maintenance of international peace and security, are provided for in the resolutions establishing the Tribunals.\(^{14}\) However, this rhetoric was employed primarily to justify creation of the Tribunals under Chapter VII of the UN Charter. It is unclear whether and how these relate to the meting out penalties to individuals standing trial before the Tribunals. Some principles specific to sentencing have emerged in the ICTY and

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\(^{13}\) M. Bagaric, J. Morss, supra note 4, at 208.

\(^{14}\) Res. 827, Res. 955, supra note 5, Preambles.
ICTR case-law. In this respect, judges clearly found inspiration in classical ‘domestic’ penal theories. 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.

15 For the overview of ‘domestic’ sentencing theories see J.W. de Keijser: Punishment and Purpose, From Moral Theory to Punishment in Action, Thela Thesis, Amsterdam, 2000, at 11-31. Cf. A. Cassese: International Criminal Law, Oxford University Press, New York, 2003 at 18. Some authors have criticized the recourse of international trials being international trials not exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or exclusively or 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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. First, 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. Second, judges are not clear 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 the cases. Judges often note that retribution and deterrence are considered the main purposes of sentencing for crimes under their jurisdiction. 17 If one considers the sentencing factors dictated by the positive law with gravity figuring at the top of the list, it seems that retribution with its focus on linking the severity of a sentence to the seriousness of committed crimes should be ascribed the primacy. There have, however, been cases where only deterrence is mentioned18 or no sentencing objectives are mentioned at all.19 There are also differences in prioritizing between these two rationales. As Drumbl summarizes ‘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”’.20 At the ICTR especially in the early case law general deterrence was ‘particularly
emphasized".  

21 Next to 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 rehabilitation should not be given undue weight given the seriousness of committed crimes.  

22 At the ICTR, protection of society is also often mentioned next to retribution, deterrence and rehabilitation.  

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 crime or motivation of a perpetrator. In others they are deemed to form ‘the context within which an individual accused’s sentence must be determined’, they ‘form the backdrop against which the Accused’s sentence has been determined’ or ‘constitute the matrix in which the proportionate sentence is meted out’. As noted by the Trial Chamber in Kunarac: ‘The Trial and Appeals Chambers of the International Tribunal generally consider what is variously and often interchangeably referred to, for example, as sentencing “objectives”, “purposes”, “principles”, “functions” or “policy” in the assessment of the term of actual imprisonment for convicted persons. These are considered in addition to the gravity of the offence and mitigating and aggravating circumstances. What appear to be justifications for imprisoning convicted persons, or theories of punishment, actually are treated as or resemble sentencing factors, in the sense that these considerations are consistently said to affect, usually in an unspecified manner, the length of imprisonment’. Consequently, it is not possible to assess how the sentencing objectives guide and/or affect 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

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22 Milutinovic, supra note 17, para. 1146; Judgment, Deronjic (IT-02-61) Appeals Chamber, 20 July 2005, para. 136. In a handful of cases, however, judges seem to ascribe more importance to rehabilitation. Cf. Judgment, Jokic (IT-01-42/1) Trial Chamber, 18 March 2004, para. 36, Judgment, Obrenovic (IT-02-60/2) Trial Chamber, 10 December 2003, para. 53. According to some scholars, however, there are cases where rehabilitation has been given considerable weight such as Erdemovic, Musema or Serushago. Cf. J.C. Nemitz, supra note 4, at 94.  


24 Judgment, Mucic et al. (IT-96-21) Trial Chamber, 16 November 1998, paras.1231-1235.  

25 Judgment, Plavsic (IT-00-39&40/1) Trial Chamber, 27 February 2003, para.22.  


28 Kunarac et al., supra note 23, para.836.
argumentation. The general principles of sentence determination and sentencing factors that ICTY and ICTR judges consistently emphasize relate primarily to retribution. The influence of retribution is apparent from the fact that gravity is consistently emphasised by the judges as the primary consideration in sentence determination and that proportionality between gravity of crime and sentence severity is often underscored. Decisions of judges regarding relevant aggravating and mitigating factors could be linked to retribution, rehabilitation and sometimes also reconciliation.

Consequently, the ICTY and ICTR case law lacks a principled and consistent approach regarding the purposes of international sentencing and their role in sentence determination. The question remains, however, whether this lack of clear argumentation regarding the purposes of international punishment 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 much further consideration and 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.

3.1.2. General principles of sentence determination

The general principles of sentence determination are broad principles judges claim to pursue in individual cases. They basically provide guidance and determine what factors are relevant and

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29 Cf. ICTR cases of Ruggiu, Seromba, Bagosora et al., Zigiranyirazo, Kalimanzira, Renzaho, Bagaragaza, Setako, Nchamihigo or Munyakazi. At the ICTY this was the case in cases of Galic, Milosevic, Tarculovski or Vasiljevic.

30 Judgment, Deronjic (IT-02-61-T) Trial Chamber, 30 March 2004, para.154; It should, however, be noted that in case of large scale atrocities such as international crimes, a proportionality assessment becomes extremely complicated.

31 In this respect, it seems that on the face of it there is no clear link between justifications and goals of punishment and the practice of punishment in the Tribunals’ case law. There seem to be a parallel to the findings of a study conducted by De Keijser who explored the link between objectives of punishment derived from moral legal theory and practice of punishment in the Netherlands, empirically examined penal attitudes of Dutch magistrate judges and concluded that ‘there is no commonly shared vision among Dutch judges in relation to the goals of punishment that apply in specific cases’ and preferences for goals of punishment were not very relevant for choosing a particular sanction, nor were sentencing decisions rationalised by goals of punishment.’ De Keijser, supra note 15, at 163-164.
what weight should be ascribed to individual sentencing factors in sentence determination. Ideally, these principles should be related to sentencing rationales, for example if retribution is pronounced as the main sentencing aim the principle of proportionality between the gravity of crime and the severity of sentence should be emphasised. The ICTY and ICTR judges consistently emphasise several sentencing principles such as principle of primacy of gravity, proportionality, totality, gradation, individualization and consistency. Each of them is discussed in more detail in the subsequent sections.

3.1.2.1. Principle of primacy of gravity

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’32, ‘by far the most important consideration, which may be regarded as the litmus test for the appropriate sentence’33, ‘the most important factor to be considered’34, ‘the principal guideline for sentencing’35 or ‘a factor of paramount importance in the determination of sentence’36. Therefore, ‘the overriding obligation in determining sentence is that of fitting the penalty to the gravity of the criminal conduct’37. The primary emphasis on the gravity of crime in sentencing is common to all the ICTY and ICTR judgments with no exceptions. 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 3.2.1. below.

3.1.2.2. Principle of totality

The principle of totality is related to the principle of primacy of gravity. It stipulates that a final sentence should reflect the totality of a 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

32 Aleksovski, supra note 9, para.182.
34 Judgment, Jelisic (IT-95-10) Trial Chamber, 14 December 1999, para.121.
35 Judgment, Brdjanin, IT-99-36, Trial Chamber, 1 September 2004, para.1093.
36 Judgment, Limaj et al. (IT-03-66) Trial Chamber, 30 November 2005, para.724.
37 Judgment, Banovic (IT-02-65/1) Trial Chamber, 28 October 2003, para.36.

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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.\(^38\) Increasingly now, both ICTY and ICTR judges have been handing out single sentences so the principle of totality has gained importance and is consistently referred to. The Appeals Chamber in the Celebici case elaborated in more detail on what the principle entails: ‘sentencing in relation to more than one offence involves more than just an assessment of the appropriate period of imprisonment for each offence and the addition of all such periods so assessed as a simple mathematical exercise. The total single sentence, or the effective total sentence where several sentences are imposed, must reflect the totality of the offender’s criminal conduct but it must not exceed that totality. Where several sentences are imposed, the result is that the individual sentences must either be less than they would have been had they stood alone or they must be ordered to be served either concurrently or partly concurrently.’\(^39\) In this respect, the influence of the totality principle is apparent in cases where the Appeals Chamber reverses some factual findings made on trial but refuses to alter a sentence. Arguably, by limiting a crime base of a defendant’s crimes, his culpability is reduced. In many of these cases, however, the Appeals Chamber rejects to adjust a sentence since ‘the overall picture of criminal conduct has not changed so substantially that an intervention of the Appeals Chamber is justified or warranted.’\(^40\) 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 crimes.’\(^41\) 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 nontransparent. Trial Chambers usually neither indicate sentence severity for individual offences

\(^{38}\) ICTY RoPE, ICTR RoPE, supra note 5, Rule 87(C).

\(^{39}\) Judgment, Mucic et al (IT-96-21) Appeals Chamber, 8 April 2003, para.46.


\(^{41}\) Kunarac et al., supra note 23, para. 855; Mucic et al., supra note 33, para. 769.
nor do they detail weight ascribed to individual aggravating and mitigating factors. They just 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.

3.1.2.3. Principle of proportionality

The principle of proportionality forms another sentencing principle closely related to the assessment of the gravity of crimes and consistently emphasized in the ICTY and ICTR case law. It is also linked to the principle of individualization in the sense that a sentence should reflect solely the personal criminal conduct of a defendant and nothing more. This is especially important in case of international crimes that are typical for their collective and systematic nature with many perpetrators involved and cooperating in committing multiple crimes. At first sight the principle of proportionality is pretty 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. Judges are thus provided with limits within which they can further individualize a sentence. This is not the case at the ICTY and ICTR. As discussed above, the positive law does not contain any indication of sentence severity for individual offences. However, judges consistently emphasize that ‘[a] sentence must reflect the predominant standard of proportionality between the gravity of the offence and the degree of responsibility of the offender’.\(^{42}\) 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’ (i.e. punishment should be proportional relative to the other defendants, more culpable defendants should be punished more severely than less culpable defendants) from their assessment: ‘The principle of proportionality “by no means encompasses proportionality between one’s sentence and the sentence of other accused.”\(^{43}\) On the other hand, it is extremely

\(^{42}\) Deronjic, supra note 30, para.154; Judgment, Rutaganda (ICTR-96-3) Appeals Chamber, 26 May 2006, para. 591.

difficult to grasp the functioning of the proportionality principle in case of international crimes. Crimes coming before 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 therefore, one would expect that penalties would be heavier than those imposed by domestic courts. This is, however, not the case and the Tribunals have been criticized for leniency of their sentences. There are fundamental problems with the proportionality assessment in case of international crimes. As noted by Osiel citing Hannah Arendt ‘[e]ven if the law had imagined a graver offense than simple murder, it could construct no fitting punishment that would encompass the additional increment of wrongdoing....[International crime] does confront us with wrongdoing that is graver and more severe than ordinary, first-degree murder – greater than the sum of the individual wrongs composing it.’ What sentence is/should then be considered proportional in cases of genocide involving multiple killings committed with the intent to eliminate a whole ethnic or religious group is extremely difficult to assess. Judges at the Tribunals sometimes also acknowledge this dilemma. As noted by the trial judges in Krajisnik: ‘There is no need to retell here the countless stories of brutality, violence, and deprivation that were brought to the Chamber’s attention. But hidden amidst the cold statistics on the number of people killed and forced away from their homes, lies a multitude of individual stories of suffering and ordeal – psychological violence, mutilation, outrages upon personal dignity, rape, suffering for loved ones, despair, death. A sentence, however harsh, will never be able to rectify the wrongs, and will be able to soothe only to a limited extent the suffering of the victims, their feelings of deprivation, anguish, and

February 2011) where the author argues for a primacy of the offence-gravity proportionality (i.e. a defendant receives punishment that is proportional to his/her wrongdoing) over the defendant-relative proportionality (i.e. more culpable defendants ought to be punished more severely than less culpable defendants) in international sentencing. According to Ohlin international sentences should above all reflect the inherent gravity of the offence so that even limited participation in international crimes by a low or mid-level offender would yield a life sentence (if the offence seriousness warrants a life imprisonment), even if participation by the highest level offenders yields the same life sentence.

