Chapter 5: Consistency of International Sentencing – ICTY and ICTR Case Study*

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ABSTRACT:

The International Criminal Tribunal for the Former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”) are the first, post Cold War, international criminal tribunals convicting perpetrators of international crimes such as genocide, crimes against humanity or war crimes. Currently, they have convicted and sentenced more than 100 individuals. Their sentencing practice, however, has been subjected to a considerable amount of criticism: inappropriate, flawed and inconsistent. This quantitative study addresses the latter of these criticisms and empirically investigates the consistency of sentencing of the international tribunals. It discusses the consistency in approach, in outcome and the cross-institutional consistency of international sentencing practice. By investigating the existing case-law, legal factors influencing the sentencing decisions are identified. The extent to which the selected factors predict sentence length is tested in a multiple regression analysis. The analysis suggests that similar, legally relevant patterns have emerged in the sentencing practice of both Tribunals. Sentencing in international criminal practice does not appear to be less consistent than sentencing under domestic jurisdictions.

Key words: ICTY, ICTR, sentencing, consistency

1. INTRODUCTION

For more than fifteen years now the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”), the first (post Cold War) international criminal ad-hoc tribunals, have been sentencing perpetrators of international crimes. Together they have convicted more than 100 individuals for their involvement in genocide, crimes against humanity and war crimes during conflicts in the former Yugoslavia and Rwanda. The ICTY and ICTR judges have been pronouncing sentences for these extraordinary crimes while lacking any detailed legislation or precedent for guidance.\(^1\) They have been vested with ‘almost unfettered’ discretionary powers in sentence determination. It could be argued that this large gap of discretion makes sentencing decisions vulnerable to local

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* This chapter was submitted to the European Journal of Criminology as: B.Hola, C. Bijleveld, A. Smeulers: Consistency of International Sentencing – ICTY and ICTR Case Study.

or individual particularities, differential weighing of legally relevant factors or even legally irrelevant influences. Indeed, the sentencing practices of the Tribunals have been subjected to a lot of criticism. On the one hand, the Tribunals’ sentencing practice has been labelled as confusing, disparate, inconsistent and erratic: ‘At the international level, there are inconsistencies in terms of the quantum of punishment meted out to similarly situated offenders within institutions and also among institutions. These inconsistencies arise from the broad discretion that is accorded to international judges and the lack of sentencing heuristic’. The heart of this critique is arbitrariness. Commentators assert that the ICTY and ICTR sentences are too “randomly” imposed with no coherent sentencing system and that, consequently, the ICTY and ICTR sentencing practice gives rise to distributive inequities. On the other hand, however, the scarce empirical evaluative studies have concluded that there appears to be a fair degree of consistency in the international sentencing practice and that judges largely follow the law when determining sentences. However, empirical enquiries into international sentencing have so far been relatively uncommon. In most cases, the combined effect of legal and extralegal factors on the sentence was tested within one Tribunal at a time. There was only one previous study where the ICTY and ICTR cases were combined and the influence of selected legal and extralegal factors on the sentence length in the sentencing practice of both Tribunals was examined. However, possible differences in sentencing mechanisms between the Tribunals have never been analyzed. We will investigate and compare the sentencing practice of both Tribunals and focus on legally relevant factors and their predictive value in relation to sentence length. In order to assess whether international sentencing is consistent, it does not suffice to study consistency within Tribunals. Rather, what is needed is empirical research that investigates

5 Steinberg & Donerty, Ibid.
6 There is only one study, where the interplay between sentence length and the legal factors solely is examined. However, this research examines only the ICTY sentences and the number of legal factors included in the study is rather limited. See Meernik J., supra note 4; in all the other studies, legal factors are combined with extralegal such as ethnicity, national background of judges or judges’ gender. In all these studies, therefore, the final result may be affected by the inclusion of these extralegal factors.
whether, both within as well as across international jurisdictions a) similar perpetrators receive similar sentences in similar cases; b) sentence determination is similarly predictable from legally relevant factors.

Consequently, this research adds to previous literature by focusing on international sentencing as such (represented by the ICTY and ICTR) and examines consistency of international sentencing across the two international tribunals. As opposed to the previous studies, our research explicitly investigates whether the sentencing determinants play a different role at each of the Tribunals. As such, we will test whether the Tribunals employ the same mechanisms in sentence determination and whether international sentencing has evolved into a consistent, homogenous system.7

Ideally an all-encompassing study of international sentencing would include sentences handed down by all the international courts and tribunals established so far, including the Nuremberg and Tokyo Military Tribunals, the ad hoc tribunals and many internationalized jurisdictions. For theoretical and pragmatic considerations, the article excludes other international sentences than that handed down by the ICTY and ICTR. There are four principle reasons for this: 1) Time lapse, i.e. the post WWII prosecutions – the first international criminal proceedings - took place immediately in the aftermath of the WWII under very different circumstances. At the time, the modern system of international law, human rights protection and international criminal law were at their inception. Since then, there have been huge developments in all these fields that have arguably influenced the current system of international criminal justice as it now stands; 2) Lack of data, i.e. in many cases the number of sentenced individuals is rather limited and therefore, difficult to quantitatively analyze trends in the sentencing practice (e.g. at Nuremberg 21 sentences were rendered; in Tokyo 25 individuals sentenced; or the Special Court for Sierra Leone (“SCSL”) convicted and sentenced only 8 defendants); 3) Heterogeneity, i.e. there are qualitative differences in jurisdiction, composition and/or applicable law of the international(ized) courts, such as the SCSL or the Special Panels for Serious Crimes in East Timor (“SPSC”), compared to the ICTY and ICTR. Arguably all the internationalized courts have a much stronger “national element” (hybrid jurisdiction over international and domestic

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7 Sentencing of international crimes is exercised not only at the international level by international courts and tribunals but also by many domestic courts in nation states. Since theoretically, there are large differences among individual jurisdictions in their sentencing law, culture and practice, this research is limited to sentencing at the international level focusing on international criminal trials. In the future, however, it would be desirable to analyze domestic sentencing of international crimes especially in light of the ICC complementarity principle giving primary responsibility to deal with international crimes to domestic institutions.
crimes, mixed composition with international and domestic judges, prosecutors or defence attorneys; applicability of international and domestic law). Therefore, it is difficult to compare directly the sentencing regimes and practice across these Tribunals. In this respect, the ICTY and ICTR can be perceived of as the only “purely international criminal tribunals”; 4) Qualitative differences in composition of cases, i.e. the composition of convictions is not so much varied as in the ICTY/ICTR and thus difficult to make comparisons (e.g. SPSC have convicted over 80 individuals but the vast majority of defendants are very low ranking perpetrators). Consequently, this study is limited to the examination of the sentencing practice of the ICTY and ICTR as the representatives of international sentencing and international criminal justice system.