44 The difficulty of operationalizing the proportionality principle are also apparent in the appeal decision-making at the ICTY and ICTR. A frequent ground of appeal of both, defence 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 [Judgment, Galic (IT-98-29) Appeals Chamber, 30 November 2006] and Gacumbitsi [Judgment, Gacumbitsi (ICTR-2001-64) Appeals Chamber, 7 July 2006] ). The Appeals Chamber usually relies on a considerable amount of discretion of Trial Chambers to reject these claims.

45 Cf. Bagaric, Morss, supra note 4, at 253 who noted that “penalties imposed by the Tribunals are breathtakingly light compared to similar offences when committed in any other domestic jurisdiction”; M. Drumbi (2007), supra note 4, at 15, D’Ascoli, supra note 4, at 50.

Therefore, given the extreme seriousness and brutality of international crimes it is impossible to come up with proportional sentences in a traditional understanding of this principle that is derived from domestic jurisdictions. As D’Ascoli correctly observes ‘...a direct proportionality (and a traditional interpretation of the principle) cannot be applied to the international trial context and international sentencing. In order to overcome the proportionality impasse in international sentencing, a new and different concept of proportionality is needed’. Such a new conception of proportionality, however, has never been addressed/discussed at the ICTY or ICTR.

3.1.2.4. 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 enables judges to differentiate between ‘crimes which are of the most heinous nature, and those which, although reprehensible and deserving severe penalty, should not receive the highest penalties’. 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 Appellant in the broader context of the conflict in the former Yugoslavia’. 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’. Over time a general principle evolved in the ICTY case law that sentences should be gradated along with increasing authority of a defendant in the state structure and significance of his/her role in crimes. This principle has also been emphasised by the ICTR. In Kayishema & Ruzinanda, for example, the judges enumerated the factors that distinguished the different levels of culpability of the two accused, both of whom were convicted of genocide. Kayishema, the prefect of Kibuye, was convicted for his leading role and active participation in several massacres and

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48 D’Ascoli, supra note 4, at 50, 145.
49 This principle is uniformly emphasized at the ICTR. At the ICTY there are some judgments where judges do not discuss the principle of gradation explicitly.
50 Ntakirutimana, supra note 21, para. 773.
52 Ibid., para.56.
53 Rukundo, supra note 19, para.605.
attacks on sacred places such as churches. He was a leader in the genocide in Kibuye prefecture and instigated and ordered attacks resulting in the death of thousands of victims. Ruzinanda, a commercial trader in Kigali, played a leadership role during one attack and also personally participated in the killings. The judges emphasized the heinous means by which he committed murders such as “the vicious nature of the murder of a sixteen-year old girl named Beatrice. Ruzinanda ripped off her clothes and slowly cut off one of her breasts with a machete. When he finished, he cut off her other breast while mockingly telling her to look at the first one as it lay on the ground, and finally he tore open her stomach.” Despite the horrendous nature of Ruzinanda’s acts the judges concluded that Kayishema deserved more punishment than Ruzinanda. The principal reasons for this decision can be traced back to the principle of gradation: Kayishema occupied a position of authority, while Ruzinanda did not. Kayishema’s conviction also covered a more extensive crime base; he was educated, a medical doctor and, at the time of genocide, the prefect of Kibuye, who betrayed the ethical duty that he owed to his community. In addition, on at least one occasion, Kayishema instructed and praised Ruzinanda, thus indicating his more important and leading role in the atrocities. Taken together, these considerations led the judges to sentence Kayishema to life imprisonment, while Ruzinanda was given a sentence of 25 years.

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. The Appeals Chamber in Celebici clarified that the principle of gradation does not “purport to require that in every case […] an accused’s level in the overall hierarchy in the conflict in the former Yugoslavia should be compared with those at the highest level, such that if the accused’s place was by comparison low, a low sentence should automatically be imposed. Establishing a gradation does not entail a low sentence for all those in a low level of the overall command structure. On the contrary, a sentence must always reflect the inherent level of gravity of a crime which “requires consideration of the particular circumstances of the cases, as well as the form and degree of the participation of the accused in the crime.” In certain circumstances, the gravity of crime may be so great that even following consideration of any mitigating factors, and despite the fact that the accused was not senior in the so-called overall command structure,

54 Judgment, Kayishema & Ruzinanda (ICTR-95-1) Trial Chamber, 21 May 1999, para. 18.
55 Ibid., para. 26.
a very severe penalty is nevertheless justified.” Consequently as often reiterated by the ICTR judges, life imprisonment as the severest sentence available to judges should be reserved for the most serious offenders,\(^\text{57}\) being those at the upper end of the sentencing scale, such as those who planned, led or ordered atrocities, or those who committed crimes with particular zeal or sadism. 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.\(^\text{58}\) However, very severe sentences can also be imposed on those at lower levels who zealously orchestrated or participated in crimes. In this sense, the principle of gradation resembles the defendant-relative proportionality whereby judges compare a 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. The principle of gradation thus actually brings into the ICTY and ICTR sentence determination also a kind of defendant-relative proportionality assessment.\(^\text{59}\)

3.1.2.5. Principle of individualization

Next to the crime gravity and the principles evolving around its assessment discussed above, the individualization of sentences is another principle uniformly emphasized and discussed by the ICTY and ICTR judges. The positive law indeed directs judges to consider individual circumstances of the offender and any mitigating and aggravating circumstances. The principle of individualization can be interpreted in two possible ways: (i) a sentence should be individualized so as to reflect solely the individual guilt of a defendant (in this sense individualization is closely related to the principle of proportionality); and (ii) a sentence should fit not only the crime but also the defendant in a sense that judges sufficiently take into account personal circumstances of the offender (‘personalized sentencing’).

Since under the positive law judges are asked to individualize a sentence and almost no further guidelines regarding relevant factors are provided for, they are able to exercise a considerable

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\(^{56}\) Mucic et al., supra note 33, para. 847; Kunarac et al., supra note 23, para. 858.

\(^{57}\) Judgment, Nahimana, Barayagwiza, Ngeze (ICTR-99-52), Trial Chamber, 3 December 2003, para. 1097.


\(^{59}\) Given the fact that international crimes under the jurisdiction of the Tribunals are collective, systematic endeavours with many perpetrators of differing roles and differing degrees of culpability cooperating together in criminal acts, it is theoretically sound to compare seriousness and culpability level among all the perpetrators involved. Cf. A. Smeulers, B. Hola: ICTY and Culpability of Different Types of Perpetrators, in A. Smeulers (Ed.): Collective Violence and International Criminal Justice, And Interdisciplinary Approach, Intersetia, Antwerpen, 2010, 175-205.
amount of discretion.\textsuperscript{60} This large leeway provided to Trial Chambers is apparent from the approach of the Appeals Chambers to sentencing appeals. Appeal judges adopted a deferential standard to the appellate review – ‘a discernible error test’. Under this test an Appellant has to demonstrate that a Trial Chamber ‘gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised discretion or that the Trial Chamber decision was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly’.\textsuperscript{61} However, since the positive law provides only very loosely defined limits, the maneuvering space of Trial Chambers is large and it is difficult to demonstrate an error on the side of the Trial Chamber. In practice, the Appeals Chamber usually respects the discretion of trial judges to determine an appropriate sentence and only rarely disturbs the sentence determination made on trial (unless it reverses a finding of a trial chamber regarding the crime basis or the defendant’s way of participation). A discernible error in the exercise of Trial Chamber discretion is identified only very exceptionally.\textsuperscript{62}

The individualization of a sentence is closely connected to the evaluation of personal/individual circumstances of a defendant. In the majority of the 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 emphasized 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.\textsuperscript{63} The weight to be accorded to mitigating circumstances lies within the discretion of a Trial Chamber.\textsuperscript{64} A finding of mitigating circumstances relates to the assessment of the sentence and in no way derogates

\textsuperscript{60} Milutinovic et al., supra note 17, para. 1142; Akayesu, supra note 33, para. 407.

\textsuperscript{61} Judgment, \textit{Martic} (IT-95-11) Appeals Chamber, 8 October 2008, para.326

\textsuperscript{62} Basically if a Trial Chamber enumerates the few factors dictated by law and assesses them in light of the facts of a case, the Appeals Chamber will not disturb its findings. For exceptions see Appeals Judgments in Aleksovski, Gacumbitsi, Mucic, Galic, Mrksic&Sljivancanin.


\textsuperscript{64} Judgment, \textit{Kajeljeli} (ICTR-98-44A) Appeals Chamber, 23 May 2005, para. 294.
from the gravity of crime nor diminishes the responsibility of convicted persons or lessens the degree of condemnation of their actions. Such a finding mitigates the punishment, not the crime.\textsuperscript{65} 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.\textsuperscript{66}

3.1.2.6. Principle of consistency

The principle of individualization of a sentence must always be balanced against another sentencing principle – consistency. The principle of consistency, in the sense of similarity of sentences in comparable cases, is also often discussed in the Tribunals’ case law. It has not, however, gained such a prominence as the other principles. In the 	extit{Celebici} case the ICTY Appeals Chamber noted: ‘One of the fundamental elements in any rational and fair system of criminal justice is consistency in punishment. This is an important reflection of the notion of equal justice. The experience of many domestic jurisdictions over the years has been that such public confidence may be eroded if these institutions give an appearance of injustice by permitting substantial inconsistencies in the punishment of different offenders, where the circumstances of the different offences and of the offenders being punished are sufficiently similar that the punishments imposed would, in justice, be expected to be also generally similar’\textsuperscript{67}. In the ensuing cases the judges often discussed the requirement of ‘a consistent sentencing’ and it is often repeated that ‘sentences of like individuals in like cases should be consistent’.\textsuperscript{68} Judges, however, almost never consider two cases to be alike and generally tend to downplay the relevance of consistency. The Appeals Chamber ‘does not discount the assistance that may be drawn from previous decisions rendered. Indeed, the Appeals Chamber has observed that a sentence may be considered capricious or excessive if it is out of reasonable proportion with a line of sentences passed in similar circumstances for the same offences. The underlying question is whether the particular offences, the circumstances in which they were committed, and the individuals concerned can truly be considered “like”. Any given case contains a multitude of variables, ranging from the number and type of crimes committed to the personal circumstances of the individual. Often, too many variables exist to be able to transpose

\textsuperscript{65} Ntakirutimana, supra note 21, para. 781.
\textsuperscript{66} Judgment, 	extit{Muhimana} (ICTR-95-1B) Appeals Chamber, 21 May 2007, para. 234.
\textsuperscript{67} Muic et al., supra note 33, para.756; the necessity of consistent sentencing was thereafter discussed in many ICTY and ICTR judgments. Cf. Kvocka et al., supra note 19, para.681.
\textsuperscript{68} Judgment, 	extit{Nzabirinda} (ICTR-2001-77-TT) Trial Chamber, 23 February 2007, para.105.
the sentence in one case mutatis mutandis to another. [...] Thus, while comparison with other sentences may be of assistance, such assistance is often limited. For these reasons, previous sentences imposed by the Tribunal and the ICTR are but one factor to be taken into account when determining the sentence.  

Due to the approach entailing detailed comparisons with previous cases decided by the Tribunals, appeals based on such analogies are almost never successful. Therefore, in the later case law the Appeals Chamber warned parties that comparisons with other cases are ‘not necessarily a proper avenue to challenge a Trial Chamber’s finding in exercising its discretion to impose a sentence’. In Bikindi the judges even explicitly allowed for a certain amount of inconsistency noting that ‘the very fact that Trial Chambers are entitled to a margin of discretion in sentencing matters implies that some disparity is possible, even between cases that may involve similar facts.’

Consequently, both principles of consistency and of individualization should be respected in the sentencing practice in order for sentencing to be fair. However, at the ICTY and ICTR the individualization seems to prevail. Judges put more emphasis on discretionary sentencing making and individualization than on consistency and sentence comparisons among individual cases.

3.1.2.7. Recourse to General Practice regarding Prison Sentences in the Former Yugoslavia and Rwanda

Next to the gravity of crimes and individual circumstances, the positive law also dictates judges to have recourse to the practice regarding the prison sentences in the former Yugoslavia and Rwanda, respectively. The judges at the Tribunals consistently interpreted this provision as requiring them only to consider the Yugoslav and Rwandese sentencing practices as one of the many factors in sentence determination. Accordingly, judges are not bound by that practice and they are entitled to impose a greater or lesser sentence than that which would have been imposed

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69 Kvocka et al., supra note 40, para. 681.
70 Exception is e.g. Mucic et al where the Appeals Chamber called for an increase in the Mucic’s sentence after comparing his case to the case of Aleksovski noting a serious disparity in their sentences. Mucic, supra note 33, para. 759.
71 Dragan Nikolic, supra note 43, para. 19.
72 Judgment, Bikindi (ICTR-01-72), Appeals Chamber, 18 March 2010, para. 203.
73 This reference was included in the Tribunals’ Statutes out of the concerns for the principles of retroactivity and legality. Cf. W. Schabas, supra note 6; R.D. Sloane, supra note 4, at 721.
by the Rwandan/Yugoslav courts. Consequently, the guidance derived from national practice is arguably of minimal impact upon sentencing practice. Numerous appeals at both Tribunals were filed where Appellants claimed that a Trial Chamber violated its discretion by imposing sentences inconsistent with Rwandese/Yugoslav domestic practice, however, such appeals have never been successful. The Appeals Chamber always reiterated that the domestic practice is just ‘an aid’ or just ‘one of the factors to be taken into account’. In some cases, the Appeals Chamber took a slightly more rigorous approach and stated: ‘Although the Trial Chamber is not bound to apply the sentencing practice of the former Yugoslavia, what is required certainly goes beyond merely reciting the relevant criminal code provisions of the former Yugoslavia. Should they diverge, care should be taken to explain the sentence to be imposed with reference to the sentencing practice of the former Yugoslavia, especially where international law provides no guidance for a particular sentencing practice.’ However, as the appeals judges in these cases also note ‘given the inherent differences in the nature, scope and scale of the offences tried before the International Tribunal’, the reasons for any divergence seem self-evident and do not require much of a sophisticated argumentation.

The above section has demonstrated that several principles emphasised consistently across the cases have emerged in the ICTY and ICTR jurisprudence. 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 individualization complements this general framework. Arguably, principles of consistency and recourse to domestic penal practices do not play such a significant role in the ICTY and ICTR case-law.

76 Dragan Nikolic, supra note 43, para. 69; Semanza, supra note 40,para. 377; Kunarac et al., supra note 23, para.829; Judgment, Bralo (IT-95-17) Trial Chamber, 7 December 2005, para. 84.
3.2. APPLICATION OF GENERAL PRINCIPLES TO INDIVIDUAL CASES

This section analyzes how the general principles of sentence determination are operationalized/implemented in the Tribunals’ practice and applied to facts in individual cases. Since almost all the above principles come back to the gravity evaluation, the concept of gravity of crimes is discussed first. How is the gravity interpreted by the judges? What factors are relevant in its assessment and is this consistent across the case law? Thereafter, aggravating and mitigating circumstances accepted by the ICTY and ICTR judges to individualize sentences and disparities among cases regarding these factors are discussed.

3.2.1. 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.\(^77\) 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 of what a defendant actually did.

3.2.1.1. 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 individual categories of international crimes. They just state that there is no hierarchy and that all the categories are very serious violations of international (humanitarian) law. 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. However, both Tribunals, however, seem to adopt the stance that there is no pre-established hierarchy between individual categories of crimes\(^78\) emphasising that all crimes under their jurisdiction are

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\(^78\) Judgment, Mrksic & Slijivancanin (IT-95-13/1) Appeals Chamber, 5 May 2009, para. 375.
very serious violations of international humanitarian law.\textsuperscript{79} In the first ICTY cases judges indicated that, all else being equal, an offence committed as a crime against humanity, that is with awareness of a widespread or systematic attack on a civilian population, is more serious than an ordinary war crime.\textsuperscript{80} However, this position was abandoned by the Appeals Chamber in \textit{Tadic} where a majority ruled that: “…there is in law no distinction between the seriousness of a crime against humanity and that of a war crime. The Appeals Chamber finds no basis for such a distinction in the Statute or the Rules of the International Tribunal construed in accordance with customary international law; the authorized penalties are also the same, the level in any particular case being fixed by reference to the circumstances of the case.”\textsuperscript{81} This quote is now recurrently referred to in almost all ICTY judgments.\textsuperscript{82} Similarly at the ICTR, in the early jurisprudence judges indicated that it is possible to pre-distinguish among individual categories of crimes on the basis of their inherent seriousness.\textsuperscript{83} Genocide has been labelled ‘the crime of crimes’ - the most serious crime because of its element of dolus specialis.\textsuperscript{84} However, in the later cases these ideas were not followed upon and in the same way as in the ICTY jurisprudence, judges started to emphasise that ‘there is no hierarchy of crimes under the Statute, and that all of the crimes specified therein are “serious violations of international humanitarian law, capable of attracting the same sentence”’.\textsuperscript{85} In contrast several legal scholars have argued that there should be a hierarchy of individual categories of international crimes based on the assessment of their gravity \textit{in abstracto}. According to these scholars, when the same act, e.g. murder, is committed as either genocide or a crime against humanity or a war crime, there should be a gradation in punishment reflecting different contextual elements of individual

\textsuperscript{80} Sentencing Judgment, \textit{Tadic} (IT-94-1-T) Trial Chamber, 14 July 1997, para. 73. This position was in substance repeated in para. 28 of the Sentencing Judgment in \textit{Tadic} (IT-94-1-Tbis-R117) Trial Chamber, 11 November 1999. The similar approach was also adopted by majority on appeal in \textit{Erdemovic}: “… all things being equal, a punishable offence, if charged and proven as a crime against humanity, is more serious and should ordinarily entail a heavier penalty than if it were proceeded upon on the basis that it were a war crime” Judgment, Joint Separate Opinion of Judge McDonald and Vohrah, \textit{Erdemovic} (IT-96-22) Appeals Chamber, 7 October 1997, para. 20.
\textsuperscript{81} \textit{Tadic}, supra note 51, para. 69.
\textsuperscript{84} \textit{Judgment, Rutaganada} (ICTR-96-3) Trial Chamber, 6 December 1999, para. 451; Musema, supra note 21, para. 981.
\textsuperscript{85} Judgment, \textit{Kayishema & Ruzinanda} (ICTR-95-1) Appeals Chamber, 1 June 2001, para. 367; Rutaganda, supra note 42, para. 590; Imanishimwe, supra note 19, para. 816.
Consequently, a genocidal murder should be considered as the most serious
entailing the severest punishment, followed by a murder as a crime against humanity and the
least severe punishment should be ascribed to a murder as a war crime.

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 pillage or destruction of property. Each
underlying offence has its specific mental (mens rea) and physical (actus reus) requirements of
proof and consequently, sentencing should ideally reflect whether a person is convicted for
killing or for appropriation 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 that is stated in law. This is not the case at the ICTY and ICTR. No sentencing
ranges for individual offences, that judges would refer to and consider in their sentence
determination, have emerged in the case law either. Sometimes judges note that the legal nature
of the offence forms one of the factors to be considered when assessing the gravity of crime.

However, they neither discuss and evaluate the abstract gravity of individual offences in more
detail nor relate/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’ and ‘on account of its distinctive features
(discriminatory intent), it justifies a more severe penalty’; or torture that ‘constitutes one of
the most serious attacks upon a person’s mental or physical integrity. The purpose and the

86 Genocidal acts have to be committed with the special intent to destroy in whole or in part a specified group.
Crimes against humanity must be part of a widespread or systematic attack against any civilian population
committed with knowledge of this attack. War crimes must be linked to an armed conflict.
87 Cf. A. Bogdan: Cumulative Charging, Convictions and Sentencing at the Ad Hoc International Tribunals for the
Former Yugoslavia and Rwanda, 3 Melb. J. Int’l. L. 2002, 1-32 at 7-8 referring to Bassiouni’s classification of
international offences; J.C. Nemitz, supra note 4, at 114 noting that “a murder as a crime against humanity is
inherently more serious than a murder as a war crime, because the former was committed as part of a widespread or
systematic attack against civilians with knowledge of this attack.”; A. Carcano: Sentencing and the Gravity of the
Offence in International Criminal Law, 51 International and Comparative Law Quarterly 2002, 583-609; In contrast
Harmon and Gaynor note that the debate on hierarchy are ultimately of little relevance to sentencing” and, similar
to the ICTY and ICTR judges, emphasise the importance of gravity in concreto assessment. Harmon, Gaynor, supra
note 4, at 696-697.
88 CF. Recommendation No R. (92) 17 of the Committee of Ministers to Member States concerning Consistency in
89 Cf. Judgment, Rajić, IT-95-14/1, Trial Chamber, 8 May 2006,para.82; Mrkić, supra note 78, para.400.
90 Judgment, Kupreškić et al. (IT-95-16) Trial Chamber, 14 January 2000, para.751.
91 Sikirica et al., supra note 19, para. 232; Banović, supra note 37, para.91; Judgment, Todorovic (IT-95-9/1) Trial
Chamber, 31 July 2001, para. 113; Obrenovic, supra note 22, para. 65;Brđanin, supra note 35, para. 1095.
seriousness of the attack upon the victim set torture apart from other forms of mistreatment.”

In one case the Appeals Chamber even rejected outright abstract comparison of offences stating that ‘the view that crimes resulting in loss of life are to be punished more severely than those not leading to the loss of life...is too rigid and mechanistic.”

Arguably, however, the gravity in abstracto (not only with respect to individual categories but also regarding individual underlying offences and their relative seriousness) should be the starting point of sentence determination. In Blaskic, the Trial Chamber discussed in more detail how this could work in practice: ‘The objective method for assessing the seriousness of a crime is linked to the intrinsic seriousness of the crime’s legal characterization. [...] In addition to the seriousness per se of the crime, it is also appropriate to take into account its [subjective] seriousness [in concreto]. Although the subjective seriousness is not taken into account in the scale of seriousness of the crimes, it is a factor in the second phase of determining the sentence and thereby ensures that the circumstances of the case may be duly taken into account in setting the sentence. [...] It is understood that the weight of the second factor, that is the subjective seriousness, should not, other than in exceptional circumstances, cancel out the first factor, that is the objective seriousness.”