The central focus of this paper is the concept of consistency of ‘international punishment’. It is a widely accepted principle of human rights that consistency of punishment is necessary for the proper and fair operation of any criminal justice system. There are several dimensions to the concept of consistency of punishment. First, all sentences should follow the same underlying principles, thus creating a coherent and harmonious system – “consistency in approach”. In this respect, it is relevant whether the ICTY and ICTR judges have developed a consistent narrative, wherein legal factors relevant to sentence determination are emphasised and their relationship to sentence severity discussed in the case-law. Is it possible to identify legally relevant factors that are consistently referred to in the ICTY and ICTR judges’ narrative? Second, sentences are consistent to the degree individual offenders are placed into distinctive groups on the basis of these “legitimate” (legally relevant) set of characteristics/case attributes, i.e. similar offenders (with similar case attributes) receive similar sentences - “consistency in outcome”, predictability of sentences. In this respect, the analysis examines whether sentence outcomes follow in a predictable manner from the combinations of examined legal factors. In statistical terms, do the legal factors selected on the basis of the case-law account for the observed variation in sentencing? And finally, for international sentencing to be considered consistent there should not be any differences depending on which Tribunal actually decides the case; similar offenders should receive similar sentences across all the Tribunals – “cross-institutional (systemic) consistency”, system coherency. Can we speak of an emerging international sentencing system? Are there any differences across the Tribunals in sentencing mechanisms?

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8 Roca, supra note 3; Prosecutor v. Mucic et al. (Feb.20, 2001), Case No. IT-96-21-A, Judgment, §756.
To empirically explore whether the ICTY and ICTR sentencing practice could be labelled as consistent, this article examines the population of all defendants sentenced by the ICTY and ICTR up to 1 June, 2010 (n=111). It should be kept in mind, as noted by Ewald, that the current stage of international sentencing is a transitional period, and therefore only limited stability in sentencing practice can be achieved. Sentencing patterns are emerging and temporary at best. This study is therefore exploratory in trying to detect and describe these emerging patterns without any pre-set hypotheses. In Part II of the article, the law relevant to sentencing at the Tribunals and the relevant sentencing principles are described. Part III describes the research protocol of this study, including the population of cases, measurement strategies and methodology and in Part IV the findings are reported. Finally, in the conclusion, the results are situated within a broader discussion on international sentencing and sentencing consistency.

2. SENTENCING UNDER THE ICTY AND ICTR STATUTES

As noted by Mettraux it would be hard to identify crimes more difficult to sentence than those provided for in the Statutes of the ad hoc Tribunals. This is not merely due to the atrocity type character of international crime but also due to their collective, systematic nature, often implicating state authorities. As a direct result of these factors it is extremely complex to assign and, for the purposes of sentencing, to ‘measure’ culpability/blameworthiness of individual perpetrators.

The Tribunals’ judges are vested with broad discretionary sentencing powers. The Statutes and Rules of Procedure and Evidence (RoPEs) provide only very general instructions regarding sentencing. The regulatory framework for sentencing is almost identical for both Tribunals. Applicable penalties are limited to imprisonment and when determining the terms of imprisonment, judges have recourse to the local courts’ practices regarding prison sentences (Yugoslavian or Rwandese). Reference to the local practices, however, has been construed very restrictively by the Tribunals. Judges have stipulated that such local practices do not curtail their discretion. The sentencing practices of domestic courts are ‘merely an aid in determining

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11 Art 24/23 ICTY/ICTR Statute, supra note 1.
the sentence to be imposed”. When the case-law of both Tribunals is reviewed it seems that judges only recite applicable domestic provisions as a formality without giving them any deeper considerations in sentence determination. In this respect the ICTY and ICTR could thus indeed be perceived of as ‘purely’ international criminal tribunals.

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. The Statutes do not contain any sentencing tariff where crimes under the Tribunals’ jurisdiction would be distinguished in terms of their inherent/objective gravity. The judges are left to evaluate the gravity of a crime on a case-by-case basis. It is often repeated that ’[b]y far the most important consideration, which may be regarded as the litmus test for the appropriate sentence, is the gravity of the offence’. In this respect judges often emphasise a necessity to assess gravity in light of the particular circumstances of each individual case. In most cases, the concept of gravity has been interpreted as encompassing two aspects: i) “the particular circumstances of the case”, i.e. magnitude of harm caused by the offender, and ii) “the form and degree of participation of the accused in the crime”, i.e. the offender’s culpability.

The provisions of the Statutes are supplemented by the Rules of Procedure and Evidence (“RoPEs”). Only one rule, Rule 101, of the 165/154 ICTY/ICTR rules governing the proceedings before the Tribunals is dedicated to factors relevant to sentencing. Rule 101 clarifies the regulation of the sentencing process only to a very limited extent. It limits the range of applicable sentences – the maximum sentence available to the judiciary is life imprisonment. It also instructs judges to take into account any aggravating and/or mitigating circumstances when determining the sentence. However, no list of aggravating and mitigating factors is provided. Only two potential mitigating factors are explicitly mentioned: ‘superior orders’ and ‘substantial

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13 Several scholars, however, argued that it is the reference to the domestic sentencing practices in Yugoslavia and Rwanda, respectively, that accounts for the differences in sentence severity between the Tribunals (ICTR has handed down comparatively much severer sentences than ICTY); M.M. Penrose, Lest We Fail: The Importance of Enforcement in International Criminal Law, 15 American University International Law Review (2000) 321-394 at 376-379; M.A. Drumbl, Atrocity, Punishment and International Law (Cambridge University Press, USA, 2007) at 57.
14 Prosecutor v. Mucic et al, supra note 8, §731.
15 Prosecutor v. Cesic (Mar. 11, 2004), Case No. IT-95-10/1-T, Judgment, §32.
16 Prosecutor v. Milutinovic et al (Feb 26, 2009), Case No. IT-05-87-T, Judgment, §1147.
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. According to case-law, mitigating factors need to be established upon the balance of probabilities and need not directly relate to the charged offences. It has been emphasised that establishing mitigating circumstances relates to the assessment of sentence and in no way derogates from the gravity of crime nor diminishes the responsibility of the convicted person or lessens the degree of condemnation of his/her actions. It mitigates punishment, not the crime.\textsuperscript{17} The standards applicable to aggravating factors are more stringent. Aggravating factors must be proven beyond any reasonable doubt and only those circumstances directly related to the commission of the offence charged and to the offender himself when he committed the offence may be considered in aggravation.\textsuperscript{18} The sentencing narrative 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 also share a joint Appeals Chamber, which also contributes on the face of it to the development of a consistent jurisprudence. In this respect, the Tribunals have developed a rather consistent sentencing narrative with similar basic principles emphasised under both jurisdictions. From this perspective, it is warranted to examine both jurisdictions together.