This approach was not followed upon in the subsequent case law where the discussion of the gravity in abstracto of individual crimes remains rudimentary or lacking. 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 the ICTY and ICTR previous 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. Despite this, the ICTR judges tried to establish ‘general ranges of sentences for each specific crime’ on the basis of the Tribunals’ previous sentencing practice to guide them in their sentencing consideration. So far, however, this attempt has remained limited and judges have not derived any general conclusions in terms of objective severity of individual offences on this basis.

### 3.2.1.2. Gravity in Concreto

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92 Simic, supra note 26, para. 34.
94 Judgment, Blaskic (IT-95-14) Trial Chamber, 3 March 2000, paras. 803-804.
96 Imanishimwe, supra note 19, para.813; Semanza, Ibid., para.564; Rukundo, supra note 19, para. 605.
As noted above, the ICTY and ICTR judges put the primary emphasis in the sentence determination on the gravity in concreto assessment, i.e. particular circumstances of the case at hand. The Appeals Chamber in Mrksic reiterated that “[w]hile consideration of the gravity of the offence involves, in addition to consideration of the gravity of the conduct of the accused, consideration of the seriousness of the underlying crimes, the Appeals Chamber emphasizes that the gravity of the crime does not refer to a crime’s “objective gravity”, but rather to the particular circumstances surrounding the case and the form and degree of the accused’s participation in the crime. [...] The Trial Chamber’s duty remains to tailor the penalty to fit the individual circumstances of the accused and the gravity of the crime so that “the accused are punished solely on the basis of their wrongdoings” and not on the basis of “abstract distinctions among crimes”.97 The factors relevant to the ‘concrete’ gravity assessment, however, differ across cases. The main reason for this confusion lies in the fact that neither the positive law prescribes what factors should be relevant for the gravity assessment and what circumstances further aggravate or mitigate a sentence nor has this ever been authoritatively settled by the Appeals Chamber.

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 the factors relevant to the form and degree of a defendant’s participation were discussed under the heading of aggravating/mitigating factors.98 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 the gravity was corrected by the Appeals Chamber in some of these cases99, while in other cases the Trial Chamber’s ruling was left undisturbed.100

97 Mrksic & Slijivancanin, supra note 78, para. 375.
98 Kvocka et al., supra note 19, para. 701; Judgment, Galic (IT-98-29), Trial Chamber, 5 December 2003, para. 758; Judgment, Krstic (IT-98-33) Trial Chamber, 2 August 2001, para 701.
99 Galic, Ibid., para. 409; Krstic, Ibid., para. 268.
100 E.g. Kvocka et al. where the Appeals Chamber did not discuss the Trial Chamber’s interpretation of gravity of crimes at all.
a. Harm

The assessment of harm caused by a defendant forms an important aspect of the gravity evaluation. Extent and duration of crime, brutality, number of victims, the vulnerability of victims and their amount of suffering and impact of crimes on victims, their relatives and broader targeted groups are the relevant considerations in this respect. 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. The obfuscation of the boundaries between the concept of gravity of crimes and aggravating/mitigating factors is apparent in the case law of both Tribunals.

b. Involvement

The second aspect of the crime gravity assessment relates to the way how 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, level of authority, 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.

Article 7(6) of the ICTY (ICTR) Statute distinguishes between superior responsibility 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. Each liability mode entails the proof of specific

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101 Milutinovic et al., supra note 17, para. 1147; Mrksic & Slivancanin, supra note 78, para. 400, Judgment, Popovic et al (IT-05-88) Trial Chamber, 10 June 2010, para. 2134.
102 Milutinovic et al., supra note 17, para. 1147, Popovic et al., Ibid., para. 2134; Judgment, Dordevic (IT-05-87-I-T) Trial Chamber, 23 February 2011, para. 2210.
103 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, Oxford University Press, New York, 2009.
actus reus and mens rea. Consequently, sentence severity should differ depending on whether a defendant is convicted as a hands-on perpetrator, order-giver, or as ‘an aider’. 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. The special character of superior responsibility calls for ‘even greater flexibility in the determination of sentence’.  

Accordingly, the Trial Chamber in Hadžihasanović argued that ‘the sui generis nature of superior responsibility under Article 7(3) could justify the fact that the sentencing scale applied to those Accused convicted … on the basis of Article 7(1) of the Statute … is not applied to those convicted solely under Article 7(3)’.

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. 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; (2) a sentence of life imprisonment is generally reserved for those who planned or ordered atrocities and those who have participated in the crimes with particular zeal or sadism; and (3) under certain circumstances a participant in a JCE might deserve a higher sentence than the hands-on perpetrator.


105 Judgment, Orić (IT-03-68) Trial Chamber, 30 June 2006, para.724.
108 Judgment, Simić et al., IT-95-9, Appeals Chamber, 28 November 2006, para.265; Semanza, supra note 40, para.388; Mrksić & Sljivancanin, supra note 78, para. 407
Since international crimes are a specific type of criminality in the sense that they are committed by many perpetrators who collaborate and coordinate their criminal activities, the specific (indispensable) role of ‘the individuals behind the actual hands-on perpetrators’ – those with no blood on their hands - was also acknowledged by the Tribunals. In this respect, the Appeals Chamber emphasised that being convicted as an indirect perpetrator does not in itself entitle a defendant to a lower sentence since ‘the role of the “indirect co-perpetrators” can be very significant, particularly in cases of large scale crimes which could not be committed without the help of the indirect co-perpetrators in such ways as planning, instigating, co-ordinating or organizing’. Therefore, being convicted as an indirect perpetrator (i.e. participant in JCE, order-giver, instigator or planner) does not by necessity imply a limited role in crime and does also not necessarily entail a low sentence.

C. Relation of the Concept of Gravity to Aggravating Factors

Aggravating factors are generally circumstances related to the gravity of the crime increasing its seriousness level. In many domestic jurisdictions factors that can be accepted in aggravation of a sentence should be provided for in the positive law. This is not the case in the Tribunals’ legal framework. Clear guidelines as to what factors are relevant for assessing the gravity of the offence and what circumstances could constitute aggravating factors have not yet been developed in the case law either. The distinction among factors relevant to evaluate “the basic” gravity of the offence and aggravating factors is not clear-cut and the jurisprudence in this respect is inconsistent: The same factors are in some cases discussed within the assessment of the gravity of the offence, yet in other cases these factors are deemed to aggravate the sentence. ICTR judges sometimes consider the gravity of crime to be one of the factors in aggravation: ‘The seriousness of the crimes and the extent of the involvement of the accused in the commission are factors to be considered in assessing aggravating circumstances. Genocide and

Crimes against humanity are inherently aggravating offences because they are heinous in nature and shock the collective conscience of mankind.”116 or ‘Amongst the aggravating circumstances, the Chamber finds, first of all, that the offences of which Musema is found guilty are extremely serious, as the Chamber already pointed out when it described genocide as the ‘crime of crimes’.”117 In some ICTY and ICTR cases, the circumstances, such as special vulnerability of victims, extra suffering of victims, form and degree of participation,118 active role in an attack, or a multitude of criminal acts, were accepted in aggravation, yet in others the same factors were considered as falling within the notion of gravity.119 In the latest case law, the Trial Chambers tend to merge the concepts of gravity and aggravating circumstances stating that ‘[s]eeking to analyse the gravity of the crimes separately from any aggravating circumstances would be an artificial exercise’.120

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’.121

What is the most important principle in this respect is that no factor is counted twice in sentence determination to the detriment of 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.122 Whether a certain aspect is considered as part of the gravity evaluation or as an aggravating factor seems to be not so important.

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

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117 Musema, supra note 21, para. 1001; For a further criticism of this practice see R.D. Sloane, supra note 4, at 723.
118 Blaskic, supra note 94, para 790.
120 Judgment, Bralo, supra note 76, para. 27; Judgment, Haradinaj et al. (IT-04-84) Trial Chamber, 3 April 2008, para. 489; Judgment, Gotovina et al. (IT-06-90) Trial Chamber, 15 April 2011, para. 2599; Dordevic, supra note 108, where the Trial Chamber at first sight distinguishes between the two headings The gravity of crimes and Individual circumstances of the Accused: aggravating and mitigating factors, however, all (aggravating) factors relating to the offence and a defendant’s role are discussed under the heading of crime gravity.
122 Judgment, Deronjic (IT-02-61) Appeals Chamber, 20 July 2005, 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. Krajsnik, supra note 27, para. 751; Judgment, Momir Nikolić (IT-02-60/1) Appeals Chamber, 8 March 2006, paras. 60, 61; Stakic, supra note 113, para. 411.
noted on several occasions that it is preferable to distinguish between the notions of gravity of crimes and aggravating factors.\textsuperscript{123} 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.\textsuperscript{124} For the sake of increased consistency of sentencing argumentation, a guideline should be developed in order to avoid the risk of double-counting of individual factors to the detriment of a defendant.\textsuperscript{125} It should be made clearer what factors are to be considered as an evaluation of gravity of crimes and which circumstances could potentially aggravate a sentence; and the trial chambers should consistently follow this distinction. The gravity evaluation, for example, could be limited to statutory elements of offence and mode of liability (that are necessary to convict a defendant – basically sort of a gravity \textit{in abstracto} assessment) and all the other factors such as multiplicity of victims, scope of crime, extra suffering for victims, extra brutality and cruelty etc. should be considered as further aggravating factors.\textsuperscript{126}

\textbf{3.2.2. Individualization of Sentence – Aggravating and Mitigating Factors}

This section focuses on factors ICTY and ICTR judges consider in sentence individualization – ‘individual circumstances of the convicted person’. In the case law ‘individual circumstances’ almost entirely overlap with aggravating and mitigating circumstances. In some cases, the Tribunals describe some sentencing factors under the heading ‘Individual/Personal Circumstances’ but these seem to serve no independent function in the sentence determination except in so far as the Tribunals find them to be aggravating or mitigating.\textsuperscript{127} Ideally major aggravating and mitigating factors shall be clarified in law or legal practice and should be compatible with the declared rationales for sentencing.\textsuperscript{128} In the ICTY and ICTR case law, some

\textsuperscript{123} Deronjic, \textit{Ibid.}, para. 106; Krajisnik, supra note 27, para 787.

\textsuperscript{124} 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. Judgment, \textit{Simba} (ICTR-01-76) Appeals Chamber, 27 November 2007, para. 320.

\textsuperscript{125} Cf. Bala in Limaj et al., supra note 36, para. 731; Kunarac et. al, supra note 23, para. 874; Zelenovic, supra note 119, para. 36-43.

\textsuperscript{126} Cf. J.C. Nemitz: The Law of Sentencing in International Criminal Law; the Purposes of Sentencing and the Applicable Method for the Determination of the Sentence, Yearbook of International Humanitarian Law, Vol. 4, 2001, 87-127 at 117 where the author notes that ‘… the Chambers should first consider the \textit{inherent} gravity of the offence [i.e. gravity in abstracto] before determining the gravity of the offence with the help of aggravating and mitigating circumstances.’


\textsuperscript{128} See Council of Europe Recommendation , supra note 11, at 360.
aggravating and mitigating circumstances are consistently referred to by judges; some are very case-specific, limited only to individual cases. Basically, however, a Trial Chamber exercises discretion in this respect and in principle it can accept any fact as aggravating and/or mitigating as long as it finds the fact relevant for a sentence determination. Judges do not attempt to link the accepted aggravating and mitigating circumstances to the sentencing rationales they declare in individual cases. This practice has been criticized in the academic literature. Bagaric and Morss bluntly state: ‘The stated aggravating and mitigating considerations are not valid given that they are not justified by reference to the stated aims of sentencing and only serve to undermine the search for a penalty which is commensurate with the seriousness of the offence.’ In general, however, the majority of aggravating factors cited by the ICTY and ICTR judges could be linked to retribution and/or deterrence while mitigating factors usually relate to rehabilitation and/or in some cases to reconciliation.

A wide range of factors has been accepted by the Tribunals in aggravation/mitigation of a sentence. The overview of these circumstances is provided below and the list of all the aggravating and mitigating factors ever accepted by the ICTY and ICTR is offered in the Appendix. Whether a certain factor constitutes a mitigating or aggravating circumstance depends largely on 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. Therefore, it is not possible to pre-determine in absolute terms whether a certain factor would always be accepted by judges as aggravating/mitigating. As the Appeals Chamber in Hadzihasanovic emphasised in relation to the possibility of ‘a transfer’ of potential aggravating factors from other cases: “[c]aution is needed when relying as a legal basis on statements made by Trial Chambers in the context of cases and circumstances that are wholly different.”

It is not entirely clear what particular role aggravating and mitigating factors play in sentence determination at the Tribunals. In theory, aggravating factors enhance crime seriousness and

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130 M. Bagaric, J. Morss, supra note 4.
131 Ibid, at 191.
132 Hadzihasanovic & Kubura, supra note 121, para. 328.
133 Cf. R.D. Sloane, supra note 4, at 725 where the author states that “because of the very high baseline established by the gravity of crimes of conviction […] it can be difficult to determine the actual effect, if any, of certain aggravating factors.”
consequently, justify severer sentences; while mitigating factors are such circumstances that justify a sentence reduction. However, since a pre-defined structure of penalties does not exist in the positive law and no guidance in this respect has emerged from the Tribunal’s case law, it is impossible to discern the effect of aggravating and mitigating factors on sentence severity at the sentencing practice of the ICTY and ICTR. In domestic legal systems with pre-defined minimum and maximum penalties, identification of such factors usually enables judges to impose a penalty above or below the range set by the law as the standard sentence for a specific crime. However, in the Tribunals’ legal framework, there are no objective benchmarks against which individual sentences could be evaluated.

Another problematic issue relates to the weight ascribed to individual factors accepted in aggravation and/or mitigation of sentence by the ICTY and ICTR judges. Again, there are no objective standards in the Statutes and/or RoPEs and judges in their sentence argumentation only very rarely indicate what weight was ascribed to a particular aggravating/mitigating factor. ICTY and ICTR judges state only very exceptionally that a particular circumstance was given significant/substantial or limited weight but how this translates in terms of the actual sentence length is never clarified. In the majority of cases, however, factors accepted in aggravation and mitigation of a sentence are only listed with no detailed discussion as to their particular effect on sentence severity. For example, in cases where Trial Chambers hand out life imprisonment - the severest sentence available to judges – it is not clear what effect accepted mitigating factors have. As stated by the Appeals Chamber in Niyitegeka ‘if a Trial Chamber finds that mitigating circumstances exist, it is not precluded from imposing a sentence of life imprisonment, where the gravity of the offence requires the imposition of the maximum sentence...’134 Consequently, the weight ascribed to particular factors in mitigation and aggravation lies entirely within the discretion of a Trial Chamber. 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 and (as already noted) due to the fact that they very rarely indicate what weight was assigned to a particular fact.135 Since there are no objective benchmarks against which to measure the effect of

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135 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: ‘in this case, the Trial Chamber does not indicate how much weight, if any, it attaches to the Appellant’s previous character and accomplishments. Thus, it is not clear that these mitigating factors unduly affected the sentence, given the
individual aggravating and mitigating factors on sentence severity, it is almost impossible to demonstrate that a Trial Chamber abused its discretion and committed a discernible error in weighting the mitigating and aggravating factors. The Appeals Chambers usually find it sufficient that a particular mitigating/aggravating factor (if relevant) was listed by the Trial Chamber which is deemed to evidence the fact that the Trial Chamber considered/took it into account. In *Celebici* the Appeals Chamber rejected the Appellant’s suggestion that Trial Chambers should specifically indicate the sentence reduction in years with respect to each mitigating factor. Consequently, the Tribunals’ Appeals Chambers defer to a large extent to Trial Chambers’ assessment and conduct only a very limited review of their arguments regarding aggravating and mitigating factors. This very limited appeal review, arguably, does not contribute to a very consistent practice regarding factors relevant for sentence individualization.

3.2.2.1. Aggravating Factors

Aggravating factors are such factors that justify an extension of a sentence. As demonstrated above, the principles applicable to aggravating factors set up 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. The group of mitigating factors accepted by judges is thus much more heterogeneous compared to aggravating factors.

The 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

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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 put focus on the fact how a perpetrator’s conduct exacerbated the already horrific conditions of victims.\(^{138}\) 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’\(^ {139}\), ‘protracted criminal activity of a defendant’\(^ {140}\), ‘scope of crimes’\(^ {141}\), ‘participation in attacks on places considered to be a safe haven’\(^ {142}\) or ‘(effective/sadistic/cold-blooded) manner of committing a crime’\(^ {143}\). As already discussed above, at the ICTR sometimes rather confusing statements are made with respect to seriousness of committed crimes. Judges consider ‘the gravity of the crimes’ not separately, as a starting point of a sentence determination but as one of aggravating factors.\(^ {144}\)

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’\(^ {145}\), ‘use of rifle during attack’\(^ {146}\) or ‘joining in jubilation over killings’\(^ {147}\).

**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 to three subgroups:

\(^{138}\) Tadic 1999, supra note 80, para. 19; Simic, supra note 26, para. 63.

\(^{139}\) Jelisic, supra note 34, para. 130; Kayishema & Ruzinanda, supra note 54, para. 18.

\(^{140}\) Brdjanin, supra note 35, para. 1111-1112; Ntakirutimana, supra note 21, para. 798.

\(^{141}\) Krajisnik, supra note 47, para. 1153.

\(^{142}\) This aggravating factor is in most cases identified only by the ICTR judges. During the genocide, many Tutsis sought refuge in churches, hospitals and schools, places universally recognised to be a sanctuary, under a false belief that they would be safe there. In several instances, Hutus attacked these concentration points and attacks resulted in massive Tutsi executions. ICTR judges in such cases emphasise the particularly condemnable nature of such attacks. Kamuhanda, supra note 18, para. 764, Ntakirutimana, supra note 21, para. 791.

\(^{143}\) Simic, supra note 26, para. 63; Vasiljevic, supra note 82, para. 279; Hadzihasanic & Kubura, supra note 106, para. 2084.

\(^{144}\) Ruggiu, supra note 116, para. 48; Serushago, supra note 84, para. 27; Musema, supra note 21, para. 1001; Rutaganda, supra note 84, para. 468.

\(^{145}\) Judgment, Milosevic (IT-98-29/1) Appeals Chamber, 12 November 2009, para. 305.

\(^{146}\) Musema, supra note 21, para. 1002.

\(^{147}\) Niyitegeka, supra note 21, para. 499.
a) circumstances describing the defendant’s position and role within the overall state hierarchy, such as ‘(abuse of) superior position, position of authority/influence’\textsuperscript{148}, ‘abuse of trust of local population’\textsuperscript{149}, or ‘encouragement of overall atmosphere of terror/encouragement of crimes of others on account of position of authority’\textsuperscript{150}.

Abuse of leadership position and relating authority and/or influence\textsuperscript{151} has been consistently accepted by the ICTY and ICTR judges in aggravation of a sentence.\textsuperscript{152} 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. The position of authority does not, in itself, merit a harsher sentence. But a person who abuses or wrongly exercises power deserves a harsher sentence. Consequently, what matters is not the position of authority in itself, but that position coupled with the manner in which the authority is exercised.\textsuperscript{153} Those with authority over a group of people can inflict more damage through this group than they would be able to inflict alone. Moreover, the leader serves as an example for others to act in a similar way, and criminal behaviour by a leader is likely, therefore, to have greater effect. Furthermore, if a person holds a public position or a position of public duty and exploits it in order to commit or facilitate a crime, the relative seriousness of the crime is further increased by the breach of duty and the legitimate expectations attached to this position.\textsuperscript{154} Similar considerations are reflected in the sentencing arguments used by the ICTR. In Ndindabahizi, for example, the judges noted as particularly aggravating the facts that he (i) was a well-known and influential figure in his native prefecture of Kibuye and abused the trust placed in him by the population; (ii) held an official position in the interim government and, instead of promoting peace and reconciliation in his capacity as minister, he supported and advocated a policy of genocide; (iii) personally participated in the massacres in Gitwa Hill, during which thousands of people were killed; and

\textsuperscript{148} Bagosora et al., supra note 109, para. 2272; Plavsic, supra note 25, para. 57.
\textsuperscript{149} Judgment, Seromba (ICTR-2001-66-I) Trial Chamber, 13 December 2006, para. 390.
\textsuperscript{150} Sikirica, supra note 19, para. 140; Haradinaj et al, supra note 120, para. 491; Judgment, Karera (ICTR-01-74-T) Trial Chamber, 7 December 2007, para. 579.
\textsuperscript{151} Paramount importance of the abuse of political, military or socioeconomic position in the Tribunals case law is often noted in the legal discourse. Cf. R.D. Sloane, supra note 4, at 726.
\textsuperscript{152} 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.
\textsuperscript{153} Babic, supra note 136, para. 61; Cf. Simic et al., supra note 108, paras. 1082.
\textsuperscript{154} Krajisnik, supra note 47, paras.1156-1157.
(iv) actively influenced and encouraged others to take part in massacres.\textsuperscript{155} The judges have argued along similar lines in many ICTY and ICTR cases concerning national, regional or even local leadership figures. There have also been cases of low ranking defendants where judges accepted their abuse of authority in aggravation\textsuperscript{156}, while in other cases judges rejected to do so noting that a defendant was of a relatively low rank and his/her authority limited.\textsuperscript{157}

b) circumstances relating to a defendant’s participation in individual attacks, such as ‘enthusiastic/active participant\textsuperscript{158}, ‘leading role in some attacks’\textsuperscript{159} and ‘commission of some of the offences by more than one perpetrator at the same time’\textsuperscript{160}, ‘direct participation in crimes by a high ranking accused\textsuperscript{161}, ‘acting as accomplice in addition to committing a crime’\textsuperscript{162};

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 beenviolated 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.\textsuperscript{163} Arguably, however, direct criminal participation is already expressed by a 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 to assess. In these cases, the Trial Chambers usually limited the concept of the gravity of crimes only to ‘the harm assessment’ and all the 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.\textsuperscript{164} For the sake of clarity,

\textsuperscript{156} Banovic, supra note 37, para. 55. In this case judges, however, emphasized abuse of his authority over detainees not over other perpetrators.
\textsuperscript{157} Popovic et al., supra note 101, para. 2173.
\textsuperscript{158} Jelisic, supra note 34, para. 131; Judgment, \textit{Serugendo} (ICTR-2005-64-I) Trial Chamber, 12 June 2006, para. 47.
\textsuperscript{159} Rutaganda, supra note 84, para. 470; Musema, supra note 21, para. 1002.
\textsuperscript{160} Kunarac et al., supra note 23, para. 866.
\textsuperscript{161} Milutinovic et al, supra note 17, para.1151; Krstic, supra note 98, para. 708; Judgment, \textit{Akayesu} (ICTR-96-4) Trial Chamber, 2 October 1998.
\textsuperscript{162} Stakic, supra note 113, para. 413.
\textsuperscript{163} Ibid.
\textsuperscript{164} Cf. D’Ascoli, supra note 4, at 153 where the author concludes that in these cases judges actually violated the principle of prohibiting double jeopardy.
transparency and enhanced consistency in sentence argumentation judges should unify their approach to interpreting the concepts of gravity of crimes and of aggravating factors.

c) circumstances particular to a defendant’s motive/state of mind such as ‘voluntary participation in crimes/zeal’\textsuperscript{165}, ‘premeditation’\textsuperscript{166}, ‘discriminatory intent/feelings of revenge’\textsuperscript{167}, and ‘pleasure derived from committing crimes’\textsuperscript{168}.