3. METHODOLOGY

3.1. Sample

The data include all defendants convicted by the ICTY and ICTR up to 1 June 2010 (n=111). All finalized sentences pronounced in individual cases and all sentences handed down by trial chambers but still pending on appeal were included in the analysis. All information was obtained from written versions of the judgments published at the ICTY and ICTR web pages. Figures 1 and 2 illustrate the current status of all 111 sentenced defendants. Our dataset combines sentences of all the 62 defendants convicted by the ICTY and of the nine cases where a sentence was pronounced by a Trial Chamber but the case was still pending appeal (n=71).

\textsuperscript{17} Prosecutor v. Elizaphan & Gerard Ntakirutimana (Feb. 21, 2003), Case Nos. ICTR-96-10-T & ICTR-96-17-T, Judgment, §781.
\textsuperscript{18} Prosecutor v. Haradinaj et al. (Apr. 3, 2008), Case No. IT-04-84-T, Judgment, §489.
Similar to the ICTY, sentences of all the 32 ICTR convicted defendants and of eight individuals where a sentence was handed down on trial but the appeal is still pending were included in our analysis (n=40).
3.2. Variables

3.2.1. Dependent Variable

Since one single sentence is usually pronounced for each convicted individual, data were organized and sentences were analyzed at the level of a defendant. The dependent variable in this study is therefore sentence length of each convicted individual, recorded in years. In the vast majority of cases the single sentence is not broken down in order to reflect a contribution of each crime/count to its length. It is therefore impossible to see from the judgments how each conviction is reflected in the sentence. In this respect, the sentencing of both Tribunals lacks transparency. This lack of transparency is also one of the reasons for using multiple regression analysis. If we want to tease out contribution of individual factors to sentence length, multiple regression is the most appropriate method in this respect.

Nineteen defendants in our dataset have been convicted to imprisonment for the remainder of their lives. Since life sentences are indeterminate, we had to assign them a numerical value to be able to include them in our quantitative analysis. Therefore, the life sentences were recoded to...
55 years. In this manner, the specific characteristic of the life sentence as the most severe sentence is maintained. This number is 10 years longer than the longest determinate sentence ever handed down by the Tribunals, i.e. 45 years.19 Moreover, as the majority of defendants were in their mid-40s (or older) at the time of conviction, this number seems to cover well the time of imprisonment that an average ICTY/ICTR defendant convicted to life imprisonment would spend in prison.

3.2.2. Independent Variables

The following data were collected for each individual from the judgments: a) number of counts against which a person was convicted; b) category of convicted crime; c) mode of responsibility; d) number of mitigating factors; e) number of aggravating factors; and f) rank in the military or political hierarchy. All independent variables included in the model could be seen as representing the two main relevant sentencing considerations according to law: gravity of crime (represented by category of crime, number of counts, aggravating factors, mode of liability and rank) and individual circumstances of the offender (represented by mitigating factors). Given the small size of the population of ICTY and ICTR cases and thus in a statistical sense limited sample size, we could only focus on a limited number of general categories (such as category of convicted crime, number of mitigating and aggravating factors) rather than more particular (but also relevant) distinctions (such as underlying offences, specific aggravating and mitigating factors etc). An overview of the variables is provided in Table 1.

<table>
<thead>
<tr>
<th>Legal Factor</th>
<th>Variable</th>
<th>Measurement</th>
<th>Proportion/ Mean (SD)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Category of crimes</td>
<td>Genocide</td>
<td>1=yes</td>
<td>32%</td>
</tr>
<tr>
<td>Each category coded as a distinct variable</td>
<td>Crimes against Humanity</td>
<td>1=yes</td>
<td>78%</td>
</tr>
<tr>
<td></td>
<td>War Crimes</td>
<td>1=yes</td>
<td>54%</td>
</tr>
<tr>
<td>Number of counts</td>
<td>Number of counts</td>
<td>actual number (1-31)</td>
<td>4.23(4.4)</td>
</tr>
</tbody>
</table>

19 Prosecutor v Kajelijeli (May 23, 2005), Case No. ICTR- 98-44A, Judgment.
<table>
<thead>
<tr>
<th>Aggravating factors (AFs)</th>
<th>Number of AFs</th>
<th>actual number (0-10)</th>
<th>3.17(2.1)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mitigating factors (MFs)</td>
<td>Number of MFs</td>
<td>actual number (0-12)</td>
<td>4.42(3.2)</td>
</tr>
<tr>
<td>Mode of liability</td>
<td>Superior responsibility</td>
<td>1=yes</td>
<td>23%</td>
</tr>
<tr>
<td></td>
<td>Hands-on perpetration</td>
<td>1=yes</td>
<td>42%</td>
</tr>
<tr>
<td></td>
<td>Joint criminal enterprise</td>
<td>1=yes</td>
<td>22%</td>
</tr>
<tr>
<td></td>
<td>Planning, Instigating, Ordering</td>
<td>1=yes</td>
<td>33%</td>
</tr>
<tr>
<td></td>
<td>Aiding and abetting</td>
<td>1=yes</td>
<td>44%</td>
</tr>
<tr>
<td>Actual rank</td>
<td>High rank</td>
<td>1=yes</td>
<td>29%</td>
</tr>
<tr>
<td></td>
<td>Middle rank</td>
<td>1=yes</td>
<td>49%</td>
</tr>
</tbody>
</table>

1. Category of Crimes

According to the Statutes, the Tribunals have jurisdiction over three broad categories of international crimes: genocide, crimes against humanity and war crimes. The Statutes do not distinguish among these distinct categories of crimes in terms of their objective severity and related sentence length. According to law, the gravity of crime is one of the factors relevant for sentence determination. It is, however, not clear what considerations should be relevant in evaluating the gravity of an offence. It is left to the judges’ discretion to determine the gravity of a crime on a case-by-case basis. Theoretically, the gravity of a crime can be determined in abstracto and in concreto.

On the one hand, the gravity in abstracto is based on an analysis, in terms of criminal law, of the subjective and objective elements of the crime. Because the actus reus and mens rea differ for each offence (e.g. murder compared to plunder of property) the objective gravity of individual offences also varies. Similar arguments could be presented with respect to individual categories of international crimes, i.e. genocide requires special intent to destroy in whole or in part a specific group of people; crimes against humanity must be committed as part of a widespread and systematic attack against a civilian population with knowledge of such an attack; whereas war crimes could be isolated incidents committed within an armed conflict. Due to these inherent differences, it has been argued in academic literature that it should matter for the purposes of sentencing if an act is classified e.g. as genocide or as a war crime. Scholars have
advocated a hierarchy of individual categories of international crimes based on their objective severity.\textsuperscript{20}

On the other hand, the gravity \textit{in concreto} depends on the actual harm done and the particular degree of culpability of the offender. In the ICTY and ICTR case-law it is the concrete gravity of a crime that has primarily been emphasised. Judges have consistently rejected the idea of an abstract ranking of offences under their jurisdiction and emphasised instead the necessity to evaluate gravity in the light of the particular circumstances of each individual case.\textsuperscript{21} However, the question whether a hierarchy exists among the individual categories of crimes based on the comparative analysis of their gravity \textit{in abstracto} has also been discussed many times in the ICTY and ICTR case-law. In the early cases, judges accepted the idea of the hierarchy among genocide, crimes against humanity and war crimes. Later, however, both Tribunals have adopted the stance that there is no pre-established hierarchy between individual categories of crimes, emphasising that all crimes under their jurisdiction are very serious violations of international humanitarian law.\textsuperscript{22} In order to see whether any differences in sentence severity among genocide, crimes against humanity and war crimes exist in the actual sentencing practice, we have recorded a category of crime each defendant was convicted of and examined sentences for each category of crimes separately. Each category of crime was coded as a separate dichotomous variable.

The following set of variables could be seen as representing the ‘\textit{in concreto}’ part of the seriousness assessment of a defendant’s criminal conduct, i.e. number of guilty counts, number of aggravating factors, rank and mode of liability.

2. Number of Counts

Most accused were found guilty of multiple counts but only one total sentence was pronounced. As often noted by the judges, a single sentence should reflect the totality of the offender’s criminal activities. The so-called “principle of totality” is seen as ‘the governing criterion’ in sentencing.\textsuperscript{23} As discussed in \textit{Jelisic} ‘a person who is convicted of many crimes should generally


\textsuperscript{21} Prosecutor v. Cesic (Mar. 11, 2004), Case No. IT-95-10/1-T, Judgment, §32.

\textsuperscript{22} Prosecutor v. Milosevic(Dec. 12, 2007), Case No. IT-98-29/1-T, Judgment, §989.

\textsuperscript{23} Prosecutor v. Mucic et al. (Apr. 8, 2003), Case No. IT-96-21-A, Judgment, §46.
receive a higher sentence than a person convicted of only one of those crimes’. Arguably, more extensive crime (more incidents or violating multiple legal prohibitions) entails more serious defendant’s criminal conduct and should result in a severer sentence. We have recorded the number of guilty counts of each defendant and we expect that the more counts against which a person is convicted, the lengthier the sentence.

3. Aggravating Factors

The assessment of the gravity of the offence is interlinked with considerations of the aggravating factors. Aggravating factors are those circumstances related to the commission of the offence which increase its criminal severity. Only those circumstances directly related to the offence and the conduct of an offender while committing the offence can be accepted in aggravation. Factors taken into account in evaluating the gravity of a particular crime may not be reconsidered as separate aggravating factors and vice versa. 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. The distinction among factors relevant to evaluate “the basic” gravity of the offence and aggravating factors is not clear-cut in case law. 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. As the Appeals Chamber noted ‘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’. Appendix I. includes a list of all the factors that were coded as aggravating in each case mentioned by judges (no matter under what rubric). Given our sample size we are not able to investigate the impact of each separate factor. We examined, however, whether it is indeed the case that sentence length increases pari passu as the number of aggravating factors accepted by judges rises.

4. Mode of Liability

The modes of individual liability of which a defendant is convicted are indicative of the manner in which (s)he participated in crimes. It is established in the ICTY and ICTR case-law that the form and degree of participation of an accused in a crime is one of the elements constituting the gravity of the crime. Article 7(6) of the ICTY (ICTR) Statute differentiates between superior

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25 Prosecutor v. Lukic & Lukic (Jul. 20, 2009), Case No. IT-98-32/1-T, Judgment, §1050.
27 Prosecutor v. Milutinovic et al (Feb 26, 2009), Case No. IT-05-87-T, Judgment, §1147.
responsibility and planning, instigating, ordering, committing or otherwise aiding and abetting in crime. To this list also participation in the so-called joint criminal enterprise (“JCE”) must be added as a specific liability mode falling under the category of ‘committing’, used especially by the ICTY. Each liability mode entails the proof of specific actus reus and mens rea requirements. Consequently, sentence severity should differ depending on whether a defendant is convicted as a hands-on perpetrator, order-giver, or as ‘an aider’. The law, however, contains no guidance for sentence determination in relation to individual modes of liability. Some fragmentary principles have evolved in case law.

It seems to be currently accepted that sentences of those convicted on the basis of superior responsibility should be generally lower. The specific nature of superior responsibility, in the sense that an individual is not convicted for the crimes committed by his subordinates but for the failure to prevent or punish such crimes, has been emphasised especially at the ICTY. Accordingly, ‘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)’.

Regarding other modes of individual liability, it has been argued that a mode of liability can either ‘augment’ or ‘lessen’ the gravity of crime. Judges seem to distinguish between direct participation (i.e. commission proper, participation in JCE, instigating, ordering, planning) and indirect participation (i.e. aiding and abetting). Direct participation generally should attract a higher sentence than criminal participation by way of facilitating and permitting the commission of the crimes. Consequently, ‘a sentence of life imprisonment is generally imposed upon persons who directly planned or ordered the criminal acts, particularly those who clearly had authority and influence at the time the crimes were committed, as well as those who participated in those crimes with particular zeal or sadism’.

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To assess possible differences in actual sentence length for individual modes of liability we recorded for each count the mode of convicted liability. Each mode of liability was coded as a separate dichotomous variable.\textsuperscript{34}

5. Actual Rank

Another important factor in the assessment of the crime gravity is the actual position of a defendant within a state structure at the time of crime commission. Theoretically, “international crimes” are manifestations of collective and systematic criminality. They are distinguished from ordinary domestic criminality not only by their large scale character but also by specific societal dynamics characteristic for such crimes. In international crimes state authorities are often involved as perpetrators. Generally, perpetrators of mass atrocities can be divided into three broad categories: leaders (top hierarchical levels), bureaucrats (occupying middle ranking positions and implementing orders stemming from the top leadership) and field executors (low ranking individuals hands-on committing atrocities). These groups represent the ordinal ranking of moral blameworthiness.\textsuperscript{35} It is generally accepted in legal but also criminological discourse that those orchestrating crime at the top leadership levels shall be considered the most culpable.\textsuperscript{36} In their argumentation the Tribunals’ judges seem to endorse this approach. It is emphasised that “the most senior members of a command structure, that is, the leaders and planners of a particular conflict, should bear heavier criminal responsibility than those lower down the scale, such as the foot soldiers carrying out the orders”).\textsuperscript{37} The sentences should be gradated along these lines - that is the most senior levels of the command structure should generally attract the severest sentences, with less severe sentences for those lower down. There is one very important \textit{caveat} to this principle of gradation: the position of the offender is just one and not necessarily \textit{the} most important consideration relevant for sentence determination. In

\textsuperscript{34} We thus coded 5 distinct variables. Instigating, ordering and planning were combined into one joint variable. Arguably, these three types of liability modes are very similar in nature. Theoretically, the liability in all cases is derived from liability of a primary perpetrator and an order-giver, instigator and planner must act with the intent that the planned, instigated or ordered crime will be committed. Empirically, it is often the case in the Tribunals case law that a defendant is convicted jointly as an order-giver/instigator/planner. All the convicted planners have also been convicted as order-givers/instigators. Out of 31 cases of convicted order-givers in 14 cases a defendant was convicted on the basis of combination of ordering and instigation and/or planning. There have been 17 cases of instigators, only in 5 of them instigation alone formed the basis for a conviction.