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; this factor should never have been accepted in aggravation. The fact that a defendant committed crimes voluntary with a requisite \textit{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 \textit{Popovic ‘willingness in the sense of voluntariness is a necessary component of the crimes and therefore [...] not [...] an aggravating factor’}.\textsuperscript{169} In the later cases, judges actually interpreted this practice as referring to the fact that an accused committed crimes with a certain amount of zeal or enthusiasm.\textsuperscript{170}

c. Victim Related Aggravating Factors

The most frequent victim-related aggravating factors include ‘high number of victims’\textsuperscript{171}, ‘extra suffering of victims/extra harm suffered by victims’\textsuperscript{172} or ‘special vulnerability of victims’\textsuperscript{173}. 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, sometimes they

\textsuperscript{165} Kayishema & Ruzinanda, supra note 85, para. 351 “The Appeals Chamber further notes that the Trial Chamber found that Ruzindana “voluntarily committed and participated in the offences and this represents an aggravating circumstance.” [592] The Appeals Chamber interprets the Trial Chamber’s finding as follows: it considers that the Trial Chamber was focusing, not simply on the fact that these acts were committed voluntarily, but also on the fact that they were committed with some element of zeal. The zeal with which a crime is committed may be viewed as an aggravating factor. As a result, the Trial Chamber’s finding on this point was not erroneous”; Akayesu, supra note 161; Tadic 1997, supra note 80, para. 57.

\textsuperscript{166} Lukic & Lukic, supra note 82, para. 1067; Serushago, supra note 84, para. 30.

\textsuperscript{167} Vasiljevic, supra note 82, para. 278.

\textsuperscript{168} Lukic & Lukic, supra note 82, para. 1087.

\textsuperscript{169} Popovic et al., supra note 101, para. 2154; See also Blagojevic & Jokic, supra note 82, para. 849.

\textsuperscript{170} Kayishema & Ruzinanda, supra note 85, para. 351; Blaskic, supra note 94, para. 792. See also D’Ascoli, supra note 4, at 190; R.D. Sloane, supra note 4, at 729.

\textsuperscript{171} Lukic & Lukic, supra note 82, para. 1063; Judgment, \textit{Rataganira} (ICTR-95-1-C-T) Trial Chamber, 14 March 2005, para. 143.

\textsuperscript{172} Jelisic, supra note 34, para. 132; Kayishema &Ruzinanda, supra note 54, para. 16.

assign them extra weight in aggravation. Regarding the multiplicity of victims, problems could arise with respect to this aggravating factor and the crime of extermination, since extermination requires ‘killing on a large scale’ as one of its elements. Therefore, the Trial Chamber in *Semanza* refused to consider large number of victims in aggravation of the crime of extermination.\textsuperscript{174} The Appeals Chamber in *Ndindabahizi*, however, took a different stance and argued that although the *actus reus* of the crime of extermination requires ‘killing on a large scale’, this does not suggest a ‘numerical minimum’. Therefore, a particularly large number of victims can be an aggravating circumstance in relation to the sentence for this crime if the extent of the killings exceeds that required for extermination.\textsuperscript{175} What number of death is required for extermination was, however, not indicated.

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\textsuperscript{176} 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 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’\textsuperscript{177} are deemed to aggravate a gravity of committed crimes and justify increase in sentence. However, these factors are highly context specific and dependent on particular circumstances of each case. As the Appeals Chamber in *Stakic* noted in reaction to the Trial Chamber’s reliance on previous cases: ‘*T*hese statements by themselves provide too tenuous a basis for holding that the previous background of the Accused, and the ethical duties stemming from it, are an

\textsuperscript{174} Judgment, Semanza, supra note 40, para. 571.
\textsuperscript{175} Ndindabahizi , supra note 107, para. 135; Rugambarara, supra note 19, para. 23.
\textsuperscript{176} Judgment, Muvunyi (ICTR-2000-55A) Trial Chamber, 12 September 2006, para. 540.
\textsuperscript{177} Judgment, Simic et al.(IT-95-9-T) Trial Chamber, 17 October 2003, para. 1108; Kamuhanda, supra note 18, para.764; Brdjanin, supra note 35, para. 1114; Judgment, Bisengimana (ICTR-00-60-S) Trial Chamber, 13 April 2006, para. 120.
aggravating factor in international criminal law. While the Trial Chamber has discretion in determining factors in aggravation, the Trial Chamber must provide convincing reasons for its choice of factors. In these cases judges should properly explain why they consider the status and education of a defendant in sentence aggravation. This is, however, not the case in the majority of these instances and it is not clear why in certain cases education and status are accepted as mitigating while in others as 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. A similar controversy applies to the factors relating to a post-conflict conduct of a defendant such as ‘deceptive actions by a defendant’ , ‘no remorse’ or ‘denial of genocide’.

Finally, in some cases judges aggravated sentences on account of factors relating to a 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’, ‘flight away from justice’, ‘non-cooperation with OTP and denial of guilt’ or ‘obstruction of justice’ constitute examples of this type of aggravating factors. Since judges consistently emphasise the principle that aggravating factors should be linked to the committed crimes, these instances of sentence aggravation are extremely controversial. A more coherent approach was suggested by the Trial Chamber in Rajic where judges argued that the fact that the accused absconded from justice and participated in cover-up activities (conducted a fraudulent investigation) would be taken into account in determining a weight to be attributed to certain mitigating factors such as good character of the accused.

3.2.2.2. Mitigating Factors

178 Stakic, supra note 113, para. 416.
179 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.
180 Mrksic & Sljivancanin, supra note 82, para. 704.
181 Rutaganda, supra note 84, para. 473.
183 Mucic et al., supra note 33, para. 786.
184 Seromba, supra note 149, para. 391.
185 Tadic, supra note 80, para. 58.
186 Popovic et al., supra note 101, para. 2199.
187 Rajic, supra note 89, para. 132,134,135.
Mitigating factors are such factors that warrant a reduction of a sentence. They need not relate to charged offences and theoretically could be constituted by a broad range of circumstances. The range and number of mitigating factors vary a lot across cases. One reason for this variation could be the fact that judges largely rely on parties and expect them to present and argue factors in mitigation. In particular, a burden of proof that mitigating factors exist is on a defendant and his/her defence. In some cases, however, a defence counsel is not very active, presents only general submissions regarding sentencing or even does not present sentencing arguments at all. The Appeals Chamber often notes in this respect that it is the accused that ‘bears the burden of establishing mitigating factors by a preponderance of the evidence. The Appeals Chamber notes that the Appellant made no sentencing submissions at trial. In such circumstances, the Trial Chamber’s determination that there were no mitigating circumstances was within its discretion and does not constitute a legal error. If an accused fails to put forward relevant information, the Appeals Chamber considers that, as a general rule, a Trial Chamber is not under an obligation to seek out information that counsel did not see fit to put before it at the appropriate time.’ Furthermore, it seems that Trial Chambers are under no obligation to list each and every factor they considered and relied upon in mitigation of a defendant’s sentence. The Appeals Chamber stated in Simic et al. that ‘failure to list in a judgement every mitigating circumstance placed before the Trial Chamber and considered, does not necessarily mean that the Trial Chamber either ignored or failed to evaluate the factor in question.’ This practice, however, has the potential to make sentencing decisions unclear, not transparent and could undermine consistency in sentencing argumentation across cases. Judges should in every case state clear and concrete reasons for imposing a particular sentence and should not leave parties second-guessing whether a particular factor was indeed considered or not. The clear reasoning in this respect is even more important given the fact that the Appeals Chamber ruled that prohibition of double-

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188 Deronjic, supra note 31, para.155.
190 Nchamihigo, supra note 182.
192 Muhimana, supra note 66, para. 231; See also Judgment, Kupreskic et al. (IT-95-16) Appeals Chamber, 23 October 2001, para. 414; Kvocka et al, supra note 40, para. 674. In some cases, however, Trial Chamber takes a more active position and examines information already on the record to determine whether any mitigating circumstances exist. See Gotovina et al., supra note 120, para. 2607.
193 Simic et al., supra note 108, para. 245; Kupreskic et al, Ibid., para. 430.
counting for sentencing purposes applies also with respect to mitigating factors.\textsuperscript{194} Therefore, similar to aggravating factors, it is necessary to clearly distinguish among factors relevant for gravity assessment and those considered in mitigation of a defendant’s sentence.

In the following a brief overview of factors accepted in mitigation by the ICTY and ITCR judges is provided. The factors that were 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.

\textbf{a. Attack Related Mitigating Factors}

The attack related mitigating factors are those connected to a context within which 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)’\textsuperscript{195} or ‘duress’\textsuperscript{196}. This type of mitigating factors is not frequently argued by defence teams or accepted by judges.

\textbf{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’\textsuperscript{197} or 'limited participation in crimes’\textsuperscript{198}, but also factors designating the role of an offender in the overall conflict/state hierarchy such as ‘no high ranking/subordinate/inferior position’\textsuperscript{199} or ‘secondary role in totality of circumstances’\textsuperscript{200}. Theoretically, it seems that sentences of almost all defendants could be mitigated because either they are occupying subordinate positions but actually killing/torturing individual victims (their sentence could be mitigated due to their inferior/unimportant position within the overall conflict) or they are high ranking important figures organizing the violence from behind their

\textsuperscript{194} Judgment, \textit{Limaj et al. (IT-03-66) Appeals Chamber, 27 September 2007}, para. 143.

\textsuperscript{195} Blaskic, supra note 94, para.770; Rugambarara, supra note 19, para. 47.

\textsuperscript{196} Judgment, \textit{Erdemovic (IT-96-22-Tbis) Trial Chamber, 5 March 1998}, para. 17.

\textsuperscript{197} Kvocka et al., supra note 19, para. 717; Ntakirutimana, supra note 21, para. 784.

\textsuperscript{198} Krnolejac, supra note 26, para. 515-516 (The accused’s limited participation in crimes was considered not as mitigating factor but as a factor counterveiling the extent of aggravation caused by his senior position.); Ndindabahizi, supra note 155, para. 507.

\textsuperscript{199} Akayesu, supra note 161; Erdemovic, supra note 196, para. 16.

\textsuperscript{200} Judgment, \textit{Aleksovski (IT-95-14/1) Trial Chamber, 25 June 1999}, para. 236.
desks but never committing crimes with their bare hands (their sentence then could be mitigated on account of their role as ‘no actual killers’). Clearer guidelines in the Tribunals’ jurisprudence are needed focusing either on the role of the offender in the overall conflict or on the fact whether he personally perpetrated atrocities.