\textsuperscript{37} \textit{Prosecutor v. Musema} (Nov. 16, 2001), Case No. ICTR-96-13-A, Judgment, §383.
exceptional cases high ranking defendants could be subjected to relatively lenient sentences and vice versa. In certain circumstances, the seriousness of committed crimes may be so great that even following consideration of any mitigating factors, and despite the fact that the accused was not senior in the overall command structure, a very severe penalty could nevertheless be warranted.

We coded the rank of the offender within the overall state hierarchy as a variable with three categories: high, middle and low. As low ranking, we coded the offenders who held little or no power/influence in the overall circumstances of each conflict such as camp guards, shift leaders in detention camps, rank and file soldiers or local politicians and people occupying such positions as a doctor in a hospital, a commercial trader or a singer (25 individuals). The middle ranking category encompasses the defendants who had more extensive de jure or de facto authority to command and/or influence conduct of others such as camp commanders, local or more senior army commanders and conseilleurs, bourgemesters in Rwanda, pastors and priests in the Catholic church or leaders of the Interahamwe (54 individuals). Finally, the group of high ranking offenders consists of regional or national military and political leaders such as members of regional or national governments, regional political leaders, prefects in Rwanda, members of national government, and military officers above the rank of colonel or military commanders of operational sectors (military equivalent of prefecture in Rwanda) (32 individuals). The rank was included in the analysis as a dummy variable with low rank as the reference category.

6. Mitigating Factors

Individual circumstances of a defendant are usually reflected in a range of mitigating factors accepted in individual cases. Mitigating factors are such circumstances that could justify a reduction of a sentence. Theoretically they could be formed by a broad range of circumstances. Defendants are not entitled to an automatic reduction of a sentence as a result of accepted mitigating factors. The Appeals Chamber indicated that even the severest sentence of life imprisonment is not precluded by the identification of mitigating factors. The most important consideration remains the gravity of crime. A wide range of factors has been accepted by the ICTY and ICTR judges in mitigation of a sentence. Appendix I lists all the circumstances accepted by the ICTY and ICTR judges in mitigation of sentence. Every time a factor was cited by the judges, we counted it as a mitigating factor. Due to the limited number of cases in our

40 Prosecutor v. Muhimana (May 21, 2007), Case No. ICTR-95-1BA, Judgment, §234.
dataset, we were not able to test for differences among individual mitigating factors, and instead focused on the number of factors. Similar to aggravating factors, we have tested whether the number of accepted mitigating factors influences sentence length. It is expected that where more factors in mitigation are identified, a shorter sentence would generally be pronounced.

3.3. Analysis Method

The collected data were analyzed by the analytical software – SPSS 18.0 for Windows. Given the N for the ICTR, it is not feasible to run separate models for the two Tribunals and we had to combine data in one dataset. By analysing the data from the ICTY and ICTR in one model, it is however assumed that the manner in which the independent variables predict sentence length is the same for both Tribunals. To investigate whether this is empirically justified, we first examined bivariate correlations between sentence length and all 14 identified legal characteristics separately for each Tribunal, in order to assess whether it is empirically warranted to merge all cases into one combined dataset. Because a distribution of sentence length is skewed for both Tribunals, the Spearman correlation coefficient was used to test for associations. Rank as a separate legal factor was for the purposes of this analysis divided into 3 categories, i.e. high rank, middle rank and low rank. Accordingly, we tested associations for 14 different variables. In this way we wanted to investigate whether associations between the sentence length and individual legal characteristics follow similar patterns at both Tribunals. By using a formula suggested by Blalock41 we tested for any differences in correlation coefficients between the Tribunals.42 It appeared that, except for association between sentence length and conviction under superior responsibility, there are actually no significant differences in bivariate associations of sentence length and tested legal factors between the Tribunals.43

42 Each of the r’s was transformed into z’s and then a formula for the standard error of the difference between two z’s was computed:

\[ SE = \sqrt{\left[ \frac{1}{N1-3} + \frac{1}{N2-3} \right]} \]

where N1 and N2 are the sample sizes of the ICTY and ICTR respectively. Z is computed by dividing the difference between the two z scores by the standard error.

\[ Z = \frac{z1 - z2}{SE} \]

In case the computed Z value is 1.96 or higher, the difference in the correlations is significant at the .05 level.

43 In case of association of sentence length and conviction as superior, the difference in the correlations was significant at the .05 level. The coefficients for the ICTY and ICTR differ in strength and in direction of association. At the ICTY, sentence length is negatively related to a conviction as superior and is of a medium strength. At the ICTR there is only a weak positive association between the two. One of the possible explanations for this difference could be the fact that at the ICTR, the doctrine of superior responsibility has not played such a strong legal role as that in the ICTY jurisprudence. Only three ICTR defendants were convicted solely on the basis
However, as this method only investigates similarity in bivariate associations across the Tribunals, we also included a number of interaction terms of type of Tribunal with specific independent variables in our later regression model to investigate whether this conclusion also holds multivariately. A multiple regression analysis (SPSS, option ‘ENTER’) was used to evaluate predictability of the ICTY and ICTR sentencing practice and to estimate the impact of each independent variable on sentence length. All the statistical assumptions for using multiple regression were met. In order to make sure that the solution is robust against our choice to code life sentences as ‘55 years’, the model was tested; 1) with life sentences recoded to 55 years; 2) with life sentences recoded to 45 and 65 years; and finally 3) with no life sentences included.