Another problematic aspect of this group of mitigating factors relates to the fact that especially the ones relating to the role of a defendant in particular crimes arguably overlap with the concept of gravity, as already discussed in relation to aggravating factors. The principle of prohibition of double-counting could thus have been violated in these cases. In some cases judges actually refused to consider in mitigation the fact that an Accused did not actively participate in murders arguing that it was already taken into account when assessing his criminal conduct (as one of the elements of his crimes).201 In connection to a conviction on the basis of superior responsibility the Appeals Chamber ruled that indirect participation is not a mitigating circumstance noting that ‘while proof of active participation by a superior in the criminal acts of his subordinates may constitute an aggravating circumstance, absence of such participation on the part of a superior is not a mitigating circumstance. Indeed, failure to prevent or punish subordinate crimes is the relevant culpable conduct and lack of active or direct participation in the crimes does not therefore reduce that culpability as a mitigating circumstance. Rather, as was done by the Trial Chamber superior responsibility should be considered in the assessment of the gravity of the crimes.’202 This reasoning is, however, easily applicable to all the other modes of liability that criminalize indirect contributions of perpetrators to criminal activities.

c. Victim Related Mitigating Factors

‘Assistance to victims’,203 ‘expression of sympathy to victims’204 or ‘measures to reduce human suffering’205 fall under the category of victim-related mitigating factors that in general pertain to positive steps/actions an offender performed towards victimized groups or individual victims.

Again with respect to this group, there are, however, inconsistencies across cases. Especially with respect to the (selective) assistance to victims, judges in some cases accept this factor in mitigation206, sometimes indicate that this fact carries ‘limited, if any, weight in mitigation’207. In
other cases judges refuse to assign any weight to the assistance to victims and sometimes they even indicate that it could aggravate a sentence as a further proof of the fact that a defendant abused trust of his victims. 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 – the weight assigned to such assistance will be very limited. In some instances, judges argue that if a defendant was in such a position to take steps to control or prevent all acts of violence, sporadic benevolent acts or ineffective assistance to victims will be disregarded.

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. The examples of the former are such mitigating factors as ‘remorse’, ‘distress about death of so many people’ or ‘steps taken to atone for the crimes’. Expression of remorse is a mitigating factor frequently accepted by the 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 to his guilt might be remorseful.

The second group of these mitigating circumstances consists of factors such as ‘contribution to peace’, ‘work in de-mining activities’ or ‘negotiation and signing of anti-sniping agreement’. Usually these mitigating factors are largely case-specific. They relate to

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207 Rukundo, supra note 19, para. 602.
209 Muvunyi, supra note 176, para. 540.
210 Kvocka et al, supra note 40, para. 693.
211 Krajsnik, supra note 47, para. 1162.
212 Todorovic, supra note 91, para. 92; Nzabirinda, supra note 68, para. 70.
213 Musema, supra note 21, para. 1005.
214 Bralo, supra note 76, para. 72.
215 Vasiljevic, supra note 129, para. 177; Judgment, Blaskic, IT-95-14, Appeals Chamber, 29 July 2004, para. 705.
216 Delic, supra note 106, para. 584; Bagosora et al., supra note 109, para. 2273.
217 Blagojevic & Jokic, supra note 81, para. 858.
218 Milosevic, supra note 82, para. 1003.
situations where a convicted person acted after the commission of the crime to rectify a 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 Framework Agreement for Peace in Bosnia-Herzegovina (Dayton Agreement) and had attempted to remove obstructive officials from office in order to promote peace.\(^{219}\) In other cases, however, judges did not accept post-crime conduct as a separate mitigating circumstance but used that factor as evidence of the sincerity of the defendant’s remorse.\(^{220}\)

e. Proceeding-Related Mitigating Factors

The proceeding-related mitigating factors are those relevant for the smooth conduct of trial before the Tribunals such as ‘(substantial) cooperation with the Prosecutor’\(^{221}\), ‘voluntary surrender’\(^{222}\), ‘good conduct while in detention’\(^{223}\) or ‘guilty plea’\(^{224}\). At the ICTY, also a more general attitude of a defendant towards proceedings is often cited by the judges in mitigation of a sentence.\(^{225}\)

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’.\(^{226}\) Similarly, some trial chambers have not mitigated a sentence on account of defendant’s voluntary surrender.\(^{227}\) This approach, however,

\(^{219}\) *Plavsic*, supra note 25, para. 85.
\(^{220}\) *Jokic*, supra note 22 para. 90-92.
\(^{221}\) *Zelenovic*, supra note 119, para. 52; *Serugendo*, supra note 158, para. 62. For more detailed discussion of this mitigating factor see S.M. Sayers, supra note 4, at 769.
\(^{223}\) *Bisengimana*, supra note 177, para. 164; *Zelenovic*, supra note 119, para. 56.
\(^{224}\) *Plavsic*, supra note 25, para. 81; *Rugambara*, supra note 19, para. 33-35. The phenomenon of guilty pleas and plea bargaining at the Tribunals and mitigating effects thereof have been extensively discussed in the legal doctrine. Cf. J.C. Nemitz, supra note 4, at 120; S.M. Sayers, supra note 4, at 767-769; R.D. Sloane, supra note 4, at 729; R. Henham (2003), supra note 4, at 102-109; Drumb (2007), supra note 4, at 65, 163-168.
\(^{225}\) *Galic*, supra note 44, para. 766.
\(^{226}\) *Orić*, supra note 105, para. 762; *Cerkez&Kordić*, supra note 40, para. 1053; *Brdjanin*, supra note 35, para. 1135.
\(^{227}\) *Judgment, Kordić & Cerkez* (IT-95-14/2-T) Trial Chamber, 26 February 2001, para. 845, 854-856.
causes inconsistencies among cases and unequal treatment of defendants since in some cases judges accept these facts and mitigate sentence on their account, while in others judges reject to accept these factors in mitigation with no specific reasons provided.228

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’229, ‘rehabilitative potential’230, ‘old age while sentenced’231, ‘young age while committing crimes’232 or ‘health problems’233), his family circumstances234 (e.g. ‘special hardship for his/her family’235) and his conduct prior to a period of violence (e.g. ‘no prior crimes’236, ‘no prior discriminatory behaviour’237) 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.238 Especially with respect to this group of mitigating circumstances there have been many instances of inconsistent treatment. The case law has demonstrated the impossibility of classifying a particular factor a priori as mitigating/aggravating. 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 qualification239 and by others assigned only limited weight. Some trial chambers reject to accept them in mitigation240 and consider them ‘a common characteristic among many accused persons’.241 Some trial chambers even indicated, as discussed above, that status and good character of a defendant

228 In some cases judges argue that the fact that the accused surrendered long time after the indictment was issued or after he actually prepared his defence constitute reasons for declining to mitigate his/her sentence or to assign only very limited weight in this respect. Cf. Blaskic, supra note 94, para. 776; Simic et al., supra note 177, para. 1086.
229 Kalimanzira, supra note 191, para. 752 ; Oric, supra note 105, para. 759.
230 Erdemovic, supra note 196, para. 16.
231 Plavsic, supra note 25, para. 105-106.
232 Blaskic, supra note 94, para. 778 where the Trial Chamber noted possible inconsistencies regarding what is considered to be ‘young age’ between the ICTY and ICTR. For a thorough discussion of this mitigating factor see D’ Ascoli, supra note 4, 167-170.
233 Simic, supra note 26, 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.
234 Ntakirutimana, supra note 21, para. 794; Erdemovic, supra note 196, para. 16.
235 Strugar, supra note 82, para. 469.
236 Krajsnik, supra note 47, para. 1164; Bisengimana, supra note 177, para. 165.
237 Nikolic, supra note 173, para. 164; Karera, supra note 150, para. 582.
238 Nzabirinda, supra note 68, para. 108; Mrda, supra note 173, para. 92, 94; Bralo, supra note 76, para. 48.
239 Stakic, supra note 114, para. 923; Rugambara, supra note 19, para. 39.
240 Judgment, Naletilic & Martinovic (IT-98-34) Trial Chamber, 31 March 2003, para. 754; Kamuhanda, supra note 18, para. 757-758; Judgment, Babic, IT-03-72, Trial Chamber, 29 June 2004, para. 91.
241 Nahimana et al., supra note 74, para. 1069.
could be accepted in aggravation.\textsuperscript{242} In \textit{Kvocka}, for example, Kvocka’s good character was seen as both, mitigating and aggravating: ‘\textit{Trial Chamber is also persuaded that Kvocka is normally of good character. He was described as a competent, professional policeman. His experience and integrity can be viewed as both mitigating and aggravating factors – his job was to maintain law and order and, although he apparently did a fine job of this prior to working in the camp, he failed seriously to perform his duty to uphold the law during his time spent in Omarska camp. Holding a position of respect and trust in the community, his failure to object to crimes and maintaining indifference to those committed in his presence was likely viewed as giving legitimacy to the criminal conduct.’\textsuperscript{243} This construction is very peculiar and it is not clear what the practical effect of the evidence of Kvocka’s good character on sentence might have been. In neither of these above described instances, 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.

\textbf{4. CONCLUSION}

This chapter analysed ‘consistency in approach’ of the sentencing at the ICTY and ICTR and reviewed the relevant literature and the ICTY and ICTR sentencing case law produced by the Tribunals up to April 2011. 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. Are the sentencing arguments of the ICTY and ICTR judges consistent across cases so that a consistent approach towards sentence determination evolved in the ICTY and ICTR case law? The structure of sentencing reasoning and general principles of sentence determination seem to be mutually influencing 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 also 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.

\textsuperscript{242} Simic, supra note 26, para. 105; Tadic 1997, supra note 80, para. 59.
\textsuperscript{243} Kvocka, supra note 19, para. 716.
On the one hand, it turned out 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 individualization complements this general framework. Some general principles applicable to aggravating and mitigating factors have also been developed and consistently emphasized by the judges, such as that aggravating factors should be proven beyond any reasonable doubt and should be linked to the committed crimes, while mitigating factors can encompass broader issues and should be demonstrated on a balance of probabilities.

On the other hand, however, the analysis detected some instances of disparities across cases. There persists a 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, however, 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 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 individual facts of each case. 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’. Second, differences between individual cases exist as to whether a particular mitigating/aggravating factor aggravates/mitigates a sentence and its significance for meting out a sentence in a particular case. One of the main problems of the ICTY and ICTR sentencing relates to the way how aggravating and mitigating factors are
applied and weighted in individual cases. There are inconsistencies across cases as to whether a certain factor aggravates/mitigates the crime and the weight assigned to it, if indicated at all, remains unclear.

The presented analysis has demonstrated that one of the main problems of the ICTY and ICTR sentencing seem 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 fueled by the approach of the Appeals Chambers that accepted a very deferential approach to the sentence review primarily emphasizing the discretion of trial judges. The ICTY and ICTR judges should 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. First, judges should rely on a clear and consistent set of sentencing objectives for international crimes, try to explain their relevance for sentence determination in individual cases and indicate the primary one. Second, judges should come up with a uniform definition of gravity of crimes for the purposes of sentencing and link it to the sentence severity. One of the possible solutions could be that the concept of gravity would encompass only the statutory elements of offence and mode of liability (that are necessary to convict a defendant – basically sort of a gravity in abstracto assessment) and 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. Third, 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 individual 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 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.\textsuperscript{244} Furthermore, judges should also try to develop clearer and uniform principles clarifying the relation between sentence severity and individual modes of liability so that it would become clear how the judges actually distinguish among different degrees of involvement in crime and how these influence sentence severity. Fourth, individual aggravating and mitigating factors should be always related to the proclaimed sentencing objectives. Some authors argued that it would be desirable to come up with an authoritative list of the major aggravating and mitigating factors that judges should consider in each case.\textsuperscript{245} There are, however, also valid counter-arguments against such a list. One of the main being that international crimes are extremely complex and complicated offences and therefore, it is difficult to envisage in advance what factors could be relevant for meting-out a sentence. Therefore, in the absence of such a list judges should always try to justify the existence of a particular aggravating or mitigating circumstance by (i) linking it to the sentencing objectives that are invoked and (ii) demonstrating how the particular factor promote the objective. 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.\textsuperscript{246} Furthermore, if a certain factor is authoritatively accepted by the judges in mitigation in a particular case then it should become an entitlement for all defendants in similar situation to rely on such circumstance in all the cases and judges should, in principle, accept it in sentence mitigation unless there is an exceptional reason not to do so (which should be clearly argued by the judges).\textsuperscript{247} And finally, Appeals Chambers should always provide clear reasons why and how they modified a particular sentence and state all relevant facts and their weight for the new modified sentence following the above described principles.\textsuperscript{248} 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

\textsuperscript{244} Cf. O. Olusanya: Sentencing War Crimes and Crimes against Humanity under the International Criminal Tribunal for the Former Yugoslavia, Europa Law Publishing, 2005, The Netherlands, at. 70.