4. RESULTS

4.1. Multiple Regression

All 111 cases of individuals sentenced by the ICTY and ICTR were included in the analysis. In our model we investigated the impact of 12 independent variables on sentence length. The results of the analysis are indicated in Table 2.

of superior responsibility. There has been no extensive discussion of the specific character of superior responsibility in these cases. In all other ICTR cases of superior responsibility, conviction as superior was combined with conviction as perpetrator and the sentencing thus reflects also considerations of a more pro-active role in the crime. In contrast, there have been more ICTY cases based solely on superior responsibility (7 out of 15) and the doctrine has been extensively discussed. There has been a shift in the conceptual understanding of superior liability in the ICTY case-law. Cf. (Prosecutor v. Halilovic, 2005) In the latest cases the specific character of superior responsibility - responsibility for omissions - is emphasised and it has been explicitly stated in the ICTY case law that due to its specific character, superior responsibility entails a lower sentence compared to other “more active” modes of responsibility.

44 The normal distribution was checked by inspecting histograms of the standardized residuals and tested by the Shapiro-Wilk’s test for normal distribution of residuals. Shapiro Wilk test was not significant indicating a distribution of residuals not significantly different from normal (SW=.980, p=.101). Homoscedascity was checked by inspecting scatterplots of residuals versus predicted values of sentence length. Independence of residuals was tested by the Durbin Watson statistic. Value of Durbin Watson statistic equaled 1.786 indicating no first-order autocorrelation given the number of predictors in the model and the sample size. Also multicollinearity among variables was checked by inspecting bivariate correlations among individual variables using variance inflation factor (VIF) – the highest value was less than 2.3, thus meeting tests of acceptability, which are normally set around 10. Cf. Meyers et al. (2006) Applied Multivariate Research – Design and Interpretation, Sage Publications, USA.

45 First block included the following 11 variables: conviction for genocide, conviction for crimes against humanity, conviction for war crimes, number of counts, number of aggravating factors, number of mitigating factors, conviction as perpetrator, aider and abettor, conviction as order-giver/instigator/planner, conviction as superior and conviction as participant in joint criminal enterprise. Rank as a dummy coded variable (high rank, middle rank; low rank as a reference category) was added to the model in a second block. This led to a statistically significant improvement of the model (F change (2,97) = 16.246, p<.0001). Therefore, the rank of a defendant as such could be seen as a significant predictor of sentence length.
Six of all 12 tested legal factors are statistically significant, i.e. each of these factors, given the other variables included in the model, contributes significantly to the prediction of sentence length. The overall fit of the model is 0.723 that is 72 per cent of the variability in sentence length can be predicted by the combination of the legal factors.

The strongest predictor of sentence length, based on the standardized coefficients, is a conviction for genocide. When a defendant is convicted for genocide, his sentence is increased by an extra 16 years and 1 month, all other things being equal. In contrast, a conviction for crimes against humanity results, ceteris paribus, in an extra 8 years and 1 month imprisonment. Consequently, it can be argued that in the Tribunals’ sentencing practice genocide is actually treated as ‘the crime of crimes’ and the most serious international crime if all other legally relevant factors are taken into account.46 Thus, the regression analysis revealed that despite the judges’ narrative, in practice the sentences handed down by the ICTY and ICTR are ordered hierarchically – with genocide at the top of the seriousness scale followed by crimes against humanity. Conviction for war crimes was not significant in our model so that we can conclude that, given scores on all the legal factors, a conviction for war crimes does not further add to

46 It should also be noted that almost all conviction for genocide have been rendered at the ICTR. At the ICTY only one defendant, Radislav Krstic, was convicted to genocide and sentenced to 35 years.
sentence length. The coefficient for the conviction for war crimes was, however, very low compared to genocide and crimes against humanity. Given the different *chapeau* requirements for individual categories of crimes and the relevance of these requirements for assessing crime severity, the identified differences in sentence severity are also theoretically plausible.

The second strongest predictor of sentence length is the rank of the offender. When a defendant occupies a position at the top level of a state political or military hierarchy, his sentence is 14 years and 6 months longer, given all other factors, than the sentence of a low ranking offender. Middle ranking offenders are sentenced to an extra 4 years and 5 months compared to low ranking offenders. The rank of the offender does make a difference in sentencing and sentences decrease as we move from the top to the bottom of the state hierarchy. Ordinary citizens and rank-and-file soldiers, i.e. individuals without any authority, are subjected to the lowest level of punishment with all other factors held constant. These differences are in line with theoretical expectations. It should, however, also be noted that the coefficient of ‘middle rank’ just missed the statistical significance.

The number of guilty counts stands out as the next important predictor of sentence length. Each guilty count results in almost 10 extra months in prison, controlling for the other variables. Therefore, those involved in more extensive criminal activities are punished more severely than those convicted of separate incidents. This finding is logical and is in line with judges’ reasoning and the often emphasised principle of totality.

The numbers of aggravating and mitigating factors are the final significant predictors of sentence length in our model. On average, each factor in mitigation cited by judges reduces sentence length by 11 months, given all other predictors. There is thus a consistent pattern of sentence reduction depending on the number of identified factors in mitigation. The model also revealed an opposite pattern of sentence extension based on number of aggravating factors. All other things being equal, each aggravating factor cited by judges increases sentence length approximately with an extra 1 year and 6 months imprisonment.

All the other factors included in the analysis do not significantly add to the prediction of sentence length. When we compare this model against the models run with different values for life sentence, the set of statistically significant predictors remains the same and their values comparable. The model is thus robust against varying quantifications of life sentences.
4.2. Multiple Regression with Interactions

The regression model described above assumed that the mechanism of sentence determination was identical at both Tribunals. While we established that almost no differences exist in bivariate associations, such a difference might still emerge in a multivariate model. In order to test this, we ran several multiple regression models with interaction terms added. An interaction represents an interplay among predictors that produces an effect on the independent variable, i.e. when the effect of one predictor (e.g. rank) depends on level of another predictor (Tribunal type). As a starting point, we used the model with all significant predictors of sentence length resulting from the regression analysis above. Then we separately (one by one) added an interaction term between each significant predictor and the type of Tribunal and ran the regression analysis again to see the effect of the added interaction terms. We thus tested 6 separate regression models adding interaction terms for type of Tribunal and each of the significant predictors (6 significant predictors, 6 models with each time interaction term tested). Given the sample size, not all interaction terms could be added at the same time.

For conviction for genocide, crimes against humanity, rank and number of aggravating factors, the interaction between the type of Tribunal and each predictor turned out not to be significant. However, in case of the number of counts and the number of mitigating factors, the interaction terms were significant, indicating possible differences across the Tribunals. When we however combined these two interaction effects into the model together with all the other significant predictors the p-values were rendered just insignificant (number of counts $p=0.057$; number of mitigating factors $p=0.092$). Adding interaction terms increased the $R^2$ only marginally underlining that the effect of interaction terms did not lead to a substantial improvement of the model. Due to level differences in the distribution of variables across the Tribunals (especially number of counts) addition of the interaction terms technically complicated the analysis by introducing multicollinearity. The problem remained after centering the variables. In order to double check for possible interactions and to avoid the problems of multicollinearity, we next ran a model based only on interaction terms of significant predictors (i.e. interaction of number of counts, mitigating factors, aggravating factors, conviction for genocide, conviction for crimes.

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48 As a matter of interest, we also tested for significance of interaction terms of all other legal factors (6 different models) and none of them turned out to be significant.
against humanity and rank with the type of Tribunal) combined with the rest of independent variables included in the original analysis (i.e. conviction for war crimes, superior responsibility, hands-on perpetration, participation in JCE, ordering/instigating/planning, and aiding and abetting). The only interaction term that turned out to be significant was again the interaction between the type of Tribunal and number of counts. Our analyses indicated that there, in general, appear to be no significant differences in between the Tribunals in the impact of each predictor on sentence length. Only for the number of counts does the effect on sentence length appear to differ depending on the Tribunal. It seems that at the ICTR each additional count results in a larger sentence increase than at the ICTY.

This difference could be related to the fact that the ICTR defendants are on average convicted of a lower number of counts compared to the ICTY defendants and sentenced to severe sentences nonetheless. (See Figure III below) At the ICTR, it is often the case that a crime base (factual background) of these guilty counts covers a much broader array of incidents and is thus qualitatively very different from a guilty count covering only one incident. Furthermore, all ICTR defendants are convicted of killings and murders – arguably the most serious offences. Formulated differently, at the ICTY sentence length is more often determined by the accumulation of more counts of a less serious nature. At the ICTR, a few counts of more serious crimes give rise to lengthier sentences. Therefore, these qualitative differences in the underlying offences of each guilty count could explain the differential effect of the number of counts on sentence length at the ICTY and ICTR indicated by our additional analyses.

Figure III – Plot of Number of Counts versus Average Sentence Length – ICTY versus ICTR
5. **DISCUSSION AND CONCLUSIONS**

The ICTY and ICTR sentencing practice has been subjected to a lot of criticism. Academics have repeatedly denounced the Tribunals’ sentencing and labelled it as inconsistent and erratic. However, it could be argued that this critique has never been founded on a comprehensive empirical analysis of the Tribunals’ sentencing practice. The current study tried to address this issue by examining the sentences handed down by the ICTY and ICTR until June 2010. The primary aim of this empirical enquiry was to explain the dynamics of a number of prominent legal factors behind sentence determination and to evaluate consistency of the international sentencing practice.

Our results indicate that the sentencing practice of the ad-hoc Tribunals appears to be rather consistent. Regarding the consistency in approach, the sentencing jurisprudence seems to be very similar with judges of both Tribunals cross-referencing each other’s case-law, relying on similar basic sentencing principles and emphasizing similar general factors legally relevant to sentencing. The only relevant difference in law lies in the fact that judges are instructed to consider the local practices in Yugoslavia and Rwanda respectively. As discussed above, the judges have ‘dismissed’ this command and considered national sentencing practices as only one
of the many (non-binding) factors in sentence determination. Consequently, the ICTY and ICTR case-law has developed fairly similarly. It is possible to identify the general sentencing principles that are consistently referred to in the case-law, such as the primary importance of the gravity of crime for sentence severity or the principle of gradation of sentence relative to seniority of a defendant. This is, however, a rather rudimentary basis of sentencing jurisprudence. There are still ‘underdeveloped’ issues in the sentencing argumentation of the judges: such as (to name the few) the mutual relationships of various sentencing objectives and their influence on relevant sentencing factors, or relationship between the sentence severity and individual modes of liability.

With respect to consistency in outcome/predictability, our model accounted for 70% of the variation in sentence length at the ICTY and ICTR practice. Is that good enough? Could we label the Tribunals’ sentencing practice as predictable? It is very difficult to judge the adequacy of this number, both theoretically and empirically. Dogmatically, sentencing should never be 100% predictable. In order to be fair, sentences should not only be predictable but also individualized reflecting particularities of each case at hand: each case has its specifics. Therefore, there should always remain some unaccounted variation in sentencing to allow for individualization. Empirically, our analysis can be compared to findings of similar quantitative research into sentencing consistency at a domestic level. In many countries such as the USA, concerns over unwarranted disparities in sentencing led to various reforms of sentencing law introducing e.g. determinate sentencing law or numerical sentencing guidelines. These instruments have limited discretionary powers of domestic judges considerably. To evaluate the success of these reforms, numerous studies evaluating sentencing predictability at a domestic level have been conducted. For example, statistical analyses conducted at the US Sentencing Commission subsequent to implementation of sentencing guidelines determined that legally relevant factors are the most important determinants of sentences pronounced by federal judges, explaining as much as 70% variation in imprisonment length. Consequently, it seems that at the international level, despite the lack of sentencing guidelines and large discretionary powers of judges, the sentences appear to be as statistically predictable as sentences in domestic legal systems with more detailed legal regulation of sentence determination.

We have also analyzed the overall consistency of international sentencing practice – “the systemic consistency”, examining possible differences across the two international criminal tribunals. It turned out that international sentencing appears to be a fairly consistent system. Looking at the set of empirically most important predictors of sentence length there are no major differences in mechanisms behind the sentence determination at both Tribunals, and the principles of sentence determination appear very much alike. In their sentencing narrative judges from one Tribunal often refer to the arguments presented in the cases of the other Tribunal. Empirically consistent (and legally relevant) patterns have emerged in the sentencing practice of both Tribunals:

Those convicted of genocide have been subjected to the severest sentences. Compared to shorter sentences handed down to defendants convicted of crimes against humanity, genocide seems indeed to be treated as ‘the crime of crimes’ for the purposes of sentencing. On the one hand, many scholars have theoretically advocated the hierarchy of individual categories of international crimes based on the analysis of their gravity in abstracto with genocide at the top of this severity scale. Our analysis indicated that this is also true in an empirical sense. On the other hand, the ICTY and ICTR judges in the latest case-law, however, dismissed the idea of the crime hierarchy and emphasised the fact that all the categories of international crimes are equally serious violations of international humanitarian law. What matters is the gravity of crimes in concreto, i.e. the particular circumstances of a case at hand with a focus on degree of harm actually caused by a defendant’s criminal conduct. Therefore, according to the judges, the legal classification of an act as genocide does not matter so much. The fact remains that many defendants convicted of genocide were the top or middle ranking organizers of a genocidal campaign at a state or regional scale. Consequently, counts of genocide encompassed a broad array of criminal conduct of many people implementing the genocidal policies and perpetrating genocidal killings. Therefore, it could be the case that genocide convictions are indeed in terms of the gravity in concreto the worst cases with the greatest amount of harm and this is what brings about the severest sentences. In order to examine this, it would be necessary to conduct a more detailed comparative analysis incorporating the particularities of each case, such as type of underlying offence (e.g. murder, violence, property appropriation), the number of victims and some other quantifications of harm caused by an offender. Such analysis would however be difficult to conduct since it is often the case that exact number of victims affected by a perpetrator’s criminal activities is lacking in the judgments.
The rank of a defendant stood out as another important predictor of sentence length. The high ranking defendants were subjected to the lengthiest sentences compared to the shorter sentences for those occupying lower ranks. This sentence gradation based on the position of a defendant within the overall state hierarchy corresponds to theoretical arguments presented in legal and criminological scholarship dealing with international crimes. It is often argued that those to be blamed the most for international crimes are indeed organizers, orchestrating crimes at the top leadership levels. The role of the top organizers is instrumental to the development of a large scale criminal system that commits international crimes. These arguments are also reflected in the ICTY and ICTR case law. Judges often emphasise the very specific and important role of the high ranking individuals in international crimes.