\textsuperscript{245} D’Ascoli, supra note 4, at 321.

\textsuperscript{246} See for similar arguments with respect to domestic sentencing M. Bagaric, R. Edney: The Sentencing Advisory Commission and the Hope of Smarter Sentencing, 16 Current Issues in Criminal Justice 125, 2004-2005 at 133.


\textsuperscript{248} It happens often that Appeals Chamber modify a sentence with no reasoning whatsoever regarding the severity of the new sentence. Cf. Krnolejac, supra note 110, para. 264. See also J. Clark, supra note 4, at 1714.
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.

The remainder of this thesis focuses on the consistency of outcome of the ICTY and ICTR sentencing. The analysis presented in this chapter serves as a basis for building up an empirical model of international sentencing presented in the following chapters of this thesis. This chapter has demonstrated that one of the main problems of the ICTY and ICTR case law is a lack of transparency. The ICTY and ICTR judges do not provide a detailed breakdown of how a sentence was calculated in individual cases and how the individual factors influenced sentence severity. It is, therefore, not clear from the case law how the general principles and individual sentencing factors translate empirically into sentence determination. The empirical analysis of sentencing conducted in the rest of this thesis, therefore, sheds additional light on the sentencing of international crimes. It tries to uncover practical implications for sentence severity of the general sentencing principles consistently emphasised in the ICTY and ICTR case law. It is not unconceivable that despite the discrepancies in the sentence argumentation among cases (that basically occur with respect to particularities, not general principles), there have emerged consistent patterns in the actual sentence length. As noted by Ewald ‘the fact that for the time being, clear and overall consistent patterns of reasoning on international sentencing judgments have not yet been discovered must not necessarily mean that (at least temporal) and [general] patterns [in sentencing outcomes] do not exist’.\textsuperscript{249}

\textsuperscript{249} U. Ewald, supra note 4, at 372.
## APPENDIX I

### LIST of AGGRAVATING FACTORS

**ICTY**

- Lengthy duration of crime/Extended period of time/Long time/Duration of crimes
- Scale of the attack/Scope of crimes/range of crimes
- Manner in which crimes committed/Systematic manner/Efficient manner
- Magnitude of crime/Pattern of repetition/Widespread criminal conduct
- Prolonged and systematic participation
- Particular cruelty/Cruelty and depravity of crimes/Cruelty of attacks
- Repugnant, bestial and sadistic nature of crime
- Brutal treatment/Enormous brutality
- Highest level of torture
- Particularly heinous murder
- Vicious nature of rape and torture
- Encouragement of overall atmosphere of terror
- Encouragement of crimes of subordinates
- Ignored pleadings of his brother to stop
- Disarmament of Glogova village
- Planning and ordering of attack on Glogova
- Planning and ordering deportation
- Use of modified air bomb
- Victims suffering/Severe pain and suffering and trauma of victims/Brutal treatment/(Extra, Extreme)
- Suffering of victims/Exacerbated humiliation and degradation of Witness A/Humiliation of victims with respect to rape
- Impact on victims and relatives/Impact of crimes/Trauma of survivors
- Victim A as a civilian detainee and at the complete mercy of her captors
- No possibility of escape for victims because of the way attack launched
- Status of victims/Civilian victims/Youth of victims
- Special vulnerability of victims
- Number of victims/Multitude of victims/Many victims/Multiple murder victims
- Vulnerability of victims
- Verbal abuse of victims
- Ignoring pleas for lives by victims
- One victim known to the accused
- Unwillingness to assist certain victims
- Abuse of Accused’s superior position/Abuse of authority/Superior position/Abuse of position of power/High ranking position/Leading member of JCE/Abuse of Position as President of Crisis Staff/Abuse of the most serious position at KP Dom/Abuse of position of authority over detainees/Abuse of power vis a vis females/Abuse of position vis a vis women/Abuse of position of trust
- Leadership role
- High position of authority
- Role of commander
- Superior position
- Command role
- Leadership position
- Political leader
Position as policeman (breach of trust/authority)
Enthusiastic participation
Informed and voluntary participation
Willing participation
Scale of accused role
Active role as a commander
Direct participation in crimes as superior
Active participant / Active role
Important role/ Substantial participation/Substantial role
Reissuing illegal orders
Encouragement of criminal activity
Organizational role
Commission of some offences with others
One of the principal participant in the persecutory campaign
Willfulness comparable to direct perpetrators
Position as member of Serbian leadership
Good character
Experience and integrity
Education/Educated person/Professional background as a doctor
Resistance to arrest
Inappropriate behavior during trial
His conduct during proceedings
Obstructing of justice
Awareness and enthusiastic support for attack on non-Serbs
Joy from committing crimes /Enjoyment he derived from crime/Enjoyment in inflicting pain
Discriminatory motives/ Discriminatory intent/Discriminatory state of mind with respect to Art 3 murder
Sadism/ Sadistic tendencies
Motive (sadistic + feeling of revenge against Serbs)
Premeditation/Cold and calculated action
Zeal/Enthusiasm

ICTR

Gravity of offences
Serious offences
Callous nature of murders
Cruelty of acts
Magnitude of crime
Heinous means (cut off breasts of a girl)
Attacks on churches and/or hospitals
Premeditation
Joined in jubilation after killings
Position of authority/Abuse of authority/ Abuse of leadership position/Abuse of stature
Superior role/Superior position
High position as civil servant
Abuse of influence/Position of influence
Abuse of his stature
Abuse of trust/Betrayal of trust
Distance from his flock
Position as bourgemestre
Important role/ Leading role in the attacks/Leading role in execution
Active Participant
Conscious choice to participate
Voluntary participation
Zeal
Use of a rifle during the attacks
Failure to prevent tea factory employees from taking part in the attacks and tea factory vehicles from being used
Failure to take reasonable measures to help in the prevention of crimes
Failure to punish the perpetrators over whom he had control
Failure to prevent atrocities of his subordinates
Long participation
Encouragement of crimes
Active role/Active participation
Personal participation/Personal participation as a Minister in government
Presence of other people
Great facilitation of attacks
Planning of crimes
Separation & killing of orphan children
Chastising of a man hiding Tutsi
Disregard for personal dignity
Status
Educated person
Stature in Rwanda
Victim’s suffering
Many victims
Young age of a victim
Public humiliation of victims
Harm caused to the families of victims
Denial of guilt
Flight from justice under forged documents
Non admission that genocide committed in Rwanda

LIST of MITIGATING FACTORS

ICTY

Does not constitute any danger anymore
Corrigible personality
Contribution to Dayton/Cooperation in Dayton implementation
Involvement in negotiation of peace accords
Prevention of historical revisionism
Steps toward rehabilitation
Willingness to contribute to reconciliation
Steps taken to atone for his crimes
Remorse
Admission of guilt
Negotiation and signing of Anti-sniping agreement
Partial acceptance of responsibility
Distress
General context (“drawn into the maelstrom of violence)/Overall context
Harsh environment of the armed conflict
Particular circumstances at the outbreak of and during war
Difficulties in Army of Bosnia and Herzegovina (ABiH)
Virulent propaganda
Assistance to victims/Occasional assistance to victims/Selective assistance to victims
Efforts to provide help to non-Serbs
(Proposals to) Open(ing) a corridor to let Muslims pass
Measures to reduce human suffering
Equal treatment of all ethnicities otherwise
Written order to secure safety of Muslim civilians
Contribution to law and order (setting up special police force etc)
Public pronouncements calling for law and order
Speeches against war profiteering
Work in de-mining activities
His order to withdraw from the town of Vares
Efforts to disseminate IHL in ABiH army
Orders not to shoot civilians and to abide by GC
Intent to distance himself and his men from guarding prisoners
Challenge to superior command - Interim Combat reports
Duress
Secondary role in the totality of circumstances
No position of authority
No commanding authority
Relative unimportance in the overall conflict
At the time of crimes not experienced
Not physical perpetrator
Short duration of crimes
Limited participation/ Limited involvement/Limited role compared to others/ Not an active participant
Limited impact (recent assumption of command)
Present at a crime site only for 2 hours
No extensive experience for his post
Age/Relatively young age at the time of sentencing /Young age (32) given the profound responsibilities/
Old age at the time of sentencing /Advanced age/ Young age at the time of crimes
Family and personal situation (security risk)
Family circumstances/Family background /Father of a young child/Special hardship for family
(paralyzed daughter)/Effects on family/Expulsion of his family after Operation Storm/Family difficulties
with his detention
Personal circumstances
(Prior) Good character/ Law abiding citizen prior to the war/No prior discriminatory behavior
No prior crimes
Personal integrity as a career military officer
Personality
Poor health
Reputation as conscientious soldier
Indigence
Bad health
Experience and Integrity
Personal background
No proper military training
Immature and fragile personality
Long and successful military career
Individual circumstances (assessment by a psychologist “follower not a leader”)
(Substantial) Cooperation with OTP/Cooperation of his counsel with TCH and OTP/Co-operation with TCH and OTP during the proceedings
General attitude towards proceedings
General spirit of co-operation very properly shown by lead counsel
Exemplary behavior throughout the trial
Voluntary surrender/Desire to surrender/Offer of voluntary surrender
Guilty plea
Time of guilty plea
Good conduct in detention
Sentence served far away from Yugoslavia
Consent to the appointment of a new judge
Correct behavior during trial and in detention
Exemplary behavior throughout the proceedings
Compliance with conditions of provisional release
Good conduct during hearings
No attempt to escape justice

ICTR

Assistance to victims/Assistance to some victims/Selective assistance to victims
Facilitation of UNAMIR convoys
Sympathy for the victims
Tried to prevent massacres
Admission of genocide and tribute to victims
Regret & Remorse
Distress about death of so many people
Regret that his premises used by perpetrators
(Substantial) Cooperation with OTP
Voluntary surrender
Guilty Plea
Co-operation during trial
Cooperation of counsel
General conduct during proceedings
Good conduct in detention
Voluntary surrender
Social background
Family background
No prior crimes
Good character
Family circumstances
Individual circumstances
Health concerns
(Prior) Good character/Good character prior and after genocide
Poor health
Age (young when crimes committed/old when sentenced)/Old age and poor health
Good personality
Prior character and accomplishments
Previous long public service to Rwanda
Prior to genocide member of moderate political party
| Prior good reputation                  |
| Prior contributions to community      |
| No prior discrimination               |
| Individual circumstances             |
| Most life worked for defense of his country |
| No hands-on perpetrator               |
| Not a very high official              |
| Not de jure official                  |
| Duress                                |
| Overall circumstances                 |
| Not leading roles                     |
| Not personal participation/Never directly participated |
| Never gave direct orders              |
| Participation in few criminal events  |