More extensive criminal activity also leads to longer sentences. Those convicted of multiple crimes are punished more harshly than those convicted of isolated, single acts. This finding corresponds to the so-called principle of totality developed in the ICTY and ICTR case-law. Judges often argue that the total sentence should reflect the totality of a criminal conduct of a defendant. Our results showed that ‘on average’ each additional guilty count adds to sentence severity. In practice, it is arguably the case that a sentence increase is not uniform for every count and depends on numerous factors such as the type of underlying offence and defendant’s role therein. In order to examine this, a more detailed analysis encompassing, for example, an influence of each underlying crime of each guilty count on sentence length would be necessary.

Further, the analysis revealed consistent patterns of (i) a sentence extension every time judges accept an aggravating factor and (ii) a sentence reduction when mitigating factors are identified. This finding is in line with judges’ reasoning and the general role aggravating and mitigating factors should play with respect to sentence length. Similar to number of counts, our analysis could not distinguish between different types of aggravating and mitigating circumstances. It is sometimes the case that judges label some aggravating/mitigating circumstances as substantial and claim to assign a decisive weight to such circumstances in sentence determinations. Or conversely some factors are argued to have a minimal impact on sentence length. This weighing up process is not reflected in our analysis. Given the limited number of cases, it is not possible to examine the influence of particular aggravating and mitigating factors on sentence length. What we have shown, however, is that on average sentence length is reduced when mitigating factors are identified and more severe sentences are handed down in cases judges find factors in aggravation.
With respect to individual modes of liability our analysis did not reveal any consistent and statistically significant empirical patterns in the ICTY and ICTR sentencing practice. As has been noted above, the judges’ narrative with respect to the relationship between individual modes of liability and sentence severity is neither very clear nor well developed. From time to time, judges discuss some relevant principles. The further development of the sentencing doctrine in this respect would enhance the clarity of sentencing law and practice.

Finally, the number of counts stood out in the subsequent analysis as the only predictor with an arguably different effect on sentence length across the Tribunals: a guilty count at the ICTR results in a larger increase in sentence length compared to the ICTY. This difference could be related to the fact that separate counts reflect more serious and/or extensive criminal conduct at the ICTR, e.g. as opposed to the ICTY all the ICTR defendants have been convicted of killings and violent offences.

In the end, we have to address limitations of our study. As already noted, there is arguably a vast array of legally relevant factors and it is practically impossible to examine them all simultaneously in this type of analysis with a dataset that is small in a statistical sense while comprising the entire ‘population’ of already decided cases. It would be desirable if a more detailed analysis could be performed and differences between e.g. individual underlying crimes or individual aggravating and mitigating factors were examined. While our study is one of the first studies examining jointly the ICTY and ICTR sentencing practice, the dataset is by necessity unbalanced. More cases have been decided by the ICTY (N=71) compared to the ICTR (N=40). Thus, ICTY patterns might have dominated the results. It should also be noted that characteristics of defendants included in our sample do not fully represent the whole population of individuals to be (potentially) convicted by the ICTY and ICTR. The cases still pending before the Tribunal’s Trial Chambers represent more complicated and arguably also more serious cases, in the sense of seniority of the accused and relating crime base/crime gravity, compared to the already finished cases.

Furthermore, there are observable differences in the composition of cases and distribution of sentences between both Tribunals. The ICTR sentences tend to be much longer than the sentences pronounced by the ICTY. Arguably, the lengthier ICTR sentences are related to a different composition of cases dealt with by both Tribunals. The different composition of cases stems from the differing nature of the underlying conflicts in the former Yugoslavia (ethnic cleansing, armed conflict among different ethnic groups) and Rwanda (genocide, extermination
of one ethnic group by another) and consequently, from a different crime base in Yugoslavia and Rwanda. At the ICTR, all defendants have been tried on genocide charges, the majority is subsequently convicted of genocidal killings and many of them sentenced to life imprisonment. This is not the case at the ICTY where charges are more varied, convictions for crimes against humanity/war crimes are prevalent and life imprisonment an exceptional sentence. Consequently, qualitatively different crimes are dealt with and quantitatively different sentences are handed down at either Tribunal. These issues, i.e. different N, qualitatively different crimes, quantitatively different sentences, make a quantitative analysis of the Tribunal’s sentencing practice and interpretation of the results complex. Even so it does appear as if the same legal factors receive similar importance at both Tribunals.

This research constitutes one of the first studies comprehensively testing the international sentencing practice represented by the two ad-hoc international criminal tribunals – the ICTY and ICTR. Despite the limitations noted above, we have revealed that well interpretable and legally relevant patterns are evident in the international sentencing practice. International sentencing practice appears to be consistent. Since the ICTY and ICTR are still functioning tribunals, pronouncing new verdicts and sentences, with more cases a more detailed empirical analysis of international sentencing can be carried out in the future. Such research could also include future sentences pronounced by other international courts such as the permanent International Criminal Court and further assess whether there indeed is one ‘common’ system of international sentencing.
APPENDIX I

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

**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
<table>
<thead>
<tr>
<th>Prior good reputation</th>
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<tbody>
<tr>
<td>Prior contributions to community</td>
</tr>
<tr>
<td>No prior discrimination</td>
</tr>
<tr>
<td>Individual circumstances</td>
</tr>
<tr>
<td>Most life worked for defense of his country</td>
</tr>
<tr>
<td>No hands-on perpetrator</td>
</tr>
<tr>
<td>Not a very high official</td>
</tr>
<tr>
<td>Not de jure official</td>
</tr>
<tr>
<td>Duress</td>
</tr>
<tr>
<td>Overall circumstances</td>
</tr>
<tr>
<td>Not leading roles</td>
</tr>
<tr>
<td>Not personal participation/Never directly participated</td>
</tr>
<tr>
<td>Never gave direct orders</td>
</tr>
<tr>
<td>Participation in few criminal events</td>
</tr>
</tbody>
</table>